National Confederation of Industry
Brazil

CNI. THE STRENGTH OF THE BRAZILIAN INDUSTRY

REPORT ON MARKET ACCESS STRATEGIES

Brazil
2014

REPORT ON MARKET ACCESS STRATEGIES

CONFEDERAÇÃO NACIONAL DA INDÚSTRIA – CNI

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INTRODUÇÃO E SUMÁRIO EXECUTIVO

A Confederação Nacional da Indústria (CNI) e a Steptoe & Johnson LLP (Steptoe) têm o prazer de apresentar o relatório sobre políticas e mecanismos institucionais para identificação e eliminação de barreiras comerciais em mercados externos. O objetivo deste relatório é realizar uma análise comparativa do marco regulatório e dos recursos institucionais empregados por governos para executar uma política voltada à exportação com vistas a identificar, avaliar a legalidade e tomar medidas para a eliminação de barreiras ao comércio de bens, serviços e investimentos em mercados externos. Com base nesta análise comparativa, apresentamos, também, recomendações para o aprimoramento da estratégia brasileira de acesso a mercados por meio de uma combinação de instrumentos de: coleta de informações e monitoramento; petição ao governo, por parte da indústria; e revisão dos recursos governamentais que o Brasil atualmente disponibiliza para eliminar barreiras ao comércio de seus produtos e serviços.

Desde a criação da Organização Mundial do Comércio (OMC), em 1995, diversos países membros compreenderam que é necessária uma combinação de políticas e instrumentos legais para preservar o acesso e a competitividade nos mercados externos. Isso é particularmente evidente nos últimos anos, porque a maior transparência a que estão sujeitas as barreiras tarifárias no âmbito das disciplinas da OMC é uma das principais causas da disseminação de barreiras não-tarifárias como instrumento de política comercial para os governos que pretendem proteger a indústria doméstica. Por sua própria natureza, barreiras não-tarifárias, tais como as medidas técnicas (incluindo requisitos de rotulagem e de certificação), medidas sanitárias e fitossanitárias, impostos e subsídios, entre outros, impõem maiores desafios para os exportadores do que as medidas tarifárias tradicionais. As barreiras não-tarifárias são muitas vezes pouco transparentes e mais difíceis de serem identificadas. É também mais difícil avaliar a sua legalidade sob as disciplinas aplicáveis. De modo geral, a OMC e as disciplinas regionais não proíbem esse tipo de medida. Ao contrário, algumas dessas barreiras são, em princípio, permitidas, desde que atendam a objetivos legítimos, tais como a proteção da saúde humana, dos consumidores ou do meio ambiente, dentre outros objetivos. Assim, a questão da legalidade das barreiras não-tarifárias está normalmente subordinada a uma série de princípios vagamente definidos, tais como amparo científico, distinções regulatórias legítimas ou efeitos adversos para os exportadores.

Este cenário mais complexo levou algumas das economias mais orientadas à exportação a implementar instrumentos legais e políticos que procuram identificar, avaliar a legalidade e, finalmente, eliminar as barreiras impostas por seus principais parceiros comerciais ao comércio de bens, serviços e investimentos. Embora alguns países tenham adotado mecanismos específicos para as barreiras não-tarifárias, a maioria dos membros da OMC ainda não faz distinção entre barreiras tarifárias e não-tarifárias em seus mecanismos institucionais de acesso a mercados.

Este relatório analisa as melhores práticas mundiais de políticas de acesso a mercados, com base na experiência de quatro dos usuários mais freqüentes do mecanismo de solução de controvérsias da OMC: a União Europeia, os Estados Unidos, o Japão e a Coréia do Sul. Para cada uma destas jurisdições ou bloco regional, centramos a análise nos seguintes elementos específicos: (1) quais são os mecanismos implementados para identificar e monitorar as barreiras comerciais; (2) se há – e de que tipo – mecanismos formais para que a indústria doméstica possa solicitar ao governo que tome medidas junto à OMC ou a outros foros regionais ou bilaterais contra barreiras comerciais ilegais; e (3) quais são os recursos utilizados por esses governos para obter a eliminação destas barreiras comerciais através de contenciosos internacionais. Exceto quando expressamente indicado, o estudo não faz distinção entre os mecanismos de ação contra as barreiras tarifárias e barreiras não-tarifárias.

Este relatório é todo baseado em informações de caráter público sobre os membros da OMC analisados. Em alguns casos, foram entrevistados funcionários governamentais com a finalidade de corroborar informações de domínio público ou confirmar a aplicação prática de instrumentos legais e de políticas. A Steptoe também acrescentou algumas observações gerais com base em sua experiência na representação de alguns desses membros da OMC nos procedimentos de solução de controvérsias. Tais observações gerais, contudo, não implicam na divulgação de qualquer informação privilegiada a que se teve acesso em razão da representação legal desses membros.

Os resultados de nossa pesquisa, tais como elaborados abaixo, permitem conclusões bastante interessantes. Em primeiro lugar, todos os membros da OMC pesquisados adotaram mecanismos institucionais de revisão que visam identificar e monitorar a evolução de barreiras comerciais em seus principais mercados de exportação. Estas revisões são compiladas principalmente por autoridades governamentais, com contribuição da indústria e outras partes interessadas. Elas assumem a forma de relatórios anuais ou bancos de dados interativos e, não raramente, ambos. Dois dos países pesquisados, Estados Unidos e Coréia do Sul, também implementaram mecanismos de revisão que lidam especificamente com barreiras não-tarifárias, como as medidas relativas a obstáculos técnicos ao comércio (OTS) e sanitárias e fitossanitárias (SFS). A União Europeia começou, recentemente, a publicar um relatório abordando exclusivamente as barreiras aos investimentos.

Além de identificar e monitorar as barreiras comerciais e aos investimentos, estes mecanismos de revisão também contribuem para a formulação de políticas comerciais. Os relatórios anuais e os bancos de dados são fundamentais para a identificação de mercados prioritários e dos tipos de barreiras, definindo a alocação de recursos e traçando planos de ação para o enfrentamento de barreiras relevantes, de acordo com a sua importância

relativa para a economia do país. No caso do Japão e da Coréia do Sul, essas revisões servem ainda para avaliar a legalidade da barreira comercial identificada face às disciplinas legais pertinentes. Nos casos da União Europeia e dos Estados Unidos, isso não é necessário, porque estes dois membros da OMC têm procedimentos legais formais para examinar a legalidade das barreiras comerciais face às regras do comércio internacional.

Em segundo lugar, os usuários mais frequentes do mecanismo de solução de controvérias da OMC implementaram procedimentos legais através dos quais os produtores nacionais podem formalmente solicitar ao governo a apresentação de um contencioso internacional contra uma barreira comercial perante a OMC ou em outros foros regionais ou bilaterais. Tanto a União Europeia (Regulamento sobre Obstáculos ao Comércio ou "ROC"), quanto os Estados Unidos (Seção 301), adotaram procedimentos legais bastante elaborados que permitem aos produtores nacionais solicitar que o governo apresente uma ação perante o foro legal apropriado para procurar obter a eliminação da barreira comercial que afeta a indústria. Normalmente, esses instrumentos abordam a legalidade da barreira comercial e os seus efeitos para os produtores nacionais. Eles também permitem comentários de diferentes partes interessadas e garantem certa discricionariedade para que a autoridade investigadora se recuse a agir quando o pleito é contrário ao interesse nacional.

Além de constituírem uma avaliação da legalidade e dos efeitos da barreira comercial em questão, instrumentos legais deste tipo também servem a propósitos colaterais de negociação, por meio da criação de certa alavancagem negociadora e maior poder de barganha com os países investigados. A experiência da União Europeia é ilustrativa visto que diversas revisões iniciadas no âmbito do ROC resultaram em uma resolução mutuamente satisfatória antes da conclusão dos procedimentos. Embora a Seção 301 tenha servido como um veículo eficaz para alavancar resoluções de barreiras comerciais no passado, ela tornou-se relativamente ineficaz desde a conclusão das negociações da Rodada Uruguai e da criação do mecanismo de solução de controvérsias da OMC. No entanto, procedimentos legais como a Seção 301 pelo menos criaram certa alavancagem negociadora por meio dos efeitos de "name and shame" de alguns dos parceiros comerciais mais importantes dos Estados Unidos.

De maneira diversa, a Coréia do Sul e o Japão não têm instrumentos legais em vigor para que a indústria possa solicitar a apresentação de um contencioso contra as barreiras comerciais. Ao contrário, esses membros da OMC recorrem a um processo informal interagências para determinar se a barreira comercial é compatível com as regras do comércio internacional e quais ação tomar a respeito. Esses tipos de procedimentos não transparentes são mais onerosos e demorados, podem ser alvo de interferência política e criam situações de conflito entre as agências com competência concorrente sobre o assunto. Além disso, não têm quaisquer efeitos positi-

vos sobre a posição negociadora do País antes que se iniciem formalmente os procedimentos legais no âmbito do mecanismo de solução de controvérsias da OMC ou em outros foros.

Finalmente, as economias exportadoras mais proativas tendem para um modelo de maior cooperação interagências no processo de elaboração, apresentação e gestão de disputas da OMC. Todos os membros da OMC pesquisados atribuem jurisdição concorrente sobre disputas da OMC (ou outras disputas internacionais) a diferentes agências governamentais, dependendo da matéria objeto da disputa. O exemplo mais notável é o recém-criado Interagency Trade Enforcement Center ("ITEC") dos Estados Unidos, que coordena ações de monitoramento da aplicação das regras do comércio internacional e o desenvolvimento de casos ofensivos na OMC, e reúne representantes de diversas agências governamentais do país, como os Departamentos de Comércio, Agricultura, Estado, Tesouro e Justiça; a Comissão de Comércio Internacional; e a CIA.

Com base nas conclusões deste relatório, recomendamos que o Brasil implemente, logo que possível, uma estratégia global de acesso ao mercado, englobando estes três pilares:

- **Relatórios de Acesso a Mercado:** o Brasil deve desenvolver um mecanismo de revisão formal por meio do qual procuraria identificar e monitorar as principais barreiras comerciais às exportações brasileiras de bens, serviços e investimento. Este mecanismo de revisão deve ter um escopo tão amplo quanto possível e cobrir tópicos como o comércio de bens, serviços, direitos de propriedade intelectual, compras governamentais e investimentos. Este mecanismo de revisão resultaria na publicação de relatórios anuais que identificariam barreiras para as exportações brasileiras de bens e serviços nos 8 mercados de exportação mais importantes para o Brasil, expandindo-se gradualmente para um total de 16 mercados prioritários. As informações sobre barreiras de acesso a mercados deveriam ser compiladas principalmente pela Câmara de Comércio Exterior (CAMEX) por meio da criação de um Grupo de Trabalho específico encarregado de identificar estas medidas, em coordenação principalmente com o Ministério da Agricultura, Pecuária e Abastecimento (MAPA), o Ministério de Desenvolvimento, Indústria e Comércio Exeterior (MDIC), o Ministério das Relações Exteriores (MRE) e a Agência Brasileiro de Promoção de Exportações e Investimentos (Apex-Brasil). A criação de uma base de dados interativa sobre as barreiras a bens e serviços brasileiros no mercado externo também poderia contribuir para a elaboração do relatório anual de acesso a mercados. No futuro, o Brasil deve considerar se estes relatórios anuais de acesso a mercado poderiam servir de base para o desenvolvimento de uma estratégia formal de política de acesso a mercados, que iria delinear as prioridades e o plano de ação do País para aumentar suas exportações de bens, serviços e investimento.

- **Mecanismo de Petição Formal para Ação Governamental Contra as Barreiras:** recomendamos que o Brasil crie um procedimento legal formal através do qual os produtores nacionais poderiam formalmente solicitar ao governo ações jurídicas contra barreiras comerciais em mercados externos. Os procedimentos devem ser abertos, transparentes, previsíveis, com prazos definidos, processos de tomada de decisão transparentes e devem resultar na publicação de uma decisão formal do governo brasileiro quanto à legalidade da medida sob as disciplinas internacionais aplicáveis e apresentar uma recomendação formal quanto ao início de um contencioso perante a OMC, o Mercosul ou outros foros regionais ou bilaterais. Estes procedimentos devem prover a possibilidade de realização de consultas internas com as partes interessadas relevantes, bem como com o país contra o qual o recurso legal é apresentado, de forma a criar e facilitar uma dinâmica negociadora durante o seu trâmite.
- **Revisão dos Recursos Disponíveis para Contenciosos Internacionais:** o Brasil deve realizar uma revisão dos recursos que destina para a resolução de disputas internacionais. No mínimo, o Brasil deve avaliar se o número de funcionários dedicado à gestão dessas disputas complexas é adequado e compatível com as suas prioridades de acesso a mercado. O País deve avaliar, também, em que medida seria desejável aumentar a cooperação interagências tanto no processo de prevenção de futuras disputas contra o Brasil quanto na elaboração e implementação de contenciosos ofensivos. Após um período de grande atividade entre 1996 e 2006, o Brasil vem utilizando o mecanismo de solução de controvérsias da OMC com menor frequência e deve estar melhor preparado para os desafios de enfrentar disputas mais complexas e técnicas contra economias desenvolvidas e emergentes.

A CNI reconhece que algumas dessas ações requerem o engajamento político de vários Ministérios e partes interessadas e envolvem, necessariamente, alguma avaliação crítica do atual aparato de acesso a mercados do Brasil. No entanto, a Confederação considera que a adoção destes três pilares na estratégia brasileira de acesso a mercados garantirá ao País um "level playing field" na competição contra alguns dos seus principais parceiros comerciais pelo acesso aos mercados de terceiros países. Para a CNI, é extremamente importante que o Brasil adote ferramentas de acesso a mercados modernas e de última geração para que o acesso da indústria aos mercados externos seja facilitado. A Confederação continua empenhada em ajudar o governo brasileiro nessa tarefa.

INTRODUCTION AND EXECUTIVE SUMMARY

The Brazilian National Confederation of Industry ("CNI") and Steptoe & Johnson LLP ("Steptoe") are pleased to present this report on institutional and policy mechanisms to identify and remove trade barriers in foreign markets. The purpose of this report is to conduct a comparative analysis of the institutional framework and resources that selected export-oriented governments have put in place to identify, assess the legality, and take action to remove barriers to trade in goods, services, and investment in foreign markets. Based on this comparative analysis, we also draw recommendations for enhancing Brazil's market access strategy, through a combination of information-gathering and surveillance mechanisms, petitioning procedures, and a review of the governmental resources that Brazil currently employs to remove barriers to trade in its goods and services.

Since the inception of the World Trade Organization (WTO) in 1995, a number of WTO Members have understood that a mix of policy and legal instruments are necessary to preserve access and competitiveness in foreign markets. This is particularly more so in recent years, because transparency requirements that generally apply to border measures under the WTO disciplines are one of the main causes of a shift to non-tariff barriers (NTBs) as the policy instrument of choice for governments that wish to offer protection to domestic producers. By their very nature, NTBs such as technical measures (including labelling and certification requirements), sanitary and phytosanitary measures, taxes, and subsidies, among others, present a more challenging set of issues for exporters than traditional tariff measures. They are often less transparent and harder to identify. It is also more difficult to assess their legality under the relevant disciplines. Generally speaking, WTO and regional disciplines do not prohibit these types of measures. Rather, NTBs are in principle permitted, so long as they advance legitimate policy objectives, such as the protection of health, consumers, or the environment, among others. Therefore, the question of the legality of NTBs is typically contingent upon a set of loosely-defined principles, such as a "scientific basis", "even handedness", or "adverse effects" on exporters.

This more complex scenario has led some of the most export-oriented economies to put in place policy and legal instruments that seek to identify, assess the legality, and eventually remove barriers imposed by their main trading partners to trade in goods, services, and investment. Although some countries have adopted mechanisms that are NTB-specific, most WTO Members still do not distinguish between tariff and non-tariff barriers in their institutional market access apparatuses.

This report reviews the world's best market access policy practices, based on the experience of four of the most frequent users of the dispute settlement mechanism of the WTO: the European Union, the United States, Japan, and Korea. For each of the jurisdiction/regional block that we have surveyed, we have focused on the following three specific elements: (1) what are the mechanisms in place to identify and monitor trade barriers; (2) whether and

to what extent there are institutional mechanisms for domestic producers to petition the government to take action before the WTO or other regional or bilateral fora against illegal trade barriers; and (3) what are the resources used by these governments to obtain the removal of these trade barriers through international adjudication. Except as otherwise indicated, the study encompasses mechanisms for action against tariff and non-tariff barriers alike.

