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ORIGINAL ARTICLE

Normative Realignment in Domestic Trade Barriers Procedures: Driving Unilateralism in the EU, US, and China

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Abstract
This article critically examines the evolution and potential of domestic trade barrier procedures in the US, EU, and China. Emblematic of this mechanism is US Section 301. Aimed at facilitating market access, these procedures function as tools of unilateralism and strategic leverage. Employing qualitative and comparative methods, the analysis explores their use in handling private complaints and combating adverse trade practices, highlighting a trend of 'normative realignment' in the deployment of these procedures. Once focused on resolving private grievances, such procedures are now increasingly playing a role in securing national interests. This shift marks a departure from traditional international cooperation, reflecting a recalibration of trade policies. Against the backgroup of growing encystment of unilateralism, the article argues that domestic trade barrier procedures could be adapted to address the demands of the current global economic environment. The article posits that, if executed properly, domestic trade barrier procedures may serve as a buffer mechanism vis-a-vis the tectonic shifts in economic order. In doing so, the article envisions a new generation of domestic trade barrier procedural frameworks.

Keywords: market access; unilateralism; protectionist measures; economic coercion; trade barrier regulation; Section 301; rules on foreign trade barrier investigation

1. Introduction

At the forefront of modern international trade dynamics rests a crucial, albeit frequently overlooked, mechanism: domestic trade barrier procedures. Originally established to facilitate market access through well-defined domestic rules,[1] the significance and application of domestic trade barrier procedures have not only dramatically changed over the past decade but are now on the rise. The United States (US) has established a precedent with its strategic use of Section 301 to confront alleged unfair trade practices, marking a clear departure from previous

[1]See generally, M. Bronckers (1984) 'Private Response to Foreign Unfair Trade Practices: United States and European Community Complaint Procedures', *Northwestern Journal of International Law and Business* 6, 651; P.C. Mavroidis and W. Zdouc (1998) 'Legal Means to Protect Private Parties' Interests in the WTO: The Case of the EC New Trade Barriers Regulation', *Journal of International Economic Law* 1, 407; G.C. Shaffer (2006) 'What's New in EU Trade Dispute Settlement? Judicialization, Public–private Networks and the WTO Legal Order', *Journal of European Public Policy* 13, 832; D. Sundberg and E. Vermulst (2001) 'The European Community Trade Barriers Regulation: An Obstacle to Trade?', *Journal of World Trade* 35, 1005; H. Gao (2010) 'Taking Justice into Your Own Hand: The TBI Mechanism in China', *Journal of World Trade* 44, 633; M. Bronckers (2008) 'Private Appeals to WTO Law: An Update', *Journal of World Trade* 42, 245.

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practices.[2] Simultaneously, the European Union (EU) issued special Anti-Coercion Regulation, earmarked to tackle trade barriers with coercive intents.[3] China's recent probes into Taiwan's trade restrictions and the EU's Foreign Subsidies Regulation further exemplify this accelerated evolution towards more assertive national trade policies.[4] It is noticeable that trade barriers are increasingly politicized and weaponized; so are trade barrier investigations. The escalation towards unilateralism,[5] observed across various countries, is underpinned by the stalemate faced by WTO's Appellate Body.[6] Together, these developments challenge the foundational purpose of established multilateral trade mechanisms in ensuring market access, highlighting the need for a re-evaluation of domestic trade barrier arsenals.

In this context, this article examines domestic trade barrier procedures through qualitative and comparative analysis, aiming to clarify and recalibrate their role in addressing harmful trade practices. The analysis uncovers how domestic trade barrier procedures have transitioned from their initial objectives of enhancing market access and bridging private complaints to acting as instruments of unilateralism and strategic leverage. The discussion further points to the possible reform trajectories for these procedures with a view to increasing their effectiveness and relevance in addressing trade barriers in the current geopolitical climate. The article posits that, if executed properly, domestic trade barrier procedures may serve as a buffer mechanism vis-a-vis the tectonic shifts in economic order.

This article concentrates on three pivotal jurisdictions – the EU, the US, and China – whose unilateral actions significantly affect the international trading system.[7] The specific mechanisms under scrutiny here are Section 301 in the US,[8] the Trade Barrier Regulations (referred to as 'TBR') in the European Union,[9] and the rules of the foreign Trade Barrier Investigations (referred to as 'TBI') in China.[10] While these mechanisms bear distinct names, historical backgrounds, and particularities, they share a two-fold function regarding market access. *Firstly*, these mechanisms lay the statutory grounds for domestic investigations, potentially leading to the initiation of WTO cases or other responsive actions against harmful trade practices. *Secondly*, they create a platform for private petitions and formal channels for private–public communication and collaboration when confronting trade obstacles.[11] Ideally, the institutionalization of this dual function could

[2]S. Lincicome et al., 'Unfair Trade or Unfair Protection? The Evolution and Abuse of Section 301', CATO (14 June 2022), www.cato.org/policy-analysis/unfair-trade-or-unfair-protection-evolution-abuse-section-301 (accessed 15 July 2024).

