

CHAPTER 15

UNILATERAL MEASURES

A. OVERVIEW OF RULES

1. BACKGROUND OF RULES

1) DEFINITION

In this chapter, a unilateral measure is defined as a retaliatory measure which is imposed by a country without invoking the WTO dispute settlement procedures or other international rules and procedures and is imposed based solely upon the invoking country's own criteria.

2) HISTORY OF UNILATERAL MEASURES

To date, the United States is the most frequent user of unilateral measures, and its application of them also tends to cause most problems. While the EU and Canada also have procedures for imposing unilateral measures similar to those of the United States, these procedures were introduced to provide a means of retaliating against unilateral measures imposed by the United States. Moreover, the EU and Canada have applied these measures only with extreme caution.

A review of post-war US trade policy shows two main streams of thought that diverged after passage of the Trade Act of 1974.

Prior to the 1970s, the Trade Expansion Act of 1962 gave the president wide-ranging trade authority. The Kennedy Administration used substantial tariff reductions to pursue trade liberalization and brought new rigor to the application of the escape clause (provisions on safeguard measures). The goal was to maintain the principles of trade liberalization and only apply remedy measures for damages incurred as a result of liberalization. Therefore, remedy measures were treated as the "exception" rather than the "rule." However, domestic interests were dissatisfied with the Kennedy Administration trade negotiating process because the Department of State was responsible for conducting trade negotiations and did not necessarily represent the interests of domestic parties. This resulted in the establishment of the Special Trade Representative (STR), the predecessor of the USTR, and laid the groundwork for the system later established with the passage of the Trade Act of 1974.

The increasing US trade deficit and oil crisis of the nineteen-seventies combined to increase protectionist pressure on Congress to relax the conditions for invoking trade remedy measures. In 1971, the United States recorded its first trade deficit of the 20th century. It was against this economic backdrop that the Trade Act of 1974 was passed, relaxing the requirements for relief under the escape clause measures and introducing a new "Super 301" provision (lapsed in 2001) that authorized retaliatory measures against unfair trade policies in foreign countries.

In the Reagan Administration of the late 1980s, the United States incurred enormous trade

deficits, and Congress' dissatisfaction (symbolized by the "Gephardt Amendment") eventually led to the passage of the Omnibus Trade and Competitiveness Act of 1988. This law reduced presidential discretion to invoke unilateral trade measures against foreign practices, policies, and customs deemed by the United States to be unfair and, instead, granted wide-ranging authority to the USTR to administer these cases. It also introduced a new "Super 301" provision that automated procedures in unfair trade investigations and made it significantly easier for the United States to impose unilateral measures.

The United States has repeatedly imposed or threatened unilateral measures under Section 301 as a means for settling trade disputes to its advantage. Section 301 allows the United States to unilaterally determine that a trade-related policy or measure of another country is "unfair" without following the procedures provided by the relevant international agreements. In the name of rectifying "unfair" practices, the United States has often threatened to use unilateral measures, and occasionally implements such measures to coerce the target country into changing the trade laws or practices at issue.

3) WHY ARE UNILATERAL MEASURES PROBLEMATIC?

First, unilateral measures are inconsistent with the letter and the spirit of the WTO, which is founded on the principle of multilateralism and the consensus and cooperation that flow from it. Article 23 of the Dispute Settlement Understanding ("DSU") explicitly prohibits Members from invoking unilateral measures that are not authorized under WTO dispute settlement procedures. The multilateral trading system is marked by countries observing international rules, including those provided by the WTO Agreement and its dispute settlement procedures. Disputes occurring within the system should be resolved through the available dispute settlement procedures, not by threatening or imposing unilateral measures.

Second, where agreements are reached through the threat or use of unilateral measures, the multilateral system may suffer. In particular, bilateral agreements secured under the threat or use of unilateral measures tend to deviate from the MFN principle, which is the most fundamental component of the multilateral framework under the WTO.

4) UNILATERAL MEASURES CANNOT BE JUSTIFIED

There are two popular rationales for unilateral measures. The first is that, since international rules are incomplete, both substantively and procedurally, defiance of these rules is justified to make existing rules function more effectively. The other rationale, based on economic or political theory, argues that credible threats of unilateral measures are effective in maintaining a free trading system from a strategic viewpoint.