This report is entirely based on information that is publicly available for each of WTO Member reviewed. In a few instances, we have interviewed governmental officials for the limited purpose of corroborating publicly available information or to confirm the application of policy and legal instruments. Steptoe has also drawn general observations from its experience in representing some of these Members in WTO dispute settlement proceedings. Such general observations however do not implicate the disclosure of any privileged information that we have obtained as a result of our legal representation of those WTO Members.

The results of our survey set forth below allow for very interesting conclusions. First, *all* of the surveyed WTO Members have adopted institutionalized review mechanisms that aim at identifying and monitoring the development of trade barriers in their main export markets. These reviews are compiled primarily by governmental authorities, with substantial input from the industry and other stakeholders. They either take the form of annual reports or interactive databases, and frequently both. Two surveyed countries (United States and Korea) have also put in place review mechanisms that deal specifically with non-tariff barriers, such as TBT and SPS measures. Others, such as the European Union, have recently begun publishing a report addressing exclusively barriers to investment.

In addition to identifying and monitoring trade and investment barriers, these review mechanisms also serve important policy-framing purposes. Annual reports and databases are instrumental in identifying priority markets and types of barriers, defining resource allocation, and outlining action plans to address the relevant barrier, in accordance with its relative importance for the WTO Member's economy. In a few instances (Japan and Korea), these reviews also serve the additional purpose of assessing the consistency or inconsistency of the identified trade barrier with the relevant legal disciplines. In the European Union and the United States cases this is not necessary, because as further discussed below these two Members have legal procedures in place to examine the legality of trade barriers with international trade rules.

Second, the most active WTO litigants have legal procedures in place through which domestic producers may petition the government for legal action against a trade barrier in the WTO or other regional or bilateral fora.

Both the European Union (Trade Barrier Regulation, or "TBR") and the United States (Section 301) have adopted fairly elaborate legal procedures that allow domestic producers to request that the government file a complaint before the appropriate legal forum to seek to obtain removal of the trade barrier affecting the industry. Typically, these instruments address both the legality of the trade barrier, as well as its effects on domestic producers. They also provide for opportunity for comments by different stakeholders, as well as some flexibility for the investigating authority to decline to take action when this is against the national interest.

In addition to constituting an assessment of the legality and effects of the relevant trade barrier, legal instruments of this type also serve collateral negotiating purposes, by creating leverage with investigated countries. The European Union's experience is illustrative in this respect – as a number of reviews initiated under the TBR have resulted in a mutually satisfactory resolution of the trade issue prior to conclusion of the procedures. However, while Section 301 served as an effective vehicle for leveraging resolutions of trade issues in the past, it has become relatively ineffective since the conclusion of the Uruguay Round negotiations, the WTO's inception and binding dispute resolution. Nonetheless, legal procedures such as Section 301 at a minimum create negotiating leverage through "name and shame" effects with some of the United States' most important trading partners.

Conversely, Korea and Japan do not have legal procedures in place for the industry to petition for legal action against trade barriers. Instead, these WTO Members resort to an informal inter-agency process to determine whether the trade barrier is consistent with international trade rules, and what action to take. These types of non-transparent procedures are more burdensome and time-consuming, lend themselves to political interference, and create situations of conflict among agencies with concurrent jurisdiction over the subject matter. Moreover, they do not create any negotiating leverage that would permit addressing the trade barrier in consultations with the regulating WTO Member.

Third and finally, the more pro-active exporting economies seem to be gravitating toward a model of increased inter-agency cooperation in the process of preparing, filing, and managing WTO disputes. *All* of the surveyed WTO Members attribute concurrent jurisdiction over WTO (or other international) disputes to different governmental agencies, depending on the subject matter of the dispute. The most notable example is the recently-created Interagency Trade Enforcement Center ("ITEC") of the United States, which coordinates enforcement actions in support of international trade rules, and congregates representatives of a variety of US government agencies such as the Department of Commerce, Agriculture, State, Treasury, Justice, the International Trade Commission, and the CIA.

Based on the conclusions of this report, we recommend that Brazil implements as soon as practicable a comprehensive market access strategy that is comprised of the following three pillars:

- **Market Access Reports**: Brazil should develop a review mechanism whereby it would identify and monitor the main barriers to Brazilian exports of goods and services. This review mechanism should be as broad in scope as possible, and cover topics such as trade in goods, services, intellectual property rights, procurement policy, and investment. This review mechanism would result in the publication of annual reports that would identify barriers to Brazilian exports of goods and services in the 8 most important Brazilian export markets, but gradually be expanded to a total of 16 priority markets. Information about market access barriers should be compiled primarily by the Brazilian Foreign Trade Chamber (CAMEX) through the establishment of a specific Working Group tasked with identifying these measures, in coordination primarily with the Ministry of Agriculture, Livestock and Supply (MAPA), Ministry of Development, Industry and Trade (MDIC), Brazilian Ministry of Foreign Relations (MRE), and Brazilian Trade and Investment Promotion Agency (APEX). The establishment of an interactive database on barriers to Brazilian goods and services in foreign markets could also provide valuable input for the elaboration of Brazil's annual market access review. Over time, Brazil should also consider whether these annual market access reports could also serve as the basis for the development of a formal market access strategy report, which will outline Brazil's priorities and plan of action to address market access issues.
- **Petitioning Mechanism for Governmental Action**: Brazil should create a formal internal legal procedure through which domestic producers formally could petition the government for legal action against trade barriers. The procedures should be open, transparent, predictable, with rigidly established deadlines, and result in the publication of a formal decision by the Brazilian government as to the legality of the measure under the relevant multilateral, regional, or bilateral legal disciplines, and making a formal recommendation as to the initiation for formal adjudicative procedures before the WTO, Mercosur, or other regional or bilateral fora. These procedures should provide for opportunity for internal consultations with the relevant stakeholders, as well as with the country against which legal recourse is being sought.
- **Review of International Litigation Resources**: Brazil should engage in a review of the resources it devotes to international dispute settlement. At a minimum, Brazil should evaluate whether the number of government officials devoted to managing these complex disputes is proper, and commensurate with its market access priorities. Brazil should investigate further whether and to what extent it would be desirable to increase inter-agency participation in the process of both preventing future disputes against Brazil, and elaboration and implementation of litigation strategies in Brazil's offensive cases. After a period of height-

ened activity in the 1996-2006 period, Brazil has used international dispute settlement less frequently, and should be better prepared for the challenges of litigating more complex and technical disputes against both developed and emerging economies.

CNI recognizes that some of these actions require political engagement by various Ministries and stakeholders, and will necessarily involve some critical assessment of Brazil's current market access apparatus. Nonetheless, CNI considers that implementation of these three market access strategy pillars will only provide Brazil with a "level playing field" in the competition against some of its main trading partners for access to third-country markets. It is extremely important that Brazil adopts modern and state-of-the-art market access tools that will facilitate the industry's access to foreign markets. CNI remains committed to assisting the Brazilian government in this endeavor.

EUROPEAN UNION 2

2.1. INTRODUCTION

According to the European Commission, the European Union ("EU") "cannot rely on a single avenue or mechanism to tackle trade barriers. Although the WTO system and multilateral cooperation are still the best way to guarantee market access, [the EU] must use formal and informal multilateral and bilateral instruments"[1] to ensure a free market access in third countries. Consequently, trade barriers are monitored and identified within the EU through a mix of policy and legal instruments.

The main EU policy framework to address trade barriers is the EU Market Access Strategy (MAS). Originally launched in 1996,[2] the MAS aims to realize the significant commercial opportunities that lie in improved market access to third-country markets for EU exporters of goods, services and capital. It does this in part by encouraging input from European businesses and other stakeholders, so as to allow the EU to enhance its approach to market access issues, and to more effectively ensure that its trading partners comply with their international commitments.

The EU Market Access Strategy has three core functions. First, it is an information gathering exercise, whereby the European Commission collects information on trade barriers in third countries and keeps a comprehensive and interactive public record in order to analyze the obstacles to trade in goods and services. Second, this information resource serves EU exporters and allows them to obtain information concerning difficulties they may encounter when trading with specific third countries. Finally, the MAS provides for action to eliminate trade barriers and ensure that the EU's trading partners comply with their international commitments. These core functions are brought to bear by three main instruments: the Market Access Database, the Market Access Partnership, and the Trade and Investment Barriers Report.[3]

The Market Access Database[4] is a free online tool, operated by the European Commission, which gives to companies exporting from the EU information concerning import conditions in non-EU country markets. Through the Market Access Partnership[5], in turn, the European Commission cooperates closely with Member States and business in a variety of Working Groups and Committees to identify and remove as possible specific obstacles that EU companies face in foreign markets.

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[1] Please refer to http://europa.eu/legislation_summaries/external_trade/r11021_en.htm

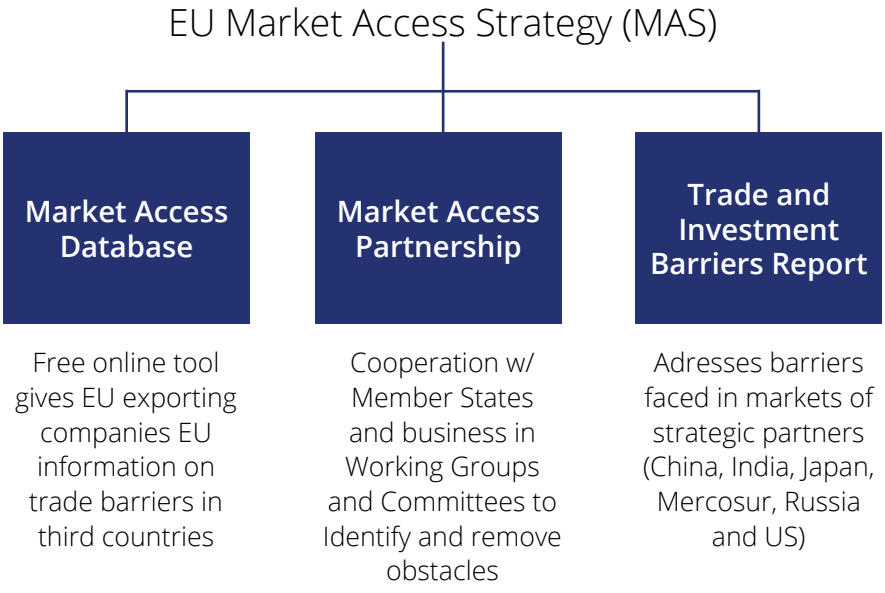
[2] Refer to European Commission, Communication on The Global Challenge of International Trade: A Market Access Strategy for the European Union, COM (96) 53 final, 14 February 1996. To be accessed here: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1996:0053:FIN:EN:PDF

[3] Although the Market Access Strategy ostensibly only makes reference to the Market Access Database and Market Access Partnership, we are considering that the Trade and Investment Barriers Report is also an integral part of the Strategy, given the market access objectives it pursues.

[4] See http://madb.europa.eu/madb/indexPubli.htm

[5] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Global Europe: a stronger partnership to deliver market access for European exporters, COM(2007) 183 final, 18 April 2007. To be accessed here: http://europa.eu/legislation_summaries/external_trade/r11021_en.htm

The EU' Market Access Strategy is brought to bear by a legal instrument to address trade barriers in third countries, namely the EU Trade Barrier Regulation (TBR).[6] The TBR is an interface between EU enterprises that suffer from unfair trade practices in third countries on the one hand, and international dispute settlement procedures of the WTO (or bilateral trade agreements), on the other. It entered into force in 1995 and has since been amended twice.[7] Broadly speaking, the TBR is a mechanism that gives the right to EU enterprises, industries or their associations, as well as the EU Member States, to lodge a complaint with the European Commission which, as the competent authority, investigates and determines whether there is sufficient evidence of a violation of the international trade rules.[8] The instrument has a broad scope of application. It applies not only to trade in goods, but also to services and intellectual property rights, provided that these rights have been violated and had an impact on trade between the EU and the third country in question. The TBR sets forth a comprehensive procedure, from lodging a TBR complaint, the examination of such complaint by the European Commission through a sophisticated investigation procedure, through to a decision finally to initiate dispute settlement proceedings under the WTO Understanding on Rules and Procedures Governing the Settlements of Disputes (DSU) or a bilateral trade agreement where appropriate.



[6] Council Regulation (EC) No 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization, see: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1994R3286:20080305:EN:PDF

[7] http://europa.eu/legislation_summaries/external_trade/r11007_en.htm#AMENDINGACT

[8] Under the TBR, any "obstacle to trade" is actionable. An obstacle to trade is defined in Article 2(1) of the Regulation as "any trade practice adopted or maintained by a third country in respect of which international trade rules establish a right of action. Such a right of action exists when international trade rules either prohibit a practice outright, or give another party affected by the practice a right to seek elimination of the effect of the practice in question." Further, Article 2(2) of the Regulation defines international trade rules in this context as primarily those established under the auspices of the WTO and laid down in the Annexes to the WTO Agreement, but also those laid down in any other bilateral or multilateral trade agreements which sets out rules applicable to trade between the European Union and third countries.

2.2. MONITORING AND IDENTIFICATION OF TRADE BARRIERS

As mentioned above, the EU identifies and monitors trade barriers through multiple mechanisms. Unlike other WTO Members, however, the EU has not adopted specific instruments to address uniquely non-tariff barriers. All of the above-mentioned EU instruments are applicable to all forms of barriers to trade, including tariff barriers, burdensome customs procedures, technical regulations, SPS measures, among others. For example, affected EU enterprises are able to report all types of barriers that restrict their trade under the Market Access Database,[9] including "duties & taxes on imports of products into specific countries." Similarly, the Market Access Partnership is designed to remove all kinds of obstacles to trade.[10] For its part, the TBR is applicable to "obstacles to trade," which is broadly defined in the Regulation as "any trade practice adopted or maintained by a third country in respect of which international trade rules establish a right of action."[11] In this context, international trade rules are primarily those established under the WTO or those contained in bilateral Free Trade Agreements.[12]

2.2.1. Market Access Database

The monitoring and identification of trade barriers via the Market Access Database has a dual purpose: it supports (1) exporters by giving them practical information on market conditions in third country; but also (2) policy actors by providing a tool for monitoring trade conditions in third countries.

The Database, in its current form, has been created through extensive consultations and dialogue between the European Commission and relevant European industries and Member States. It is freely available to all economic operators throughout the EU and acceding/candidate countries to the EU via the Internet. It was set up by the Commission[13] in order to:

- provide basic information of interest to EU exporters (e.g. import duties, related taxes and documentary import requirements applicable in export markets, trade statistics, studies on market access related topics)[14];
- list all trade barriers affecting EU exports by country and by sector, divided into individual sections by the nature of the barrier,[15] and to

[9] See http://madb.europa.eu/madb/datasetPreviewFormATpubli.htm?datacat_id=AT&from=publi

[10] Although the Commission acknowledges that "non-tariff and other "behind-the-border" barriers are increasingly important", the Market Access Partnership addresses also tariff barriers and burdensome customs procedures, http://europa.eu/legislation_summaries/external_trade/r11021_en.htm

[11] Article 2 (1) TBR

[12] Article 2 (2) TBR

[13] See http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998D0552:EN:HTML

[14] Please refer to http://madb.europa.eu/madb/statistical_form.htm

[15] For reason of practicability, the trade barriers are divided into tariffs, procedures and formalities, sanitary and phytosanitary issues, rules of origin and other trade barriers; see http://madb.europa.eu/madb/indexPubli.htm

ensure systematic follow-up of the barrier identified; and
- provide an interactive means of communication between business and the European authorities, allowing an exchange of information on-line.

The database includes an elaborated form for industry actors to report trade barriers[16] to the Commission. Complainants have to provide their contact details including a description of the industry sector that they belong to, identify the country that is alleged to have introduced a market access barrier, and select the type of measure they complain about and provide a summarized description of the measure. It is important to note that the listed trade barriers are not necessarily illegal trade measures[17] on the part of the EU's trading partners but also legal, but unfair or trade-restrictive, measures. A legal analysis of the reported measures is not necessarily carried out by the Commission before the measure is included in the database.[18]

[16] Please refer to http://madb.europa.eu/madb/complaint_register_form.htm

[17] As opposed to trade barriers subject to complaints under TBR, as will be illustrated below in Section 3.

[18] The MADB is administered by the European Commission. There is no formal process in place to filter the information that is published through the MADB. The Commission publishes any verified information that can be useful to promote exports from the EU to third countries.

MARKET ACCESS DATABASE ENTRIES CONCERNING BRAZIL

There are 15 entries in the MAD concerning trade barriers faced by EU companies in doing business in Brazil. These barriers are across a number of sectors including in the agriculture, chemicals, financial services, and transportation. Below are examples of the key barriers added to the database in the last five years.