[3]European Commission, Regulation (EU) 2023/2675 on the Protection of the Union and its Member States from Economic Coercion by Third countries.

[4]R. Jennings and K. Wong, 'Mainland China launches probe into Taiwan's "trade barriers" affecting 2,400 products', *SCMP*, 12 April 2023, www.scmp.com/economy/global-economy/article/3216789/mainland-china-launches-probe-taiwans-trade-barriers-affecting-2455-products (accessed 15 July 2024); *Global Times*, Exclusive: EU's FSR Violates Multilateralism, Erects Barriers for Chinese Companies, Authoritative Experts Say, 2 July 2024.

[5]J. Chaisse and G. Dimitropoulos (2021) 'Special Economic Zones in International Economic Law: Towards Unilateral Economic Law', *Journal of International Economic Law*, 24(2), 229, 235–240; J. Bhagwati (2002) 'Introduction: The Unilateral Freeing of Trade versus Reciprocity', i*Going Alone: The Case for Relaxed Reciprocity in Freeing Trade*. Cambridge, MA: MIT Press; K. Claussen (2019) 'Can International Trade Law Recover? Forgotten Statutes: Trade Law's Domestic (Re)Turn', *American Journal of International Law Unbound* 113, 40.

[6]W.J. Davey. (2022) 'WTO Dispute Settlement: Crown Jewel or Costume Jewelry?', *World Trade Review* 21(3), 291–300.

[7]Major trading jurisdictions worldwide have established trade barrier mechanisms. This study scrutinizes over 30 such systems, with a focus on systemic players such as the US, China, the EU, Canada, Japan, India, and Brazil. For example, Canada's International Trade Tribunal (CITT) investigates trade barriers, while India's Foreign Trade Disputes Settlement Appellate Tribunal (FTDSAT) adjudicates foreign trade disputes. Japan and Brazil also have bespoke dispute resolution systems. Notably, only the EU, US, and China consistently provide detailed data on trade barriers, facilitating comprehensive analysis over extended periods, unlike Canada, Japan, India, and Brazil, where data limitations and less frequent WTO litigation impact analytical depth.

[8]Trade Act of 1974, Pub. L. No. 93–618, § 301, 88 Stat. 1978, 2041-43 (codified as amended at 19 USC. § 2411).

[9]Regulation 2015/1843, 2015 O.J. (L 272) 1, codifying and repealing Regulation 3286/94, 1994 O.J. (L 349) 71.

[10]MOFCOM, Duiwai Maoyi Bilei Diaocha Guize [Regulation on Foreign Trade Barriers Investigation Rules], entering into effect on 1 March 2005.

[11]G.C. Shaffer (2003) *Defending Interests: Public-Private Partnerships in WTO Litigation*. Brookings Institution Press, 12-3; See supra n. 1; see also J.C.V. Eeckhaute (1999) 'Private Complaints against Foreign Unfair Trade Practice: The European

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foster a legalistic approach to addressing harmful trade practices and advancing rules-based fair-trade.

The article first demonstrates an emerging trend in the deployment of trade barrier procedures, showing that in the US, the EU, and China, these mechanisms have been increasingly used as strategic tools rather than as mechanisms for systematically addressing market access hindrances. The article coins this gradual shift as a 'normative realignment', which emerged as both a cause and a consequence of waning commitment to multilateralism.[12] The article then sets forth the operational paradigm of trade barrier procedures in addressing trade grievances, and on this basis, suggests that the role of trade barrier mechanisms must be re-evaluated and aligned with the recent developments. The article proposes several aspects where changes could be made.

The remainder of this paper is organized as follows. Section 2 outlines the history, objectives, and functions of domestic trade barrier procedures in three key jurisdictions: the US, the EU, and China. Section 3 evaluates the performance of domestic trade barrier procedures, addressing questions related to private actors' initiation of formal complaint proceedings, official investigations initiated in response to private requests, and the correlation between domestic trade barrier procedures and retaliation. Section 4 positions domestic trade barrier procedures within the broader context of power politics and provides a comprehensive overview of their limitations. Section 5 offers insights into the future of domestic trade barrier procedures and reform orientations. From the halls of multilateralism to the corridors of unilateral action, the journey of trade barrier procedures narrates a tale of strategic evolution and diplomatic pivots.

2. An Overview of Trade Barrier Mechanisms

This section outlines the history, objectives, and mechanics of domestic trade barrier investigation procedures.[13] The description focuses on the evolvement of domestic trade barrier procedures, their scope, rights of private applicants, discretionary power of government authorities under the procedures, and responsive actions following the investigations. The section emphasizes that the original purpose of domestic trade barrier procedures was to link private complaints and dispute resolution in order to combat detrimental trade practices by foreign states.

