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Wolfgang W. Leirer

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Retaliatory Action in United States and European Union Trade Law: A Comparison of Section 301 of the Trade Act of 1974 and Council Regulation 2641/84

Wolfgang W. Leirer†

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I. Introduction

Though trade relations between the European Union (EU) and the United States are very close, their economic relationship has undergone a number of severe crises during the last few years. This relationship is especially important in light of the fact that economic matters should become prevalent in U.S.-EU relations in the years to come.

1 The European Union and the United States are each other's largest single trading partner and the world's two largest trading entities. The European Union accounted for 23.4% of world trade (excluding intra-Union trade), the United States for 19.7%, and Japan for 8.6%. Statistic Office of the European Communities, External Trade and Balance of Payments Statistical Yearbook, Recapitulation 1958-1992, at 94 (1993).

come as the significance of defense and security issues declines due to the end of the cold war. Though a trade war between the two giants, both of which possess an enormous retaliatory power, could have disastrous results, the tendency to take recourse to unilateral trade dispute resolution measures is increasing on both sides of the Atlantic.

Both the United States and the European Union have adopted legal instruments aiming at allegedly unfair foreign trade practices. In the Trade Act of 1974, Congress empowered the President to suspend or withdraw the benefits of trade agreements and to impose additional duties, or other import restrictions, on products from countries engaging in unfair trade practices. In 1984, partly in response to section 301 of the Trade Act of 1974, the Council of the European Communities enacted Council Regulation 2641/84 which provides for retaliatory power in cases where third countries use "illicit" commercial practices against EU producers. Not surprisingly, the first action of the Council under the new regulation was directed against the United States.

Correspondingly, from 1985 forward, the U.S. Executive made increasing use of section 301 of the Trade Act of 1974. In nearly one quarter of all cases, section 301 actions were aimed at allegedly unfair trade practices of the European Union. Recently, section 301 has again aroused the concern of the European Union because President Clinton renewed "Super 301" by Executive Order dated March 3, 2001.

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3 Id. at 394-95.
4 Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 1978, 2041-43 (1975) (codified at 19 U.S.C. § 2411 (1988)). However, the power to restrict imports from countries unfairly discriminating against U.S. exports has explicitly been vested in the Executive Branch for already more than one hundred years. In 1890, Congress granted the President the power to impose a retaliatory tariff schedule on certain agricultural goods from countries levying duties on U.S. products which the President deemed to be "unequal or unreasonable." Act to Reduce the Revenue and Equalize Duties on Imports and for Other Purposes (Tariff Act of 1890), ch. 1244, § 3, 26 Stat. 567, 612. In 1934, Congress amended the Tariff Act of 1930 and again provided for presidential authority analogous to that of section 301. Act of June 12, 1934, ch. 474, § 350, 48 Stat. 943, 943-44 (codified as amended at 19 U.S.C. §§ 1351-1366 (1988)). Under the new section 350(a)(2) of the amended 1930 Tariff Act, the President was entitled to proclaim modifications of existing duties (decreases and increases) and to suspend the application of such a proclaimed decrease of duties to products of any country "because of its discriminatory treatment of American commerce . . . ." Id. at 944. Finally, in 1962 Congress passed the immediate predecessor of section 301, section 252 of the Trade Expansion Act of 1962, which was comprised of detailed provisions concerning unilateral retaliatory action in cases of unfair foreign practices. Trade Expansion Act of 1962, § 252, 76 Stat. 872, 879-80 (codified at 19 U.S.C. § 1862 (1988)).
The European Union, admittedly, was "not very happy" with this decision since the dismantling of section 301 of the Trade Act of 1974 has been one major objective of European trade negotiators during the seven years of the GATT's Uruguay Round negotiations. The Union now fears that Clinton's decision "revealed the true face of the Clinton administration's trade policy." The renewal of "Super 301" only adds to the already existing problems with section 301. Three member states of the European Union—Italy, Greece, and Spain—found themselves placed on the "watch list" under the "Special 301" provision of the Trade Act of 1974. The Clinton administration has expressed an interest in giving the provision a "fresh direction" by using it more aggressively. In March 1994, U.S. retaliation against France under section 301 resulting from French efforts to restrict imports of U.S. fresh fish was barely prevented. The situation necessitated a last minute tentative agreement between the United States and France.

Since unilateral U.S. action under section 301 of the Trade Act of 1974 would certainly lead to strong European counterreactions, it is worthwhile to examine and compare the procedures utilized by the United States and the European Union to address situations where a trading partner uses practices which, in the eyes of the other, are unfair and violate their export interests. Therefore, this Article will analyze the procedural as well as the substantive law of section 301 of the Trade Act of 1974 and Council Regulation 2641/84. The efficiency of the two instruments will also be compared. Part one will deal with the procedural law of section 301 of the Trade Act of 1974, including the prerequisites for triggering an investigation and discussing the course of such an investigation. An examination of section 301's substantive law will follow. The discussion will include an analysis of the conditions under which mandatory or discretionary action can be taken by

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10 Id. at 369.
11 Id.
12 Office of the United States Trade Representative, 1993 National Trade Estimate Report on Foreign Trade Barriers 102, 140, 241 (1993). Portugal was only removed from the "watch list" in 1990. Id. at 225. The International Intellectual Property Alliance (IIPA), which represents eight trade associations, wants to go much further and is pressuring the Clinton administration to place not only single Member States but the whole European Union on the "watch list." Intellectual Property: Industry Presses U.S. to Act Against 36 Countries for Copyright 'Piracy', 11 Int'l Trade Rep. (BNA) No. 8, at 275 (Feb. 28, 1994).
14 Japan, EU Express Concern, supra note 9, 11 Int'l Trade Rep. (BNA) No. 10, at 389.
15 See infra part II.A.
the United States Trade Representative (USTR) and of the scope of the USTR's retaliatory power. Moreover, it will be shown that decisions taken by the USTR cannot be reviewed by the courts. Part two will discuss Council Regulation 2641/84, the European instrument of trade retaliation, in similar fashion. Next, this Article will compare the two instruments with regard to their procedural as well as their substantive law and with respect to the justiciability of decisions taken by the USTR and the Commission. Finally, the Article will provide an explanation as to why section 301 of the Trade Act of 1974 can be characterized as the more efficient, and therefore more successful, instrument.

II. Section 301 of the Trade Act of 1974

Section 301, as amended by the Omnibus Trade and Competitiveness Act of 1988, empowers the USTR to investigate “unfair” foreign trade practices and to take retaliatory action against such foreign trade practices.

A. Procedural Law of Section 301

A section 301 proceeding typically includes six distinct steps: (1) an initiation of an investigation; (2) a request for consultations with the foreign government(s) concerned; (3) a public hearing and submission of written briefs and rebuttal briefs; (4) consultations; (5) a request for formal dispute settlement under the applicable trade agreement; and (6) a determination by the USTR.

1. Initiation of an Investigation

Section 301 investigations may be initiated either in response to a petition of a private person or by the USTR on a self-initiated motion.

a. Initiation by Petition

Section 302 of the Trade Act of 1974 permits any “interested person” to file a petition with the USTR requesting retaliatory action

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16 See infra part II.B.
17 See infra part II.C.
18 See infra part III.
19 See infra part IV.
20 See infra part V.
23 Id. § 2412(a) and (b) (1988); 15 C.F.R. § 2006.0-4 (1994).
under section 301.  Both the Trade Act of 1974 and the federal regulation on "Procedures for Filing Petitions for Action under Section 301 of the Trade Act of 1974" contain rather broad definitions of the term "interested person." In fact, the definition is so broad that most parties have little difficulty establishing that they qualify as an "interested person" under section 302. Under these definitions, the term encompasses all U.S. producers, exporters, importers, or investors affected by the foreign trade practice as well as trade unions represented in a negatively affected industry and representatives of consumer interests. More generally, "any other private party representing a significant economic interest affected" is included. Pursuant to section 302(a)(1) of the Trade Act of 1974, the petition must set forth the allegations supporting the request. The petition, inter alia, must briefly describe the petitioner's negatively affected economic interest, identify the rights of the United States being violated, or the unreasonable foreign practices in question, and clarify the degree to which U.S. commerce is burdened or restricted.

Immediately following the receipt of a petition, the USTR must notify the foreign government of the allegations and request that government to provide further information on its trade practice. At the same time, the USTR asks all members of the interagency Section 301 Committee for their advice. On that basis, the USTR has to deter-

30 Id. § 2411(d)(9).
34 15 C.F.R. § 2006.0(b) (1994).
36 15 C.F.R. § 2006.1 (1994). Before filing a petition with the United States Trade Representative (USTR) potential petitioners can ask the USTR or the Chairman of the Section 301 Committee for help concerning the requirements of an acceptable petition and with respect to further information on the allegedly unfair foreign trade practice. They can even submit a draft petition to the USTR or the Chairman of the Section 301 Committee who then will comment on the draft and propose corrections. 2 United States Import Trade Law § 42.11 (Eugene T. Rossides et al. eds., 1992) [hereinafter Import Trade Law]; Judith H. Bello & Alan F. Holmer, Section 301 of the Trade Act of 1974: Requirements, Procedures, and Developments, 7 Nw. J. Int'l L. & Bus. 633, 645-46 (1986). Even if the petition does not substantially comply with these requirements, the USTR (through the Chairman of the Section 301 Committee) can accept it and proceed to a decision whether to initiate an investigation. 15 C.F.R. § 2006.2 (1994); Thatcher, supra note 33, at 506.
37 Bello & Holmer, supra note 36, at 647 n.82 (citing 15 C.F.R. § 2006.4 (1994)). If the foreign government fails to provide sufficient information, the USTR makes his determination on the basis of the best information available. 15 C.F.R. § 2006.4 (1994).
38 15 C.F.R. § 2006.3 (1994). The interagency Section 301 Committee is a standing
mine whether to initiate an investigation within 45 days from the receipt of the petition.\textsuperscript{39}

When determining whether the initiation of an investigation demanded by a private party under section 302(a) of the Trade Act of 1974 is within the USTR's complete discretion, an important distinction must be made between petitions alleging the denial of U.S. rights under a trade agreement, or the violation of a trade agreement, on one hand, and petitions alleging unjustifiable, unreasonable, or discriminatory foreign trade practices, on the other hand.\textsuperscript{40} The legal basis for this distinction is to be found in section 302(c) of the Trade Act of 1974. This section provides that:

\begin{quote}
[i]n determining whether to initiate an investigation under subsection (a) or (b) of any act, policy, or practice that is enumerated in any provision of section 301(d) [i.e., unreasonable, unjustifiable or discriminatory acts], the Trade Representative shall have discretion to determine whether action under section 301 would be effective in addressing such act, policy, or practice.\textsuperscript{41}
\end{quote}

Since the denial of rights under a trade agreement, or the violation of a trade agreement, are practices not mentioned in section 301(d) of the Trade Act, the initiation of petitions alleging such practices is not within the discretion of the USTR.\textsuperscript{42} Consequently, where the violation of a trade agreement is alleged, the USTR's decision on the initiation of an investigation can only be based on legal considerations, and not on policy reasons.\textsuperscript{43} In cases where section 301(c) of the Trade Act of 1974 provides for broad discretion, however, the USTR is permitted to consider policy reasons when deciding on the initiation of a section 301 investigation.\textsuperscript{44}

\textsuperscript{40} Nettesheim, supra note 32, at 368.
\textsuperscript{41} 19 U.S.C. § 2412(c) (1988).
\textsuperscript{42} Nettesheim, supra note 32, at 368 n.101.

\textsuperscript{43} Id. There are many reasons that the USTR may decide not to initiate an investigation. For example, the USTR may decline to initiate an investigation because: (1) the allegedly unfair foreign trade practice is not actionable under section 301; (2) the petition contains insufficient information on the foreign trade practice; (3) a trade agreement is involved in the practice and the United States is unlikely to be successful in a formal dispute resolution procedure; and (4) the petitioner can file for relief under another trade remedy provision. Bello & Holmer, supra note 36, at 647-48. See also Nettesheim, supra note 32, at 368.

\textsuperscript{44} Policy considerations, preventing the USTR from initiating a section 301 proceeding include, for example, the political inappropriateness of an investigation (even though the foreign trade practice would theoretically be actionable under section 301) and the lack of significant economic impact of the unfair foreign practice on U.S. exporters (only in cases where an injury test is not necessary). Shirley A. Coffield, Using Section 301 of the Trade Act of 1974 as a Response to Foreign Government Trade Actions: When, Why, and How, 6 N.C. J. INT'L L. & COM. REG. 381, 390 (1981). See also Nettesheim, supra note 32, at 368; David M. Pedley, A Definition for "Unreasonable" in Section 301 of the Trade Act of 1974: A Consideration of the United
Regardless of the USTR's determination, the decision must be made public in the Federal Register.\textsuperscript{45} If the USTR decides to initiate an investigation, he must also publish an abstract of the petition in the Federal Register.\textsuperscript{46} If the USTR does not initiate an investigation, he is required to publish a summary of his reasons for the negative determination in order to inform the petitioner.\textsuperscript{47}

\textit{b. Self-Initiation}

\textit{i. Section 302(b)(1)}

Under section 302(b)(1),\textsuperscript{48} the USTR is empowered to self-initiate an investigation with respect to any matter which could be actionable under section 301, after consultation with advisory committees established pursuant to section 135 of the Trade Act of 1974.\textsuperscript{49} In this case, a petition by a private party is not required. Here again, pursuant to section 302(c), the USTR has broad discretion in deciding whether to initiate an investigation if the case does not involve a violation of a trade agreement.\textsuperscript{50}

\textit{ii. "Special 301"}

The Omnibus Trade and Competitiveness Act of 1988\textsuperscript{51} introduced mandatory self-initiation of section 301 investigations\textsuperscript{52} against countries that have been identified by the USTR as "priority foreign countries" (so-called "Special 301").\textsuperscript{53} Under section 182(a)(2) of the Trade Act of 1974,\textsuperscript{54} "priority foreign countries" are countries which deny adequate and effective protection of intellectual property rights or refuse fair and equitable market access to U.S. persons relying upon intellectual property protection.\textsuperscript{55} Although, under section 302(b)(2)(A),\textsuperscript{56} self-initiation of investigations against these countries is mandatory, the USTR may avoid self-initiation by invoking the economic interest exception.\textsuperscript{57} Under this exception the USTR does not need to initiate an investigation if he thinks that an investigation

\textit{States-\textit{Thailand Tobacco Dispute}, 5 Emory Int'l L. Rev. 285, 291 (1991); Fisher & Steinhardt, supra note 33, at 602 n.163.}


\textsuperscript{46} 19 U.S.C. § 2412(a)(4); 15 C.F.R. § 2006.3(b) (1994).

\textsuperscript{47} 19 U.S.C. § 2412(a)(2); 15 C.F.R. § 2006.3(a) (1994).


\textsuperscript{49} Id. § 2155.

\textsuperscript{50} Nettesheim, supra note 32, at 369. See also supra notes 40-44 and accompanying text.


\textsuperscript{53} Id. § 2242(a)(2) (1988).

\textsuperscript{54} Id. § 2242(a)(1) (1988).

\textsuperscript{55} Id.

\textsuperscript{56} Id. § 2412(b)(2)(A).