- **Internal Taxation** (reported January 2014): Certain measures concerning taxation and charges affect several economic sectors and, in some cases, they apply horizontally to all goods or to broad categories of goods. These measures, taken as a whole and individually, increase the effective level of border protection in Brazil, whilst providing preferences and support to domestic producers and exporters, by inter alia (1) imposing a higher tax burden on imported goods than on domestic goods, (2) conditioning tax advantages to the use of domestic goods, and (3) providing export contingent subsidies. Whereas some of the specific measures at issue have existed for some years, the overall framework of tax advantages to operators in Brazil, in relation to taxation, has been strengthened since September 2012 with the adoption of new specific tax schemes and the revision or completion of existing ones, thus following a consistent pattern. This case has been raised at the WTO.
- **BSE Rules for the Import of Bovines and their Products** (reported May 2011): While Brazil modified its import rules on BSE standards, it has not yet fully aligned them with the relevant international BSE standards of the World Organisation for Animal Health (OIE), and did not provide a risk assessment to do so. Brazil still imposes conditions for deboned beef, does not allow at all the imports of bone-in-meat, lists too many materials as "specific risk materials" (SRMs), and has set unclear requirements for the approval of a specific system of removal of SRMs.
- **Restrictions in the Telecommunication Sector** (reported April 2009): In Brazil there is growing state intervention in the telecommunications sector, notably through the National Broadband Programme adopted in 2010, raising concerns of potential distortion of competition in broadband markets. Moreover, foreign ownership requirements in the broadcasting sector limit the provision of pay TV services, which undermines the development of broadband in the country. Additionally, Brazil does not facilitate the provision of satellite services offered by EU satellite providers although such services correspond to today's business model notably in business-to-business activities. The EU has raised the issue in bilateral contacts with Brazil, notably in the context of the yearly European Commission (EC) - Brazil Information Society Dialogue.

The usage of the Market Access Database is broadly restricted to users in the Member States of the European Union and acceding or candidate countries.[19]

In 2011, the Directorate-General for Trade of the European Commission commissioned an external evaluation of the Market Access Database, which resulted in a positive feedback from stakeholders as regards the usage and usefulness of the database.[20] The database is updated regularly.[21] The number of new entries only in 2014 amounts up to more than 200.[22]

2.2.2. Market Access Partnership

Over the period from 1996, when the EU launched its Market Access Strategy, to 2007, the EU's trade policy gave priority to multilateral and bilateral efforts to increase market access. Less attention was paid to specific obstacles to market access. Given the changing nature of market access obstacles, from border barriers to increasingly complex "behind the border" barriers and a clear demand from stakeholders to participate in the process to identify and remove barriers in specific markets, the Market Access Partnership was implemented in 2007[23] as a renewed effort to concretize the EU's Market Access Strategy.

The implementation of the Market Access Partnership aimed at "achieving a clearer, more results-oriented approach"[24] that focuses on concrete problems that EU businesses face in third country markets. According to the Commission, this required much more systematic contact and cooperation at all levels, both within the EU and in third countries. The key ingredients to this approach, which the European Commission proposed in its Communication "Global Europe: a stronger partnership to deliver market access for European exporters,"[25] are (1) a better coordination and cooperation (bottom-up participation and feedback as well as coordinated action) between the actors involved at the three levels of European Commission, Member States and business, and (2) a clear focus on key priorities in terms of barriers and markets (priority countries, issues and sectors).[26]

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[19] From a technical point of view, if the computer through which the database is being accessed is not directly connected to the Internet via an Internet Service Provider located in one of those countries, then users are prohibited from viewing the individual sections of the database for any purpose. The Commission is only entitled to grant access to official representative of a member state who work in a non-EU country, see http://madb.europa.eu/madb/madb_faq.htm

[20] Please refer to http://trade.ec.europa.eu/doclib/docs/2011/december/tradoc_148401.pdf

[21] The unit responsible for the operation of the Market Access Database is the Unit 3G (Unit Market Access, Industry, Energy and Raw Materials) in the EC´s Directorate-General for Trade. The unit comprises at present 24 persons. Its annual budget is roughly €1 million. However, it is important to note that the Unit does more than administer the MADB. While the largest part of its budget is allocated to the MADB, the Unit also organizes meetings of the Market Access Advisory Committee (MAAC) and its working groups (MAWGs), publishes the TIBR, and organizes conferences.

[22] For the latest updates, please refer to http://madb.europa.eu/madb/latestupdates.htm

[23] See Fn. 4 *supra*.

[24] See Fn. 4 *supra*.

[25] See Fn. 4 *supra.*

[26] The Market Access Advisory Committee determines the key priorities in terms barriers and markets which

The Market Access Partnership aims at establishing a stronger co-operation between stakeholders both at the EU level and in key third country markets. This cooperation aims to improve prioritizing, knowledge-sharing between local actors and market access specialists, disseminating information on key barriers to market access, and ultimately resolve them. To this end, the Market Access Partnership established a variety of working groups, namely (1) the Market Access Advisory Committee, (2) Working Groups and (3) Market Access Teams.

At the local level, the Market Access Partnership established a network built up between business, Member States and officials of the European Commission in local Market Access Teams ("MAT").[27] The MATs in non-EU countries, managed by the respective EU delegations, gather local expertise to identify and tackle trade barriers. The rationale behind this is that a local approach allows more systematic contacts and effective coordination in identifying and reporting on barriers to market access. Local involvement is also supposed to improve political and economic leverage of diplomatic actions to prevent market access barriers from taking effect. In practical terms, the concept of a MAT is a flexible one. The format of a MAT therefore ranges from regular coordination meetings on market access issues comprising the European Commission and European Member States and involving business representatives when appropriate to very specific working group-type meetings that focus on a special barrier or sector. This sort of coordination on trade barriers has already been well established in a number of third countries. In May 2010,[28] the number of established MATs amounted to 33.

At EU level, the Market Access Partnership also created the so-called Market Access Committee[29], which brings together the European Commission, the EU Member States and business representatives once per month in Brussels to exchange information and develop strategies on how to address trade barriers and to set priorities in the EU's efforts to remove such barriers. The Market Access Committee acts as a steering committee for technical aspects of the Market Access Strategy.

Further, the Market Access Partnership has established a variety of Market Access Working Groups ("MAWG"). The Working Groups examine trade barriers in specific sectors and types of market access issues, such as *inter alia* medical devices, tires, wines, spirits, automobiles, and textiles.[30] They pool the technical expertise of representatives from the Commission, Member States and business, and meet on an ad hoc basis in Brussels.[31]

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should be addressed by the Market Access Partnership.

[27] See Fn. 4, *supra*.

[28] Find a list of all MATs here: http://trade.ec.europa.eu/doclib/docs/2010/june/tradoc_146233.pdf

[29] See Fn. 3, *supra.*

[30] http://trade.ec.europa.eu/doclib/docs/2008/july/tradoc_139898.pdf .

[31] There are no predefined requirements for forming MAWGs. They are set up on an ad hoc basis and are open for all technical experts who can provide valuable input on the addressed markets and barriers. However, since

When implementing the Market Access Partnership, the European Commission was of the opinion that the increase in complexity and variety of NTBs require a greater prioritization of trade obstacles needing to be analyzed, addressed and consequently removed.[32]

Within the Market Access Partnership, the criteria for determining priorities among trade barriers are the following:

- Potential economic benefits of aligning them in the short and medium term;
- Extent of the infringement of existing agreements or rules posed by the barrier;
- The likelihood of solving the issue in a reasonable amount of time.[33]

The outcomes of the prioritization process leads to a selection of key countries, comprising mostly emerging economies and Organisation for Economic Co-operation and Development (OECD) economies, a set of sectors and a set of specific market access issues (such as IPR infringements). The MAWGs that have been established reflect this selection of priorities.

As part of the Market Access Partnership, the Commission regularly consults with and reports to the Council and the European Parliament on investment and trade barrier matters in the "Trade and Investment Barriers Report" (TIBR). The report, which was presented for the first time in 2011, implemented a mandate given in the Europe 2020 Strategy, which was subsequently taken up in the Commission's Communication "Trade, Growth and World Affairs." This Communication committed to "produce from 2011 onwards an annual trade and investment barriers report for the Spring European Council as our key instrument to monitor trade barriers and protectionist measures and trigger appropriate enforcement action."

The European Commission commissioned an evaluation of the Market Access Partnership in 2012, which resulted in a positive feedback of the involved actors.[34] They stressed that the Market Access Partnership facilitates and streamlines the EU's process for monitoring and identifying trade obstacles. It allows an efficient evaluation of the trade obstacles concerned and simplifies the means to address these obstacles, be it through political and diplomatic activities in the relevant third countries or via the introduction by the EU of WTO dispute resolution proceedings. Further, it helps im-

the Commission formally takes the lead within the MAAC, it can be assumed that it has at least some degree of discretion with regard to the setup of MAWGs, limited however by the EU´s legal principle of non-discriminatory treatment. The concept of the MAWGs in terms of their functional structure is a flexible one. The Commission last published an overview of all active MAWGs in 2011 (http://trade.ec.europa.eu/doclib/docs/2011/march/tradoc_147653.pdf). The list demonstrates that there has been a diversity of groups formed over the past years, some of which focus on specific products in specific countries whereas others focus rather on a group of products in multiple countries.

[32] See Fn. 4, *supra*.

[33] Ecorys, Evaluation of the Market Access Partnership, Final Report, 20 November 2012, p. 23 ; the report can be accessed here: http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_150847.pdf

[34] See http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_150847.pdf

proving and developing the Market Access Database through a constant dialogue between local experts and European institutions and actors.[35]

2.3. PETITIONING THE GOVERNMENT FOR TRADE ACTION

2.3.1 The EU Trade Barrier Regulation

The Trade Barrier Regulation (TBR) is the means through which EU enterprises, industries or their associations as well as the EU Member States can lodge a complaint with the European Commission. The Commission then investigates the relevant trade barrier and determines whether the measure merits the launching of a WTO complaint.

The TBR plays the central role in the EU's policy to handle WTO complaints. Since access to the Dispute Settlement Mechanism of the WTO, as well as the bilateral agreements between the EU and its trading partners, is closed to private parties, the TBR introduced a formal legal mechanism through which European businesses can contest alleged illegal trade distortions. It applies also for EU Member States since the EU represents all EU Member States before the WTO. Although the EU may also introduce WTO complaints *ex officio,* it was, and still is, the Union's intention to put the affected industry actors and EU Member States into the primary role as far as triggering WTO action against third countries is concerned.[36]

However, if there is enough factual evidence for the existence of an illegal trade barrier and depending on the economic impact of the measure, the Commission may introduce a proceeding before the WTO DSU *ex officio*. This route is not governed by any specific legislation, but is derived from the trade policy powers rooted in the Treaties of the European Union.[37] This route to tackle illegal trade barriers route is more opaque and more political than the TBR route. Although the Commission may decide autonomously if a WTO complaint is introduced, the Commission has to inform the EU Member States in each case through the European Council's Trade Policy Committee (formerly "Article 133 Committee"), a Working Group in the Council, which comprises representatives of all European Member States. In practical terms, action is more likely if there is strong backing from at least a number of Member States.

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[35] In its Communication on the Market Access Partnership, the Commission proposed that the local "Market Access Teams should produce regular reports on trade barriers in their host countries which will update and strengthen the picture offered by the Market Access Database", see Fn. 3, supra.

[36] European Commission Interim Evaluation of the European Union´s Trade Barrier Regulation (TBR), June 2005, p. 3.

[37] Article 207 TFEU

It is important to note, however, that under this route, the Commission has no formal competence to investigate alleged illegal trade measures of third countries. Such competence is provided to the Commission solely by the TBR mechanism. In turn, the TBR does not provide the Commission with the possibility to launch a TBR investigation procedure on its own motion. A formal investigation under the TBR always requires a formal application by an eligible industry complainant or Member State.[38] Notwithstanding the above, in terms of trade barriers in third counties, the Commission is frequently engaged in informal talks with the concerned industry actors and we have seen cases in which the Commission has informally asked the industry to launch a formal TBR investigation in order to be able to properly investigate the case. [39]

The TBR is a legal instrument that embodies standards and procedural requirements for triggering action which balances the interests of affected parties against the general trade policy interests and available resources to pursue WTO complaints of the European Union. The requirements and procedures incorporated into the TBR are meant to strike a balance between these elements.

As mentioned above, the TBR has a broad scope and is generally applicable to all "obstacles to trade", including NTBs. The term is defined as "any trade practice adopted or maintained by a third country in respect of which international trade rules establish a right of action"[40]. Hence, the TBR provides, as a general requirement, that international trade rules, primarily those established under the WTO or those contained in bilateral Free Trade Agreements,[41] must be violated in order to file a complaint. Hence, resort to the TBR is simply not feasible when there is no perceived violation of trade rules.

The existence of an obstacle to trade is not sufficient to file a complaint under the TBR. It must also be demonstrated by the complainant that the relevant measure caused either an injury or adverse trade effects and that there is a causal link between the complaint and such effect or injury. The TBR thus parallels the EU's trade defense instruments in these regards.

Adverse trade effects are the effects which an obstacle to trade causes, or threatens to cause, in respect of a product or service, to EU enterprises in the market of any third country, and which have a material impact on the economy of the EU, an EU region or a sector of economic activity within the EU.[42] Broadly speaking, the measure must hinder exports to the third

[38] "Community Industry" is defined in Article 2.5 of the TBR as "producers and providers whose combined output constitutes a major proportion of total Community production of the products or services in question".

[39] There is not a formal procedure in place under EU law under which the European Commission decides to lodge a WTO complaint ex *officio* to tackle illegal non-tariff barriers to trade. In practice, however, extensive consultation between the Commission and the affected industries would take place before a complaint/request for dispute settlement consultations would formally be lodged by the Commission.

[40] Article 2 (1) TBR

[41] Article 2 (2) TBR

[42] See Article 2 (4) TBR

country, for instance in cases in which trade flows are prevented, impeded or diverted. Note that adverse trade effects suffered by an individual EU enterprise are not necessarily sufficient in themselves to justify a finding that the Commission should initiate a TBR investigation. The adverse trade effects must have a wider impact on the European Union and this impact must be material.

By contrast, an injury finding requires that the third country measure has an effect inside the EU. It is defined as material injury which an obstacle to trade causes or threatens to cause, in respect of a product or service, on the EU market.[43] The TBR contains a list of factors that are examined to establish whether an injury exists.[44] Again, there are close parallels to the EU's trade defense investigations. Under certain conditions, the TBR also provides the possibility to prevent damage being caused to an EU industry in the future, by allowing complaints to be lodged to pre-empt such injury.[45]

As a recurring element of its main commercial policy, legal instruments incorporated into the Union's trade policy[46] oftentimes require that the action that is supposed to be taken by the Commission does not run contrary to the EU's interest. This is true also for the TBR. Before adopting steps to counter actionable obstacles to trade under the TBR, such action must be deemed as being necessary in the interests of the EU in order to ensure the exercise of the EU's rights under the international trade rules.[47]

The TBR foresees certain requirements that have to be fulfilled by the individual complainant. Private companies and firms formed under the laws of one of the EU Member States can lodge a complaint as long as the company or firm is directly concerned in the production of goods or the provision of services affected by the obstacle to trade.[48] A complaint can also be made under this procedure by any association, with or without legal personality, acting on behalf of one or more EU enterprises.[49]

With regard to obstacles to trade that have an effect inside the EU, any natural or legal person, or any association not having a legal personality, may lodge a TBR complaint under the EU industry procedure if it is acting on behalf of an

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[43] Refer to Article 2 (3) TBR

[44] Article 10 (1) TBR, e.g. the volume of Community imports or exports concerned and the prices of the Community industry's competitors

[45] See Article 10 (2) TBR

[46] For instance the EU´s anti-dumping and anti-subsidy regulations

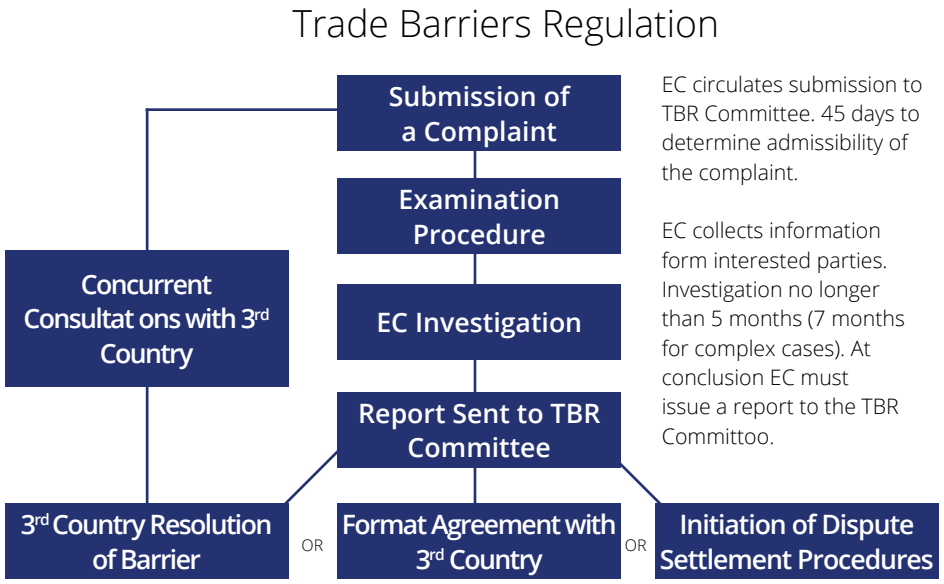
[47] Article 12 (1) TBR

[48] Article 4 (1) TBR

[49] Filing a complaint under the TBR is a much more onerous process than uploading a barrier to the MAD. To upload a barrier to the MAD, a company just needs to fill provide a summary of the barrier on the online form located at: http://madb.europa.eu/madb/complaint_register_form.htm. To file a complaint under the TBR, a company must fulfill stringent requirement including, (1) identification of the complainant and of its activities, including general information on production, turnover and number of employees; (2) definition of the goods, services or intellectual property rights affected by the trade barrier; (3) data on trade flows in which the complainant is involved; (4) evidence of the existence of the trade barrier (i.e., description of the barrier with a copy, if possible, of all the pertinent legislation or regulations or prima facie evidence of its claim letters or faxes from sales agents, importers or clients confirming the existence of the barrier); (5) indication of how this trade barrier breaches international trade rules; and (6) evidence that the trade barrier results or threatens to result in adverse trade effects or injury.