2.1 Historical Foundations and Objectives of Trade Barrier Procedures

The trade barrier procedures discussed in this article are a body of domestic legislation that instructs states to detect and respond to foreign unfair trade praxis. One of the earliest examples

Community's Trade Barriers Regulation', *Journal of World Trade* 33, 202; M. Bronckers and N. McNelis (2001) 'The European Union Trade Barriers Regulation Comes of Age', *Journal of World Trade* 35, 427; R. Sherman and J. Eliasson (2006) 'Trade Disputes and Non-state Actors: New Institutional Arrangements and the Privatisation of Commercial Diplomacy', *World Economy* 29, 473; C.G. Molyneux (1999) 'The Trade Barriers Regulation: The European Union as a Player in the Globalisation Game', *European Law Journal* 5, 375; N. McNelis (1998) 'The European Union Trade Barriers Regulation: A More Effective Instrument', *Journal of International Economic Law* 1, 149.

[12]'Normative realignment' conceptually refers to the process through which the underlying norms and values that guide regulatory practices are systematically transformed. This transformation can reflect changes in societal values, technological advancements, or shifts in political power, leading to a reevaluation and subsequent adjustment of legal standards. In the context of this article, the concept of 'normative realignment' offers a significant explanation for the evolution of domestic trade barrier procedures by emphasizing the dynamic nature of the norms and values that underpin these regulations. It conceptualizes a change in the foundational principles that guide trade policy, from a predominantly collaborative, multilateral framework towards a more unilateral, domestically focused approach – without necessitating formal legal amendments to the rules. The explanatory force of this concept lies in its ability to capture the fluidity of domestic trade norms but also to shed light on the growing tension between national interests and international trade objectives.

[13]For comprehensive comparative analyses of the three mechanisms see Bronckers, supra n. 1; Mavroidis and Zdouc, supra n. 1; J. Song (2007) 'A Comparative Study on the Trade Barriers Regulation and Foreign Trade Barriers Investigation Rules', *Journal of World Trade* 41, 799.

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of domestic trade barrier procedures is US Section 301, initially established as a self-help tool to supplement the GATT's weak dispute resolution and enforcement system.[14] Section 301 is a legal provision that allows the US to retaliate foreign countries that break trade agreements with the US or participate in actions that are considered unjustified or unreasonable and negatively impact US commerce. [15] Therefore, Section 301 could be used not only in the case when US' rights under trade agreements are afflicted but also any other trade practices that it deems unfair arise.

Foreign harmful acts are widely defined under Section 301. Apart from regular trade in goods, the US Congress expanded the purview of Section 301 several times to include various subject matters, including services and investment, intellectual property rights (IPR) protection, competition law enforcement, and labour practices.[16] As a result, Section 301 is said to cover 'virtually any trade practice the USTR [United States Trade Representative] wishes to attack'.[17]

The effectiveness of Section 301 in gaining market access is evident in its provenance.[18] From 1974 to 1985, the US predominantly utilized the mechanism to deal with any GATT non-compliance acts committed by its trading partners, thereby maintaining its position as a leading trading nation.[19] This focus is reflected in the profile of early Section 301 investigations, which were primarily directed at emerging economies or economic rivals to the US, such as the EU, Canada, Japan, and South Korea. Section 301 was therefore perceived as a major culprit of trade relations with the US by its trading partners,[20] eventually leading to the hallmark Section 301 case in 1998.[21] To be clear, although the WTO does not prohibit Member States from investigating alleged trade barriers unilaterally, it constrains unauthorized retaliation. Hence, while the Section 301 panel did not declare Section 301 as such as an outlaw, it considered the statute as a 'prima facie' violation of WTO obligations. [22] Subsequently, this ruling has curtailed the possibility of using Section 301 to attain rights under the WTO.[23] As will be demonstrated in this article, Section 301 has since then been gradually transformed from a major unilateral tool for economic reprisal to a procedural arrangement that links private complaints and dispute resolution.

The adoption of Section 301 ruling has also affected the drafting of the subsequent trade barrier investigation procedures in other jurisdictions. Both the EU's TBR and China's TBI were inspired by Section 301.[24] Yet, they are not intended to be used in the same way as Section 301 initially. The EU's own TBR, which has replaced its forerunner, New Instrument

[14]T.J. Trendl (1990) 'Self-Help in International Trade Disputes', *Proceedings of the American Society of International Law* 84, 32; J.H. Bello and A.F. Holmer (1998), 'The Heart of the 1988 Trade Act: A Legislative History of the Amendments to Section 301', *Stanford Journal of International Law* 25, 1, at 10; C. O'Neal Taylor (1997) 'The Limits of Economic Power: Section 301 and the World Trade Organization Dispute Settlement System', *Vanderbilt Journal of Transnational Law* 30, 209, at 214.