"would be detrimental to United States economic interests." Despite the fact that Congress wanted to compel the USTR to investigate against "priority foreign countries" by enacting "Special 301," the economic interest exception nevertheless provides broad discretion to the USTR.

iii. "Super 301"

Like "Special 301," "Super 301" was added to the Trade Act of 1974 by the Omnibus Trade and Competitiveness Act of 1988 and basically constitutes another self-investigation procedure. The provision expired in 1990 but was renewed by Executive Order on March 3, 1994. "Super 301" requires the USTR, on the basis of the National Trade Estimate Report, to identify "priority foreign country practices the elimination of which is likely to have the most significant potential to increase U.S. exports." Within twenty-one days of the submission of the National Trade Estimate Report, the USTR has to self-initiate a section 301 investigation with regard to all of the priority foreign country practices identified. Once initiated, these investigations are subject to the normal section 301 procedures, except that in the consultations with the foreign countries concerned, the USTR must seek an agreement providing for the elimination of unfair foreign trade practices as soon as possible.

If the USTR decides to self-initiate an investigation, he is required to publish his decision in the Federal Register. From January 1990 to May 1993, self-initiated investigations slightly outnumbered investigations initiated by a petition pursuant to section 301(a) of the Trade Act of 1974.

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59 See S. Rep. No. 71, 100th Cong., 1st Sess. 74-75 (1987). The objective "was to encourage a more active use of the President's power to self-initiate section 301 investigations." Id. at 75.
63 See generally Nettesheim, supra note 32, at 369.
65 Pursuant to section 181(b)(1) of the Trade Act of 1974, the USTR has to submit the National Trade Estimate Report to the President and to selected committees of the two Houses of Congress on or before March 31 of each calendar year. 19 U.S.C. § 2241(b)(1) (1988).
67 Id. sec. 2.
68 Nettesheim, supra note 32, at 370.
71 Five investigations were initiated by private petitions (Docket Nos. 301-80, 301-82, 301-83, 301-84, and 301-90). Three were "normal" self-initiations (Docket Nos. 301-81, 301-
2. Request for Consultations with the Foreign Government Concerned

If the USTR decides to commence a section 301 investigation, he must request the foreign government concerned for consultations on the date of the initiation. This request may be delayed for up to 90 days if the USTR believes that more time for the preparation of the consultations is needed. In cases involving a trade agreement, the time span for consultations is limited to 150 days, or even less if the trade agreement involved provides for a shorter consultation period. If the consultations do not lead to a mutually acceptable solution of the dispute within these 150 days, the USTR is required to trigger the formal dispute settlement procedures provided for in the trade agreement.

3. Public Hearings and Submission of Written Briefs and Rebuttal Briefs

Since section 302(a)(4) of the Trade Act of 1974 requires the USTR to “provide opportunity for the presentation of views concerning the issues,” all interested persons must submit written briefs. If they want to contest the information provided by the other party, parties are also permitted to prepare rebuttal briefs. Moreover, at any stage of the investigation, a petitioner, or any interested person, can demand to present their views at a hearing. The USTR is obliged to hold such a hearing.

4. Consultations

During a section 301 investigation, the USTR is required to consult with the petitioner and to seek the advice of relevant committees, such as the Advisory Committee for Trade Policy and Negotiations. The USTR can also request the views of the Interna-

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87, 301-88) and four were self-initiations under section 301(b)(2)(A) (Special 301) (Docket Nos. 301-85, 301-86, 301-89, and 301-91). USTR SECTION 301 TABLE OF CASES, supra note 7.
73 19 U.S.C. § 2413(b)(1)(A) (1988); 15 C.F.R. § 2006.5(b) (1994). The USTR can delay up to 90 days, but he is required to consult with the petitioner before he makes his determination.
78 Id. § 2006.8(c) (1994). Rebuttal briefs will be entertained, but these are limited to identifying errors of fact or analysis that were not pointed out in the briefs or hearings. Id. § 2414(b)(1)(A) (1988); 15 C.F.R. § 2006.7 (1994). See also IMPORT TRADE LAW, supra note 36, at 42.15.
80 19 U.S.C. § 2155(b) (1988). Another important committee in this context is the Section 301 Committee which meets weekly to discuss pending cases and petitions and to analyze special issues in detail. Bello & Holmer; supra note 36, at 646-47, 649.
tional Trade Commission concerning the probable impact of the pro-
posed retaliatory action on the U.S. economy. One purpose of such
a consultation would be to help avoid any negative effects on industries
other than those petitioning for a USTR investigation.

5. Request for Formal Dispute Settlement Under Applicable Trade
Agreement

During the consultations with the foreign government concerned,
the USTR and the foreign government may not be able to agree on a
mutually acceptable solution to disputes arising under the applicable
trade agreement within the time frame provided by section 303(a)(2)
of the Trade Act of 1974. In such a situation, the USTR must initiate
the formal dispute settlement procedure provided for by the trade
agreement.

6. USTR Determination

On the basis of the USTR investigation, consultations with the for-
ign government, and any formal dispute settlement proceedings, the
USTR must make a final decision as to whether the foreign trade prac-
tice is actionable under section 301, and if so, what retaliatory action
should be taken. The Omnibus Trade and Competitiveness Act of
1988 tightened the time limits with regard to the classification of a
foreign trade practice as unfair. If the investigation involves a trade
agreement, the USTR has to make an unfairness determination within
thirty days after the dispute settlement procedure under that trade
agreement was concluded, or within eighteen months after the initia-
tion of the investigation (regardless of whether the dispute settlement
proceedings under the trade agreement are still going on), whichever
is earlier. If the investigation does not involve a trade agreement, a
final decision on retaliatory action must be taken twelve months after
the initiation of the investigation. Different time limits, however, apply
for unfairness determinations under “Special 301.” Under “Spe-
cial 301,” the USTR must make a final decision no later than six

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83 Bello & Holmer, supra note 36, at 651.
as the period specified in the trade agreement, and subsection (a)(2)(B) sets the period at
150 days after the consultations are commenced. Id.
in complex and complicated cases, the determination must occur no later than nine months after the self-initiation of a "Special 301" investigation. All USTR determinations have to be published in the Federal Register.

The Omnibus Trade and Competitiveness Act also provides for time limits concerning the implementation of action. Retaliatory action must be implemented within thirty days after an unfairness determination was made by the USTR. Under certain circumstances, however, the USTR may delay implementation for up to 180 days.

B. Substantive Law of Section 301

1. Trade in Goods, Services, and Investments

The substantive law of section 301 covers not only foreign practices concerning the trade of goods but also practices impeding U.S. trade in services if these services are associated with international trade. The term "services" is very broad and must be construed to include the transfer of information as well as banking, insurance, or broadcasting activities. Unfair constraints on U.S. direct investment abroad are also actionable under section 301 if the U.S. investment concerned has implications for the trade in goods and services. However, only actions of a government or an instrumentality thereof (regardless of whether it is a federal, state, or local government entity) can be subject to a section 301 investigation.
2. Mandatory Action

One of the most important modifications made to the substantive law of section 301 by the Omnibus Trade and Competitiveness Act of 1988 was the creation of two different classes of action. First, the 1988 Act introduced mandatory action directed against the violation of international legal rights of the United States in general and of U.S. rights under trade agreements in particular. Discretionary action directed against other unfair foreign trade practices was also addressed by the new legislation.\(^{105}\)

Section 301(a)(1) of the Trade Act of 1974, as amended by the Omnibus Trade and Competitiveness Act of 1988, provides for mandatory action where: (1) the rights of the United States under any trade agreement are being denied;\(^{106}\) or (2) "an act, policy or practice of a foreign country (i) violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under, any trade agreement,"\(^{107}\) or (ii) is unjustifiable and burdens or restricts U.S. commerce.\(^{108}\)

a. Denial of U.S. Rights Under a Trade Agreement

i. Trade Agreement

For the purposes of section 301, the term "trade agreement" has been interpreted very narrowly by the USTR\(^{109}\) to include only the GATT and agreements approved by Congress under section 3(a) of the Trade Agreements Act of 1979 (the MTN Codes).\(^{110}\) Though in at least one case the term of "trade agreement" was expanded to include a bilateral agreement,\(^{112}\) treaties of friendship, commerce, and navig-

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\(^{105}\) 19 U.S.C. § 2411(b) (1988). Discretionary action under the statute applies not to just any other unfair practice, but only to those acts, policies, or practices which are unreasonable or discriminatory and burden or restrict U.S. commerce, see id. § 2411(b)(1), and under circumstances where action by the United States is appropriate, see id. § 2411(b)(2).

\(^{106}\) Id. § 2411(a)(1)(A) (1988).

\(^{107}\) Id. § 2411(a)(1)(B)(i) (1988).

\(^{108}\) Id. § 2411(a)(1)(B) (1988).

\(^{109}\) Bello & Holmer, supra note 36, at 634-35 n.4.


\(^{112}\) Memorandum of July 31, 1986, for the United States Trade Representative, Determination Under Section 301 of the Trade Act of 1974, 51 Fed. Reg. 27,811 (1986) (in which the President stated that "any future failure by the Government of Japan to meet the commitments and objectives of the Agreement [between the governments of Japan and the United States regarding trade in semiconductors] would be inconsistent with a trade agreement or an unjustifiable act that would burden or restrict U.S. commerce"). Thereby, the President explicitly characterized the U.S.-Japan Semiconductor Accord of 1986 as a "trade agreement" under section 301(a)(1)(A) or (B)(i) (19 U.S.C. § 2411(a)(1)(A) or (B)(i)). See also Bello & Holmer, supra note 36, at 535 n.9; Nettesheim, supra note 32, at 362 n.61. For the text of the accord, see Arrangement Concerning Trade in Semiconductor Products, Sept. 2, 1986, U.S.-Japan, reprinted in 25 I.L.M. 1409 (1986); see also Dorinda G. Dallmeyer, The United States-Japan
tion (FCN treaties), and other bilateral agreements relating to trade are normally not considered trade agreements under section 301(a)(1)(A). The reason for this construction is that in all cases involving trade agreements, section 303(a)(2) directs the USTR to trigger the formal dispute settlement proceedings provided for in the relevant agreement if the dispute could not be solved by prior consultations. Because the dispute settlement procedures of some agreements dealing with trade matters provide for referral to the International Court of Justice (ICJ), section 301(a)(1)(A) of the Trade Act of 1974 is to be construed narrowly since Congress, when passing section 301, did not intend to require resort to the ICJ in trade disputes.

Some commentators suggest that the Organization for Economic Co-operation and Development (OECD) codes, as well as informal or hortatory agreements, are also covered by the term "trade agreement" as used in section 301(a)(1)(A) and (B). However, the wording of section 302(a)(2) of the Trade Act of 1974 providing for the triggering of formal dispute settlement procedures if prior consulta-


Bello & Holmer, supra note 36, at 634-35 n.4; Bello & Holmer, supra note 111, at 212 n.3; Nettesheim, supra note 92, at 362. But see the Taiwan Customs Valuation case: In 1979, the United States and many other countries concluded the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade (Relating to Customs Valuation), Apr. 12, 1979, T.I.A.S. No. 10,402 [hereinafter GATT Customs Valuation Code], which is a trade agreement for the purposes of section 301(a)(1)(A) and (B)(i) of the Trade Act of 1974. 19 U.S.C. § 2411(a)(1)(A) and (B)(i) (1988). In the same year, Taiwan, which could not become party to the GATT Customs Valuation Code because it is not a party to the GATT, in an agreement with the United States (effected by an exchange of letters), agreed to observe obligations "substantially the same" as those applicable to developing countries under the GATT Customs Valuation Code. In a determination the USTR made on August 1, 1986, the President stated that Taiwan, by not having implemented the bilateral agreement with the United States, had "violate[d] a trade agreement." 51 Fed. Reg. 28,219 (1986). Though a bilateral agreement was violated, the USTR applied section 301(a)(1)(A) of the Trade Act of 1974. This is no exception to the USTR's narrow interpretation of that norm since Taiwan, by violating the bilateral agreement with the United States, at the same time, violated the GATT Customs Valuation Code to which the bilateral agreement referred and which de facto defined Taiwan's obligations under the bilateral agreement. Bello & Holmer, supra note 36, at 638-655.


114 Bello & Holmer, supra note 36, at 634-35 n.4; Bello & Holmer, supra note 111, at 212 n.3.


tions do not lead to a mutually acceptable solution, does not support such a broad interpretation of the term “trade agreement.” It can be supposed that Congress, when passing section 303(a)(2), assumed that every trade agreement covered by section 301 provided for formal dispute settlement proceedings. Otherwise, Congress would have probably adopted a different, more restrictive wording comparable to that used in section 303(a)(2)(A) dealing with consultations under a trade agreement. In the case of consultations, Congress must have been aware of the fact that not all trade agreements provided for a specified consultation period since it included the reservation “if any.” As Congress omitted such a restriction when dealing with formal dispute settlement procedures, OECD codes and informal and hortatory agreements should not be considered as falling within section 301(a)(1)(A) and (B)(i) of the Trade Act of 1974, because both fail to provide for formal dispute settlement procedures.

This very restrictive interpretation of the term “trade agreement” has also been reflected in the practice of the USTR who does not consider FCN-treaties, other bilateral agreements relating to trade, OECD codes, and informal or hortatory agreements to be trade agreements for the purposes of section 301(a)(1)(A) and (B)(i).

ii. Denial of Rights

The foreign trade practice is only actionable under section 301(a)(1)(A) of the Trade Act of 1974 if the USTR finds a denial of U.S. rights under a trade agreement (i.e., a plain violation of an international agreement). Contrary to actions against merely “unjustifiable” foreign acts, actions under section 301(a)(1)(A) do not require a demonstration of a burden or restriction on U.S. commerce, because “a per se violation of the GATT . . . is presumed to cause harm.”

b. Denial of Benefits of the United States Under a Trade Agreement

Another basis for a section 301 action arises when a foreign country denies benefits under a trade agreement to the United States. Like section 301(a)(1)(A), section 301(a)(1)(B)(i) of the Trade Act

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120 Id. § 2413(a)(2)(A).
121 Id.
122 Id. The only exception was the Taiwan Customs Valuation case. See supra note 113 for a description of this case.
125 Id. § 2411(a)(1)(A) and (B)(i) (1988).
128 Id. § 2411(a)(1)(A).
COMPARISON OF RETALIATORY TRADE SANCTIONS

of 1974\textsuperscript{129} is limited to "trade agreements." The narrow interpretation of this term is the same in both cases.\textsuperscript{130} The only difference between the two bases of action is that the notion of "denial of benefits" is broader than the term "denial of rights." Though both coincide to a certain extent, the former also covers cases in which a foreign government does not violate a trade agreement but only nullifies or impairs concessions through economic measures which undermine the equivalence of the mutually granted trade concessions.\textsuperscript{131}

c. Unjustifiable Foreign Trade Practices

The last cause of action under section 301(a) of the Trade Act of 1974 concerns the protection of U.S. exports against "unjustifiable" foreign trade practices which burden or restrict U.S. commerce.\textsuperscript{132}

i. Unjustifiability

The first prerequisite for an action under section 301(a)(1)(B)(ii) of the Trade Act of 1974 is that the foreign practice in question is unjustifiable,\textsuperscript{133} or more specifically, that the practice is "in violation of, or inconsistent with, the international legal rights of the United States."\textsuperscript{134} The Trade Act of 1974 also explicitly names three such unjustifiable foreign practices: (1) the denial of most-favored-nation treatment; (2) denial of the right of establishment; and (3) denial of protection of intellectual property rights.\textsuperscript{135} As section 301(d)(4)(A) of the Trade Act of 1974 refers to "the international legal rights of the United States,"\textsuperscript{136} an action under this subsection can be based on the breach of an agreement other than a "trade agreement" (e.g., one of the numerous bilateral FCN-treaties).\textsuperscript{137}

Some authors suggest that the meaning of "unjustifiable" is still broader, "embracing conduct which violates the spirit, if not the letter, of binding international agreements."\textsuperscript{138} Retaliation against measures which do not violate the letter of a treaty but which are contrary to its spirit is not unknown to the international trade order. GATT's Article XXIII(2) explicitly addresses such nonviolation nullification and impairment measures,\textsuperscript{139} and section 301(a)(1)(B)(i) of the Trade Act of 1974 allows retaliation against them in cases where "trade agreements"

\textsuperscript{130} Id. § 2411(d)(4)(A) (1988).
\textsuperscript{131} Bello & Holmer, supra note 36, at 640; Nettesheim, supra note 32, at 363.
\textsuperscript{132} Bello & Holmer, supra note 36, at 640; Nettesheim, supra note 32, at 363.
\textsuperscript{133} Id. § 2411(d)(4)(A) (1988).
\textsuperscript{134} Id. § 2411(d)(4)(B) (1988).
\textsuperscript{135} Id. § 2411(d)(4)(A).
\textsuperscript{136} Bello & Holmer, supra note 36, at 640; Nettesheim, supra note 32, at 363.
\textsuperscript{137} Fisher & Steinhardt, supra note 35, at 597. See also Nettesheim, supra note 32, at 363.
are involved.\textsuperscript{140} Therefore, it is arguable that Congress, given its general intention to grant the Executive broad retaliatory authority,\textsuperscript{141} also wanted to provide for retaliatory authority in cases of the nonviolation nullification and impairment of "normal" bilateral treaties (i.e., treaties not constituting "trade agreements").