EU industry.[50] This procedure has been designed to allow EU industries facing illegal competition in the EU market from foreign goods or services to take steps to limit this injury by using the TBR. In addition, special rules have also been established to allow regional EU industries to lodge TBR complaints. Producers or providers of services within a particular geographical region of the EU may be considered as an EU industry if their collective output constitutes a major proportion of the output of the products or services in question in the Member State(s) within which the region is located, provided that the effect of the obstacle to trade is concentrated in this area.[51]

In addition to enterprises or associations of enterprises, EU Member States can file complaints under the TBR. In contrast to private party complainants, Member States are privileged applicants under the TBR complaint procedure and are *ipso facto* presumed to satisfy the standing requirements imposed under the TBR.[52]



Once a TBR complaint has been formally lodged with the European Commission, the Commission is normally required to reach a decision on whether or not it will initiate an investigation (the so called "examination procedure") into the alleged barrier within 45 days, starting with the publication of the Notice of Initiation in the EU's *Official Journal*. The TBR itself sets out the basic information that must be contained in the Notice.[53]

In particular, the Commission must notify the representatives of the countries concerned by the TBR procedure and, if appropriate, offer the possibility of negotiations or consultations once the Notice of Initiation is published.

[50] Article 3 (1) TBR
[51] Article 2 (5) TBR
[52] Article 6 (1) TBR
[53] Articles 5 (4) and 6 (5) TBR

The Commission is authorized to seek all information necessary from EU economic operators involved in the product or service concerned. In addition, it has to provide concerned parties the opportunity to submit comments within 30 days after the publication of the Notice. When the Commission has concluded its investigation, it is required to report its findings in an examination report to the TBR Committee within 5 to 7 months.

Since trade diplomacy is a very important element of the EU's overall trade policy,[54] the TBR provides the Commission with some flexibility to secure a removal of the trade obstacle via a negotiated settlement.[55] If settlement negotiations fail, the EU may initiate formal WTO or bilateral dispute settlement procedures to remove any obstacle to trade found to exist after a TBR examination procedure by a decision authorizing the commencement of WTO action.[56] However, there is no defined time limit for the adoption of such a decision.

If a third country refuses to remove an obstacle to trade even after the WTO has ruled against it, the TBR empowers the European Commission to adopt retaliation measures. These sanctions are described in the TBR as "commercial policy measures."[57] The TBR contains a non-exhaustive list of such measures. These read as follows:

- The suspension or withdrawal of any concession resulting from commercial policy negotiations.
- The raising of existing customs duties or the introduction of any other charge on imports.
- The introduction of quantitative restrictions or any other measures modifying import or export conditions or otherwise affecting trade with the third country concerned.

However, such sanctions may only be imposed on the relevant third country if the EU has discharged its own international obligations under the WTO Dispute Settlement Understanding or other dispute resolution provision contained in bilateral trade agreements.[58]

The Commission does not prepare regular statistics on the use of the TBR. According to information of the Commission, which was published in 2008, 25 examinations procedure were carried out since 1996, the year of the implementation of the TBR. Of those investigations, twelve led to satisfactory action by the concerned third country, seven resulted into WTO dispute settlement cases and one was terminated since no trade barriers

[54] See for instance http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150742.pdf, p. 16
[55] Article 11 (2) TBR
[56] Articles 12 (1), 12 (2) and 13 (2) TBR
[57] See Article 12 TBR
[58] See Article 12 (3) TBR

were identified[59]. In addition, our own research indicates that until now the Commission concluded in 20 TBR cases that the relevant trade barrier was not consistent with WTO law and hence proposed to negotiate the case with the third country concerned or, if such negotiations would not lead to an adequate solution, launch a WTO complaint. However, due to informal talks between the Commission and the concerned industry prior to a formal complaint, it can be assumed that those cases in which the Commission has initiated a formal investigation provided strong indications for the existence of illegal trade practice.

TBR INVESTIGATION ON BRAZILIAN TRADE PRACTICES REGARDING RETREADED TYRES

On 5 November 2003, BIPAVER lodged a complaint pursuant to the TBR against certain Brazilian trade practices which prevent the importation of retreaded tyres. The Commission, after consulting the Trade Barriers Regulation Committee, initiated an examination procedure on 7 January 2004.

The complaint concerned Brazil's ban on the importation of retreaded tyres as well as financial fines on the marketing (sale), transportation, storage, keeping or keeping in warehouses of imported retreaded tyres in the amount of 400 R$ (around 107 €) per unit. The investigation found that these penalties did not apply to domestically retreaded tyres, nor was the production of retreaded tyres prohibited in Brazil.

The investigation concluded that the Brazilian measures were inconsistent with several provisions of the WTO Agreement and could not be justified on grounds of environmental or public health protection. The investigation resulted in the EC filing a complaint against Brazil at the WTO under the DSU in June 2005.

[59] See http://trade.ec.europa.eu/doclib/docs/2005/april/tradoc_122567.pdf, p. 17

2.4. RESOURCES FOR MANAGING INTERNATIONAL DISPUTES

The EU's external trade relation is one of the areas in which the EU has full and direct competency.[60] Although the 28 Member States of the EU are WTO members in their own right, the EU works as a single actor in the WTO and is represented by the European Commission rather than by the EU's Member States. Hence, the Commission negotiates trade agreements and defends the EU's interests before the WTO Dispute Settlement Body.

Within the European Commission, the Directorate-General for Trade ("DG Trade"),[61] in collaboration with the European Commission's Legal Service,[62] is responsible for investigating alleged trade barriers under the TBR and for filing WTO complaints or resolving trade disputes otherwise, in addition to monitoring and identifying obstacles to trade through the above-described instruments.

Within DG Trade, the responsible unit for investigating and prosecuting trade barrier is the unit F2.[63] The unit comprises 15 persons, most of whom are legal advisors. However, the unit is supported in each case by the specialized Directorates of other Directorate-Generals of the European Commission, depending on the sector, the goods or the services concerned. The unit is responsible for handling TBR complaints, the examination procedures under the TBR, and for consultations under the WTO DSU procedure or other dispute settlement provisions of bilateral trade agreements. If the initial consultation procedure under the WTO DSU does not resolve the dispute, the Legal Service of the European Commission, more specifically the "Trade Policy and WTO" Team, takes over the case from DG Trade. The team comprises at present 12 legal advisors and is likewise supported by the relevant Directorates of DG Trade or other DGs that deal with the sectors and goods concerned.

In terms of financial resources, the budget for the investigation and the prosecution of trade barriers is included in the European Union's overall trade policy budget. According to the information that we received from the Commission, there is no financial limit for the handling of an individual case under the TBR or the WTO DSU.

Participation by External Counsel in a WTO Complaint

Legally, the Commission would be free to mandate outside legal counsel to assist preparation of a WTO procedure. However, the Commission typically

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[60] See Article 207 of the Treaty of the Functioning of the European Union ("TFEU")

[61] http://ec.europa.eu/trade/

[62] http://ec.europa.eu/dgs/legal_service/index_en.htm; Inside the Legal Service, the TRADE Team is the responsible Unit to deal with WTO complaints, see:
http://ec.europa.eu/staffdir/plsql/gsys_www.branch?pLang=EN&pId=3333&pDisplayAll=1

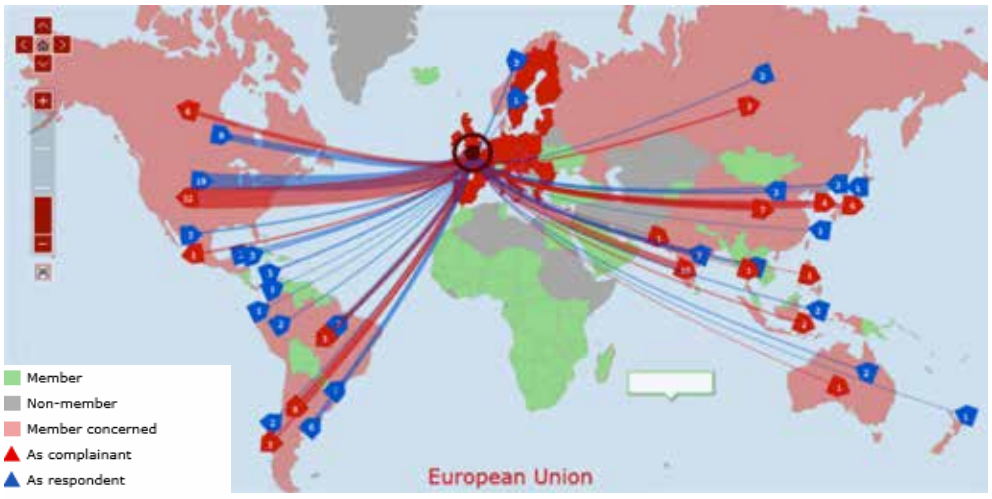
[63] For the organogram of DG Trade, please refer to: http://ec.europa.eu/trade/trade-policy-and-you/contacts/people/

does not directly retain outside counsel to investigate the factual basis or to facilitate a WTO complaint, but it is our understanding that interested industry stakeholders frequently collaborate with legal and/or economic advisors to prepare comments and submissions under the TBR procedure and/or to submit comments on WTO complaints to the Commission. Hence, it can be assumed that the Commission is, in practice, indirectly supported by external advisors. On at least one occasion in the past, the Commission seems to have been assisted more directly by legal counsel in connection with WTO dispute settlement proceedings, but these were extraordinary circumstances due to the sheer size and complexity of the case at issue.

Record of Participation in WTO Dispute Settlement Proceedings

Although the Commission stressed in its most recent TIBR that trade diplomacy is a very important element of its overall trade policy, the EU has been among the most active WTO members over the past in terms of WTO dispute settlement. In total, the EU was involved in 90 cases as complainant, in 77 cases as respondent and in 138 cases as third party[64], which amounts to roughly 20% of all WTO DSU cases.

Map of EU Participation in WTO Disputes



Source: WTO

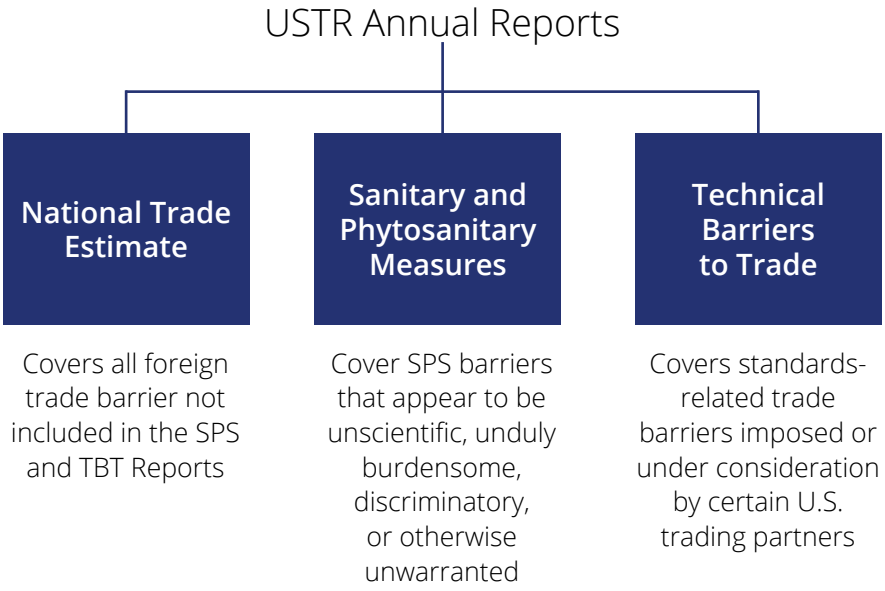
[64] http://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm

UNITED STATES 3

3.1 INTRODUCTION

The Obama Administration has stated that "opening markets for American goods and services, either through negotiating trade agreements or through results-oriented enforcement actions" is the Administration's "top trade priority." The Administration has over the last five years refocused its trade enforcement efforts and adopted a "whole-of-government approach" to enforcement.[65] This effort has included the creation of the Interagency Trade Enforcement Center (ITEC), which has the goal of increasing the Administration's efforts devoted to trade enforcement and leveraging existing resources more efficiently across the Administration.

The Office of the United States Trade Representative (USTR) leads the U.S. government's efforts in addressing trade barriers. Each year, following a months-long evaluation process involving multiple government agencies and consultation with stakeholders, USTR releases a trio of reports identifying various trade barriers that U.S. exporters face around the world.



While the U.S. government proactively works to address and resolve many of the trade barriers identified in the USTR reports, there is a formal option, under Section 301 of the Trade Act of 1974, for companies to petition USTR to address trade barriers that they are facing. If USTR decides to accept a petition and initiate an investigation under the Section 301 process, it is statutorily required to attempt to resolve the barrier at issue through existing dispute settlement mechanisms if the barrier is alleged to be a violation of an existing trade agreement. The Special 301 process is not generally used or necessary to pursue WTO dispute settlement, typically industry works informally with USTR to that end. Section 301 is infrequently used to address barriers outside the reach of covered WTO agreements, as it has limited scope for taking unilateral action to resolve such barriers.

[65] 2014 NTE Report

3.2 MONITORING AND IDENTIFICATION OF TRADE BARRIERS

The U.S. government is statutorily required to provide an inventory of the most important foreign barriers affecting U.S. exports of goods and services, foreign direct investment by U.S. persons, and protection of intellectual property rights.[66] The USTR publishes three annual reports that detail trade barriers faced by U.S. companies to fulfill that statutory requirement. The three annual reports are the National Trade Estimate Report on Foreign Trade Barriers (NTE Report), the Report on Sanitary and Phytosanitary Measures (SPS Report) and the Technical Barriers to Trade Report (TBT Report).

The NTE Report details all trade barriers faced by U.S. companies, including tariff barriers, except for those that are detailed in the recently introduced SPS and TBT Reports. The TBT Report is dedicated to identifying unwarranted barriers in the form of standards-related measures (such as product standards and testing requirements), while the SPS Report addresses unwarranted barriers to U.S. exports of food and agricultural products that arise from sanitary and phytosanitary (SPS) measures related to human, animal, and plant health and safety. Together with the NTE Report, the three reports provide the inventory of trade barriers required by U.S. law.

USTR describes the purpose of the three reports as (1) identifying measures that act as significant barriers to U.S. exports; (2) providing a central focus for intensified engagement by U.S. agencies in resolving trade concerns related to these barriers; and (3) documenting ongoing efforts to give greater transparency and confidence to American workers, producers, businesses, consumers, and other stakeholders with regard to the actions the Administration is taking on their behalf.[67]

The reports are based upon information compiled within USTR, the Departments of Commerce and Agriculture, and other U.S. Government agencies, and supplemented with information provided by stakeholders in response to notices published in the Federal Register, and by members of the private sector trade advisory committees and U.S. Embassies abroad. Drafts of the three reports are also circulated through the interagency Trade Policy Staff Committee (TPSC).