[15]Office of the United States Trade Representative, 'Enforcement' (*USTR*), https://ustr.gov/issue-areas/enforcement (accessed 15 July 2024).

[16]J.R. Silverman (1996) 'Multilateral Resolution over Unilateral Retaliation: Adjudicating the Use of Section 301 Before the WTO', *University of Pennsylvania Journal of International Economic Law* 17, 233.

[17]A. Sykes (1992) 'Constructive Unilateral Threats in International Commercial Relations: The Limited Case for Section 301', *Law and Policy in International Business* 23, 263, 281.

[18]R.E. Hudec (1974) 'Retaliation Against Unreasonable Foreign Trade Practices: The New Section 301 and GATT Nullification and Impairment', *Minnesota Law Review* 59, 461.

[19]Taylor, supra n. 14, at 222.

[20]The Section 301 provoked a barrage of debate concerning its pros and cons. See for instance, Hudec, supra n. 18; A. Lynne Puckett and W.L. Reynolds (1996) 'Rules, Sanctions and Enforcement Under Section 301: At Odds with the World Trade Organization?', *American Journal of International Law* 90, 675 (1996); J.H. Bello and A.F. Holmer 'Significant Recent Developments in Section 301 Unfair Trade Cases', *International Lawyer* 21, 211 Sykes, supra n. 17, at 281.

[21]Panel Report, *United States–Sections 301–310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000.

[22]Panel Report, *US* – Section 301 *Trade Act*, para 8.1.

[23]From the inception of the WTO to 1998, 24 investigations were launched, exceeding the annual average during Section 301's early days. Shaffer, supra n. 11, at 51.

[24]Mavroidis and Zdouc, supra n. 1; Bronckers, supra n 1; C. Cai (2003) '中欧贸易壁垒调查立法比较研究' ['Comparative Study on Investigation and Legislation of Chinese–EU's Trade Barriers]', *Chinese Law* 157

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of Commercial Policy,[25] came about in 1994 as part of the Uruguay Round implementation package.[26] However, unlike the early Section 301, the TBR was in the beginning expected to serve as a procedural means for private actors to request the Commission to lead their claims to dispute settlement.[27] This is evidenced by the fact that the procedure can only be triggered by complaints.[28] The legal basis for the TBR, Regulation 3286/94, was amended five times, with the most recent amendments taking effect in 2015.[29] A wide sweep of economic activities, including trade in goods, trade in services, and IPR issues, fall within the ambit of the TBR.[30] Yet, it is worth noting that, different from Section 301, the TBR was designed merely to assist the EU in pursuing international law-based rights.[31] Consequently, the TBR does not cover 'unfair' trade practices beyond bilateral and international accords to which the EU is a party. Overall, trade obstacles should meet three criteria to be considered actionable under the aegis of TBR: (1) they should be State act *stricto sensu*, as opposed to private restrictive business practices;[32] (2) with regard to the alleged obstacles there should be the *international trade rules* 'establish a right of action', including both outright prohibition and WTO non-violation claims[33]; and (3) the challenged obstacles should result either in injury on the EU market or have adverse trade effects on third-country markets.[34]

In China, the adoption of TBI was driven by the Chinese government's concerns about mounting trade remedy measures against Chinese exports.[35] Provisional rules on TBI were promulgated in 2002, followed by the adoption of official rules in 2005.[36] Pursuant to Article 1 of the TBI, the rules were enacted 'in order to conduct and standardize the investigation of foreign trade barriers, eliminate the impact of foreign trade barriers on [China]'s foreign trade, and promote the normal development of foreign trade'.[37] In addition, Foreign Trade Law of the People's Republic of China (hereinafter, 'Foreign Trade Law'), which is a mainstay of Chinese foreign trade legislation, designates the Ministry of Commerce of the People's Republic of China (MOFCOM) as the responsible authority for addressing foreign trade matters nationwide. As noted, the intended objectives of TBI mirror those of the TBR but feature a less important role for private engagement in the procedure. The Chinese government conceived of the TBI as a mechanism 'for notification and rapid reaction on foreign trade barriers … '. [38] The term 'foreign trade' encompasses the import and export of goods, technology, and international trade of services, as well as foreign-trade-related IPR.[39] As the rules and procedures of TBI

[25]Council Regulation (EEC) No.2641/84 of 17 September 1984.

[26]Bronckers and McNelis, supra n. 11; R.M. MacLean (2006) *The EU Trade Barrier Regulation: Tackling Unfair Foreign Trade Practices*, 2nd edn. Sweet and Maxwell, 4.