Neither rationale, however, is persuasive. First, as we discuss in more detail below, the WTO Agreement covers a broader spectrum and maintains a stronger dispute settlement process than previous trade agreements. These enhancements destroy whatever rationale there may have once been for "justified" defiance. After all, such way of thinking may result in vicious circles of unilateral measures and allow arbitrariness by major states. The second rationale of "strategic justification" also is meaningless with the development of dispute settlement procedures that allow for WTO-controlled retaliatory measures.

Furthermore, unilateral measures are necessarily exercised on the basis of the "unilateral" decision of invoking states which play both roles of a plaintiff and judge. Since their decisions tend

to be made arbitrarily, solely from the perspective of interests in the invoking states, there is no guarantee that neutrality and fairness are secured when they take unilateral measures.

2. LEGAL FRAMEWORK

The WTO dispute settlement mechanism is the only forum for WTO-related disputes. Unilateral measures that are not consistent with WTO obligations, such as unilateral tariff increases and quantitative restrictions, are prohibited. Such measures violate several provisions of the WTO Agreement: Article I (General MFN Treatment), Article II (Schedules of Concessions), Article XI (General Elimination of Quantitative Restrictions) and Article XIII (Non-Discriminatory Administration of Quantitative Restrictions). In addition, the threat of unilateral tariff increases may have an immediate impact on trade, nullifying and impairing benefits accruing to the injured country under the WTO Agreement. In the past, the United States has rationalized its need to use unilateral measures by arguing that the GATT dispute settlement procedures were not effective. Inefficiency, however, can no longer be used as a justification for departing from dispute settlement procedures, because the DSU provides for a strict timeframe and greater automation to ensure quick dispute settlement.

RULES ON THE WTO DISPUTE SETTLEMENT PROCEDURES

The WTO dispute settlement procedures provides two rules, which go beyond previous dispute settlement systems by clearly prohibiting the use of unilateral measures concerning issues within the scope of the WTO rules. These rules are discussed below.

(1) Clear Obligation to Use the WTO Dispute Settlement Procedures

The WTO Agreement states clearly that all disputes must follow the WTO dispute settlement procedures and explicitly bans unilateral measures not conforming to these procedures. The use of unilateral measures in contravention of these procedures is itself a violation of the WTO Agreement. Article 23 of the DSU, which is a part of the WTO Agreement, stipulates that when a WTO Member seeks redress for a breach of obligations, nullification or impairment of benefits under the covered agreements, or for an impediment to attaining any objective under the covered agreements, the WTO Member shall follow the rules and procedures set forth in the DSU.

Although it was also obvious that the settlement of GATT-related disputes should be governed by the GATT dispute settlement procedures, the fact that this principle has been explicitly stated at the establishment of WTO represents a significant step forward.

(2) Expanded Coverage of the Agreement

The WTO Agreement expands the GATT coverage from goods alone to include trade in services and intellectual property rights. As discussed later in this chapter, in addition to disputes involving trade in goods, the United States has applied Section 301 in an effort to open markets for services and to increase the level of protection afforded intellectual property rights. Under the WTO Agreement, however, there no longer exists justification for the United States to ignore multilateral processes and to resort to unilateral measures.

In light of the two considerations above, we have categorized unilateral measures based on: (1) the nature of the underlying dispute; (*i.e.*, whether the country imposing the unilateral measures

Part II: WTO Rules and Major Cases

claims damages based on a WTO violation or damages in areas not covered by the WTO); and (2) the nature of the measures enacted (*i.e.*, whether the measures violate the WTO Agreement – for example, tariff increases within bound rates). Figure II-15, below, discusses whether these various unilateral measures are consistent with the WTO Agreement. As indicated in the chart, the measures in question, except for item D, may violate Article 23 of the DSU and/or be inconsistent with the WTO Agreement.

In the case of item D, a unilateral measure would not itself constitute a violation of the WTO Agreement. For example, a unilateral measure could be taken against a trading partner's measure that was allegedly outside the scope of the WTO Agreement, even though in actuality the measure was within the scope of the WTO Agreement. Under this scenario, the enforcing country could unreasonably escape WTO violation. To avoid this problem, it should be made clear that regardless of whether each case is related to the WTO Agreement, it should be judged objectively according to the rules of dispute settlement.