Moreover, some commentators argue that international declarations, resolutions, UNCTAD\textsuperscript{142} and OECD codes, and other "soft law" can also be invoked under section 301(a)(1)(B)(ii) of the Trade Act of 1974\textsuperscript{143} in order to challenge "unfair but technically legal conduct."\textsuperscript{144} However, this interpretation is not covered by the definition of "unjustifiable" given in section 301(d)(4)(A) of the Trade Act of 1974 because only practices violating the "international legal rights"\textsuperscript{145} of the United States are actionable. Though technically, UNCTAD and OECD codes, and other "soft law" rules are not legally binding,\textsuperscript{146} they constitute relatively loose commitments, which states should not be allowed to disregard.\textsuperscript{147} However, these commitments only have a moral or political nature\textsuperscript{148} because the parties to such a nonbinding, "soft" agreement exclude any legal responsibility in case of a breach of that agreement.\textsuperscript{149} Therefore, "soft" rules might contribute to the creation of new (customary) international norms, but they do not grant "rights" to anyone. Thus, acts and practices contrary to "soft law" do not violate the "international legal rights" of the United States and are not actionable under section 301(a)(1)(B)(ii) of the Trade Act of 1974.\textsuperscript{150}

\textit{ii. Injury}

In order to be actionable, unjustifiable acts have to "burden[ \ ] or restrict[ \ ] United States commerce."\textsuperscript{151} Though the section 301 injury test is less stringent than that of other U.S. trade laws that demand substantial,\textsuperscript{152} serious,\textsuperscript{153} or material\textsuperscript{154} in-

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\textsuperscript{141} Fisher & Steinhardt, supra note 33, at 597-98.
\textsuperscript{142} UNCTAD stands for the "United Nations Conference on Trade and Development."
\textsuperscript{144} Fisher & Steinhardt, supra note 33, at 597. See also Nettesheim, supra note 32, at 563.
\textsuperscript{146} See generally Richard Schwartz, Are the OECD and UNCTAD Codes Legally Binding?, 11 INT'L L. 529 (1977).
\textsuperscript{149} Schachter, supra note 148, at 300.
\textsuperscript{151} Id.
\textsuperscript{152} Section 337 of the Tariff Act of 1930 speaks of "[u]nfair methods of competition ... the ... effect of which is to ... substantially injure an industry in the United States." 19 U.S.C. § 1337(a)(1)(A)(i) (1988) (emphasis added).
comparision of retaliatory trade sanctions

jury, the showing of injury is not pro forma; de minimis allegations will not prevail. This was clearly shown in two cases where the USTR discontinued an investigation because of an insufficient substantiation for the claim that an allegedly unfair foreign trade practice burdened U.S. commerce. In another case, the USTR refused to initiate a section 301 investigation for the same reason.

d. Exceptions to Mandatory Retaliation

Contrary to prior law where retaliation was completely discretionary, under the 1988 amendments to the Trade Act of 1974, the USTR must retaliate if he finds a foreign trade practice actionable under section 301(a)(1) of the Trade Act of 1974, however, provides for important exceptions to the general requirement of mandatory retaliation. The USTR does not need to take action: (1) if the United States receives an unfavorable determination in a GATT or another formal dispute settlement procedure; (2) if the foreign country is taking steps in order to terminate its unfair trade practice; or (3) if it provides compensatory trade benefits to the United States. Moreover, “the USTR can refrain from action if retaliation would cause serious harm to the national security of the United States” or if it would have an adverse impact on the American economy (i.e., the national economic interest waiver exemption). All these exceptions, but notably the national economic interest waiver exemption, give the USTR a certain amount of discretion enabling him

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155 Ashman, supra note 60, at 127-28; Fisher & Steinhardt, supra note 33, at 601-02; Kevin C. Kennedy, Presidential Authority under Section 337, Section 301, and the Escape Clause: The Case for Less Discretion, 20 Cornell Int’l L.J. 127, 134 n.55 (1987); Nettesheim, supra note 32, at 364; Thatcher, supra note 33, at 502-03.

156 Fisher & Steinhardt, supra note 33, at 602; Thatcher, supra note 33, at 502-03.

157 In American Iron Steel Institute, EC and Japan Diversion of Steel to U.S., 43 Fed. Reg. 3,962 (1978), the USTR found there was “not sufficient justification to the claim that the EC/Japanese understanding created any unfair burden on the United States.” Id. In Indonesia Pencil Slat, 58 Fed. Reg. 610 (1993), the USTR found that “there [was] no basis for concluding that [the alleged practices were] burdening or restricting United States commerce.” Id. at 612. See also Kennedy, supra note 155, at 142-43.

158 In Roses, Inc., 50 Fed. Reg. 40,250 (1985), the USTR stated that “the petition did not, with respect to several allegations, adequately demonstrate the burden to U.S. commerce.” Id.


160 Id. § 2411(a)(2) (1988).

161 Import Trade Law, supra note 36, § 42.05.


163 Id. § 2411(a)(2)(B)(i) and (ii) (1988).


to avoid mandatory retaliation. However, given Congress' intention to increase retaliatory activity, the USTR must be careful not to use these exceptions too often.

3. Discretionary Action

Mandatory action is not required if the USTR determines that "an act, policy, or practice of a foreign country is unreasonable or discriminatory." In both cases, such foreign trade practices must burden or restrict U.S. commerce.

a. Unreasonable Acts

The first category of foreign unfair trade practices allowing discretionary action comprises all so-called "unreasonable" acts. The Trade Act of 1974 contains both a general definition of "unreasonable" foreign trade practices and an illustrative list of specified practices which are considered to be per se "unreasonable."

i. The General Definition of "Unreasonable"

The general definition of the term "unreasonable" given by the Trade Act of 1974 is extremely broad and vague. It includes any "act, policy, or practice [which], while not necessarily in violation of, or inconsistent with, the international legal rights of the United States, is otherwise unfair and inequitable." In the past, several commentators have tried to develop criteria for the unreasonableness determination. Hudec was the first to address the issue. After having carefully analyzed the drafting history of "unreasonable," he came to the conclusion that "the normative content of the word 'unreasonable'... cannot be defined" and that it would "be interpreted to cover any trade impediment that exporters find annoying." Fisher and Steinhardt wanted to proscribe all "conduct which is... in bad faith." This interpretation should enable the President, when deciding on retaliatory action, to take into account and to balance the pros and cons of a

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167 Ashman, supra note 60, at 140-41.
170 Id.
173 Id. § 2411(d)(3)(A).
175 Id.
176 Fisher & Steinhardt, supra note 33, at 598.
177 At that time (1982), it was still the President who determined whether a foreign prac-
foreign trade practice as well as the political and economic consequences of U.S. retaliation under section 301.\textsuperscript{178} However, this extremely general approach is not very helpful in formulating precise standards for deciding whether or not a foreign trade practice is “unreasonable.”

Though USTR decisions under section 301(b)(1) of the Trade Act of 1974\textsuperscript{179} are generally not based upon any set criteria,\textsuperscript{180} an analysis of recent cases where “general” unreasonableness\textsuperscript{181} was invoked shows that the most important element in an unreasonableness determination is the finding of a lack of reciprocity.\textsuperscript{182} Under this approach, a foreign trade practice is considered to be unreasonable if there is no “substantial equivalence between the market share held by American exporters in a certain good or service in a foreign country and the market share held by exporters for that country in the United States market.”\textsuperscript{183} In the Japan Semiconductors case, for instance, the USTR initiated an investigation because of an alleged lack of reciprocity in terms of market shares.\textsuperscript{184} The dispute was finally settled by an agreement aiming at the increase of the share held by American firms in the Japanese semiconductor market.\textsuperscript{185}

Moreover, the importance of the concept of reciprocity for any unreasonableness determination is stressed by two other factors. First, section 301(d)(3)(D) of the Trade Act of 1974 explicitly mentions the principle of reciprocity when it states that “[f]or purposes of determining whether any act, policy, or practice is unreasonable, reciprocal opportunities in the United States for foreign nationals and firms shall be taken into account.”\textsuperscript{186} Second, not only was the concept of reciprocity one of the most important issues in the discussions leading to the
passing of the 1979, 1984, and the 1988 amendments.\textsuperscript{187} “reciprocal market access” is one of the overall trade negotiating objectives set forth in section 1101(a)(1) of the Omnibus Trade and Competitiveness Act of 1988.\textsuperscript{188}

Despite all of this, the standard of fairness and equity established in section 301(d)(3)(A) of the Trade Act of 1974 “remains virtually undefined”\textsuperscript{189} and contains nearly no restriction on what the USTR may consider “unreasonable.”\textsuperscript{190} This lack of a clear standard allows the United States to impose its sometimes arbitrary\textsuperscript{191} standards of fairness in international trade on the rest of the world.\textsuperscript{192}

\textit{ii. Specific Unreasonable Practices}

Section 301(d)(3)(B) of the Trade Act of 1974 enumerates several trade practices which are supposed to be per se “unreasonable.” These include the denial of “fair and equitable opportunities for the establishment of an enterprise,”\textsuperscript{193} the denial of “adequate and effective protection of intellectual property rights,”\textsuperscript{194} and the denial of “market opportunities, including the toleration of systematic anticompetitive activities by . . . or among private firms.”\textsuperscript{195} Moreover, section 301(d)(3)(B) includes export targeting\textsuperscript{196} and the denial of certain worker rights such as the right of association as actions which are unreasonable per se.\textsuperscript{197}

\textit{b. Discriminatory Acts}

Foreign trade practices discriminating against U.S. firms can form another basis for discretionary action under section 301(b)(1) of the

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\textsuperscript{188} 19 U.S.C. § 2901(a)(1) (emphasis added).


\textsuperscript{190} Hansen, supra note 182, at 1133; Robert E. Hudec, Thinking About the New Section 301: Beyond Good and Evil, in Aggressive Unilateralism: America’s 301 Trade Policy and the World Trading System 113, 123 (Jagdish Bhagwati & Hugh T. Patrick eds., 1990).

\textsuperscript{191} Nettesheim, supra note 32, at 365.

\textsuperscript{192} Id. at 365-66; Marjorie Minkler, The Omnibus Trade Act of 1988, Section 301: A Permissible Enforcement Mechanism or a Violation of the United States’ Obligations under International Law?, 11 J.L. & Com. 283, 300 (1992).


\textsuperscript{194} Id. § 2411(d)(3)(B)(ii)(I).

\textsuperscript{195} Id. § 2411(d)(3)(B)(ii)(II).


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Trade Act of 1974. Under the Act, discriminatory trade practices are defined to include “any act, policy, [or] practice which denies national or most-favored-nation treatment to United States goods, services, or investment.” Discriminatory practices which are contrary to the GATT, contrary to another trade agreement, or “unjustifiable” (i.e., inconsistent with the international legal rights of the United States) are exclusively covered by section 301(a)(1) of the Trade Act of 1974. In these cases, retaliation is not discretionary but mandatory.

The provisions prescribing mandatory retaliation would otherwise be undermined.

c. Injury

An unreasonable or discriminatory trade practice is only actionable under section 301(b)(1) of the Trade Act of 1974 if it “burdens or restricts United States commerce.” This injury requirement is the same as that contained in section 301(a)(1)(B)(ii).

4. Retaliatory Authority

Whenever a foreign trade practice is actionable under section 301(a) or (b), section 301(c) of the Trade Act of 1974 authorizes the USTR to: (1) “suspend, withdraw, or prevent the application of, benefits of trade agreement concessions to carry out a trade agreement with the foreign country”; (2) impose duties or other import restrictions on the goods and services of the foreign country; or (3) enter into a binding agreement with the foreign country committing this country to eliminate, or phase out the unfair practice, eliminate the burden on U.S. commerce, or provide satisfactory compensation for the burdened U.S. economic sector. Moreover, in cases where the USTR wants to retaliate against the foreign service industry, he is entitled to restrict the terms and conditions of any service sector access authorization or to “deny the issuance of any such authorization.”

199 Id. § 2411(a)(1) (1988).
200 Nettesheim, supra note 32, at 361.
201 Id. at 367.
203 Id. § 2411(a)(1)(B)(ii). See supra notes 151-58 and accompanying text.
205 Id. § 2411(c)(1)(B).
206 Id. § 2411(c)(1)(C)(i).
207 Id. § 2411(c)(1)(C)(ii).
208 Id. § 2411(c)(1)(C)(iii).
209 Id. § 2411(c)(2)(A)(i).
210 Id. § 2411(c)(2)(A)(ii).
C. Judicial Review of Section 301 Actions

Because section 301 of the Trade Act of 1974 contains no provision concerning the judicial review of unfairness determinations made by the USTR, commentators have not yet been able to reach a consensus on whether or not courts can review the USTR's decisions. Thus, it is interesting to examine whether, for instance, a petitioner can attack the final determination of the USTR under section 304(a)(1) of the Trade Act of 1974 to dispute whether a certain foreign trade practice is not unfair.