[27]Regulation 2015/1843, 2015 OJ (L 272) 1, codifying and repealing Regulation 3286/94, 1994 OJ (L 349) 71, art. 1; EU Trade and Investment barriers report 2019, https://trade.ec.europa.eu/doclib/docs/2020/june/tradoc_158789.pdf. Trade policy instruments before the TBR have focused on injury within the Union market. See Molyneux, supra n. 1; M.S. Rydelski and G.A.V.R. Zonnekeyn (1997) 'The EC Trade Barriers Regulation: The EC's Move Towards a More Aggressive Market Access Strategy', *Journal of World Trade* 31, 5.

[28]TBR, Articles 1–6.

[29]Ibid.

[30]Mavroidis and Zdouc, supra n. 1, at 415.

[31]Sundberg and Vermulst, supra n. 1, at 989.

[32]Mavroidis and Zdouc, supra n. 1, at 416.

[33]TBR, art. 2.

[34]TBR, art. 1.

[35]Gao, supra n. 1; Song, supra n. 14. On Chinese literature see for instance, Cai, above 28; C. Cai (2004) '我国对外贸易壁垒调查制度: 成就, 不足及完善' [China's Foreign Trade Barrier Investigation System: Achievements, Insufficiencies, and Improvements'], *Legal Science* 22, 110.

[36]Gao, supra n. 1.

[37]TBIR, art. 1.

[38]Gao, supra n. 1, citing S.C. Wang, 'Yingdui Maoyi Bilei de Duice Jianyi' ['Strategies for Dealing with Trade Barriers'], *Renmin Ribao [China Daily]*, 27 May 2022.

[39]The Foreign Trade Law, art. 2.

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were largely modelled after the EU's TBR, the three criteria in identifying trade barriers were borrowed from the TBR mutatis mutandis.

To sum up, although the three procedures were enacted for differing purposes, they eventually converge in the key functionality. In both the EU and China, trade barrier procedures were intended as a procedural means to link private grievances to an international solution. Although Section 301 predates the WTO dispute settlement mechanism and came about as a unilateral self-help tool, it has also been converted into a similar procedural tool.

2.2 Operational Dynamics and Strategic Implications of Trade Barrier Mechanisms

This section provides an overview of the administration of domestic trade barrier procedures in the three jurisdictions and their various procedural phases. To fulfil their objectives of addressing and responding to trade barriers, these mechanisms encompass three major phases: initiation, investigation, and retaliation.[40]

The initiation of trade barrier investigations is largely dependent on private complaints. In the EU, only complaints from private actors and the Member States can trigger the TBR procedure.[41] To serve its purpose of bridging private entities and government, all the trade barrier procedures were crafted to be highly accessible for private actors. This accessibility is underscored, inter alia, by the inclusivity of the applicants that the mechanisms accommodate. Section 301, for instance, permits 'any interested person' to hand in a petition.[42] According to TBI, eligible complaints are the 'enterprises or industries that are directly related to the production of products or supply of services involved in the alleged trade barriers', and natural persons, legal persons, or organizations representing them.[43] Furthermore, all these mechanisms establish well-defined procedures and set relatively low threshold requirements to encourage the private sector to submit petitions. For example, Section 301 does not explicitly include the requirements for filling a petition. While both the EU and China outline three key criteria that should be met with prima facie evidence, they have attempted to relax their rules.[44] More importantly, all three mechanisms specify reasonable and predictable time limits for executive authorities with limited potential for extensions.[45] Overall, on paper, the mechanisms offer private applicants an advantageous array of procedural and transparency guarantees, time limits, and decision-making machinery for submitting their grievances.

Putting aside these procedural safeguards, it is also true to say that the authorities retain broad margins of discretion in the process of official interrogations. In the US, although Section 301 highlights certain matters under which the USTR is bound to take action, it does not expressly create any obligation for the USTR to investigate.[46] The USTR is virtually entitled to open, suspend, and terminate any investigatory proceedings.[47] Even in mandatory cases, the USTR has sufficient latitude for the initiation and outcome of an investigation.[48] In addition, they are permitted to self-initiate investigations in the absence of private complaints.[49] Similarly, if the

[40]See a more detailed breakdown of Section 301 procedures in A.B. Schwarzenberg, 'Section 301 of the Trade Act of 1974' (*Congressional Research Service,* 13 May 2024), https://crsreports.congress.gov/product/pdf/IF/IF11346 (accessed 15 July 2024). Note Section 301 procedures also contain annual 301 reports and special 301 report which concerns intellectual property issues. Here we only discuss as hoc investigations.

[41]TBR, arts 2-6.

[42]Section 302(a)(1).

[43]TBIR, art. 5.

[44]On the TBR, see Mavroidis and Zdouc, supra n. 1, at 417; see also TBIR, art. 8.