Figure II-15 Unilateral Measures and WTO Coverage

		Unilateral Measures	
		In violation of the WTO Agreement	Not in violation of the WTO Agreement
Contents of disputes	WTO-related disputes	A Violation	B Violation
	WTO non-related disputes	C Violation	D

Notes:

1. For items A and B, utilization of the WTO Dispute Settlement process is required according to Article 23 of the DSU. Unilateral measures in these situations are thus inconsistent with Article 23 of the DSU.
2. For item C, the measure in question will be inconsistent with the WTO Agreement.
3. For item D, there is no violation of the WTO Agreement (though there remains the option of a non-violation complaint for the injured country). As the scope of the WTO Agreement has expanded dramatically, the range of D, to which the WTO does not apply, has shrunk dramatically.

3. ECONOMIC ASPECTS AND SIGNIFICANCE

Retaliatory measures that are not based on WTO dispute settlement procedures have enormous potential to distort trade. Tariff hikes and the like are themselves trade distortive measures; their unilateral application is likely to provoke retaliation from the trading partner, leading to a competitive escalation of retaliatory tariffs. Unilateral measures are often based on domestic interests (*i.e.*, protection of domestic industries and profits for exporters), and once procedures are initiated it may be extremely difficult domestically to suspend or terminate them.

It should be clear that unilateral measures reduce trade both for the country imposing them and the country against which they are imposed. They are detrimental to the domestic welfare and economic interests of both countries, and impair the development of world trade. One need only

recall the competitive hikes in retaliatory tariffs during the 1930s and the vast reductions in trade and the worldwide economic stagnation that they produced.

B. MAJOR CASES

(1) The Japan-US Auto Dispute (DS6)

The *Japan-US Auto Dispute* was the first case in which a US Section 301 action was challenged under WTO dispute settlement procedures. The United States initiated a Section 301 investigation against the Japanese aftermarket for auto parts on 1 October 1994, and announced sanctions on 5 May 1995. The United States proposed unilateral measures that would impose 100-percent import duties on Japanese luxury automobiles. In response to this unilateral threat, Japan immediately requested consultations pursuant to GATT Article XXII with the United States.

In these consultations, Japan protested that retaliatory import duties imposed only on Japanese luxury automobiles by the United States violated the WTO provisions of most-favored-nation treatment (GATT Article I), schedules of concessions (GATT Article II) and general elimination of quantitative restrictions (GATT Article XI), and that this measure also violated DSU Article 23, which prohibits resolving disputes covered by the WTO Agreements by unilateral measures such as Section 301 action rather than through the WTO. The United States insisted that through Section 301 procedures they determined Japanese restrictions to be “unreasonable and discriminative” under their domestic laws, but not as inconsistent with the WTO Agreements. They insisted that Section 301 and the DSU were conceptually different and their decision raised no problems of consistency. However, by this line of argument, even though countries resort to unilateral measures, it would not be a violation of DSU Article 23 unless they clearly refer to “WTO Agreement violation” as a reason for their measures. In this case, the US government sent a letter dated on May 9, 1995 to the WTO Director-General, requesting WTO dispute settlement against Japan. In this letter, the US government stated that “Due to (Japan’s) excessive and complicated restrictions, most automobile services are awarded to designated maintenance factories closely connected to domestic auto parts makers.” Furthermore, directly quoting the WTO and TBT Agreements (Article 2 Clause 2 and Article 5 Clause 1), they mentioned that these restrictions had caused unnecessary barriers to international trade. These facts showed that the United States clearly recognized Japan’s restrictions in the aftermarket should be covered under the WTO Agreements. In any case, it is not interested countries but international adjudicators such as panels that should determine whether cases causing unilateral measures should be covered under the WTO Agreements or not.

Ultimately, the dispute was settled through bilateral negotiations outside the WTO process, but the fact that the matter was referred to WTO dispute settlement procedures and that negotiations took place before the international community was integral to achieving a resolution in conformity with international norms and to preventing a trade war. In particular, at the DSB meeting on this case in May 1995, approximately 30 member countries criticized the unilateral notification of tariff hikes by the United States and urged the utilization of WTO dispute settlement procedures. International opinion at these multinational meetings played a significant role in solving this case.

(As for US requests for Japanese companies to buy foreign products, which brought about the *Japan-US Auto* dispute, refer to “Data: ‘When Foreign Governments Directly Request Japanese

Companies to Buy Foreign products' (1995 Report on the WTO Inconsistency of Trade Policies by Major Trading Partners, Appendix III).")

(2) The Japan-US Film Dispute (DS44)

The United States requested bilateral negotiations with Japan in this case under Section 301, but Japan's adamant opposition to engage in negotiations under this provision resulted in the case being brought before a WTO dispute settlement panel. The thrust of the US claim was that the actions of the government of Japan in relation to consumer photographic film and photographic paper were in violation of GATT Article XXIII: 1(b). Rather than arguing that the measures taken were themselves violations of the WTO Agreement, the United States argued that the measures nullified and impaired the interests of other countries under the Agreement. The panel, however, rejected all US claims.