Industry is consulted in this process through the above mentioned notices published in the Federal Register. These requests for public comments are industry's opportunity to notify the U.S. government of barriers they face in foreign countries. There are separate Federal Register Notices for each of

[66] 2013 NTE Report; p. 1

[67] These goals are described in the introductions to the 2013 iterations of the NTE, SPS and TBT Reports.

the three reports. In recent years, the requests for comments have generally been issued in late summer or fall with a submission deadline one to two months later.[68] Following the interagency review process and a review of the public submissions, the three reports are issued by USTR at the end of the following March.

In addition to the three main reports on trade barriers described above, USTR also files several other annual reports that are related to trade barriers that are mandated by Congress. These reports tend to be very narrow in their focus and include reports on China's and Russia's compliance with their WTO commitments, a report on operation of the Andean Trade Preference Act and a review of the operation and effectiveness of U.S. telecommunications trade agreements.

3.2.1 National Trade Estimate Report

The NTE Report is published annually and provides a survey of significant foreign barriers to U.S. exports. The recently released 2014 NTE Report is the 29th iteration of the report. USTR describes the NTE Report as playing an "important role by shining a spotlight on significant trade barriers that our goods and services exporters face." In addition to the identification of foreign barriers, the report provides, where feasible, quantitative estimates of the impact of these foreign practices on the value of U.S. exports. The Report also includes information on actions taken by the U.S. Government to eliminate existing barriers.[69]

The latest edition of the NTE report discusses the largest export markets for the United States, including 58 countries, the European Union, Taiwan, Hong Kong, and one regional body. USTR excluded some countries from the report due primarily to the relatively small size of their markets or the absence of major trade complaints from representatives of U.S. goods and services sectors. However, USTR notes that "omission of particular countries and barriers does not imply that they are not of concern to the United States."[70]

In the NTE Report, USTR defines trade barriers as "government laws, regulations, policies, or practices that either protect domestic goods and services from foreign competition, artificially stimulate exports of particular domestic goods and services, or fail to provide adequate and effective protection of intellectual property rights." Consequently, the NTE Report covers signifi-

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[68] For the current year's Requests for comments in the Federal Register, see 78 FR 50481 (https://federalregister.gov/a/2013-20074) for the NTE Report, 78 FR 63271 (https://federalregister.gov/a/2013-24720) for the TBT Report and 78 FR 63270 (http://www.gpo.gov/fdsys/pkg/FR-2013-10-23/html/2013-24722.htm) for the SPS Report.

[69] 2013 NTE Report p1

[70] 2014 NTE Report; p3

cant tariff and non-tariff barriers, whether they are consistent or inconsistent with international trading rules.[71]

The NTE Report classifies foreign trade barriers into nine different categories, including tariff barriers. The categories are:

- Import policies (e.g., tariffs and other import charges, quantitative restrictions, import licensing, and customs barriers);
- Government procurement (e.g., "buy national" policies and closed bidding);
- Export subsidies (e.g., export financing on preferential terms and agricultural export subsidies that displace U.S. exports in third country markets);
- Lack of intellectual property protection (e.g., inadequate patent, copyright, and trademark regimes and enforcement of intellectual property rights);
- Services barriers (e.g., limits on the range of financial services offered by foreign financial institutions, regulation of international data flows, restrictions on the use of foreign data processing, and barriers to the provision of services by foreign professionals);
- Investment barriers (e.g., limitations on foreign equity participation and on access to foreign government-funded research and development programs, local content requirements, technology transfer requirements and export performance requirements, and restrictions on repatriation of earnings, capital, fees and royalties);
- Government-tolerated anticompetitive conduct of state-owned or private firms that restricts the sale or purchase of U.S. goods or services in the foreign country's markets;
- Trade restrictions affecting electronic commerce (e.g., tariff and non-tariff measures, burdensome and discriminatory regulations and standards, and discriminatory taxation); and
- Other barriers (barriers that encompass more than one category, e.g., bribery and corruption, or that affect a single sector).[72]

[71] The 2014 NTE Report acknowledges "many barriers to U.S. exports are consistent with existing international trade agreements. Tariffs, for example, are an accepted method of protection under the General Agreement on Tariffs and Trade 1994 (GATT 1994). Even a very high tariff does not violate international rules unless a country has made a commitment not to exceed a specified rate, i.e., a tariff binding. On the other hand, where measures are not consistent with U.S. rights under international trade agreements, they are actionable under U.S. trade law, including through the World Trade Organization (WTO)."

[72] 2013 NTE Report; p2

ENTRIES ON BRAZIL IN THE 2014 NTE REPORT

The 2014 NTE Report contains an eight page section on Brazil, which includes entries on barriers posed by import policies, NTBs, import licenses, subsidies, government procurement, IPR protection, services and investment barriers. Below are four of the identified issues.

- **Import Restrictions**: Brazil prohibits imports of all used consumer goods, including automobiles, clothing, tires, medical equipment, and information and communications technology (ICT) products as well as some blood products. Brazil also restricts the entry of certain types of remanufactured goods (e.g., earthmoving equipment, automotive parts, and medical equipment). In general, Brazil only allows the importation of such goods if an importer can provide evidence that the goods are not or cannot be produced domestically.
- **Audiovisual Services and Broadcasting**: Brazil imposes a fixed tax on each foreign film released in theaters, on foreign home entertainment products, and on foreign programming for broadcast television. Brazil also requires that 100 percent of all films and television shows be printed locally. Importation of color prints for the theatrical and television markets is prohibited. Domestic film quotas also exist for theatrical screening and home video distribution.
- **Express Delivery Services**: The Brazilian government charges a flat 60 percent duty for all goods imported through the Simplified Customs Clearance process used for express delivery shipments. U.S. industry contends that this flat rate is higher than duties normally levied on goods arriving via regular mail, putting express delivery companies at a competitive disadvantage. Moreover, Brazilian Customs has established maximum value limits of $5,000 for exports and $3,000 for imports sent using express services. These limits severely restrict the Brazilian express delivery market's growth potential and impede U.S. exporters doing business in Brazil.
- **Government Procurement**: U.S. companies without a substantial in-country presence regularly face significant obstacles to winning government contracts and are often more successful in subcontracting with larger Brazilian firms. Regulations allow a Brazilian state enterprise to subcontract services to a foreign firm only if domestic expertise is unavailable. Additionally, U.S. and other foreign firms may only bid to provide technical services where there are no qualified Brazilian firms.

3.2.2 Report on Sanitary and Phytosanitary Measures

For the last five years USTR has published the SPS Report in conjunction with the NTE and TBT reports. While the information in the SPS Report was originally contained in the NTE Report, the SPS Report was created to identify and combat unwarranted SPS barriers to U.S. food and agricultural exports.

The report defines SPS measures as rules and procedures that governments use to ensure that foods and beverages are safe to consume and to protect animals and plants from pests and diseases.[73]

ENTRIES ON BRAZIL IN THE 2014 SPS REPORT

There are two entries relating to Brazil in the 2014 SPS report.

- **Live Cattle, Beef, and Beef Products:** Brazil bans imports of U.S. live cattle, beef, and beef products following the detection of a BSE-positive animal in the United States in 2003. In 2013, Brazil modified their import regulations, establishing a new regulatory pathway to allow imports of U.S. beef and beef products. For U.S. beef and beef products, the new pathway will require a bilateral agreement establishing conditions for import. On December 10, 2013, Brazil issued final sanitary import requirements for beef and beef products. The United States continues to work with Brazil to negotiate the necessary bilateral agreement open its market fully to U.S. beef and beef products based on science, the OIE guidelines, and the United States' BSE negligible risk status.
- **Pork:** Brazil only allows imports of U.S. pork from establishments that its inspectors have individually inspected and approved. This approach is burdensome on the industry and significantly limits the market access of companies willing and able to export to Brazil. Brazil has not explained why an establishment by establishment inspection and approval system is required rather than the systems-based approach recommended by the WTO and used in FSIS' ongoing system equivalence process. The United States continues to discuss this issue with Brazil.
  Brazil also restricts imports of pork and pork products from the United States, citing the risk of trichinosis. Currently, fresh U.S. pork can be imported into Brazil only if the product is tested to be free of trichinae or if the risk is otherwise mitigated (e.g., by cooking). The United States does not consider these requirements for trichinosis to be necessary as U.S. producers maintain stringent biosecurity protocols that serve to limit the presence of trichinae in the United States to extremely low levels in commercial swine

[73] 2013 SPS Report

USTR acknowledges that while many SPS measures are fully justified, "too often governments cloak discriminatory and protectionist trade measures in the guise of ensuring human, animal, or plant safety." The SPS Report focuses on SPS measures that appear to be unscientific, unduly burdensome, discriminatory, or otherwise unwarranted and create significant barriers to U.S. exports. According to USTR, the report is intended to describe and advance U.S. efforts to identify and eliminate unwarranted SPS measures.[74]

The SPS Report not only details SPS barriers that the U.S. faces on a bilateral basis, but also important unwarranted SPS barriers that impede U.S. exports to multiple foreign markets. USTR notes that "among the most significant of these cross-cutting barriers are restrictions related to export certifications, agricultural biotechnology, bovine spongiform encephalopathy (BSE), avian influenza (AI), and maximum residue limits (MRLs) for pesticides."[75]

Before formally engaging a foreign government with respect to a proposed or existing SPS measure, USTR generally consults with other federal agencies that participate in addressing trade policy matters. USTR coordinates SPS policy through a multi-tiered interagency process. The Trade Policy Staff Committee (TPSC), with representation at the senior civil service level, serves as the primary operating body for this interagency process. A TPSC subcommittee specifically devoted to addressing SPS matters supports the TPSC's deliberations.[76]

3.2.3 Technical Barriers to Trade Report

The TBT report is issued concurrently by USTR with the NTE and SPS reports. The TBT Report is a specialized report addressing significant foreign barriers in the form of product standards, technical regulations, and conformity assessment procedures (standards-related measures). Prior to 2010 these barriers were identified in the NTE report.[77]

The TBT Report includes country reports that identify specific standards-related trade barriers imposed or under consideration by certain U.S. trading partners. The report also includes general information on standards-related measures, the processes and procedures the United States uses to implement these measures domestically, and the tools the United States uses to address standards-related measures when they act as unnecessary barriers to trade.[78]

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[74] 2013 SPS Report
[75] 2013 SPS Report
[76] 2013 SPS Report, p 14
[77] 2014 TBT Report, p 8
[78] 2014 TBT Report, p 8

The 2014 TBT Report identifies and describes significant standards-related trade barriers currently facing U.S. exporters, along with U.S. government initiatives to eliminate or reduce the impact of these barriers in 16 countries – Argentina, Brazil, China, Chile, Colombia, Ecuador, India, Indonesia, Korea, Malaysia, Mexico, Peru, Russia, Saudi Arabia, Taiwan, and Turkey – as well as the European Union (EU).[79]

[79] 2014 TBT Report, p 7

ENTRIES ON BRAZIL IN THE 2014 TBT REPORT

USTR highlighted two items relating to Brazil in the 2014 TBT report.

- **Medical Devices – GMP Certificates**: The U.S. continues to be concerned with delays in registering medical devices in Brazil. A manufacturer must obtain a GMP certificate to access the Brazilian market, however, the average waiting time from submitting the inspection request until completing the inspection is twenty months, while U.S. industry reports a wait time of up to three years. This is significantly longer than the average time of three months for similar inspections performed by other accredited auditing bodies. This delay hinders medical device exports to Brazil.
  In 2013, ANVISA hired and is now training more than 300 professionals to expedite the registration process. Brazil has also deputized state health inspectors to conduct international inspections. In 2014 the United States will continue to monitor the implementation of medical device registration requirements in Brazil.

- **Telecommunications – Acceptance of Test Results**: The U.S. continues to be concerned about Resolution 323 (November 2002) promulgated by Brazil's National Telecommunications Regulatory Agency. Resolution 323, Standard for Certification of Telecommunications Products, requires that in order to place products on the market in Brazil products be tested in Brazil, except in cases where the equipment is too large or too costly to transport. As a result, U.S. suppliers must present virtually all of their information technology and telecommunications equipment for testing at laboratories located in Brazil before that equipment can be placed on the Brazilian market. This requirement causes redundant testing, higher costs, and delayed time to market. Brazil did not notify Resolution 323 to the WTO.

  The United States has urged Brazil to implement the Inter-American Telecommunication Commission (CITEL) MRA with respect to the United States. Under the CITEL MRA, two or more CITEL participants may agree to provide for the mutual recognition of conformity assessment bodies and mutual acceptance of the results of testing and equipment certification procedures undertaken by those bodies in assessing the conformity of telecommunications equipment to the importing country's technical regulations. The United States and Brazil are both participants in CITEL. The United States continued in 2013 to encourage Brazil to implement the CITEL MRA with respect to the United States, and will continue engagement with Brazil to this end in 2014.

USTR coordinates the identification of standards-related trade barriers and determines how to address them through the TPSC and, more specifically, its specialized TBT subgroup, the TPSC Subcommittee on Technical Barriers to Trade (TPSC Subcommittee). The TPSC Subcommittee, comprising representatives from federal regulatory agencies and other agencies with an interest in foreign standards-related measures, meets formally at least three times a year, but maintains an ongoing process of informal consultation and coordination on standards-related issues as they arise.

Information for the TPSC Subcommittee on foreign standards-related measures is collected and evaluated on a day-to-day basis through a variety of government channels including: the U.S. TBT Inquiry Point and Notification Authority (U.S. TBT Inquiry Point) at NIST, the Trade Compliance Center (TCC), the Office of Standards Liaison, and the U.S. Commercial Service (UCS) in the Department of Commerce; the Foreign Agricultural Service (FAS) and its Office of Agreements and Scientific Affairs (OASA) in the Department of Agriculture; the State Department's economic officers in U.S embassies abroad; and USTR.[80]

3.3 PETITIONING THE GOVERNMENT FOR TRADE ACTION

The main mechanism though which a company may petition the U.S. Government for resolution of a non-tariff barrier is Section 301 of the 1974 Trade Act. These investigations can be initiated as the result of a petition filed by a firm or industry group or self-initiated by USTR. If USTR decides to initiate a Section 301 investigation, the U.S. must seek to negotiate a settlement with a foreign country in the form of compensation or elimination of the trade barrier. For cases involving trade agreements, USTR is required to request formal dispute proceedings as provided by the trade agreements. If the issue at hand goes beyond the purview of a WTO trade agreement, there is limited room for unilateral action under Section 301 without risking a WTO challenge. One option available to USTR is to remove discretionary benefits (for example, benefits granted under the Generalized System of Preferences program) if done in an appropriate manner. Additionally, USTR also conducts an annual review of foreign intellectual property laws and policies as part of a Special 301 review, which can trigger a Section 301 investigation.

If a petition is filed regarding violation of a WTO agreement then USTR will make a consultation request under the DSU. If consultations do not result in a mutually acceptable resolution, USTR will request the establishment of a WTO panel under the DSU.

[80] 2014 TBT Report, p 13. The day-to-day information collected by the TPSC Subcommittee is gathered through informal mechanisms and not through a formal request for comment posted in the Federal Register.

3.3.1 Section 301

The Section 301 provisions of the Trade Act provide a domestic procedure whereby interested persons may petition USTR to investigate a foreign government act, policy, or practice that may be burdening or restricting U.S. commerce and take appropriate action. USTR also may self-initiate an investigation.[81] Upon receipt of a petition, USTR has 45 days to review the allegations and determine whether to initiate an investigation.[82] USTR consults with the Interagency Trade Enforcement Center (ITEC) and other agencies during this review process.

In determining whether to initiate an investigation, USTR has the discretion to determine whether action under Section 301 would be effective in addressing the act, policy, or practice at issue.[83] For example, USTR declined to investigate a petition filed under Section 301 in 2007 to bring WTO case against China's alleged currency manipulation because they did not "believe that this Section 301 petition is likely to be the most productive way to secure Chinese movement towards currency flexibility."[84]

If USTR initiates an investigation, it must publish a summary of the petition in the Federal Register and, as soon as possible, provide opportunity for the presentation of views concerning the issues, including a public hearing.[85] Under the statute, USTR also must seek consultations with the foreign government whose acts, policies, or practices are under investigation immediately upon initiation of an investigation or, after consultation with the petitioner, delay for up to 90 days for the purpose of verifying or improving the petition.[86]

Under the statute, USTR is to determine whether the acts, policies, or practices in question (1) deny U.S. rights under a trade agreement or (2) whether they are unjustifiable, unreasonable, or discriminatory and burden or restrict U.S. commerce. If the acts, policies, or practices are determined to violate a trade agreement or to be unjustifiable, USTR must take action. If the acts, policies or practices are determined to be unreasonable or discriminatory and to burden or restrict U.S. commerce, USTR and the President must determine whether action is appropriate and if so, what action to take.