[45]The setting up of deadlines is particular prominent in the case of Section 301.

[46]Section 302 provides that 'the Trade Representative shall review the allegations in any petition … and … shall determine whether to initiate an investigation'. Shaffer, supra n. 11.

[47]Section 302, Trade Act of 1974

[48]Bello and Holmer, supra n. 14, at 12.

[49]Section 302(b), ibid.

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MOFCOM determines that a petition is well founded, it might consider launching an investigation; alternatively, it could start an investigation on its own initiative.[50] In the EU, while the Commission is not endowed with an equivalent self-initiation power, the TBR follows a 'top-down' approach, where authorities actively engage with private actors and can choose to reject petitions if they consider the evidence insufficient in the Union's interest.[51] To restrain administrative discretion, a judicial review of trade barrier investigations under the mechanisms is in theory possible in the US and the EU.[52] However, as noted, only the TBR grants private actors substantive rights to compel the authorities to act.[53]

Once the procedures proceed to the official examination phase, authorities possess various investigation methods, such as hearings, onsite inspection, questionnaires, and expert and public consultations. The foreign country concerned and the petitioner shall be engaged with.[54] Further, both TBR and TBI explicitly empowered the executives to decide on the suspension and termination of an investigation during the course of the examination.[55]

At the close of the investigation, the authorities should make determinations regarding the ensuing actions. Potential paths include WTO procedures and other forms of retaliation without prejudice to international obligations. For instance, Section 301 prescribes four grounds for the USTR to bring a WTO complaint or otherwise respond (and possibly retaliate) to a foreign country's practice of restricting US exports. Two of the grounds formally trigger the aforementioned 'mandatory cases': where there is a violation of any 'trade agreement' or the violation of any 'international legal rights of the United States'.[56] Actions that the USTR may take include: (1) suspension of trade agreement concessions, (2) imposing duties or other import restrictions, (3) imposing fees or restrictions on services, (4) entering into agreements with the subject country to eliminate the offending practice or to provide compensatory benefits for the US; and/or (5) restricting service sector authorizations.[57] In the EU, the Commission's assessment of private complaints leads to three categories of outcome. Insofar as a complaint is deemed unjustified, it is rejected.[58] However, if the investigation leads to a finding of a trade obstacle, the EU should engage in dialogue with the implicated third country. Successful negotiations leading to satisfactory unilateral undertakings by a third country can result in the suspension or termination of the TBR procedure.[59] Conversely, if the third country fails to make adequate reparations,[60] the EU is poised to escalate measures.[61] These escalations include initiating international consultations or dispute settlement procedures, reaching agreements with the third countries involved, and implementing commercial policy measures as necessary. Parallel to the EU's approach, China's MOFCOM also responds to identified trade barriers under TBI Rules through various measures tailored to specific circumstances. Options at MOFCOM's disposal include engaging in bilateral consultations, invoking multilateral dispute settlement mechanisms, or resorting to other suitable measures. Overall, the implementation and retaliation tools of trade barrier mechanisms

[50]TBIR, art. 4. But see also article 12 for contradictory language.

[51]TBR, arts 5, 9.

[52]On Section 301 see in R. Bhala and K. Kennedy (1998) *World Trade Law: The GATT–WTO System, Regional Arrangements, and US Law*. Lexis Law, 1045–1047; E.P. Eichmann and G.N. Horlick (1989) 'Political Questions in International Trade: Judicial Review of Section 301', *Michigan Journal of International Law* 10, 735; See also J. Catalfamo (2022) 'Toward a Rebalanced Section 301 Authority: Reconsidering the Separation of Powers in International Trade', *George Washington Law Review* 90, 536. See TBR in Bronckers, supra n. 1.

[53]Shaffer, supra n. 11; Bronckers and Mcnelis, supra n. 11.

[54]TBR, art. 9; Section 303, Trade Act of 1974; TBIR, art. 25.

[55]TBR, art. 12; TBIR, art. 26.

[56]Bhala and Kennedy, supra n. 52, at 1024–1025.

[57]Section 301 of the US Trade Act of 1974.

[58]Regulation (EU) No. 2015/1843, art. 12.

[59]Ibid., arts 9, 12.

[60]Ibid., art. 13.

[61]Ibid., art. 13.

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underscore an incremental approach to managing trade disputes, allowing for flexibility in response to international trade barriers, while aiming to uphold free trade practices and protect domestic interests.[62]

The aforementioned procedural and substantive design of trade barrier regulations seems compatible with their purpose. *First,* the procedures span a broad coverage of subject matter, rendering them capable of accommodating varying trade concerns. *Second*, domestic trade barrier procedures offer a highly accessible channel for private parties to petition the government, despite the executives' discretionary powers. *Third*, domestic trade barrier procedures offer various remedial and retaliatory measures, including WTO litigation. Ideally, the breadth and legalistic design of domestic trade barrier procedures should appeal to private actors, and monitoring protectionist trade policies should lead to claims at the WTO. The next section employs qualitative studies to verify these assumptions.