In this dispute, the United States announced that statements made in the government of Japan's legal submissions to the WTO dispute settlement panel are "commitments" subject to monitoring to ensure their implementation. Based on this position, the United States released its first "Monitoring Report" in August 1998. The US position is untenable. Like all submissions to WTO dispute settlement panels, Japan's submissions in the Film Dispute presented historic factual circumstances and legal principles at issue in the particular case. The US characterization of these factual representations about the past as future "commitments" represents a unilateral attempt to create new future obligations. Such an approach is unreasonable and could be viewed as a derivative of Section 301. Although the United States intends to issue reports biannually, Japan should not accept such an approach.

(3) The EU-Banana Dispute (DS27)

Under the Lomé Convention, the European Union provides preferential treatment to imports of bananas from African, Caribbean, and Pacific ("ACP") countries. A WTO panel and the Appellate Body both ruled that the EU banana imports regime violated MFN and other WTO obligations. The EU announced that it would rectify the relevant measures by 1 January 1999, but none of the EU proposals to do so were accepted by the complaining parties (the United States, Ecuador, Guatemala, Honduras and Mexico). In April 1999, the United States imposed retaliatory tariffs, but agreement between the US and the EU, and the EU and Ecuador, in April 2001 resulted in the elimination of these tariffs in July 2001. (See Part II, Chapter 1 "Most-Favoured-Nation Treatment Principle" for Panel and Appellate Body Reports, and Chapter 16 "Regional Integration" for relation with Lomé Convention)

i. History of the EU-Banana Disputes

In accordance with the WTO recommendations, the EU furnished two implementation drafts, one in July 1998 and the other the following October. The complaining parties (the United States, Ecuador, Guatemala, Honduras and Mexico), however, asserted that the proposed amendments still illegally favored the ACP countries and were, therefore, inconsistent with the WTO Agreements. In December 1998, the EU and Ecuador both requested the establishment of the original panel under Article 21.5 of the DSU.

Meanwhile, the US government, under strong pressure from the affected parties through Congress, decided to invoke unilateral measures under Section 301 against the EU. The United States asserted that such unilateral measures were authorized by Article 22 of the DSU if the EU did

not amend its banana import regime in compliance with the WTO Agreements. The EU asserted that any application of unilateral measures must be preceded by approval from the panel pursuant to Article 21.5 of the DSU. In November 1998, the EU requested consultations, insisting that the US Section 301 imposed measures were inconsistent with Article 23 of the DSU's prohibition on imposing unilateral sanctions.

In December 1998, pursuant to Section 301, the United States imposed unilateral measures totaling \$520 million on handbags, Kashmir wool products and other goods imported from the EU. The US and the EU agreed to refer the case to arbitration. The WTO issued the results of this arbitration on 6 April 1999 and approved up to \$191.4 million of the \$520 million in sanctions sought by the United States. The US government announced that it would finalize a list of sanctions and collect them retroactively from 3 March 1998. The 19 April DSB meeting approved the US proposed list of sanctions. In December 2000, the EU announced a "first-come, first-serve" system that grants banana import licenses under the tariff quota to parties preferentially exporting bananas to the EU market. It was proposed that the quota system would take effect in April 2001, with a tariff-only system to take effect no later than 2006.

In April 2001, an agreement was finally reached between the US, Ecuador and the EU in what had become a very protracted dispute. One of the stipulations in the agreement was that the EU would institute a licensing system beginning on 1 July 2001 as a transitional measure, shifting to a tariff-only system in January 2006. The licensing system was implemented as scheduled, leading the US to lift the sanctions imposed on the EU since 1999, effective 1 July.