1. Lack of Judicial Review Provisions in Section 301

Some commentators, suggesting that unfairness determinations made by the USTR under section 301 are not subject to judicial review, argue that unlike the anti-dumping and countervailing duty laws, section 301 does not contain provisions explicitly providing for judicial review. Therefore, Congress did not want section 301 determinations to be reviewed by the courts. However, the fact that section 301 is silent with respect to judicial review does not per se mean that unfairness determinations cannot be attacked before the courts. In the context of a section 201 "escape" clause action, courts have dealt with the question as to whether presidential decisions in international trade controversies can be reviewed by the courts, despite the fact that section 201 of the Trade Act of 1974 does not explicitly grant judicial review. Even though the court put an extreme limitation on judicial review, and gave nearly unlimited discretion to the President, it also found circumstances in which courts are allowed to intervene. Therefore, the silence of section 301 with regard to judicial

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213 Id. § 1516a (containing detailed provisions concerning "[j]udicial review in countervailing duty and antidumping duty proceedings").
214 Bello & Holmer, supra note 126, at 69; Jones, supra note 211, at 453.
216 Eichmann & Horlick, supra note 211, at 752.
218 Maple Leaf Fish Co. v. United States, 762 F.2d 86 (Fed. Cir. 1985).
219 "In international trade controversies . . . involving the President . . . this court and its predecessors have often reiterated the very limited role of reviewing courts." Id. at 89. . . .
220 "[T]he President's findings of fact and the motivations for his action are not subject to review." Id. (quoting Florsheim Shoe Co. v. United States, 744 F.2d 787, 795 (Fed. Cir. 1984)).
221 "For a court to interpose, there has to be a clear misconception of the governing statute, a significant procedural violation, or action outside delegated authority." Id.
review alone does not hinder the courts from taking up the case.\textsuperscript{222}

2. \textit{The Political Question Doctrine}

However, the so-called political question doctrine could be a serious obstacle to judicial review of USTR decisions under section 301 since these decisions nearly always involve political considerations. Though courts are normally very hesitant in reviewing decisions of the Executive involving foreign affairs, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."\textsuperscript{223} Consequently, among commentators, there is much disagreement on the exact scope of the political question doctrine.\textsuperscript{224} Nevertheless, a six-prong test developed by Justice Brennan in \textit{Baker v. Carr}\textsuperscript{225} is considered to be the "now-classic catalogue of conditions to which the political question doctrine applies."\textsuperscript{226} According to Brennan's test, a dispute falling within one or more of the following categories is regarded to be political and therefore not reviewable by the courts:\textsuperscript{227}

\begin{enumerate}
\item a textually demonstrable constitutional commitment of the issue to a coordinate political department; or
\item a lack of judicially discoverable and manageable standards for resolving it; or
\item the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or
\item the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or
\item an unusual need for unquestioning adherence to a political decision already made; or
\item the potentiality of embarrassment from multifarious pronouncements by various departments on one question.\textsuperscript{228}
\end{enumerate}

As the first category is not relevant in this context,\textsuperscript{229} only the remaining five criteria have to be dealt with. These can be broken down into two groups. Factors two and three concern the ability of the judiciary to resolve the question; factors four to six deal with the possible embarrassment of the Executive by court decisions.\textsuperscript{230}

\textsuperscript{222} Eichmann & Horlick, \textit{supra} note 211, at 752. \textit{But see} Duracell, Inc. v. United States Int'l Trade Comm'n, 778 F.2d 1578, 1580 (Fed. Cir. 1985) (denying judicial review of a presidential action because "[n]othing in section 337(g) or elsewhere in the statute [i.e., the Tariff Act of 1930] provides a litigant with a right of review of the President's decision per se").


\textsuperscript{224} \textit{See}, e.g., \textit{THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?} (1992).

\textsuperscript{225} \textit{Baker v. Carr}, 369 U.S. at 211.


\textsuperscript{228} \textit{Baker v. Carr}, 369 U.S. at 217.

\textsuperscript{229} Eichmann & Horlick, \textit{supra} note 211, at 746 n.53 (interpreting U.S. CONST. art. I, § 8 (Congress shall "regulate commerce with foreign nations").

\textsuperscript{230} \textit{Id.} at 746. The same simplified approach is used in Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1511 (D.C. Cir. 1984).
a. Justiciability

Under the Brennan test, a dispute is justiciable if a court can find “discoverable and manageable standards” with which to analyze the question.\textsuperscript{231} Section 301 grants the USTR retaliatory authority in different cases. Thus, each of them must be examined separately.

i. Violation of a Trade Agreement

Under sections 301(a)(1)(A) and (B)(i) of the Trade Act of 1974,\textsuperscript{232} the USTR has to retaliate if a trade agreement is violated, or if a nonviolation nullification and impairment of a trade agreement will result. As the term “trade agreement” is interpreted to include only the GATT and certain MTN-treaties,\textsuperscript{233} and since the GATT is a “legalistic treaty,”\textsuperscript{234} courts should not have problems construing “trade agreements” and deciding on their violation or impairment by foreign trade practices.\textsuperscript{235} This assumption is proved by the fact that, in several cases, U.S. courts already interpreted and applied the GATT without having difficulties in finding “judicially discoverable and manageable standards.”\textsuperscript{236}

ii. Unjustifiable Foreign Trade Practices

An unjustifiable act is defined as being “in violation of, or inconsistent with, the international legal rights of the United States.”\textsuperscript{237} Most of the cases under section 301 where an “unjustifiable” foreign trade practice was invoked involved the alleged violation of bilateral treaties relating to trade (mostly FCN treaties) or the denial of most-favored-nation treatment. Here again, courts only have to deal with legal problems similar to those arising under the GATT.\textsuperscript{238} As, at least in the past, U.S. courts proved to master these legal problems successfully,\textsuperscript{239} “unjustifiable” foreign acts are also clearly justiciable.\textsuperscript{240}

iii. Unreasonable Foreign Trade Practices

As discussed above, the definition of “unreasonable” foreign trade

\textsuperscript{231} Baker v. Carr, 369 U.S. at 217.
\textsuperscript{232} 19 U.S.C. § 2411(a)(1)(A) and (B)(i) (1988).
\textsuperscript{233} See supra notes 109-22 and accompanying text.
\textsuperscript{234} Eichmann & Horlick, supra note 211, at 748.
\textsuperscript{235} Id.
\textsuperscript{238} Eichmann & Horlick, supra note 211, at 749.
\textsuperscript{239} See, e.g., John T. Bill Co. v. United States, 104 F.2d 67 (C.C.P.A. 1939) (The U.S. Court of Customs and Patent Appeals interpreted the U.S.-Germany FCN treaty and voided a 50% tariff as inconsistent with the FCN treaty.).
\textsuperscript{240} Eichmann & Horlick, supra note 211, at 749-50.
practices in the Trade Act of 1974\textsuperscript{241} is extremely broad and vague.\textsuperscript{242} One commentator even came to the conclusion that "the normative content of the word 'unreasonable' . . . cannot be defined."\textsuperscript{243} Due to this lack of "judicially discoverable and manageable standards," "unreasonable" trade practices are not justiciable.\textsuperscript{244}

As demonstrated by the above analysis, actions under sections 301(a)(1)(A) and (B),\textsuperscript{245} dealing with the violation or the nonviolation nullification and impairment of a trade agreement as well as with unjustifiable foreign trade practices, are justiciable while actions under section 301(b)\textsuperscript{246} against merely unreasonable foreign acts are not justiciable.

\textit{b. Embarrassment}

However, under the Brennan test certain questions, though generally justiciable and ripe for decision, may not be reviewed by the courts because of possible embarrassment to the Executive Branch.\textsuperscript{247}

In the context of an investigation under section 301(a)(1) of the Trade Act of 1974,\textsuperscript{248} a distinction has to be made between two scenarios where the courts could possibly intervene. The first scenario involves the situation where, in his final determination under section 304(a)(1) of the Trade Act of 1974,\textsuperscript{249} the USTR found no unfair foreign trade practice\textsuperscript{250} or terminated the investigation which was initiated by a private petitioner for other reasons (i.e., negative final determination). Since relief was denied by the USTR, the petitioner may desire to challenge this negative final determination before the courts.\textsuperscript{251} In the second scenario, the USTR determined that the foreign practice investigated was unfair (i.e., positive final determination) and takes retaliatory action pursuant to section 301(c) of the Trade Act of 1974.\textsuperscript{252} The importers of foreign products which are affected, or which will be affected, by the retaliation (e.g., by higher duties) may want to attack the action in the courts.\textsuperscript{253}

\textsuperscript{242} See supra notes 173-92 and accompanying text.
\textsuperscript{243} Hudec, \textit{supra} note 174, at 521.
\textsuperscript{244} \textit{Contra} Eichmann & Horlick, \textit{supra} note 211, at 750-54.
\textsuperscript{246} Id. § 2411(b)(1) (1988).
\textsuperscript{249} Id. § 2413(a)(1) (1988).
\textsuperscript{250} In the following, "unfair trade practice" only means a trade practice actionable under section 301(a)(1) of the Trade Act of 1974. 19 U.S.C. § 2411(a)(1) (1988). As shown in \textit{supra} notes 232-40 and accompanying text, such an unfair trade practice meets the judiciability requirements under the Brennan test.
\textsuperscript{251} An unsuccessful petitioner would have standing as he has been injured by the lack of relief. Eichmann & Horlick, \textit{supra} note 211, at 756.
\textsuperscript{252} 19 U.S.C. § 2411(c) (1988).
\textsuperscript{253} These persons would have standing. Eichmann & Horlick, \textit{supra} note 211, at 756.
i. Negative Final Determination

Even if the USTR finds no unfair foreign trade practice, the final determination is always preceded by consultations and negotiations with the foreign government concerned.\textsuperscript{254} In many of the section 301 investigation cases, the foreign country agrees to change its allegedly unfair trade practice after consultations with the United States, which in exchange terminates the section 301 investigation.\textsuperscript{255} If petitioners, who are not satisfied with the changed foreign practice and who still think this practice to be unfair, can attack the termination of investigations before the courts, the Executive Branch would be extremely embarrassed. Even though the foreign country changed its practice relying on the U.S. "promise" to end the section 301 investigation, it would still be exposed to a section 301 investigation restarted pursuant to a court decision. Such situations would cast doubt upon the credibility of the U.S. government in consultations and negotiations with foreign governments. Therefore, the judicial review of negative determinations made by the USTR could severely compromise the Executive Branch.\textsuperscript{256}


\textsuperscript{256} Contra Eichmann \& Horlick, supra note 211, at 755.
\textsuperscript{257} See, e.g., Canada Restrictions Affecting the Importation of Beer, 55 Fed. Reg. 27,731 (1990) (USTR made a positive final unfairness determination on December 29, 1991 and imposed higher duties on beer from Canada sufficient to offset fully the nullification and impairment of GATT rights resulting from the unfair Canadian trade practices. In August 1993, the USTR terminated the retaliatory duties after an agreement with Canada was reached improving the access for U.S. beer into the Canadian market.); Semiconductor Industry Association, 50 Fed. Reg. 28,866 (1985) (President imposed higher duties on certain Japanese electronic products on April 17, 1987 because of Japanese non-compliance with the U.S.-Japan Semiconductor Arrangement of September 2, 1986. As a result of Japan's improved compliance with the agreement the USTR suspended the increased duties in June 1987.): See also Retaliation under Section 301, Int'l Trade Rep. (BNA), Import Reference Manual, 49:0114-0115 (Nov. 24, 1993).
addition, the threatening effect of positive determinations would be at least partly removed.\textsuperscript{258}

Therefore, both negative and positive final determinations should not be subject to judicial review as this could severely embarrass the Executive Branch and undermine its credibility in trade negotiations with foreign countries.

III. Council Regulation 2641/84

In 1984, partly in response to the enactment of section 301 of the Trade Act of 1974 by the United States,\textsuperscript{259} the Council of the European Communities adopted Council Regulation 2641/84\textsuperscript{260} in order to "defend vigorously the legitimate interests of the Community in the appropriate bodies, in particular GATT, and to make sure the Community . . . acts with as much speed and efficiency as its trading partners."\textsuperscript{261}

\textit{A. Procedural Law of Council Regulation 2641/84}

The Commission, when initiating an examination procedure under Council Regulation 2641/84, can have two objectives: (1) it can aim at responding to an illicit foreign commercial practice in order to remove the injury caused by this practice to a "Community industry";\textsuperscript{262} or (2) it can aim at ensuring the full exercise of the Union’s rights with regard to the commercial practices of other countries.\textsuperscript{263} Such an examination procedure can consist of up to five different stages: (1) initiation of an examination procedure;\textsuperscript{264} (2) consultations with the foreign government(s) concerned (not mandatory);\textsuperscript{265} (3) public hearing and submission of written briefs and rebuttal briefs;\textsuperscript{266} (4) report of the Commission and decision on which further steps to take;\textsuperscript{267} and (5) the triggering of dispute settlement procedures.\textsuperscript{268}

\textit{1. Initiation of an Examination Procedure}

The Commission can initiate the examination proceedings provided for in Council Regulation 2641/84 in response either to a writ-

\begin{footnotes}
\textsuperscript{258} Contra Eichmann & Horlick, \textit{supra} note 211, at 756-59.
\textsuperscript{259} Devine, \textit{supra} note 33, at 1093; Petermann, \textit{supra} note 215, at 37.
\textsuperscript{261} Id. at art. 1(a).
\textsuperscript{262} Id. at art. 1(b).
\textsuperscript{263} Id. at art. 6(1).
\textsuperscript{264} Id. at art. 6(1)(b).
\textsuperscript{265} Id. at art. 6(5).
\textsuperscript{266} Id. at art. 6(9).
\textsuperscript{267} Id. at art. 10(2).
\end{footnotes}
ten complaint by a private party or to a request made by one of the twelve Member States.

a. In Response to a Complaint by a Private Party

Any private party acting on behalf of a "Community industry" can lodge a complaint with the Commission if it can prove that it has suffered injury resulting from an illicit foreign trade practice. After the receipt of an admissible complaint, the Commission will decide whether the initiation of an examination procedure is "necessary in the interest of the Community." However, the right of private parties to ask for an examination procedure is restricted. They can only challenge illicit foreign commercial practices (so-called "clause a" procedures). They cannot request the Commission to initiate proceedings aimed at "ensuring the full exercise of the Community's rights with regard to the commercial practices of third countries" (so-called "clause b" procedures). This right is reserved to the Member States.

i. Admissible Complaint

(A) Community Industry

The first prerequisite for the admissibility of a private complaint is that it is lodged by a natural or legal person (including an association which does not have legal personality) acting on behalf of a "Community industry." Pursuant to this definition, "Community industry" means either all Union producers or all producers whose combined output constitutes a major proportion of the total Union production of goods identical or similar to the product which is the subject of the illicit foreign trade practice in question. Consumers and processors of such goods can also form a "Community industry" for the purpose of Council Regulation 2641/84 if they meet the above mentioned requirements (e.g., they must represent all Union consumers or proces-

269 Id. at art. 3.
270 Id. at art. 4.
271 Id. at art. 3(1).
272 Id. at art. 6(1).
273 Id. at art. 3(1); James R. Atwood, The European Economic Community's New Measures Against Unfair Trade Practices in International Trade: Implications for United States Exporters, 19 INT'L LAW. 361, 364 (1985). Council Regulation 2641/84 defines "the Community's rights" as "those international trade rights which it may avail itself under international law or under generally accepted rules." Reg. 2641/84, supra note 260, at art. 2(2).
275 Reg. 2641/84, supra note 260, at art. 3(1).
276 Id. at art. 2(4).
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sors); traders are not included in this definition of "Community industry." However, this rather rigid rule allows an exception in favor of regional industries, representing only a part of the "Community industry." Thus, producers within one region of the Union are also considered to represent a "Community industry" only if their combined output constitutes the major output of the product in question in that region and the illicit foreign trade practice mainly affects this region. This restrictive definition has been borrowed from the EU anti-dumping and subsidizing regulations which reflect the corresponding provisions of the 1979 GATT Anti-Dumping code and the 1979 GATT Subsidies and Countervailing Duty code.

Up to now, complainants never had any problems establishing that they were representing a "Community industry," partly because the Commission interpreted the requirement that a complainant has to act on behalf of a "Community industry" rather generously.