3. The Realities behind the Ideal in Trade Barrier Investigations

In the light of a baseline understanding of their intended functions, the analysis progresses through a structured inquiry into three key areas: the frequency of states employing unilateral trade barrier procedures against unfair trade practices, the prevalence of formal complaints by private entities along with the discretionary power authorities in response, and the relationship between domestic trade barriers procudures and WTO litigations. The analysis leads us to discern a significant shift in the intended functions. It demonstrates a tangible and quantifiable move away from their original objectives, highlighting a transition in the deployment of trade barrier procedures towards unilateralism.

3.1 Strategic Realignment in Trade Barrier Investigations: An Analytical Overview

The first question investigates the frequency with which states use unilateral trade barrier procedures in response to unfair trade practices. An historical review of such investigations reveals distinct peaks within different jurisdictions (Figure 1). However, a similar tendency is discernible, signifying an inclination towards a normative alignment.

3.1.1 Shifts in US Trade Policy: From Multilateralism to Unilateral Measures

As of 2024, more than 130 Section 301 investigations have been carried out. The prime period of Section 301 coincided with the 1980s and the 1990s, during which approximately 90 investigations were conducted.[63] However, after the establishment of the WTO in 1995, the number of Section 301 investigations declined drastically, with only 35 taking place.[64] Notably, investigations since 2000 have become increasingly rare. Prior to the Trump Administration, the most recent Section 301 investigation transpired in 2013 without sanctions.[65] The last investigation leading to tariffs, before the Trump administration's tenure, took place in 2009, focusing on Canada's compliance with the 2006 US–Canada Softwood Lumber Agreement. However, resurgence in the Section 301 investigations occurred in 2017, with most being self-initiated by the USTR. It is also noteworthy that two new investigations were opened during the Biden Administration, signifying a continued interest in the use of unilateral trade barrier procedures.

Table 1 provides a list of Section 301 investigations that the US government has carried out in a variety of nations as well as the WTO procedures that have followed those investigations. The

[62]TBIR, art. 33.

[63]See Lincicome and others, supra n. 2.

[64]A.B. Schwarzenberg, 'Section 301 of the Trade Act of 1974' (*Congressional Research Service,* 13 May 2024), https://crsreports.congress.gov/product/pdf/IF/IF11346 (accessed 15 July 2024).

[65]'2010 Trade Policy Agenda and 2009 Annual Report, Chapter – Trade Enforcement Activities' (USTR, 2009), https://ustr.gov/2010-trade-policy-agenda (accessed 15 July 2024).

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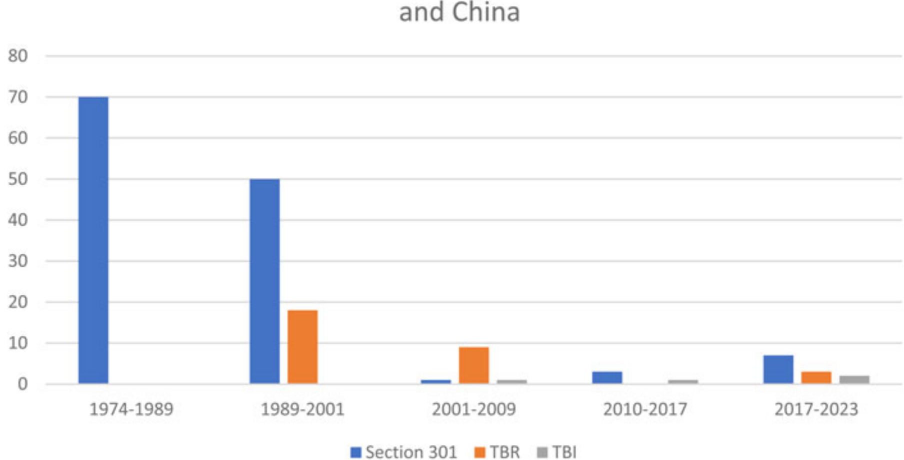

Figure 1. Comparative Trajectory of Trade Barrier Investigations in the US, EU, and China (1974–2023)
Source: Elaborated by the authors from various public sources.

table demonstrates that the US has undertaken a variety of investigations into other nations, the majority of which have focused on concerns relating to commerce and intellectual property. The results of these investigations were diverse, with some leading to WTO procedures or talks and others leading to unilateral penalties or bilateral agreements.