This issue was continuously taken up at DSB meetings, and discussions were held to unify the custom duties by the end of 2005, which was the mandated time of the agreement between the EU, the US and Ecuador signed in 2001. At the beginning of 2005, the EU proposed to apply "specific tax 230 Euros/mt + no tariff quotas" on imports of bananas. The affected countries expressed concern that the new proposal might limit the import of bananas grown in the third countries. They had negotiations with the EU, but failed to achieve agreement. Therefore, in March and April in 2005, nine Latin American countries (Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Panama, Venezuela, Nicaragua and Brazil) applied for initiation of arbitration procedures pursuant to the DSU. In August 2005, the arbitration panel ruled that the EU proposal was not WTO consistent, due to the inappropriateness of calculation of specific taxes and the absence of proper measures for ACP countries. At the end of November 2005, the EU published the "introduction of specific tax 176 Euros/mt + exemption of tariffs for 775,000 tons (ACP countries) (in January 2006)". However, three Latin American countries (Honduras, Nicaragua and Panama) insisted that this proposal was inconsistent with recommendations by the WTO Appellate Body and subsequent arbitration decisions, and requested consultations on November 30. Subsequently, in early 2006, Ecuador also requested consultations in order to reconsider these decisions. In February 2007, the countries above requested the establishment of dispute settlement panel under the terms of DSU Article 21.5, which took place in March, and in April 2008 the panel's report was distributed, which stated that neither the recommendation nor the ruling of the DSB had been executed by the EU. At the same time, the US had also requested the establishment of a panel based on DSU Article 21.5 in June 2007, and in July of the same year this panel was convened, subsequently distributing a report in May 2008 stating that the EU had been unable to implement either the recommendation or the ruling of the DSB. In August 2008, the EU appealed the reports of both these panels, but in November the same year the Appellate Body issued a decision stating that the EU should bring its banana import systems into line with the WTO Agreements.

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In December 2009, the EU announced that it had reached a historic agreement with Latin American countries concerning the banana dispute. In January 2010, the EU stated that it also had reached an agreement with Ecuador. As a result, this issue was dropped from the agenda of DSB meetings. In November 2012, all concerned countries gave their notification of “mutually agreed solutions” under Article 3.6 of the DSU.

ii. Issues in this Case from the Viewpoint of the WTO Agreements

a) Relationship between Article 21.5 and Article 22 of the DSU

Article 22 of the DSU states that if the DSB’s recommendation is “not implemented within a reasonable period of time,” concerned Members may request authorization from the DSB to invoke unilateral measures (“suspension of concessions”). Since the DSB uses a “reverse consensus” method for decision-making, authorization is virtually automatic unless the concerned countries express objection and refer the matter to arbitration.

In this case, the EU insisted, based on Article 21.5, that the panel should judge the WTO consistency of the losing Member’s implementation as a prerequisite to any unilateral measures set forth in Article 22 and requested the General Council to adopt an authoritative interpretation. In the DSU, there is no provision indicating the relationship between Article 21.5 and Article 22. However, it is generally considered that the prevailing party cannot impose unilateral measures by independently determining that the measure taken by the losing Member to implement the DSB’s recommendation is not consistent with the WTO Agreements. In such a case, the matter should be referred to the original panel as stipulated under Article 21.5 of the DSU. This issue was studied during the DSU review, with a new Article 21.2 (formulated by Japan) included in the joint proposal on improving the DSU. Following the Doha Ministerial Meeting, the EU, Japan and others submitted an amended proposal during the debate on reviewing the DSU.

Importantly, if a panel’s finding with regard to Article 21.5 is a strict prerequisite for imposing unilateral measures, a procedural defect in the form of an “endless loop” would exist. That is, if the losing Member does not implement the DSB’s recommendation in good faith, the matter would be referred to the original panel, repeating eternally the Article 21.5 procedure.

b) Application of Measures by the U.S. on imports of EU products

The DSB approved US retaliatory tariffs against the EU on 19 April 1999, but the United States originally expected approval by 3 March and had required deposits in the amount of the tariff before 19 April. Consequently, this had the effect of instituting retroactive tariffs dating back to 3 March. The EU requested that a panel be convened in May 1999, alleging that this retroactive measure by the United States was in violation of Article 23 of the DSU. In July 2000, a report was distributed by the panel that virtually upheld the EU’s argument, but the EU filed an appeal with the Appellate Body in September 2000 because it was still dissatisfied with the panel’s ruling on some points. The Appellate Body report, distributed in December 2000, treated the 3 March measure separately from the 19 April measure and overturned the panel’s ruling by finding that the 3 March measure no longer existed and that there was, therefore, nothing for the United States to remedy. However, the Appellate Body upheld the finding of the panel that the 3 March measure was a unilateral measure taken by the United States without the approval of the DSB and, therefore, in contravention of Article 3.7 of the DSU. The Appellate Body avoided defining the order of precedence between Article 21 and Article 22 procedures in its ruling. However, it found that the panel improperly ruled that the mediator under Article 22.6 could judge the implementation of the

DSB's recommendation (role under Article 21.5). Japan supports these rulings by the Appellate Body.