In a Section 301 investigation, an act, policy, or practice is unjustifiable if the act, policy, or practice is in violation of, or inconsistent with, the international legal rights of the U.S. and include, but are not limited to, those that deny national or most-favored-nation treatment or the right of establishment or

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[81] 2014 Trade Policy Agenda

[82] 19 USC § 2412(a)(2)

[83] 19 USC § 2412(c)

[84] http://www.ustr.gov/about-us/press-office/press-releases/archives/2007/june/administration-declines-section-301-petition

[85] 19 USC § 2412(a)(4)

[86] 19 USC § 2413

protection of intellectual property rights.[87] 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.[88]

Even if the acts, policies, or practices are determined to violate a trade agreement or to be unjustifiable by the Section 301 investigation, USTR is not required to take action in any case in which a dispute settlement body has adopted a report, or a ruling issued under the formal dispute settlement proceeding provided under a trade agreement that finds that (1) the rights of the United States under a trade agreement are not being denied, or (2) the act, policy, or practice at issue is not a violation of, or inconsistent with, the rights of the United States, or does not deny, nullify, or impair benefits to the United States under any trade agreement.[89]

USTR is also not required to take action if it determines that: (1) the foreign country is taking satisfactory measures to grant the rights of the U.S. under a trade agreement; (2) the foreign country has agreed to eliminate or phase out the act, policy, or practice, or agreed to an imminent solution that is satisfactory to USTR; (3) it is impossible for the foreign country to achieve the results in the previous two points, but the foreign country agrees to provide to the U.S. compensatory trade benefits that are satisfactory to USTR; (4) "in extraordinary cases", where taking action would have an adverse impact on the U.S. economy "substantially out of proportion to the benefits" of such action; or (5) where taking action would cause serious harm to national security.[90]

If the acts, policies, or practices at issue are alleged to have violated a trade agreement, the statute requires USTR to use the dispute settlement procedures that are available under the trade agreement to resolve the dispute.[91] Therefore, as stated above, if the measure defined in the petition relates to a violation of a WTO agreement, USTR will make a consultation request under the DSU. If consultations do not result in a mutually acceptable resolution, USTR will request the establishment of a WTO panel under the DSU.

It is important to note that although USTR can initiate a Section 301 investigation itself, USTR does not need to do so in order to initiate WTO dispute settlement action.

For acts, policies, or practices at issue that are not related to a trade agreement, the statute outlines the following actions that USTR may take under Section 301 to resolve the infringement: (1) suspend trade agreement con-

[87] 19 USC § 2411(d)(4)

[88] These acts, policies and practices are further described at 19 USC § 2411(d)(3)(B)

[89] 19 USC § 2411(a)(1) and 19 USC § 2411(b)

[90] 19 USC § 2411(a)(2)

[91] 19 USC § 2413

cessions with the subject country; (2) impose duties or other import restrictions; (3) impose fees or restrictions on services; (4) enter into agreements with the subject country to eliminate the offending practice or to provide compensatory benefits for the United States; and/or (5) restrict service sector authorizations.[92]

Section 301 was the subject of a complaint brought by the European Communities in 1998.[93] The European Communities claimed that the U.S. statute mandated USTR to make a unilateral decision as to whether another Member is acting inconsistently with the WTO Agreement 18 months after a consultation request, while DSU procedures normally take 19 1/2 months. The European Communities argued that a determination by USTR, in the situation where the DSB has not yet adopted a report with findings on the matter, would violate Article 23.2(a) of the DSU. The Panel found that it is for the WTO, through the DSU process, and not an individual WTO member, to determine that a measure is inconsistent with WTO obligations. While the Panel's preliminary conclusion was that the U.S. statute constitutes a prima facie violation of Article 23.2(a), "by mandating a determination before the adoption of DSB findings and statutorily reserving the right for this determination to be one of inconsistency," the Panel's final determination was that the U.S. had in fact already lawfully removed the *prima facie* violation though the language included in the Statement of Administrative Action, a document submitted by the President and approved by Congress that accompanied the U.S. implementation of the Uruguay Round and through statements it made to the Panel.

Section 301 investigations have become increasingly rare following the establishment of the WTO, as the statute was amended to comply with WTO rules prohibiting unilateral trade actions against fellow WTO Members. Under certain circumstances, especially when done in consultation with USTR, filing a Section 301 petition can serve to draw attention to an issue and exert leverage on other countries to resolve an issue. However, often filing a Section 301 petition reflects an inability to secure support from USTR and an attempt by U.S. petitioners to pressure USTR to take action or be more forceful in advocating and addressing a foreign practice (a fact understood by knowledgeable trade practitioners). For example, USTR declined to initiate all of the petitions it received under the Bush Administration and while there has been minor use of Section 301 under the Obama Administration,[94] it remains largely dormant. . The current perception of Section 301 is that it is of limited utility in securing U.S. government action and resolving trade barriers.

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[92] 19 USC § 2413

[93] Japan previously filed a complaint against U.S. regarding duties imposed under Section 301 in 1995 (DS 6), but withdrew its complaint later that same year.

[94] USTR accepted a petition from the United Steelworkers in 2010 in relation to Chinese practices affecting trade and investment in the green technology sector. USTR announced months later that it was starting consultations with China on one particular subsidy program relating to wind power under the WTO DSU, but the case has yet to move past the consultations stage. Most recently, USTR conducted a Section 301 investigation into the intellectual property policies of Ukraine following its designation as a Priority Foreign Country as part of the Special 301 process, which is explained in further detail below

3.3.2 Special 301

The U.S. Government is statutorily mandated to undertake an annual survey of foreign countries' intellectual property laws and policies and identify countries which do not provide "adequate and effective" protection of intellectual property rights or "fair and equitable market access to United States persons that rely upon intellectual property rights."[95] USTR fulfills this obligation through the Special 301 process and issuance of its annual Special 301 Report.

BRAZIL IN SPECIAL 301 INVESTIGATIONS

Brazil has only once (1993) been designated as a Priority Foreign Country by USTR as part of its Special 301 investigation, but it has been included on the priority watch list or watch list almost every year since Special 301 investigations were launched in 1989. In recent years, USTR has noted Brazil's efforts to improve the intellectual property issues that have been identified in the report. While Brazil was placed on the priority watch list from 2002 to 2006, Brazil's efforts have resulted in placement on the watch list for the last eight years.

In the 2014 report, USTR stated that Brazil continues on a generally positive trajectory regarding both its domestic IPR policy and its enforcement of IPR. Brazil has taken steps to address a backlog of pending patent and trademark applications, including by authorizing the hiring of for new examiners, but very long delays still exist. Brazil has also continued to make progress in enhancing the effectiveness of IPR enforcement. Significant concerns remain with respect to the high levels of counterfeiting and piracy, including Internet piracy; however, positive strides have been made in the area of pay-television piracy. Concerns also persist with respect to Brazil's inadequate protection against unfair commercial use of undisclosed test and other data generated to obtain marketing approval for pharmaceutical products. Earlier opinions by the Federal Attorney General, which clarified that ANVISA does not have such authority. The United States is also concerned about a series of lawsuits recently filed by Brazil's National Industrial Property Institute (INPI) seeking to invalidate or shorten the term of certain "mailbox" patents for pharmaceutical and agrochemical products.

Industry is involved in the Special 301 process through written submissions requested by USTR from the public through a notice published in the Federal Register and participation in a public hearing in front of the interagency Special 301 subcommittee about issues relevant to the review.[96]

[95] 19 USC § 2242

[96] 2013 Special 301 Report, p 4

If a country is designated as a Priority Foreign Country at the conclusion of the Special 301 process then USTR is obligated to initiate a Section 301 investigation into the measures that were the basis of the Special 301 designation as a Priority Foreign Country. USTR does have the option of deciding not to initiate a Section 301 investigation if it determines that the initiation of the investigation would be detrimental to United States economic interests. If USTR decides not to initiate an investigation it must submit a written report to Congress detailing the reasons for its determination and the economic interests that would be adversely affected by the initiation of an investigation.[97]

Special 301 was initially very useful, as countries feared an unfavorable designation would lead to a perception that the country was an unattractive location for foreign investment. As a result, the Special 301 process served as leverage for countries to reform their practices to avoid such designation. However, today countries no longer view placement on the watch list as significantly harmful to investor perception (which has reduced USTR's leverage), although they remain sensitive about receiving the more onerous designation of Priority Foreign Country.

3.4 RESOURCES FOR MANAGING INTERNATIONAL DISPUTES

USTR coordinates the Administration's activities in identifying, monitoring, enforcing, and resolving the full range of international trade issues under international trade agreements. Those agreements include broad, multilateral agreements such as those adopted at the creation of the WTO, regional agreements such as the North American Free Trade Agreement (NAFTA), and bilateral agreements such as the various free trade agreements (FTAs).[98]

USTR's WTO & Multilateral Affairs (WAMA) office has overall responsibility for trade negotiations and policy coordination regarding matters before the WTO. Specific responsibilities include the operation of various WTO committees, including those established for subject areas such as subsidies, antidumping and other trade remedies, import licensing procedures, standards and technical barriers to trade, government procurement, customs/trade facilitation & security matters, WTO Accessions, WTO Trade Policy Reviews, and preferential trade arrangements.

USTR's Geneva Office is charged with representing the United States in the WTO. Key responsibilities include representing the United States in: (1) WTO negotiations, including the ongoing Doha Round of trade negotiations; (2) the various WTO committees and other bodies charged with managing and

[97] 19 USC § 2412(b)

[98] http://www.ustr.gov/trade-topics/enforcement

monitoring the implementation of WTO agreements; (3) the WTO's dispute settlement system, including meetings of the Dispute Settlement Body and hearings before dispute settlement panels and the Appellate Body; and (4) negotiations on the accession of new members to the WTO. The Office also works with the U.S. Mission to the United Nations and Other International Organizations in Geneva to address trade issues that come up in other international organizations headquartered in Geneva, including UNCTAD, WIPO and the WHO. The Geneva Office works very closely with WAMA, the General Counsel's Office and other units of USTR in carrying out these responsibilities.

The Office of the General Counsel provides legal advice to the United States Trade Representative, Deputy U.S. Trade Representatives, and regional and other USTR offices on negotiations, agreements, trade legislation, certain trade remedies, administrative law, and government ethics. In addition, the office monitors compliance by foreign governments with their obligations under trade agreements with the United States. The office also prosecutes and defends cases in WTO and U.S. FTA dispute settlement proceedings.[99]

USTR is supported in its efforts by the Interagency Trade Enforcement Center (ITEC). In his 2012 State of the Union Address, President Obama called for increased efforts to investigate unfair trading practices in countries around the world, including creation of a new trade enforcement unit. On February 28, 2012, the President signed Executive Order 13601, establishing the ITEC. The newly created entity serves as the primary forum within the federal government for executive departments and agencies to coordinate enforcement of international and domestic trade rules.

The goal of the ITEC is to increase the efforts devoted to trade enforcement, as well as leveraging existing resources more efficiently across the Administration. USTR and the Department of Commerce have assembled the ITEC staff from a variety of U.S Government agencies including the U.S. Departments of Commerce, Agriculture, State, Treasury, and Justice, as well as the International Trade Commission and the intelligence community. The ability to assemble a diverse staff allows the ITEC to assemble experts in various fields, such as intellectual property rights, subsidy analysis, economics, agriculture, and animal health science, as needed.[100]

The *2014 Trade Policy Agenda* notes that the ITEC played a critical role in providing research and analysis regarding new and ongoing WTO disputes, such as *China – Rare Earths, Argentina – Measures Affecting the Importation of Goods*, and *India – Solar Panels*, among others, for which there were serious concerns regarding U.S. trade interests. In each instance, the United States initiated steps in the WTO to protect U.S. rights.

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[99] http://www.ustr.gov/about-us/human-resources/organization

[100] 2014 Trade Policy Agenda

Depending on the nature of a Section 301 petition, ITEC may be involved in doing additional research during the investigation phase. With regard to the majority of WTO dispute settlement actions, ITEC will perform some of the same types of research that outside parties would typically do themselves in order to file a 301 petition.[101]

In the upcoming year, ITEC is expected to increase its capabilities through the acquisition of foreign language-proficient trade experts. In coordination with other offices at USTR and other agencies, ITEC has identified priority projects for research and analysis regarding a number of countries and issues.[102]

For example, the *2014 Trade Policy Agenda* states that through ITEC the United States will continue to push further and dig deeper into the complex web of industrial policies and bureaucratic systems of key trading partners like China. This increased base of knowledge provides U.S. negotiators and litigators with improved information that enables a more effective and efficient deployment of resources, which enhances the US ability to prevail in key disputes. ITEC will also continue to research, with assistance from US industry, support provided by China and other governments to various industries with a view to assessing compliance with WTO obligations. Furthermore, ITEC will continually monitor compliance of other key trading partners, such as Russia, Brazil, and India, with their WTO commitments in coordination with trade experts from across the U.S. Government.[103]

Participation by External Counsel in a WTO Complaint

USTR typically does not retain external counsel to assist in WTO dispute settlement. However, very frequently the U.S. domestic industry retains counsel that liaises with USTR in the preparation of cases, overall legal strategy, and provides advice during the course of the panel and Appellate Body proceedings. Accordingly, it is fair to state that USTR is indirectly assisted by external counsel, despite the fact that it retains a leading role in developing its litigation strategy and managing a WTO dispute.

[101] www.ustr.gov/trade-topics/enforcement/itec/faq
[102] 2014 Trade Policy Agenda
[103] 2014 Trade Policy Agenda

Record of Participation in WTO Dispute Settlement Proceedings

Since the establishment of the WTO, the United States has been one of the most active participants in Dispute Settlement. The U.S. has filed 103 complaints at the WTO, thus far successfully concluding 70 of them by settling 29 disputes favorably and prevailing in 41 others through litigation before WTO panels and the Appellate Body.

The U.S. has been a respondent in 121 cases to date. In 50 of those cases the U.S. did not prevail on the core issue, while it prevailed on the core issue in 17 cases. There have been 21 cases that have been resolved without completing litigation. The remainder of the cases are either in consultations, in the process of being litigated or are otherwise inactive.

The U.S. has participated in 109 dispute settlement cases as a third party.

Map of U.S. Participation in WTO Disputes

Source: WTO

JAPAN 4

4.1 INTRODUCTION

Japan differs from the European Union and the United States in that it does not have a formal mechanism for companies to petition the government to remove a trade barrier in an export market. Japan nonetheless monitors and identifies trade barriers in a similar manner to the EU and the U.S., with an annual publication outlining the barriers that its exports face in major trading partners. Japan's process for the identification of the barriers differs slightly from the EU and U.S. because it also addresses the question of the WTO-consistency trade barriers it identifies. While industry can notify the Japanese government of barriers it is facing, the main input of stakeholders comes through the Japan External Trade Office (JETRO) process, and through a committee of distinguished academics, high-ranking company officials, and industry representatives.