277 Id.
279 Reg. 2641/84, supra note 260, at art. 2(4)(b).
280 Council Regulation 288/82, 1982 O.J. (L 35) 1; Council Regulation 2176/84, 1984 O.J. (L 201) 1. Both regulations were repealed by Council Regulation 2423/88 of July 11, 1988 on the Protection Against Dumped and Subsidized Imports from Countries not Members of the European Economic Community, 1988 O.J. (L 209) 1.
282 See Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, Apr. 12, 1979, art. 6(5), T.I.A.S. No. 9619, 1186 U.N.T.S. 204 [hereinafter GATT Subsidies Code]; Bourgeois, supra note 278, at 6-22 to 6-23.
283 In four cases, the Commission decided to initiate an examination procedure: Akzo v. United States, 1986 O.J. (C 25) 2, 2 (where the Commission held that the Akzo group was "the sole producer of aramid fiber in the Community"); IFPI v. Indonesia, 1987 O.J. (L 335) 22, 22 (where the Commission stated that complainant, the association of members of the International Federation of Phonogram and Videogram Producers (IFPI), acted "on behalf of producers representing virtually the whole of the Community sound-recording industry"); ECSA v. Japan, 1991 O.J. (C 40) 18, 18 (where the Commission found that the European Community Shipowners' Association (ECSA) represented "approximately some 90% of all Community shipping lines trading to and from Japan"); IFPI v. Thailand, 1991 O.J. (C 189) 26, 26 (where the Commission again came to the conclusion that IFPI represented "virtually all producers of sound recordings in the Community").
284 See, e.g., Akzo v. United States, 1986 O.J. (C 25) 2, where the Commission decided that aramid fibers constituted a product distinct from other synthetic fibers. Thus, Akzo, the only producer of aramid fibers in the Union, had no difficulties proving that it acted on behalf of a "Community industry." If the Commission had chosen synthetic fibers as the relevant group of products, Akzo would not have met the "Community industry" requirement. Notice of an initiation of an examination procedure concerning illicit commercial practices within the meaning of Council Regulation 2641/84, consisting of the exclusion from the U.S. market of the unlicensed importation of certain aramid fiber manufactured by Akzo NV or its affiliated companies outside the United States. Id. at 2. See also M.I.B. Arnold & M. C.E.J. Bronckers, The EC New Trade Policy Instrument: A Brief Review of the Application of Regulation 2641/84, 2 LEIDEN J. INT'L L. 96, 99 (1989).
(B) Proof of the Existence of an Illicit Commercial Practice

The second requirement for a complaint by a private party is that it contains sufficient evidence to prove the existence of an allegedly illicit foreign trade practice.\(^\text{285}\) One of the most important questions is whether a private complaint is admissible if it is based on the allegation that a certain foreign commercial practice is illicit because it infringes on international legal rules which are neither self-executing nor directly applicable.\(^\text{286}\) Negating this question would mean that a private petitioner could not invoke the violation of GATT provisions because these rules, at least according to the European Court of Justice (E.C.J.),\(^\text{287}\) are neither self-executing, nor have they been incorporated into the Union's legal order.\(^\text{288}\) However, such a standpoint is based on a misinterpretation of the purposes and effects of Council Regulation 2641/84: It is not concerned with the direct enforceability by private individuals of benefits accruing to them under GATT or any other non-self-executing rule of international law;\(^\text{289}\) rather, Council Regulation 2641/84 only sets out the requirements for private petitions and therefore only deals with the prerequisites for action of the Commission and its duties under Council Regulation 2641/84.\(^\text{290}\) Moreover, restricting private complaints to commercial practices violating self-executing rules would limit the practical impact of Council Regulation 2641/84.\(^\text{291}\) Both the Commission, which in the Akzo case accepted a complaint though it was based on an alleged violation of Article XX(d) and Article III(4) of the GATT (i.e., non-self-executing provisions),\(^\text{292}\)

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\(^\text{285}\) Reg. 2641/84, supra note 260, at art. 3(2).


\(^\text{288}\) Denton, supra note 286, at 8.

\(^\text{289}\) Id.


\(^\text{291}\) See Völker, supra note 286, at 49 (noting that the refusal of the Court of Justice to hold the GATT "directly effective" in Article 173 EEC cases would effectively eliminate breaches of the 'generally accepted rules' as bases for private party complaints); Steenbergen, supra note 286, at 427.

and the E.C.J. seem to agree with this standpoint. The E.C.J., in its Fediol III ruling, explicitly stated that "Regulation 2641/84 entitles the economic agents concerned to rely on the GATT provisions in the complaint which they lodge with the Commission in order to establish the illicit nature of the commercial practices which they consider to have harmed them."\(^{293}\)

(C) Proof of an Injury Resulting from the Illicit Foreign Commercial Practice

A private petitioner must also prove that the allegedly illicit foreign commercial practice caused or threatened to cause injury to a "Community industry."\(^{294}\) In light of the objectives the Commission pursued when introducing the injury requirement, the standards which the petitioner has to meet when proving an injury to the "Community industry" are rather high. By limiting the scope of action against illicit commercial practices at the initiative of private petitioners,\(^{295}\) the Commission wanted to allay the concerns of certain Member States which feared that the new commercial instrument would be too protectionist.\(^{296}\) Moreover, the Commission aimed at avoiding costly examination proceedings where there was no prima facie general material interest at stake.\(^{297}\) Finally, another indicator for the strict requirements demanded for a proof of injury to a "Community industry" can be found when comparing the injury requirement of Council Regulation 2641/84 and that of the anti-dumping and anti-subsidy regulation 2423/88. The latter regulation provides that an injury determination is to be made "if the dumped or subsidized imports are . . . causing or threatening to cause material injury to an established Community industry or materially retarding the establishment of such an industry."\(^{298}\) Regulation 2641/84, however, does not mention the mere retardation of the establishment of a "Community industry" and therefore, requires that there must be injury to an already established industry.\(^{299}\) Therefore, this regulation makes it more difficult for a complainant to prove an injury.\(^{300}\) For these reasons, the proof

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\(^{293}\) Case 70/87, EEC Seed Crushers' and Oil Processors' Federation (Fediol) v. Commis-
\(^{295}\) Reg. 2641/84, supra note 260, at art. 3(1). The factors that have to be considered when proving injury are enumerated in Article 8 of Council Regulation 2641/84. Id. at art. 8.
\(^{296}\) Bourgeois, supra note 278, at 6-19; Bronckers, supra note 274, at 736.
\(^{298}\) Bronckers, supra note 274, at 736.
\(^{300}\) See, e.g., the Akzo Commission decision, 1987 O.J. (L 117) 18, where the Commission
of injury can (and must) represent a serious hurdle for private parties.\(^{301}\)

\[ \text{ii. Decision of the Commission Whether to Initiate an Examination Procedure} \]

After having consulted with an advisory committee (the Committee), composed of representatives of each Member State and chaired by a representative of the Commission,\(^{302}\) the Commission will initiate an examination procedure if “it is necessary in the interest of the Community.”\(^{303}\) Though commentators agree that this term grants the Commission discretion whether to commence investigation proceedings,\(^{304}\) they do not agree on the scope of this discretion. One commentator suggests that Article 6(1) of Council Regulation 2641/84 provides for “the widest possible discretion.”\(^{305}\) However, other authors argue against unlimited and in favor of limited discretion. “First, a grant of unlimited discretion [negates] the procedural safeguards awarded to private petitioners in Regulation 2641/84.”\(^{306}\) Second, when inserting the notion of “interest of the Community” in such an early procedural phase, the Council’s end was not to grant unlimited discretion to the Commission even before the full facts of the case are known. Rather, in the light of the E.C.J.’s \textit{Fediol I} ruling,\(^{307}\) the Commission stated “that there \textit{was} no \textit{present} injury resulting from the ITC exclusion order” since this exclusion order was issued in November 1985 and actual (limited sale) commercial production by the Community producer only started in mid-1986.” \textit{Id.} at 20 (emphasis added). However, the Commission was of the opinion that there was a threat of injury to the “Community industry.” \textit{Id.} In this case, one might have equally and perhaps more coherently argued that the ITC exclusion order only retarded the establishment of a “Community industry” as, at the time the ITC order was issued, the production of the aramid fibers had not yet started. Following this argumentation, Akzo would not have had standing under Council Regulation 2641/84. Schoneveld, \textit{supra} note 299, at 28.\(^{301}\) Bronckers, \textit{supra} note 274, at 736.\(^{302}\) Reg. 2641/84, \textit{supra} note 260, at art. 5(1).\(^{303}\) \textit{Id.} at art. 6(1).\(^{304}\) Bourgeois, \textit{supra} note 278, at 6-25; Bronckers, \textit{supra} note 274 at 742; Denton, \textit{supra} note 286, at 11-12.\(^{305}\) Bourgeois, \textit{supra} note 278, at 6-25. \textit{Cf.} Denton, \textit{supra} note 286, at 12 (stating that the insertion of the notion of “Community interest” already in art. 6(1), i.e., at a very early stage of the procedure, “emphasises [sic] the political fact that the Community will not act unless it feels it expedient to do so”).\(^{306}\) Bronckers, \textit{supra} note 274, at 742. Such procedural safeguards are, for instance, the complainant’s right to inspect all information made available to the Commission, Reg. 2641/84, \textit{supra} note 260, at art. 6(4)(a); his right to be informed of the principal facts and considerations resulting from the examination procedure, \textit{id.} at art. 6(4)(b); or his right to demand hearings, \textit{id.} at art. 6(5). Concerning the importance of these procedural safeguards in determining whether the Commission’s decision on the initiation of an anti-subsidy investigation was subject to judicial review, \textit{see} Case 191/82, EEC Seed Crushers’ and Oil Processors’ Federation (Fediol) v. Commission, 1983 E.C.R. 2913, 2934 [hereinafter \textit{Fediol I}].\(^{307}\) \textit{Fediol I}, \textit{supra} note 306, 1983 E.C.R. 2913. Fediol wanted to attack a Commission decision not to initiate anti-subsidy proceedings before the E.C.J. Contrary to the Commission, which argued that such a complaint was not admissible, the E.C.J. declared Fediol’s complaint admissible which meant that the Commission’s decision to initiate or not to initiate anti-subsidy procedures was (to a certain extent) subject to judicial review. It seems as if
cil, by granting limited discretion, wanted to prevent judicial review of a Commission decision not to initiate an investigation.\textsuperscript{308} Due to this limited discretionary power, the Commission can only refuse to open an examination procedure if, after weighing the possible negative (political or economic) effects of the opening of an investigation against the interests of the “Community industry” affected by the foreign trade practice, it is clearly foreseeable that important Union interests will be damaged by the initiation of an investigation.\textsuperscript{309}

A decision on the initiation of an examination procedure has to be taken within 45 days after a complaint was submitted; in special circumstances this period may be extended to 60 days.\textsuperscript{310} As these time limits are provided for in the interest of the complainants, the latter can waive them so that the Commission can extend the time span within which it has to decide on the initiation of an investigation.\textsuperscript{311} If the Commission decides to trigger an investigation, it must announce the initiation in the Official Journal of the European Union.\textsuperscript{312}

\textit{b. In Response to a Request of a Member State}

Under Council Regulation 2641/84 an investigation may also be initiated in response to a request of one of the Member States.\textsuperscript{313} Contrary to private parties, Member States may lodge a complaint not only with respect to “clause a” procedures but also with regard to “clause b” procedures\textsuperscript{314} (i.e., they can also demand the initiation of proceedings aimed at “ensuring full exercise of the Community’s rights with regard to the commercial practices of third countries”).\textsuperscript{315} Depending on which of the two procedures the Member States wants to trigger, the requirements for the admissibility of a complaint differ.\textsuperscript{316}

\textsuperscript{308} Bronckers, \textit{supra} note 274, at 742.

\textsuperscript{309} Völker, \textit{supra} note 286, at 47-48. Albeit the Commission has only limited discretion when deciding on the opening of an examination procedure, it is important for private complainants to contact the Commission, which in practice is willing to assist potential complainants with filing complaints, before submitting a complaint. Bourgeois, \textit{supra} note 278, at 6-24 to 6-25.

\textsuperscript{310} Reg. 2641/84, \textit{supra} note 260, at art. 6(8).

\textsuperscript{311} See Bourgeois, \textit{supra} note 278, at 6-26. In the Akzo and in the Soya Meal from Argentina cases, the complainants agreed to an extension of the time limit from 45 to 60 days. \textit{Id.}

\textsuperscript{312} Reg. 2641/84, \textit{supra} note 260, at art. 6(1)(a).

\textsuperscript{313} \textit{Id.} at art. 4(1).

\textsuperscript{314} \textit{Id.} at art. 4(1). See also Atwood, \textit{supra} note 273, at 364. For an explanation of these terms, see \textit{supra} notes 271-74 and accompanying text.

\textsuperscript{315} Devine, \textit{supra} note 33, at 1104.

\textsuperscript{316} Steenbergen, \textit{supra} note 286, at 423.
If a Member State intends to lodge a complaint with respect to the first aim of Article 1 of Council Regulation 2641/84 (i.e., with regard to an illicit foreign commercial practice), the complaint has to meet the same high admissibility standards as a private complaint\(^{317}\) (i.e., the complaint has to contain sufficient evidence of the illicit foreign commercial practice and of the injury resulting therefrom).\(^{318}\) Here again, the Commission will only open an investigation if “it is necessary in the interest of the Community.”\(^{319}\)

Complaints aimed at “ensuring full exercise of the Community’s rights with regard to commercial practices of third countries”\(^{320}\) do not require the proof of injury to a “Community industry.”\(^{321}\) A Member State is only required to submit proof of the violation or the non-violation nullification and impairment of a trade agreement between the Union and a third state.\(^{322}\)

c. Self-Initiation by the Commission

The question whether the Commission can self-initiate an investigation is not explicitly addressed in Council Regulation 2641/84. One commentator suggests that the practice under the anti-dumping and anti-subsidy rules serves as a guideline,\(^{323}\) since the relevant procedural provisions of Council Regulation 2641/84 are modelled after the anti-dumping and anti-subsidy rules.\(^{324}\) Though an anti-dumping or anti-subsidy procedure will normally only be initiated after a complaint by a private party was lodged,\(^{325}\) Articles 5 and 7 of Council Regulation 2423/88 do not make the receipt of a complaint an obligatory prereq-

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\(^{317}\) Devine, supra note 33, at 1104.

\(^{318}\) Reg. 2641/84, supra note 260, at art. 4(2). See supra notes 294-301 and accompanying text.

\(^{319}\) Reg. 2641/84, supra note 260, at art. 6(1). See supra notes 302-09 and accompanying text.

\(^{320}\) Reg. 2641/84, supra note 260, at art. 1. See supra notes 278 and accompanying text.

\(^{321}\) See, e.g., Steenbergen, supra note 286, at 433.

\(^{322}\) See supra notes 278 and accompanying text.

\(^{323}\) See, e.g., Council Regulation 2423/66, 1988 O.J. (L 209) 1; Council Regulation 288/82, 1982 O.J. (L 35) 1; Council Regulation 2176/84, 1984 O.J. (L 201) 1. See also, Bourgeois, supra note 278, at 6-21.

\(^{324}\) Bourgeois, supra note 278, at 6-21; Völker, supra note 286, at 50. See, e.g., the identical wording of articles 3(1) and 6(1) of Council Regulation 2641/84, 1984 O.J. (L 252) 1, 2-3, on one hand, and Articles 5(1) and 7(1) of Council Regulation 2423/88, 1988 O.J. (L 209) 1, 8-9, on the other hand.