Note: Like the Banana case, the Beef Hormones case is another instance in which there have been conflicts between fulfilling the WTO dispute settlement procedures and the unilateral measures found in Section 301 of the US Trade Act. See Chapter 11, Standards and Certification, Part II for a discussion of this case.

(4) US - Section 301 Trade Act (DS27)

See Part II, Chapter 3 "Unilateral Measures (1) Section 301 of the Trade Act of 1974 (procedure after amendment by Section 1301 of the 1988 Act) and other related provisions."

COLUMN: THE EU ANALOGOUS MEASURES

TRADE BARRIERS REGULATION (TBR)

The European Union maintains a procedure called the Trade Barriers Regulation ("TBR"), which appears to be analogous to US Section 301. The EU measure was instituted in December 1994 by EU Council Regulation No.3286/94 (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) and amended prior EU law in this area.

In principle, Article 133 (former Article 113) of the Treaty of Amsterdam granted the EU authority to enact unilateral trade measures as long as the measures were within the scope of common economic policy. This led in 1984 to EU Council Regulation No.2641/84, the "Council regulation on strengthening of the common commercial policy with regard in particular to protection against illicit commercial practices" (hereinafter "New Commercial Policy Instrument (NCPI)"). The regulation provided a framework through which the European Union could take unilateral measures. The NCPI framework was superseded by the TBR to ensure better conformity with the WTO dispute settlement procedures.

Like Section 301 of the US Trade Act, the TBR is intended to promote the opening of foreign markets, but differs in some aspects. First, its scope is limited to trade practices for which international trade rules establish a right of action. Second, there is no rigid time frame between the initiation of an investigation and a determination, and the EU is bound by the findings of the dispute settlement procedures. The EU regime seems more consistent with the DSU. We can hardly say that this regime itself constitutes a "unilateral measure" prohibited by the DSU. Because the philosophy of this scheme is somewhat similar to our "rule-based criteria," it has some positive aspects. Nevertheless, since its scope is not limited to violations of the WTO Agreements, and the organizations to which dispute cases are referred are not limited to the WTO, it could violate the WTO Agreements if improperly applied. We believe that its practical application in the future needs to be monitored.

(1) Description

In addition to its objective to protect European enterprises from foreign unfair trade practices, the

TBR also aims to support the activities of European enterprises in foreign markets. In this system, a community industry, an individual enterprise, or an EU Member country can request the European Commission to investigate “obstacles to trade” based on the Community’s or individual enterprise’s benefit.

Notes: The major changes to the NCPI made in 1994 are described below.

In the NCPI, the measures of foreign countries within the scope of petitions were defined as “illicit commercial practices”. The TBR introduced the concept of “trade barriers” in its place. They are defined as “trade practices adopted or maintained by a third country in respect of which international trade rules establish a right of action.” Thus its relation to international trade rules was clarified, and the scope of the procedures was expanded to cover non-violation complaints.

Rules regarding services and intellectual property have been added since the WTO Agreement established trade rules for services and intellectual property as well as goods.

As the TBR permits individual enterprises to submit a petition based on that enterprise’s own benefit, it became easier for those within the Union to avail themselves of procedures regarding trade barriers to outbound trade.

The European Commission, if requested, will start an investigation normally within 45 days, and investigate the foreign measure within five months (in complicated cases, seven months). If the foreign measure is determined to be an “obstacle to trade” after the investigation, the European Commission refers the matter to international dispute settlement procedures (mainly to the WTO dispute settlement system). If the measure is determined to be illegal in the international dispute settlement system and the defendant country does not improve the measure, the European Council will decide to take unilateral measures within 30 days based on the European Commission’s proposition. Moreover, any action by the European Commission and the Council of Ministers under this regulation, including refusal to open a procedure, can be challenged in the European Court of First Instance by any interested party.

The unilateral measures under this regime include measures affecting trade with third countries, such as raising tariff rates and the imposition of quantitative restrictions. The TBR maintained the obligation to make full use of and respect for the determination of the dispute settlement procedures of international arrangements before deciding on unilateral measures. In light of the strengthened WTO dispute settlement procedures, it makes special note of the need to take measures in line with the WTO recommendations.

(2) Case of Application

See “Column: The EU analogous measures” in Chapter 15, Part II of the 2014 Report on Compliance by Major Trading Partners with Trade Agreements for recent cases taken up by the TBR.