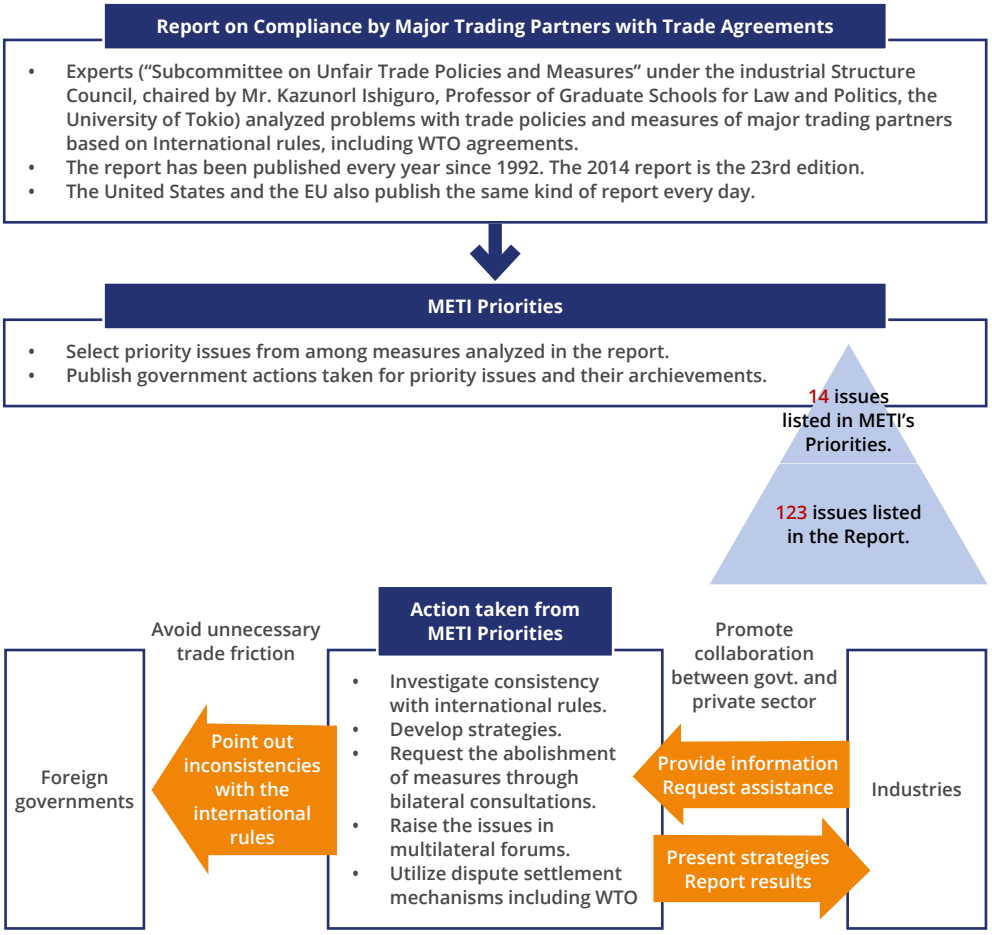
The Ministry of Economy, Trade and Industry (METI) then selects a limited number of issues identified in the report as priorities for action over the upcoming year. METI then develops strategies, requests the abolishment of measures through bilateral consultations, raises the issues in multilateral forums and, if necessary, utilizes dispute settlement mechanisms including at the WTO. Many of the priority issues are carried over from year-to-year as Japan works to resolve the barriers. For instance, only two new priority issues were identified by METI in 2014.

4.2 MONITORING AND IDENTIFICATION OF TRADE BARRIERS

Japan releases an annual Report on Compliance by Major Trading Partners with Trade Agreements (the Report on Compliance). The Japanese Government collects information from export markets primarily through JETRO, a government-related organization that works to promote mutual trade and investment between Japan and the rest of the world. This is a different set-up than in the EU and U.S. In the U.S. it is primarily state-level agencies that promote trade and investment, while in the EU this falls to entities within the Member States as the Commission has no such powers. Originally established in 1958 to promote Japanese exports abroad, JETRO's core focus in the 21st century has shifted toward promoting foreign direct investment into Japan and helping small to medium size Japanese firms maximize their global export potential. JETRO employs over 1,500 people, 700 overseas, in its domestic and international offices. As of April 2013, JETRO had 73 overseas offices in 55 countries, including an office in São Paulo.

On the basis of information collected by JETRO, industry associations, and companies, a committee of Experts working under the auspices of METI produces the Report on Compliance, which addresses the consistency of

wide-ranging trade policies and measures of major trading partners with WTO agreements and other international rules, and requests improvements of those policies and measures. Based on the Report on Compliance, METI also releases annually the METI Priorities Based on the Report on Compliance, which lists priority issues taken from the Report on Compliance, publishes government actions taken on priority issues and Japanese government achievements in resolving previously identified priority issues.



Source: METI

4.2.1. Report on Compliance by Major Trading Partners with Trade Agreements

The Report on Compliance by Major Trading Partners with Trade Agreements has been published every year since 1992. The 2014 report, released in May, is the 23rd edition of the report. METI states that the purpose of the report is to "point out trade policies/measures of major trading partners that may not be consistent with international rules such as WTO agreements, and to urge those partners to improve such trade policies/measures." Japan notes that the report is similar to USTR's NTE report.

The report is drafted by a group of experts that comprise the Subcommittee on Unfair Trade Policies and Measures (the Subcommittee) under the Industrial Structure Council. The Industrial Structure Council is an official advisory body to METI. The Subcommittee is comprised of distinguished academics, high-ranking company officials and industry representatives. The Subcommittee analyzes problems with the trade policies and measures of major trading partners based on international rules, including WTO agreements and collaborates with industry in drafting the Report on Compliance.

The primary goals of the Report on Compliance are: (1) to develop a framework for dispassionate and constructive solutions to trade disputes and (2) "to identify and analyze problems concerning the trade policies and measures of Japan's major trading partners…and to urge them to remove or otherwise remedy the problematic policies and measures." The report covers both tariff and non-tariff barriers.

In addition, the Report on Compliance also provides a detailed explanation of the current rules and the basic principles under the WTO and various free trade agreements as they affect global trade in the context of actual cases and disputes. The report also highlights potential problems in the current rules, focuses attention on areas of possible improvements, and tries to offer suggestions, albeit partially, for future direction.

The Report on Compliance covers the "dozen or so economies important to Japan, based on the amount of bilateral trade with each (total exports and imports)." The 2014 report covered 123 policies/measures in 16 countries and includes eight polices that were not included in the 2013 report.

In the preface to the 2012 Report on Compliance, the Subcommittee highlights that its analysis is based on "rule-based" criteria, which is not "focused on the results of competition, but on the rules under which competition takes place. As long as fair competition takes place under agreed-upon rules, challenging the fairness of results is not only misguided, it is also a destruction of the base of agreed-upon rules." The Subcommittee believes that this approach provides "an effective means of avoiding needless misunderstandings and emotionalism over trade concerns, as well as of preventing trade friction from becoming a political issue." The Report offers the following example:

> "If, for example, the United States invokes retaliatory measures under Section 301 of its Trade Act unilaterally by condemning a foreign country's measure as a violation of the WTO Agreement without going through the WTO dispute settlement procedures, it would itself be in violation of the WTO Agreement; and so such an action cannot be accepted. As economic relations between Japan and other Asian countries have intensified, more problems

> have been occurring with regard to individual trade with these countries. In order to construct mature economic relations with these countries without it becoming a political issue, it is important to solve these problems in a calm and constructive manner according to rules."

The result-based criteria allow a country to brand as "unfair" or "unreasonable" the trade policies or measures of another country instantly. A country that takes this approach may regard the trade policies and measures of trading partners as "unfair" if there is a large trade imbalance or if exports to that trading partner fall short of expectations. The Subcommittee notes that results-based criteria have a number of issues including: lack of objectivity, lack of casual relationship and the danger of "managed trade."

4.2.2 METI Priorities Based on the Report on Compliance

Shortly following the publication of the Report on Compliance, METI issues its Priorities Based on the Report on Compliance. The publication identifies a shorter list of issues that are contained in the Report on Compliance that METI identifies as priorities for the coming year.

Of the 123 issues identified in the 2014 version of the Report on Compliance, METI identified 14 of the issues as priority issues in its annual METI Priorities report. Those 14 priority issues fell into three categories: (1) issues for which solutions continue to be sought by various means including bilateral or multilateral consultation and the WTO Dispute Settlement Mechanism; (2) issues already referred to the WTO Dispute Settlement Mechanism; and (3) issues on which Japan urges prompt implementation of the WTO recommendations.

The METI Priorities document provides a summary of each of the priority issues, its current status and the actions that it expects to undertake over the next year. Additionally, the Priorities document also contains an update on the current status of each of the policies and measures specified in the previous year's METI Priorities report and METI's relevant actions over the past year to resolve those issues.

METI notes that the priorities report has two main functions: (1) to promote collaboration between the government and the private sector and (2) to avoid unnecessary trade friction with foreign governments. METI indicates that collaboration with the private sector is strengthened by requesting information on barriers from the private sector and then following up by presenting strategies for addressing the barriers and reporting results. The priorities report will help avoid trade friction with other governments by pointing out inconsistencies with international rules.

PRIORITY ISSUE ON BRAZIL: DISCRIMINATORY IMPLEMENTATION OF INDUSTRIAL PRODUCT TAX

Japan continues to request the elimination of the measures and corrections by utilizing the framework of bilateral consultations and WTO Committees.

- In October 2012, the Brazilian government announced the Inovar--Auto which continued the 30% increase of IPI on cars for five years from 2013 to 2017 while making it possible for automobile manufacturers to reduce IPI in exchange for (1) achieving the prescribed fuel efficiency standards, (2) carrying out certain manufacturing processes for car production in Brazil, (3) investing a certain amount in domestic research and development etc. For imported cars, the IPI reduction would be applied only in condition to the local content usage etc. At the same time, preferential taxation has been expanded in connection with the local content requirements in wide-ranging fields, such as that of communication network equipment and that of chemicals (fertilizer).
- The measure gives unfavorable treatments to imported products in receiving the benefit of tax exemption. Accordingly, it is likely to be inconsistent with Article III (national treatment requirements) of the GATT. Also, it is likely to be inconsistent with Article III of the GATT, Article 2 of TRIMs, and Item (b), Paragraph 1 of Article 3 of the Agreement on Subsidies and Countervailing Measures in encouraging the usage of local contents.
- METI pointed out to the Brazilian Minister of Development, Commerce and Industry the possible infringement of WTO rules in May and November 2012, respectively. METI Vice-Minister for International Affairs expressed concerns and requested cooperation including information provision at the Japan-Brazil Joint Committee on Promoting Trade and Investment in November 2012.
- In December 2013, the EU requested bilateral consultations under the WTO dispute settlement procedures (including fields other than automobiles) and Japan also requested participation as a third party (but was rejected by the Brazilian government).

4.3 PETITIONING THE GOVERNMENT FOR TRADE ACTION

Japanese companies and associations are able to register complaints about unfair trade practices of foreign nations to METI during the compilation of the annually published Report on Compliance, but there is no procedure for requesting initiation of an investigation with the aim of correcting the problems.

As a result, at present, the only countermeasure that Japanese companies injured by foreign trade barriers can take is to lodge an informal complaint through an industry association or similar body to the government Ministry in charge. Although this method is not entirely without merit, in the sense that it affords government and the private sector a realistic means of response, it has been noted for its opacity and instability because it would seem to leave issues to the government's discretion.

Moreover, the ministry in charge varies depending upon the affected sector. To illustrate, the Ministry of Economy, Trade and Industry would have to be addressed in matters of general industrial products; the Ministry of Agriculture, Forestry and Fisheries in matters of food or agricultural and marine products; the Ministry of Economy, Trade and Industry and the Ministry of Public Management, Home Affairs, Posts and Telecommunications in matters of telecommunications services; the Ministry of Land, Infrastructure and Transport in matters of transport, distribution, and construction services; the Ministry of Finance in matters of customs valuation; and the Ministry of Health, Labor and Welfare, and the Ministry of Justice in matters of immigration or employment, and so forth. Many Japanese companies also complain about the lack of a unified approach among the various ministries. Moreover, depending on the matter at issue, it may even be difficult to identify the minister in charge.

An example of the lack of central procedures for companies facing barriers can be found in the steps outlined by METI for companies concerned with IPR violations. The Office of Intellectual Property Protection within METI advises companies that suffer intellectual property rights violations abroad to submit a petition to the Office of Intellectual Property Protection, which will then make a determination within 45 days whether an investigation is warranted and inform the petitioner. If the Office of Intellectual Property Protection feels an investigation is warranted then it has six months to conduct an investigation based on the petition and will present the findings to the petitioner upon completion. If the results of the investigation merit proceeding, the Government of Japan will enter into bilateral negotiations with the other country and then seek to resolve the issue in accordance with bilateral/international agreements, including WTO dispute settlement procedures.

4.4 RESOURCES FOR MANAGING INTERNATIONAL DISPUTES

The Office for WTO Compliance and Dispute Settlement in the Multilateral Trade System Department of the Trade Policy Bureau and the International Legal Affairs Office in the Trade Policy Bureau are the divisions under METI in charge of compiling and publishing the Report on Compliance and the Report on Priorities.

The Economic Affairs Bureau within the Ministry of Foreign Affairs (MOFA) has the responsibility over trade agreements and international economic organizations, which makes MOFA the coordinating office for Dispute Settlement policy. The International Trade Division of MOFA is responsible for daily policy issues as well as Doha and other negotiations under the WTO umbrella. Additionally, the Multilateral Trade System Department in the Trade Policy Bureau is the division under METI that coordinates with MOFA on WTO dispute settlement.

Participation of External Counsel in WTO Complaints

Japan occasionally retains outside counsel to assist with discrete tasks of WTO dispute settlement proceedings, such as the drafting of submissions or oral statements at hearings. Typically, Japan does not entrust the entire representation to outside counsel, and retains the primary role in litigating WTO disputes.

Record of Participation in WTO Dispute Settlement Proceedings

Japan has been a complainant in 19 cases. Eleven of the cases have been concluded, while five cases are still pending. One was concluded with the negotiation of a mutually agreed solution. One had the panel dissolved. One case had the consultation suspended after the respondent effectively removed the measures Japan raised.

Japan has been a respondent in 15 cases. Six cases reached a conclusion through litigation, while there were mutually agreed solutions in five other cases. Three cases were essentially terminated at the consultation stage. While its participation as a complainant and a respondent is not that high, Japan has been a third party in 146 cases – the most of any WTO member.

Map of Japanese Participation in WTO Disputes

Source: WTO

SOUTH KOREA 5

5.1 INTRODUCTION

A more recent entrant in establishing a system to address trade barriers, Korea has recognized the importance of identifying and monitoring trade barriers imposed by foreign markets. According to the Korea Federation of Small and Medium Businesses (KFSB), 26.9% of the Korean companies exporting to Japan and 16.7% of the Korean companies exporting to China have encountered trade barriers, including NTBs. Alarmed by this result, Korea has taken a novel approach in establishing a Public-Private Partnership to tackle these barriers. The Korea Ministry of Trade, Industry & Energy (MOTIE) and the Ministry of Foreign Affairs (MOFAT) jointly published the 2013 National Report on Foreign Trade Environment.

Similar to Japan, the national trade and investment agency, the Korea International Trade Association (KITA), plays an important role in this process, though in contrast KITA has a formalized arrangement with the Government of Korea in addressing trade barriers. KITA is a private non-profit organization founded in 1946 with more than more than 65,000 member firms, representing almost the entirety of Korea's international trade community.

In practice, Korea has adopted a broad definition of trade barriers, one that covers quantitative restrictions (such as import quotas), state-trading enterprises, technical barriers to trade (TBT), procedural issues (customs and license requirements), sanitary barriers (e.g. Sanitary and Phytosanitary measures (SPS)), and government subsidies. Contingent protections in the form of antidumping and countervailing duty and safeguards are treated as "trade remedies" and thus regulated separate and independent of other trade barriers. Specific areas viewed as affected by NTBs also include intellectual property, investment and services.

5.2 MONITORING AND IDENTIFICATION OF TRADE BARRIERS

5.2.1 Establishment of NTB Conference and Executive Office

On September 16, 2013, KITA and MOTIE jointly established a NTB Executive Office (hereinafter, "NTB Office") within KITA to systematically respond to NTB problems. The NTB Office is expected to monitor, identify, and examine NTBs by consolidating the efforts that have thus far been scattered and regularly hold NTB Conferences to address those issues. In essence, the NTB Office will play a crucial role as a liaison between the government and private organizations by (1) compiling NTB information/data from all private and state organizations; (2) analyzing and evaluating their effects on domestic businesses; (3) establishing systematic databases by sharing the information with other affiliated entities; (4) petitioning the government, if need be, to urge a response to certain NTBs; and (5) sponsoring/supporting

the operation of the newly established NTB Conference. The Conference is chaired by the assistant secretary of the MOTIE and composed of twenty-two industrial associations, an advisory panel, Korea Trade-Investment Promotion Agency (KOTRA)[104] and others. They held their first meeting in October 2013.

5.2.2 Establishment of Systematic Information Management

In an attempt to centralize data and establish a management system, KITA launched, under the instruction and supervision of MOTIE, a new online platform on the already-existing Consolidated Trade Information Services website (www.tradenavi.or.kr). A new section titled "Non-Tariff Barriers" mainly serves two purposes: (1) providing information to industries and (2) facilitating industry petitions against unfair trade measures. The website allows the public to obtain information on the diverse types of trade barriers imposed by various nations, which Korean exports are subject to the trade barrier, and if any counter measures have been taken. This information facilitates the ability of companies/industries to file complaints with regards to certain trade measures that seem unreasonable and improper. Additionally, the website serves as a mechanism through which domestic companies more easily communicate the difficulties they experience in exporting due to trade barriers.