\(^{325}\) Jacques H.J. Bourgeois, EC Antidumping Enforcement—Selected Second Generation Issues, 1986 ANNUAL PROCEEDINGS OF THE FORDHAM CORPORATE LAW INSTITUTE: ANTI-TRUST AND TRADE POLICY IN THE UNITED STATES AND THE EUROPEAN COMMUNITY 563, 591 (Barry E. Hawk ed., 1986). The reason for this restrictive use of the right to self-initiate anti-dumping procedures can be found in Article 5(1) of the GATT Anti-Dumping Code which provides that the right to self-initiate an anti-dumping investigation can only be exercised in "special circumstances." GATT Anti-Dumping Code, supra note 281. However, it should be noted that Art. 2(3) of the GATT Anti-Subsidy Code does not limit the right of the competent authority to self initiate anti-subsidy procedures. GATT Subsidies Code, supra note 282.
The Commission should also be able to self-initiate procedures under Council Regulation 2641/84. Therefore, because of the nearly identical wording of certain parts of Articles 3(1) and 6(1) of Council Regulation 2641/84, on one hand, and Articles 5(1) and 7(1) of Council Regulation 2423/88, on the other hand, the Commission should also be able to self-initiate procedures under Council Regulation 2641/84.

This argument, however, is erroneous given the differences in the wording of the relevant parts of the anti-dumping/anti-subsidy regulation, on one hand, and Council Regulation 2641/84, on the other hand. Bourgeois only refers to Article 5(1) of Council Regulation 2423/88 which is in fact identical with Article 3(1) of Council Regulation 2641/84. The right of the Commission to self-initiate anti-dumping and anti-subsidy proceedings, however, does not emanate from Article 5(1) of Council Regulation 2423/88 but from Article 5(6) of this regulation. There is no equivalent provision in Council Regulation 2641/84. Therefore, the rules providing for the Commission’s power to self-initiate proceedings under the anti-dumping and anti-subsidy regulation are not transferrable to cases involving retaliation against foreign illicit commercial practices. Thus, the Commission cannot self-initiate proceedings under Council Regulation 2641/84.

2. Consultations with the Foreign Government Concerned

After the publication of its decision to initiate an examination procedure, the Commission officially notifies the representatives of the foreign governments which are the subjects of the investigation.

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327 Bourgeois, supra note 278, at 6-21. However, the author is of the opinion that if the Commission follows its present policy in anti-dumping and anti-subsidy cases it is highly unlikely that it will self-initiate an investigation under Council Regulation 2641/84. Id. Up to now, the Commission has not yet self-initiated anti-dumping or anti-subsidy proceedings. However, pursuant to Article 14(1) of Council Regulation 2176/84, 1984 O.J. (L 201) 1, 13 (now Article 14 (1) of Council Regulation 2423/88, 1988 O.J. (L 209) 1, 14), the Commission self-initiated one review in the Ball Bearings from Poland and Other Countries case, 1985 O.J. (C 77) 4, 4. See also BESSELER & WILLIAMS, supra note 326, at 177 n.25a.

328 See, e.g., PETERMANN, supra note 215, at 98; Hilf & Rolf, supra note 290, at 305.


330 Reg. 2641/84, supra note 260, at art. 3(1); Bourgeois, supra note 278, at 6-21.

331 Bellis, supra note 326, at 47 n.15. Even Bourgeois himself acknowledges that in anti-dumping or anti-subsidy cases the legal basis for the Commission’s right to self-initiate proceedings is to be found in Article 5(6) of Council Regulation 2423/88. Bourgeois, supra note 325, at 590.


333 Reg. 2641/84, supra note 260, at art. 6(1)(b).
Council Regulation 2641/84 entitles, but does not obligate, the Commission to hold consultations with the foreign government at this early stage. 334

3. **Public Hearings and Submission of Written Briefs and Rebuttal Briefs**

Article 6(5) of Council Regulation 2641/84 provides for the possibility of a hearing involving the concerned parties. The parties primarily concerned have a right to a hearing if they make a timely written request. 335 Moreover, after a request, the Commission shall give the parties primarily concerned an opportunity to meet and to exchange their opinions. 336 No party can be forced to participate in such a meeting, and a party's failure to attend is not prejudicial to its interests. 337 Even if the parties primarily concerned attend the meeting, they can withhold all information they consider to be confidential. 338 As Articles 7 and 6(4)(a) of Council Regulation 2641/84 provide for extensive protection of confidential information, the opportunities for the country accused to rebut the complainant's evidence can be rather limited. 339 Article 6(4)(a), however, gives the country concerned (and all exporters, importers as well as the complainant) a right to inspect all information made available to the Commission unless it is not relevant for the protection of its interests. 340

4. **Report of the Commission and Decision on Which Further Steps to Take**

When the Commission terminates an investigation, it has to submit a report to the Committee within five months of the initiation of the proceedings unless the issues involved in the investigation are too complex to be examined within these five months. In such a case, the Commission has to report within seven months. 341 The Commission can make three different determinations in its report: (1) it can determine that the "interests of the Community do not require any action" and terminate the procedure; 342 (2) it can terminate the procedure if

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334 *Id.* *See also* Atwood, *supra* note 273, at 366 (stating that consultations with the government concerned will probably be deferred until the termination of the investigation).

335 Reg. 2641/84, *supra* note 260, at art. 5. The time limit within which a hearing can be requested is made public in the Official Journal of the European Community. This announcement is part of the notice of initiation.

336 *Id.* at art. 6(6).

337 *Id.*

338 Atwood, *supra* note 273, at 366. Article 6(6) of Council Regulation 2641/84, 1984 O.J. (L 252) 1, 4, stipulates that "the Commission shall take account... of the need to preserve confidentiality."


341 *Id.* at art. 6(9).

342 *Id.* at art. 9(1).
the foreign country concerned has taken satisfactory action;345 and (3) it can recommend action.344

Depending on which determination the Commission wants to make, Council Regulation 2641/84 provides for two different decision making processes: (1) the so-called “guillotine procedure”;345 and (2) the procedure under Article 113 of the Treaty of Rome.346

a. The “Guillotine Procedure”

The “guillotine procedure”347 is set out in Article 12 of Council Regulation 2641/84 pursuant to which the Commission has to submit a draft of the decision to the Committee which will discuss it.348 After having considered the opinion of the Committee, the Commission adopts a decision which is communicated to the Member States.349 If the matter is not referred to the Council by one of the Member States within ten days of communication, the Commission’s decision becomes final. If, however, the matter is referred to the Council by one of the Member States within these ten days, the Council, acting by a qualified majority, can revise the decision of the Commission within another thirty days. If no action is taken by the Council within this thirty day period, the Commission’s decision becomes effective.350

The “guillotine procedure” is applied if the Commission wants to terminate an investigation because, in its opinion, “the interests of the Community do not require any action.”351 The Commission also can, but need not, proceed pursuant to Article 12 of Council Regulation 2641/84 if it has the intention to terminate an examination procedure because of satisfactory action by the foreign country concerned.352 Finally, the “guillotine procedure” is to be used in cases where, in a “clause a” procedure, the Commission wants to initiate formal dispute settlement proceedings.353

343 Id. at art. 9(2)(a).
344 Id. at art. 10(1) and (2).
345 See infra notes 347-54 and accompanying text for a discussion of this term.
346 See infra notes 353-61 and accompanying text for a discussion of this procedure.
347 The term “guillotine procedure” was first used in the Commission’s explanatory statement accompanying its draft regulation. Vorschlag einer Verordnung (EWG) des Rates zur Stärkung der gemeinsamen Handelspolitik und insbesondere des Schutzes gegen unlautere Handelspraktiken (von der Kommission dem Rat vorgelegt) Kom(83)87 final at 4. See also Hilf & Rolf, supra note 290, at 307 n.104.
348 Reg. 2641/84, supra note 250, at art. 12.
350 Reg. 2641/84, supra note 250, at art. 12.
351 Id. at art. 9(1); Petersmann, supra note 215, at 102.
352 Reg. 2641/84, supra note 260, at art. 9(2)(a). From the use of the term “may,” it can be derived that the Commission is not required to use the procedure set out in Article 11; thus, it can also make use of the “guillotine procedure.” van Bael & Bellis, supra note 349, ¶ 4470 n.33.
353 Reg. 2641/84, supra note 260, at art. 11(2)(a).
b. Procedure Under Article 113 of the Treaty of Rome

Procedures under Article 113 of the Treaty of Rome give a greater say to the Member States and curtail the decision-making power of the Commission since, in these cases, the Council, acting by a qualified majority, must approve all decisions proposed to it by the Commission. The Council must accept a decision within thirty days after receiving the Commission's proposal. However, unlike under the "guillotine procedure," a failure of the Council to make a decision within this time limit does not make the Commission draft decision final. The Council's approval is needed in all cases.

The Commission can, but need not, proceed pursuant to Article 113 of the Treaty of Rome if it wants to terminate an investigation because of satisfactory action of the foreign country concerned. However, this procedure must be followed in cases where the Commission's actions are aimed at ensuring the full exercise of the Union's rights ("clause b" procedures) and where the Commission wants to trigger a prior formal dispute settlement procedure under a trade agreement. Moreover, Article 113 of the Treaty of Rome must be applied where the Commission wants, and is allowed, to take immediate retaliatory action because a formal dispute settlement procedure is not required under international law.

This complicated decision making machinery is the result of a compromise designed to allay the concerns expressed by some Member States. Some Member States believed that terminating examination proceedings after "voluntary" commitments were made by foreign countries was tantamount to concluding trade agreements. Under the EEC treaty, this power is exclusively assigned to the Council and not to the Commission.

5. Dispute Settlement Procedure

Any decision relating to the conduct or the termination of the dispute settlement proceedings has to be taken in accordance with the special decision making machinery set out in Article 11 of Council Regulation 2641/84. If the dispute settlement procedure deals with

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355 Reg. 2641/84, supra note 260, at art. 11(2)(b).
356 Id. at art. 12. See supra note 350 and accompanying text.
357 Reg. 2641/84, supra note 260, at art. 11(2)(b) and 11(3); EEC Treaty, supra note 354, art. 113(4), 298 U.N.T.S. at 60.
358 Reg. 2641/84, supra note 260, at art. 9(2)(a).
359 Id. at art. 11(3). See also van Bael & Bellis, supra note 349, ¶ 4475.
360 Reg. 2641/84, supra note 260, at art. 11(2)(b) and 11(3). See also van Bael & Bellis, supra note 349, at ¶ 4475.
361 Bourgeois, supra note 278, at 6-59; van Bael & Bellis, supra note 349, ¶ 4465. See also EEC Treaty, supra note 354, art. 114, 298 U.N.T.S. at 60.
362 Reg. 2641/84, supra note 260, at art. 11.
an illicit foreign commercial practice ("clause a" procedure), decisions are to be taken pursuant to the "guillotine procedure" of Article 12.\textsuperscript{363} Decisions concerning "clause b" dispute settlement proceedings are taken by the Council under Article 113 of the Treaty of Rome.\textsuperscript{364}

If the dispute settlement is terminated, and if the Union is entitled to retaliate under international law, the Council, both in "clause a" and "clause b" cases, will make a final decision on the retaliatory commercial policy measures the Union decides to apply. The Commission can only propose certain measures.\textsuperscript{365}

B. Substantive Law of Council Regulation 2641/84

1. Substantive Law Requirements for Retaliatory Action

Article 10(1) of Council Regulation 2641/84 entitles the Union to take retaliatory action aimed at: (1) responding to any illicit commercial practice with the aim of removing the injury resulting therefrom ("clause a" procedure); or (2) ensuring full exercise of the Union’s rights with regard to the commercial practices of third countries ("clause b" procedure).\textsuperscript{366} Depending on which aim the Commission pursues, the substantive requirements are different.

a. Illicit Commercial Practices

The first substantive law requirement for a "clause a" action is that the foreign trade practice in question is an "illicit commercial trade practice." Pursuant to the statutory definition of illicit commercial practice given in Article 2(1) of Council Regulation 2641/84, several criteria have to be fulfilled. The practice must be: (1) a trade practice; (2) attributable to a third country; (3) incompatible either with international law or with "generally accepted rules";\textsuperscript{367} and (4) have caused injury to a "Community industry."\textsuperscript{368} Each requirement will be discussed in detail below.

i. Trade Practice

The foreign commercial practice must be a "trade practice" in the spirit of Article 2(1) of Council Regulation 2641/84.\textsuperscript{369} The question here is whether the term "trade practice" only encompasses trade in goods, or whether it also includes trade in services.\textsuperscript{370} The legislative history and the wording of Council Regulation 2641/84 seem to indi-

\textsuperscript{363} Id. at art. 11(2)(a).
\textsuperscript{364} Id. at art. 11(3); EEC Treaty, supra note 354, art. 119(4), 298 U.N.T.S. at 60.
\textsuperscript{365} Reg. 2641/84, supra note 260, at art. 11(2)(b) and 11(3); EEC Treaty, supra note 354, art. 113(4), 298 U.N.T.S. at 60. See also Van Bael & Bellis, supra note 349, ¶ 4475.
\textsuperscript{366} Reg. 2641/84, supra note 260, at art. 10(1).
\textsuperscript{367} Id. at art. 1(1).
\textsuperscript{368} Id. at art. 2(3).
\textsuperscript{369} Id. at art. 2(1).
\textsuperscript{370} See Bourgeois, supra note 278, at 6-8.
cate that it only applies to trade in goods. In its opinion on the Commission proposal, the European Parliament stated that the “scope of the Regulation should be extended to cover not only goods but also services.” However, during the ensuing discussions neither the Commission nor the Council wanted to extend the scope of the regulation to include trade in services. Moreover, since Article 2(4) uses the terms “producers,” “consumers,” and “processors” when defining the notion of “Community industry,” it is highly unlikely that trade in services should be included because services are neither produced nor processed. However, in the Japan Harbor Management Fund case, dealing with the complaint of European shipping lines, the Commission seemed to take the view that transporting cargo to and from Japan is a “product” for the purposes of Council Regulation 2641/84, although the transport of goods is generally considered a service. Given the wording of Article 2(4), this is at least a “somewhat strained interpretation.”

ii. Attribution to a Third Country.

An allegedly illicit commercial practice can only be actionable under Council Regulation 2641/84 if it is “attributable” to a third country. This requirement is met if the foreign government itself, regardless whether in the form of local, state, or federal government, is acting in an illicit manner. This action can be legislative, regulatory, or administrative. Such a practice “of” a foreign government is always attributable to a foreign country.

However, given the difference in the wording of Article 2(1) of Council Regulation 2641/84, on one hand, and of Article 1(b), on the

571 Id.
573 Bourgeois, supra note 278, at 6-8.
574 Reg. 2641/84, supra note 260, at art. 2(4).
575 GRATZ ET AL., supra note 332, 238-39. Bourgeois, supra note 278, at 6-8; Hill & Rolf, supra note 290, at 304; Bronckers, supra note 274, at 734-35; Bourgeois & Laurent, supra note 274, at 48-49; Devine, supra note 33, at 1106; Petermann, supra note 215, at 73. A further argument in favor of a limited scope application of Council Regulation 2641/84 can be found in Council Regulation 4057-86 on Unfair Pricing Practices in Maritime Transport, 1986 O.J. (L 378) 14, dealing with maritime transport and thus, a service. This Regulation would be superfluous if Council Regulation 2641/84 also covered trade in services. See GRATZ ET AL., supra note 322, at 259.
577 Schoneveld, supra note 299, at 33.
578 Id.
579 Id.
580 VAN BAEL & BELLIS, supra note 349, ¶ 3830; Bourgeois, supra note 278, at 6-16.
other hand, the term "practices attributable to third countries" must have a different meaning than the notion of "practices of third countries." Therefore, the scope of Article 1(b) arguably does not only include direct government practices (i.e., practices of third countries) but also practices of semi-governmental bodies and of private companies that have directly or at least to a substantial degree been prompted by the action of a third country.

iii. Incompatible with International Law or with Generally Accepted Rules

An illicit commercial practice must be incompatible either with international law or with generally accepted rules.

(A) International Law

Council Regulation 2641/84 does not clarify what is meant by "international law." However, "international law" undoubtedly includes the GATT and its side agreements (e.g., the Anti-Dumping code, the Anti-Subsidy code, and the Customs Valuation code), as well as other bilateral and multilateral agreements relating to international trade, even if these agreements were concluded by the Member States before the founding of the European Communities in 1957. Moreover, complainants can also invoke breaches of customary international trade law.

(B) Generally Accepted Rules

Council Regulation 2641/84 does not contain a definition of the term "generally accepted rules." However, it seems clear that "generally accepted rules" are not the same as customary international law since in this case these rules would have already been covered by the term "international law." Thus, the reference to "generally accepted rules" in Article 2(1) would have been superfluous. On the other hand, the word "rules" implies certain legal qualities. Taking into

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381 Reg. 2641/84, supra note 260, at art. 2(1) (emphasis added).
382 Id. at art. 1(b) (emphasis added). Steenbergen, supra note 286, at 425 and 433; Bourgeois, supra note 278, at 6-16.
383 Steenbergen, supra note 286, at 425; Denton, supra note 286, at 9. See, e.g., Notice of Initiation of an Examination Procedure Concerning Illicit Commercial Practice within the Meaning of Regulation (EEC) No. 2641/84, Consisting of the Imposition in Japan of a Port Charge or Fee Used for the Creation of the Harbour Management Fund, 1991 O.J. (C 40) 18, 19. In the Japan Harbor Management Fund case, an allegedly illicit practice of the Japan Harbor Transport Association (JHTA), a body acting under the guidance of the Japanese Ministry of Transport, was attributed to the Japanese government. Id. See also Schoneveld, supra note 299, at 19 and 24:25.
384 Reg. 2641/84, supra note 260, at art. 2(1).
385 Bourgeois, supra note 278, at 6-9; Hilf & Rolf, supra note 290, at 299.
386 Hilf & Rolf, supra note 290, at 301.
387 Schoneveld, supra note 299, at 21; Hilf & Rolf, supra note 290, at 301.
388 Bourgeois, supra note 278, at 6-12; Hilf & Rolf, supra note 290, at 301; Petermann,
account these considerations, two major fields of application of "generally accepted rules" can be distinguished. The first group includes cases in which the trade practices of a country are contrary to a widely accepted trade agreement to which this country is not a party. The second group is comprised of practices contrary to so-called "soft" law.389

When drafting Council Regulation 2641/84 both the Commission and the Council wanted to enable the Community to retaliate against trade practices which were incompatible with GATT, its side agreements, or with any other widely accepted trade agreement despite the fact that the country concerned was not a party to that agreement.390 In such a case, the provisions of these agreements are considered to be "generally accepted rules" as a great number of states adhere to them. Some commentators suggest that the de facto application of GATT rules, for example, to non-members is a violation of the principle of public international law that those countries which are not party to a treaty cannot be bound by its provisions.391 However, the characterization of a foreign practice as "incompatible ... with generally accepted rules" only matters for the right of complaint of the EU industry and for the Commission's competence to open an investigation.392 This does not yet have any immediate negative consequences for the third country concerned. Only the final stage of such an examination procedure, the taking of retaliatory action, directly affects the foreign country.393 However, since Council Regulation 2641/84 only allows retaliation if it is "compatible with international obligations and proce-

389 Hilf & Rolf, supra note 290, at 301.
390 Bourgeois, supra note 278, at 6-11 to 6-12.
392 Bourgeois, supra note 278, at 6-12, 6-14 to 6-15; Bourgeois & Laurent, supra note 274, at 52.
393 Bourgeois & Laurent, supra note 274, at 52.
dures," the principle *res inter alios acta* is not violated and Council Regulation 2641/84 does not give any more rights to the Union. For example, in the *Unauthorized Reproduction of Sound Recordings in Indonesia* case, the complainant claimed that Indonesia did not comply with the provisions of both the Berne Convention for the Protection of Literary and Artistic Works and the Universal Copyright Convention even though Indonesia was not a party to these conventions. The complainant alleged that "in view of the large number and importance of countries adhering to those Conventions" they must be regarded as "generally accepted rules." The Commission agreed with this point of view and initiated an investigation against Indonesia.

The second major field of application of "generally accepted rules" are violations of so-called "soft" law, such as the OECD codes or the U.N. code against restrictive business practices.

**iv. Injury to a "Community Industry"**

The last prerequisite for an "illicit commercial practice" is that it must have caused or threatened to cause injury to a "Community industry."

**b. Full Exercise of the "Community's Rights"**

Under Article 1 of Council Regulation 2641/84, the Union is not limited to counteracting foreign "illicit commercial practices," it can also retaliate in order to ensure "full exercise of the Community's rights with regard to the commercial practices of third countries" ("clause b" procedures). The "Community's rights" are defined in Article 2(2) of Council Regulation 2641/84 as "those international trade rights of which it may avail itself either under international law

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394 Reg. 2641/84, *supra* note 260, at art. 10(3).
395 For a discussion of this principle, see *supra* note 391.
396 See Bourgeois & Laurent, *supra* note 274, at 52.
397 Notice of Initiation of an "Illicit Commercial Practice" Procedure Concerning the Unauthorized Reproduction of Sound Recordings in Indonesia, 1987 O.J. (C 136) 3, 3 [hereinafter Sound Recordings in Indonesia].
399 Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T. 2732, 216 U.N.T.S. 133.
400 Sound Recordings in Indonesia, *supra* note 397, 1987 O.J. (C 136) at 3.
401 *Id.*
402 *Id.* at 4.
403 See *supra* notes 142-50 and accompanying text for a discussion of this term.
or under generally accepted rules." Thus, Article 1(b) refers to the same rights whose infringement constitutes an "illicit commercial practice" under Article 1(a). However, there are two major differences with regard to the prerequisites for "clause a" procedures ("illicit commercial practices") and "clause b" proceedings ("ensuring full exercise of the Community's rights"). First, "clause b" only applies to practices of third countries while "clause a" refers to practices attributable to third countries. Therefore, the scope of application of "clause b" is limited to practices of the foreign government. Contrary to "clause a," "clause b" does not apply to acts of semi-governmental or even private bodies. Second, if a Member States wants to lodge a complaint under Article 1(b), it does not have to prove that the foreign trade practice caused or threatened to cause any injury to the Community industry. In this regard, the admissibility standards for complaints by Member States under Article 1(b) are remarkably lower than those for petitions under Article 1(a). However, up to now, no complaint has been lodged under Article 1(b).

2. Retaliatory Authority

Article 10(3) of Council Regulation 2641/84 provides for broad retaliatory authority since it entitles the European Union to take "any commercial policy measures." Notably, it allows:

(a) the suspension or withdrawal of any concession resulting from commercial policy negotiations, (b) the raising of existing customs duties or the introduction of any other charge on imports, (c) the introduction of quantitative restrictions or any other measure modifying import or export conditions or otherwise affecting trade with the third country concerned.

This very broad retaliatory authority, however, is severely limited by the requirement that any commercial policy measure taken by the Union has to be "compatible with existing international obligations and procedures."

C. Judicial Review of Actions Taken Under Council Regulation 2641/84

Since Council Regulation 2641/84 does not contain any provisions concerning judicial review, the general rules on judicial review apply so that a complaint has to meet the admissibility requirements.

407 Id. at art. 2(2).
408 Steenbergen, supra note 286, at 433.
409 Reg. 2641/84, supra note 260, at art. 1(b).
410 Id. at art. 2(1).
411 Steenbergen, supra note 286, at 433.
412 Reg. 2641/84, supra note 260, at art. 4(2).
413 Id. at art. 10(3)(a)-(c).
414 Id. at art. 10(3).
set out in Article 173(2) of the Treaty of Rome.\textsuperscript{415} Pursuant to this provision, "any natural or legal person may . . . institute proceedings against a decision addressed to the person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct or individual concern to the former."\textsuperscript{416}

1. Refusal to Initiate an Examination Procedure

The question whether the refusal of the Commission to initiate an examination procedure can be reviewed by the E.C.J., and if yes, how far, was answered in several cases. All of them dealt with complaints of the EEC Seed Crushers' and Oil Processors' Federation (Fediol). The first Fediol case (\textit{Fediol I})\textsuperscript{417} dealt with the refusal of the Commission to open an anti-subsidy proceeding with regard to the imports of soya bean oil cakes from Brazil. As the relevant provisions of Council Regulation 2641/84 are mainly modeled after the respective provisions of the anti-subsidy/anti-dumping regulation 2423/88,\textsuperscript{418} the rules established in \textit{Fediol I} by the E.C.J. with respect to the anti-subsidy regulation can also be applied to cases involving Council Regulation 2641/84.\textsuperscript{419} The court stated:

that the regulation recognizes the existence of a legitimate interest on the part of the Community producers in the adoption of anti-subsidy measures and that it [the regulation] defines certain specific [procedural] rights in their favor, namely the right to submit to the Commission all evidence which they consider appropriate, the right to see all information obtained by the Commission subject to certain exceptions, the right to be heard at their request, and to have the opportunity of meeting the other parties concerned in the same proceeding, and finally the right to be informed if the Commission decides not to pursue a complaint.\textsuperscript{420}

From these facts, the E.C.J. concluded that complainants have a right to bring an action before the E.C.J., if it is alleged that one of the above-mentioned procedural rights has been violated by the Commission.\textsuperscript{421} However, the court did not limit judicial review to an alleged infringement of these procedural rights. It also acknowledged a right to bring an action in cases where it is claimed that the Commission:

\begin{quote}
has committed manifest errors in its assessment of the facts, has omitted to take into consideration any essential matters of such a nature as
\end{quote}

\textsuperscript{415} EEC Treaty, supra note 354, art. 173, 298 U.N.T.S. at 75-76.
\textsuperscript{416} Id.
\textsuperscript{417} Fediol I, supra note 306, 1983 E.C.R. 2913.
\textsuperscript{418} Compare the wording of Article 7 of Council Regulation 2423/88, 1988 O.J. (L 209) 1, 9 and that of its predecessors Council Regulations 288/82, 1982 O.J. (L 35) 1, and 2176/84, 1984 O.J. (L 201) 1, on one hand, and of Article 6 of Council Regulation 2641/84, 1984 O.J. (L 252) 1, 3-4, on the other hand, which provide for the same procedure both in anti-subsidy/dumping cases and in cases under Council Regulation 2641/84.
\textsuperscript{419} VAN BAELE & BELLUS, supra note 349, ¶ 4495; Hilf & Rolf, supra note 290, at 309; Zoller, supra note 211, at 293; Bronckers, supra note 274, at 741; Vedder, supra note 388, ¶ 152.
\textsuperscript{420} Fediol I, supra note 306, 1983 E.C.R. at 2994.
\textsuperscript{421} Id. at 2935.
to give rise to a belief in the existence of [an illicit commercial practice] or has based the reasons for its decisions on considerations amounting to a misuse of powers.422

Thus, since the E.C.J., to a certain extent, can also review discretionary decisions of the Commission, the fact that the Council inserted the term “necessary in the interest of the Community,” when drafting Regulation 2641/84, does not hinder judicial review of the Commission’s decisions whether or not to initiate an investigation under Article 6(1) of Council Regulation 2641/84.423 This interpretation of the reviewability of discretionary decisions was reaffirmed in Fediol II424 where the E.C.J. held “that, even though a discretion has been conferred on the Commission in the matter at issue, the Court is required to verify whether or not” the Commission used its discretion in a correct way.425 The criteria used in this test were the same as those mentioned in Fediol I.426

In Fediol III,427 the E.C.J. extended the scope of judicial review with regard to decisions of the Commission whether or not to initiate an investigation.428 Plaintiff Fediol tried to attack a decision of the Commission rejecting a complaint lodged by Fediol in which Fediol requested an examination procedure with regard to certain commercial practices of Argentina concerning the export of soya cake.429 Fediol argued that the Commission, when characterizing the Argentinean trade practices as being in conformity with the GATT, interpreted the GATT in a wrong way.430 The Commission claimed that the action was unfounded since Fediol was not permitted to put forward submissions questioning the Commission’s interpretation of the GATT.431 The E.C.J. did not agree with the Commission, and in a rather apodictic way, held that complainants can:

in proceedings before the Court, rely on the provisions of the GATT in order to obtain a ruling on whether conduct criticized in a complaint lodged under Article 3 of Regulation No 2641/84 constitutes an illicit commercial practice within the meaning of that regulation. . . . [Therefore] economic agents are entitled to request the Court to exercise its powers of review over the legality of the Commission’s decision applying [GATT] provisions.432

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422 Id.
423 Bronckers, supra note 274, at 742 n.350; Hilf & Rolf, supra note 290, at 309.
424 Case 188/85, EEC Seed Crushers’ and Oil Processors’ Federation (Fediol) v. Commission, 1988 E.C.R. 4221 [hereinafter Fediol II].
425 Id. at 4223.
426 Id. See also supra notes 417-22 and accompanying text; Case 264/82, Timex Corp. v. Council and Commission, 1985 E.C.R. 849, 866, where the E.C.J. also referred to the criteria mentioned in Fediol I.
428 Id. at 1831.
429 Id. at 1826.
430 Id. at 1829.
431 Id. at 1830.
432 Id. at 1831.
As a result of the three Fediol cases discussed above, a petitioner can attack a refusal by the Commission to initiate an examination for three main reasons: (1) the Commission violated the petitioner's procedural rights (Fediol I); (2) the Commission misused its discretionary power when determining whether the opening of an investigation was in the "interest of the Community" (Fediol I and II); and (3) the Commission incorrectly interpreted the term "illicit commercial practice" (Fediol III). However, it should be noted that although the Court will review discretionary decisions of the Commission and though there is nothing like a political question doctrine in European law, this judicial review will not provide the complainant with much assistance because it is highly unlikely that the Court will find a misuse of discretion.\(^\text{433}\) Rather, the E.C.J. explicitly acknowledged that the Commission had "a very wide discretion to decide, in terms of the interests of the Community, any measures needed to deal with the situation."\(^\text{434}\) Therefore, unsuccessful petitioners cannot confidently rely upon the Court's review of action by the Commission under Council Regulation 2641/84.\(^\text{435}\)

2. Termination of an Examination Proceeding and Adoption of Commercial Policy Measures

A complainant who wants to attack the decision of the Commission to terminate an examination procedure pursuant to Article 9(1) and (2)(a) of Council Regulation 2641/84, or a Council decision to take certain retaliatory actions, has the same right to an action before the E.C.J. as a petitioner attacking a refusal to initiate an investigation.\(^\text{436}\) Thus, the E.C.J. will review whether the Commission violated the complainants' procedural rights and whether the Council, when adopting trade policy measures, has misused its discretionary power.\(^\text{437}\) However, here again, the institutions of the Union have "very wide discretion"\(^\text{438}\) thus making the annulment of a Commission or Council decision on this ground rather unlikely.