More specifically on non-tariff barriers, the website includes two subsections that provide an overview of the global status of NTBs; the first includes statistical data detailing the number of barriers each country imposes under each NTB category and the second contains examples of cases demonstrating disputes arising from various NTBs. It also includes information on environmental regulations, approval/permission information, standards information, importing requirements, strategic items, technical regulation trend, import regulation trend, and TBT Notices. Users are able to search each of these topics by country, industrial code or Korean harmonized tariff code to learn details of barriers/regulations in selected countries, which items are subject to these barriers and cases that have been brought against the barriers. There are no NTBs involving Brazil on the site at this time.

In addition to the Trade Navi portal, the website http://www.knowtbt.kr/, managed and operated by the Korean Agency for Technology and Standards (KATS), specializes in TBT issues.

[104] KOTRA is a state-funded trade and investment promotion organization operated by the Government of South Korea.

5.2.3 Strengthen Communications Between Related Private and Public Entities

MOTIE and KITA have also announced that they are seeking to reinforce and increase communication among private organizations, affiliated groups, and the involved government ministries. Previously, trade organizations and related groups focused their NTBs efforts on inspecting and studying NTBs within the constraints of their individual resources without formal coordination with other organizations. The lack of public channels and formalized means for coordinated communication could often result in such efforts having a limited impact or coming to a standstill. Acknowledging this problem, MOTIE and KITA have joined forces to collect data/information from the various trade entities (including, but not limited to, KOTRA, Small and Medium Business Association (SMBA), KTL (Korea Testing Laboratories), Korea Institute of Industrial Technology (KITECH), Yes Trade (handling strategic items), Korea Institute for International Economic Policy (KIEP) and Korea Trade Insurance Corporation (KSURE)) for use in the previously discussed Trade Navi portal.

Once MOTIE and KITA receive relevant data and information, it is uploaded on the consolidated system. The data is updated frequently as MOTIE and KITA receive the data. While the database for import/export regulations are updated on a daily basis, MOTIE and KITA are planning on updating the NTBs database every three months, coinciding with the NTB Conference schedule.

MOTIE holds a conference every three months to confer on NTB issues and hear from various organizations and associations. The content and method of reporting during the Conference varies from meeting to meeting. In addition, MOTIE and KITA will take the lead to publish a National Report on Foreign Trade Environment concerning each nation to which Korea is exporting, following upon the publication of the 2013 National Report on Foreign Trade Environment.

5.2.4 Proactive and Strategic Approaches to Handling NTBs

Parallel to the efforts described above, the Korean government is also working on NTBs in the context of bilateral trade agreements. To keep the establishment of new NTBs with its FTA partners to a minimum, Korea proactively suggests holding meetings with partner nations to discuss NTBs. For example, Korea recently held the fifth FTA meeting with China to address NTB issues, including country of origin, customs, TBT, SPS, trade remedies, unfair competition and transparency. The goal of these meetings are to reduce, if not eliminate as a whole, the effects of NTBs. Additionally, Korea has also been pursuing mechanisms within their trade agreements to reduce NTBs. For example, Korea and the U.S. agreed to include a provision requir-

ing the organization of a separate entity to monitor technical regulations and resolve different standards for automobiles in their trade agreement. Incorporating dispute resolution/arbitration procedures in FTAs is another attempt through which the Korean government has tried to identify and more easily address NTBs with partner countries.

5.3 PETITIONING THE GOVERNMENT FOR TRADE ACTION

Unlike the EU and the U.S. and similar to Japan, the Korean industry does not have a formal legal instrument to petition the government to take legal action against a trade barrier. The system in place only permits industries to informally lobby the government to counteract trade barriers, and MOTIE and/or MOFAT decide whether to negotiate with foreign counterparts and/or bring a WTO action.

There are various offline channels through which industries can seek action from the government to resolve export barriers. These outlets are provided by various governmental ministries, related organizations and affiliated groups. The Trade Navi portal provides an online service where companies can conveniently register their complaints.

Once complaints on certain trade barriers are submitted, facilitators/advisors are coordinated to initiate field studies in relevant areas and examine, among other things, technical aspects, compliance with trade law, policies and obligations, and material effects of the alleged NTBs on Korean companies and industries.[105] NTB teams within the KITA and MOTIE coordinate efforts to conduct field studies by consolidating matters through the jointly established NTB Office. All the relevant data or information is compiled by and funneled through this NTB Executive Office and the office holds regular conferences attended by numerous industry practitioners and experts/advisors to discuss rising issues and potential field studies. It does not appear that this process includes an evaluation of national interest, but instead the focus is on whether identified barriers are consistent with trade law and policies and the adverse effects they have on exports by Korean companies.

Depending on the complexity of issues, some barriers are resolved through simple internal advisors' counseling, while others take much more time and effort. During the investigation, MOTIE and KITA teams reach out to experts in pertinent areas for counseling and together contemplate strategic ways to react to the barriers. Discussions take place both internally and externally

[105] It appears that the Korean Agency for Technology and Standards (KATS) entirely sponsors the efforts to resolve TBT issues. For NTBs, it is less clear because the major private economic organizations have contributed to the establishment and operation of the NTB Office and implementation of resolutions. However, all of these entities get funding from the government (MOTIE) and thus their contributions would likely stem from MOTIE. Therefore, an assumption can be made that MOTIE ultimately sponsors most of the activities conducted to resolve the NTB issues including, but not limited to, conducting field studies.

through a variety of negotiating channels provided by various governmental and private institutions. If the attempts to redress the problem fail, MOTIE will make a final decision on whether to bring the issue to the WTO. The legal department of MOTIE takes responsibility for the process of WTO disputes, except in the case of technical barriers in which MOFAT takes the lead. MOFAT also has responsibility to make decisions to call for WTO action for certain other trade regulations besides NTBs (e.g. antidumping, countervailing duty, and other trade remedies).

As the Korean government has been more and more successful at resolving a number of NTB cases through bilateral agreements, negotiations between countries are conducted prior to resorting to the WTO process. According to a KITA report on the Trade and Industry Forum held in March 2014, the Korean government successfully addressed India's double taxation on transportation during the presidential visit to India. On another matter, the head of KITA and one of the MOTIE representatives successfully eliminated, through negotiations with the EU Association of Commercial Distribution, a European buyer's imposition of the additional requirement of a BSCI audit as a condition for their continuous transaction.

Realizing how effective such country-to-country negotiations can be, the Korean government is now proactively moving towards communications with foreign nations, while simultaneously encouraging participation of twenty-two Korean industries to report the NTB problems they are facing. WTO actions, therefore, have become more or less a last resort after negotiations have failed to resolve the barrier at hand.

5.4 RESOURCES FOR MANAGING INTERNATIONAL TRADE DISPUTES

There is no record of Korean participation in WTO dispute resolution cases relating to NTBs to date. Since the office in charge of NTBs, which has eight employees, has only been in existence for 8 months, there has yet to be an instance of a barrier identified by the office leading to WTO action. To date, the government and related organizations have focused more on pooling resources and establishing a unified system and mechanism.

With the establishment of the NTB Office, MOTIE and KITA are expected to maintain records in relation to NTBs, take charge in collecting and analyzing NTB data and persuade the government to bring WTO action when warranted.

Once the Korean government has determined to petition a foreign government through the WTO, the two ministries (MOTIE and MOFAT) usually delegate their representation to outside counsel.

Participation of External Counsel in WTO Complaints

Korean does retain outside counsel to assist in WTO dispute settlement. External counsel directly assists MOTIE in overall litigation strategy and during all stages of WTO proceedings.

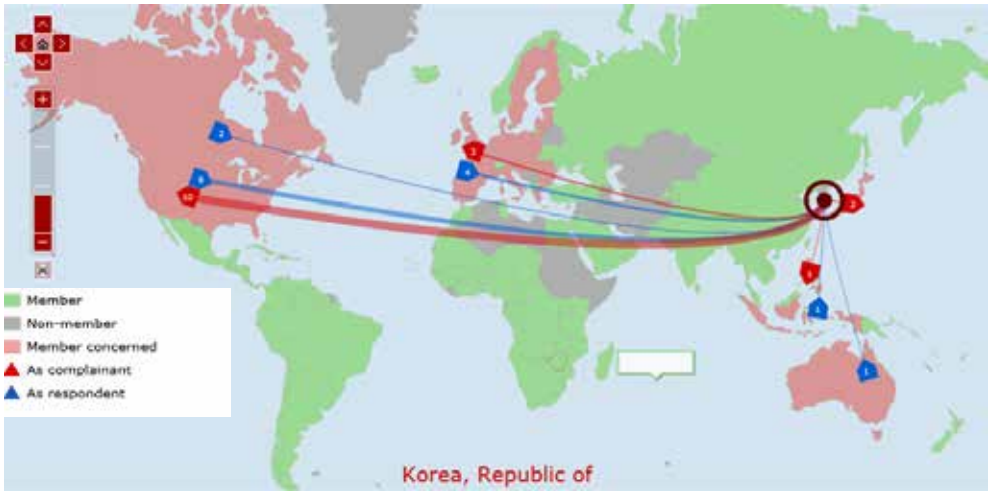
Record of Participation in WTO Dispute Settlement

Korea has been a complainant in 16 cases, ten of which have been against the U.S. Nine of the 16 cases proceeded fully through the DSU and four cases are still pending. One was concluded with the negotiation of a mutually agreed solution. Korea withdrew one of the complaints after the U.S. removed the allegedly infringing duties and one complaint had its authority for panel lapse.

Korea has been a respondent in 14 cases with the highest number (six) brought by the U.S. Eight of the cases have been litigated to their conclusion, while there was a mutually agreed solution or settlement in four other cases. A pair of cases were essentially closed at the consultation stage.

Korea has been a third party in 87 cases to date.

Map of Korean Participation in WTO Disputes



Source: WTO

CONCLUSION AND RECOMMENDATIONS

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The above survey of the European Union, United States, Japan and Korea has focused on (1) the mechanisms in place to identify and monitor trade barriers; (2) the institutional mechanisms for domestic producers to petition the government to take action before the WTO or other regional or bilateral fora against illegal trade barriers; and (3) the resources used by these governments to obtain the removal of these trade barriers through international adjudication.

The EU, US, Japan and Korea all have adopted institutionalized review mechanisms that seek to identify and monitor trade barriers in their main export markets. Most of these reviews rely on substantial input from the domestic industry, whether directly from individual companies or through industry organizations, and though other stakeholders, but are complied, primarily, by governmental authorities. In Korea and Japan this includes formal participation in the process from government-related industry organizations.

All four of the jurisdictions publish annual reports on trade barriers, though Korea has published just one such report to date. In addition to the annual reports, the EU and Korea have established interactive databases. The US and Korea established review mechanisms that deal specifically with non-tariff barriers, such as TBT and SPS measures, while EU has recently begun publishing a report addressing exclusively barriers to investment. Japan's process is not NTB-specific.

The review mechanisms also serve as important policy-framing purposes. Annual reports and databases are instrumental in identifying priority markets and types of barriers, defining resource allocation, and outlining action plans to address the relevant barrier, in accordance with its relative importance for the WTO Member's economy. Each year the US issues a Trade Policy Agenda and Annual Report that is influenced by the priority issues identified trade barrier reports. Japan has an even more direct link between its monitoring mechanism and direct action from the Japanese government, as a limited number of issues identified in its Report on Compliance are highlighted for inclusion in its Priories Report. The issues in the Priorities Report receive increased resources and increased focus on achieving a resolution.

In Korea and Japan, these reviews also serve the additional purpose of assessing the consistency or inconsistency of the identified trade barrier with the relevant legal disciplines. In the EU and US such an assessment is not necessary at this stage, as both have formal legal procedures in place under which the legality of trade barriers with international trade rules are examined.

It is not surprising that the most active WTO litigants, the EU and US, have legal procedures in place through which domestic producers may petition the government for legal action against a trade barrier in the WTO or under other regional or bilateral agreements. Both the Trade Barrier Regulation in the EU and Section 301 in the US have fairly elaborate legal procedures that

allow domestic producers to request that the government file a complaint before the appropriate legal forum to seek to obtain removal of the trade barrier affecting their industry. These instruments seek to determine not only the legality of the trade barrier under the rules of the WTO or other agreements, but also examine the effects of the trade barriers on the domestic producers. The mechanisms in the EU and US also provide for involvement in the process from different stakeholders. The formalized rules of these mechanisms and the ability for participation from interested parties results in a process that is transparent, objective and inclusive. However, both jurisdictions do retain some flexibility for the investigating authority by allowing for a determination to decline to undertake action when such action is deemed to be against the national interest.

In addition to constituting an assessment of the legality and effects of the relevant trade barrier, legal instruments of this type also serve collateral negotiating purposes, by creating leverage with investigated countries. The EU's experience is illustrative in this respect – as a number of reviews initiated under the TBR have resulted in a mutually satisfactory resolution of the trade issue prior to conclusion of the procedures. However, while Section 301 served as an effective vehicle for leveraging resolutions of trade issues in the past, it has become relatively ineffective since the conclusion of the Uruguay Round negotiations, the WTO's inception and binding dispute resolution. Nonetheless, legal procedures such as Section 301 at a minimum create negotiating leverage through "name and shame" effects with some of the US' most important trading partners.

Conversely, Korea and Japan do not have legal procedures in place for the industry to petition for legal action against trade barriers. Instead, Korea and Japan resort to an informal inter-agency process to determine whether the trade barrier is consistent with international trade rules, and what action to take. The US has also operated under a similarly informal process in recent years as the use of Section 301 has decreased. These types of non-transparent procedures are more burdensome and time-consuming, lend themselves to political interference, and create situations of conflict among agencies with concurrent jurisdiction over the subject matter. Moreover, they do not create any negotiating leverage that would permit addressing the trade barrier in consultations with the regulating WTO Member.

Finally, the more pro-active exporting economies seem to be gravitating toward a model of increased inter-agency cooperation in the process of preparing, filing, and managing WTO disputes. *All* of the surveyed WTO Members attribute concurrent jurisdiction over WTO (or other international) disputes to different governmental agencies, depending on the subject matter of the dispute. The most notable example is the recently-created Interagency Trade Enforcement Center of the US, which coordinates enforcement actions in support of international trade rules, and congregates representatives of a variety of US government agencies such as the Depart-

ment of Commerce, Agriculture, State, Treasury, Justice, the International Trade Commission, and the CIA.

Based on the information gleaned from the above survey, we recommend that Brazil implements as soon as practicable a comprehensive market access strategy that is comprised of the following three pillars:

Market Access Reports: Brazil should develop a review mechanism whereby it would identify and monitor the main barriers to Brazilian exports of goods and services. This review mechanism should be as broad in scope as possible, and cover topics such as trade in goods, services, intellectual property rights, procurement policy, and investment. This review mechanism would result in the publication of annual reports that would identify barriers to Brazilian exports of goods and services in the 8 most important Brazilian export markets, but gradually be expanded to a total of 16 priority markets. Information about market access barriers should be compiled primarily by the Brazilian Foreign Trade Chamber (CAMEX) through the establishment of a specific Working Group tasked with identifying these measures, in coordination primarily with the Ministry of Agriculture, Livestock and Supply (MAPA), Ministry of Development, Industry and Trade (MDIC), Brazilian Ministry of Foreign Relations (MRE), and Brazilian Trade and Investment Promotion Agency (APEX). The establishment of an interactive database on barriers to Brazilian goods and services in foreign markets could also provide valuable input for the elaboration of Brazil's annual market access review. Over time, Brazil should also consider whether these annual market access reports could also serve as the basis for the development of a formal market access strategy report, which will outline Brazil's priorities and plan of action to address market access issues.

Petitioning Mechanism for Governmental Action: Brazil should create a formal internal legal procedure through which domestic producers formally could petition the government for legal action against trade barriers. The procedures should be open, transparent, predictable, with rigidly established deadlines, and result in the publication of a formal decision by the Brazilian government as to the legality of the measure under the relevant multilateral, regional, or bilateral legal disciplines, and making a formal recommendation as to the initiation for formal adjudicative procedures before the WTO, Mercosur, or other regional or bilateral fora. These procedures should provide for opportunity for internal consultations with the relevant stakeholders, as well as with the country against which legal recourse is being sought.

Review of International Litigation Resources: Brazil should engage in a review of the resources it devotes to international dispute settlement. At a minimum, Brazil should evaluate whether the number of government officials devoted to managing these complex disputes is proper, and commensurate with its market access priorities. Brazil should investigate further

whether and to what extent it would be desirable to increase inter-agency participation in the process of both preventing future disputes against Brazil, and elaboration and implementation of litigation strategies in Brazil's offensive cases. After a period of heightened activity in the 1996-2006 period, Brazil has used international dispute settlement less frequently, and should be better prepared for the challenges of litigating more complex and technical disputes against both developed and emerging economies.

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