IV. Comparison

Though both section 301 of the Trade Act of 1974 and Council Regulation 2641/84 authorize trade retaliation against foreign countries using trade practices which are deemed to be unfair or "illicit,"\(^\text{439}\)

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\(^{433}\) Petermann, supra note 215, at 137.


\(^{435}\) Appleton, supra note 293, at 261.

\(^{436}\) Bourgeois, supra note 278, at 6-43 to 6-44, 6-47; Hilf & Rolf, supra note 290, at 309-10.

\(^{437}\) Bourgeois, supra note 278, at 6-47.


\(^{439}\) Devine, supra note 33, at 1108-99.
and though Council Regulation 2641/84 can, at least, partly be considered as an express countermeasure against section 301 of the Trade Act of 1974, the two instruments show remarkable differences with regard both to their procedural and substantive law. Moreover, it is interesting to note that the actual use of the retaliatory authority provided for in the two instruments made by the United States and the European Union differs enormously. For instance, from July 1975, when the first petition under section 301 of the Trade Act of 1974 was received, until May 1993, the USTR had to deal with ninety-one cases. Out of these ninety-one cases, forty-four were initiated after September 1984, the date of the enactment of Council Regulation 2641/84. In contrast, Council Regulation 2641/84, up to now, has been invoked in not more than six cases.

A. Procedural Law

1. Initiation of an Examination Procedure

The procedural law of the two statutes reflects the different approaches of the U.S. legislator, on one hand, and the European legislator, on the other hand, toward the role of private petitioners in the triggering of an investigation. In 1974, Congress, believing that the Executive would not use the new instrument efficiently and often enough, provided for a complaint procedure whereby private parties could request the USTR to initiate an examination procedure in order to increase the likelihood of retaliatory action. Because Congress wanted to encourage private petitions, the threshold requirements for the admissibility of a complaint are easy to satisfy and do not present a

440 Guatemala Cargo Preference case, No. 301-1, 40 Fed. Reg. 29,134 (1975), where a petition was filed by Delta Steamship Inc. on July 1, 1975. USTR TABLE OF SECTION 301 CASES, supra note 7, at 49:0841.
441 Id. at 49:0841-0864.
442 Id. at 49:0848-0864.
serious hurdle for private petitioners. In contrast, the Council, when passing Council Regulation 2641/84, deliberately set high standards for the admissibility of private complaints in order to allay the concerns of some Member States which were against any sort of private involvement. Therefore, under European law, the right of private parties to lodge complaints is in many respects much more limited than under U.S. law.

First, under Council Regulation 2641/84 a petitioner must represent a "Community industry," while under section 301 of the Trade Act of 1974, any "interested person"—a very broadly defined term—has standing. Second, under Council Regulation 2641/84, private parties can only complain about foreign "illicit commercial practices" ("clause a" procedures). They cannot lodge complaints aiming at ensuring "full exercise of the Community’s rights" ("clause b" procedures) because this right is reserved to the Member States. Under section 301 of the Trade Act of 1974, however, private parties can also lodge a petition with the USTR alleging that "the rights of the United States under any trade agreement are being denied" or that a foreign trade practice "violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under, any trade agreement." This limitation of European petitioners to "clause a" procedures implies a further disadvantage for petitioners since "clause a" procedures always require that a "Community industry" has suffered injury resulting from the foreign "illicit commercial practice." In contrast, U.S. petitioners can invoke section 301(a)(1)(A) and (B)(i) of Trade Act of 1974 even though the foreign unfair trade practice has not caused any injury to U.S. commerce.

Third, under Council Regulation 2641/84, a private complaint is only admissible if the petitioner furnishes sufficient proof of the existence of both the alleged "illicit commercial practice" and the injury to a "Community industry." Under section 301 of the Trade Act of

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445 See supra notes 29-36 and accompanying text for a discussion of these requirements.
446 Bourgeois, supra note 278, at 6-19; Bronckers, supra note 274, at 736; Hilf, supra note 296, at 449-50. See also supra notes 275-301 and accompanying text.
447 Reg. 2641/84, supra note 260, art. 3(1). See also supra notes 275-84 and accompanying text.
448 See the definitions of "interested person" in 19 U.S.C. § 2411(d)(9) (1988) and 15 C.F.R. § 2006.0(b) (1994). See also supra notes 29-34 and accompanying text.
450 Reg. 2641/84, supra note 260, at art. 3(1) and 4(1).
453 See supra notes 294-301 and accompanying text.
454 19 U.S.C. § 2411 (a)(1)(A) and (B)(i). However, in case of an action under section 301(a)(1)(B)(ii) or (b)(1), the foreign unfair trade practice must have burdened or restricted U.S. commerce. Id. § 2411(a)(1)(B)(ii) or (b)(1) (1988). See also supra notes 124-26 and accompanying text.
455 Reg. 2641/84, supra note 260, at art. 3(2). See supra notes 285-301 and accompanying text.
1974, however, a private complainant only has to set forth allegations supporting the petition; proof is not needed.\textsuperscript{456}

Fourth, even if a complaint meets these high admissibility standards, it is not clear whether the Commission will open an examination procedure as the initiation of an investigation lies within the broad, if not unlimited, discretion of the Commission.\textsuperscript{457} In contrast, the USTR only has discretion if the petitioner complains about an allegedly "discriminatory" or "unreasonable" foreign trade practice. In all other cases, the opening of an investigation is mandatory if all admissibility requirements are fulfilled.\textsuperscript{458}

Moreover, Council Regulation 2641/84 does not only limit the right of private petitioners to lodge complaints it also forbids the Commission to self-initiate an investigation.\textsuperscript{459} This stands in sharp contrast to the nearly two-thirds of investigations under section 301 of the Trade Act of 1974 which have been self-initiated by the USTR either under section 302(b)(1),\textsuperscript{460} "Special 301,"\textsuperscript{461} or "Super 301"\textsuperscript{462} since the enactment of the Omnibus Trade Competitiveness Act of 1988. This lack of authority to self-initiate examination proceedings under Council Regulation 2641/84 constitutes an important obstacle to the efficient use of Council Regulation 2641/84. Furthermore, the possibility of complaints by the Member States has proven to be an inadequate substitute since, up to now, no Member State made use of this opportunity.

All in all, while section 301 of the Trade Act of 1974 both encourages private complaints and provides for the aggressive use of the USTR’s power to self-initiate investigations, the procedural law of Council Regulation 2641/84 makes it rather difficult to trigger proceedings. This may, at least partly, explain why, from 1984 up to now, only six complaints were lodged under Council Regulation 2641/84,\textsuperscript{463} two of which were rejected.\textsuperscript{464}

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{457} \textit{See supra} notes 302-09 and accompanying text. Pursuant to Article 6(1) of Council Regulation 2641/84, 1984 O.J. (L 252) 1, 3, the Commission can decide whether the opening of an examination procedure is "in the interest of the Community."
\item\textsuperscript{458} 19 U.S.C. § 2412(c) (1988). \textit{See supra} notes 40-44 and accompanying text.
\item\textsuperscript{459} \textit{See supra} notes 323-32 and accompanying text.
\item\textsuperscript{460} 19 U.S.C. § 2412(b)(1) (1988).
\item\textsuperscript{461} \textit{Id.} § 2412(b)(2) (1988).
\item\textsuperscript{462} \textit{Id.} § 2420(b) (1988). Fifteen out of twenty-three investigations were self-initiated. These fifteen self-initiated investigations can be broken down into three main groups: (1) "normal" self-initiations pursuant to section 302(b)(1)(A) (Docket Nos. 301-69, 71, 81, 87, 88); (2) "Special 301" (Docket Nos. 301-85, 86, 89, 91); and (3) "Super 301" (Docket Nos. 301-73, 74, 75, 76, 77, 78). \textit{USTR Table of Section 301 Cases, supra} note 7.
\item\textsuperscript{463} For a list of cases, \textit{see supra} note 445.
\item\textsuperscript{464} Soya Beans from Argentina case, \textit{see} 1987 O.J. (C 96) 8; Patent Protection in Jordan case, 1989 O.J. (L 30) 67 (Commission decision).
\end{itemize}
\end{footnotesize}
The course of the examination procedure both under section 301 of the Trade Act of 1974 and under Council Regulation 2641/84 is similar. Both instruments give any interested party an opportunity to submit briefs and rebuttal briefs and provide for a hearing of the parties concerned. Therefore, in both cases, the procedure is transparent (i.e., it is public, adversarial, and administered in conformity with due process standards). Moreover, the procedural law of both instruments obliges the USTR and the Commission to trigger international dispute settlement proceedings if such proceedings are required under international law (e.g., under the GATT).

B. Substantive Law

1. Mandatory and Discretionary Action

At first glance, the most remarkable difference between the substantive law of section 301 of the Trade Act of 1974 and of Council Regulation 2641/84 seems to be that section 301 provides for mandatory trade retaliation under certain circumstances (i.e., it obliges the USTR to take retaliatory action). The rationale behind this legislation is that Congress, given its "festering frustration" with the Executive's hesitant use of its retaliatory authority, wanted to force the Executive Branch into action. In contrast, Council Regulation 2641/84 provides for broad discretion of the Commission and of the Council when deciding whether or not to retaliate. However, given the fact that section 301 contains several exceptions to mandatory action (notably the national economic interest waiver exemption), which allow the USTR not to act even though a certain foreign trade practice is actionable, the actual outcome is not as different as it first appears to be. One commentator even suggested that the introduction of mandatory retaliation in 1988 "...while posited in bold language - change[d] little from prior law."

2. Actionable Practices

The scope of Council Regulation 2641/84 is considerably more

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466 Zoller, supra note 211, at 232.
469 Presidental Authority to Respond to Unfair Trade Practices: Hearing on Title II of S. 1860 and S. 1862 Before the Senate Comm. on Finance, 99th Cong., 2d Sess. 64 (1986).
470 The Council only decides to retaliate if "action is necessary in the interests of the Community." Reg. 2641/84, supra note 260, at art. 10(1).
472 Ashman, supra note 60, at 141.
limited than that of section 301 of the Trade Act of 1974, since Council Regulation 2641/84 only covers trade in goods but not trade in services and investment. In contrast, section 301 of the Trade Act of 1974 applies to all trade.

Moreover, under Council Regulation 2641/84, both "clause a" and "clause b" procedures address foreign trade practices which are incompatible with international law or with "generally accepted rules." Taking into consideration the legislative history of Council Regulation 2641/84, both terms can be defined rather clearly. Even for the term "generally accepted rules," there exist at least some standards for interpretation since all commentators agree that the notion of "generally accepted rules" refers either to widely accepted trade agreements such as the GATT or to "soft" law. The possibility that by invoking a violation of "generally accepted rules" the European Union might infringe the principle of res inter alios acta is excluded by the fact that any retaliatory action taken by the Union has to be in conformity with international law.

Section 301, by allowing retaliation against "unreasonable" foreign commercial practices, however, defines actionable practices in a much broader way. While the provisions referring to acts which violate a trade agreement, or which are "unjustifiable," generally do not give rise to foreign concerns, since they only allow retaliation against foreign trade practices which are illegal under international law, the USTR's power to retaliate against "unreasonable" practices was harshly attacked by both the European Union and Japan. Due to the difficulty in defining the term "unreasonable," the United States might retaliate against foreign trade practices which though they are deemed to be "unfair and inequitable" are in perfect conformity with international law. In contrast, in Council Regulation 2641/84, the scope of action is limited by the requirement that all retaliatory action taken by the European Union has to be compatible with inter-

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473 Bourgeois, supra note 278, at 6-8; Hill & Rolf, supra note 290, at 304; Bronckers, supra note 274, at 734-35. See supra notes 369-78 and accompanying text.
475 Reg. 2641/84, supra note 260, at art. 2(1) and (2).
476 See supra notes 387-405 and accompanying text.
477 Id. See supra note 391 for a discussion of res inter alios acta.
480 See supra notes 173-92 and accompanying text.
482 See the statutory definition of "unreasonable" practices: "An act, policy, or practice is unreasonable if the act, policy, or practice, while not necessarily in violation of, or inconsistent with, the international legal rights of the United States, is otherwise unfair and inequitable." Id. § 2411(d)(3)(A) (1988) (emphasis added).
national law.\textsuperscript{483} Section 301 of the Trade Act of 1974 does not contain such a limitation. Therefore, section 301 of the Trade Act of 1974, by referring to "unreasonable" foreign trade practices has the potential of violating international law in general and the GATT in particular.\textsuperscript{484}

\section*{C. Judicial Review}

With regard to judicial review, the differences between European law and section 301 of the Trade Act of 1974 are also important. An American petitioner whose complaint was rejected by the USTR, or an importer whose business suffers from an increase in duties on certain foreign products resulting from retaliatory action, are barred from attacking the decisions of the USTR in the courts under the political question doctrine.\textsuperscript{485} Under European law, however, decisions of the Commission and the Council are, to a certain extent, subject to judicial review. Yet, the effect of such a right to judicial review is rather limited because in trade matters, the E.C.J. grants very broad discretion to both the Commission and the Council.\textsuperscript{486} Thus, only manifest errors will lead to an annulment of a Commission or Council decision.

\section*{V. Conclusion}

Comparing solely the number of examination procedures under section 301 of the Trade Act of 1974 with that of investigations under Council Regulation 2641/84, section 301 of the Trade Act of 1974 seems to be more efficient in addressing foreign unfair trade practices. However, as shown above, the discrepancy in the number of investigations is above all due to the very high admissibility standards for private complaints under European law\textsuperscript{487} and to the fact that the Commission is not allowed to self-initiate examination procedures under Council Regulation 2641/84.\textsuperscript{488} Looking to the outcome of investigations under Council Regulation 2641/84, the "new instrument of commercial policy" seems to be able to fulfill its purposes. In one case, the Union obtained a favorable GATT decision,\textsuperscript{489} and also in two of the other four examination proceedings, which have been opened, the outcome ended with the foreign country agreeing to abandon its "illicit commercial practice."\textsuperscript{490} The fourth investigation is still pend-
ing.491 In another case, the mere threat of an investigation under Council Regulation 2641/84 caused the foreign country concerned to discontinue the allegedly unfair trade practice.492 Thus, in order to encourage the wider use of Council Regulation 2641/84, it is not primarily the substantive law that has to be changed but the procedural law with its exaggerated admissibility requirements for private petitions493 and its lack of a provision enabling the Commission to self-initiate proceedings.494 However, in order to avoid "strained interpretation[s]"495 of Council Regulation 2641/84 (like in the *Japan Harbor Management Fund* case),496 the scope of application of Council Regulation 2641/84 should be extended to investments and to trade in services.

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492 Soon after the adoption of Council Regulation 2641/84, the Community producers of Scotch whiskey informed the Bulgarian government that they intended to file a complaint under Council Regulation 2641/84 against Bulgaria for allowing the sale and export of a local Bulgarian liquor under the designation "Scotch Whiskey." Shortly after this notification, the Bulgarian authorities stopped the use of the controversial designation. M.I.B. Arnold & M. C.E.J. Bronckers, *The EEC New Trade Policy Instrument: Some Comments on Its Application*, 22 J. WORLD TRADE, Dec. 1988, at 19, 36.
493 However, it should be noted that, when enacting Council Regulation 2641/84, the Council's main objective was not the protection of private interests but as indicated by the title of Council Regulation 2641/84, the strengthening of the common commercial policy. Hilf, * supra* note 296, at 447.
494 See, e.g., *Petermann, supra* note 215, at 147.
495 Schoneveld, * supra* note 299, at 33.
496 See * supra* notes 376-78 and accompanying text.