Given this exploration of the changing landscape of Section 301 investigations, it becomes apparent that the US' approach to trade barrier investigations has undergone a significant transformation, marked by two distinct phases of normative realignment. The first significant shift occurred after the WTO was established in 1995. Before this period, the 1980s and the 1990s represented the prime period for Section 301, when Section 301 was employed as self-help tool as set forth in section 2. However, following the establishment of the WTO, there was a notable decline in the number of Section 301 investigations. This reduction signals a normative alignment towards a multilateral approach to resolving trade disputes, in congruence with the global trade norms and dispute resolution mechanisms instituted by the WTO. However, the narrative took a pivotal turn with the resurgence of Section 301 investigations under the Trump administration from 2017 onwards, which has been widely acknowledged as signalling a strategic recalibration towards unilateralism.[66] This demonstrates a significant shift in the US' recent perception of trade barrier resolution.

3.1.2 EU's Evolving Trade Defense: Reassessing the Trade Barriers Regulation

The normative realignment in the EU's use of trade barrier procedure is characterized by a phase of underutilization, followed by strategic reengagement with a rising amount of piecemeal trade barrier instruments. First of all, a parallel trend is observed in the EU's application of TBR, which exhibits glaring similarity to Section 301. As listed in Table 2, the European Commission initiated approximately 30 investigations under the TBR from 1995 to 2022.[67] This figure is strikingly smaller compared to the multitude of market access barriers encountered by the EU, with 2021 alone recording 455 active trade and investment barriers in 65 third countries.[68] Only

[66] Claussen, supra n. 5.

[67] *Uncoated Wood Free Paper* (Turkey), 2018 OJ (C 218) 20.

[68] The Commission/DG TRADE launched 'Access2Markets' as an online information portal to increase the uptake of opportunities offered by trade agreements. For new barriers and complaints, 2021 was the first full year of the Single Entry Point, which was established to support the Chief Trade Enforcement Officer and provides a one-stop-shop accessible

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Table 1. Outcomes of Section 301 investigations and their international repercussions (1999–2024)

	Basis for Section 301 Investigation	Year	Country	Implementation and Actions
1	Canada – border water tourism	1999	Canada	N/A
2	EC–Measures Concerning Meat and Meat Products	1999	EC	For implementation of WTO Awards
3	EC – Importation, Sale and Distribution of Bananas	1999	EC	For Implementation
4	Wheat Trading Practices of the Canadian Wheat Board	2000	Canada	*Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain* (DS276)
5	Intellectual Property Laws and Practices of the Government of Ukraine	2002	Ukraine	Unilateral sanction
5	Canada – Compliance with Softwood Lumber Agreement	2009	Canada	Unilateral sanction
6	China – Acts, Policies and Practices Affecting Trade and Investment in Green Technology	2010	China	Consultations (China–Subsidies on Wind Power Equipment (DS 419))
7	Ukraine – Intellectual Property Rights	2013	Ukraine	N/A
8	China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation	2017	China	Unilateral sanction+ Consultations (*China – Certain Measures Concerning the Protection of Intellectual Property Rights* (DS542))
9	France – Digital Services Tax	2019	France	Unilateral sanction
10	Enforcement of US WTO Rights in Large Civil Aircraft Dispute	2019	EU	For implementation
11	Digital services tax in 11 jurisdictions	2020	Austria, Brazil, The EU, India, Indonesia, Italy, Turkey, Spain, United Kingdom	Unilateral sanction + plurilateral agreement (i.e. Statement on a two-pillar solution to address tax challenges arising from the digitalization of the world economy).
12	Vietnam's Acts, Policies, and Practices Related to the Import and Use of Illegal Timber	2020	Vietnam	Bilateral agreement
13	Mexico's Acts, Policies, and Practices Concerning Seasonal and Perishable Agricultural Products	2022	Mexico	Pending
14	China–Targeting the Maritime, Logistics, and Shipbuilding Sectors for Dominance	2024	China	Pending

Source: Elaborated by the authors from various public sources.

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Table 2. Trade grievances and WTO dispute proceedings: a spectrum of TBR complaints

	Basis for the TBR complaint	Year	Country	WTO Proceeding
1	Rules of origin for textile products	1996	US	Consultations (DS85; DS151)
2	Piracy of Sound Recordings (initially started under the New Commercial Policy Instrument)	1996	Thailand	N/A
3	Import licensing regime for steel plates	1997	Brazil	N/A
4	Restrictions on the marketing of Cognac	1997	Brazil	N/A
5	Restrictions in the leather sector	1997	Japan	Consultations (DS147)
6	The Anti- dumping Act of 1916	1997	US	*United States – Anti-dumping Act of 1916*, WT/DS136/R, circulated on 31 March 2000 (see also the WTO Appellate Body Report WT/DS136/AB/R, adopted 26 September 2000)
7	Cross-border music licensing requirements	1997	US	*United States* – Section 110*(5) of the US Copyright Act*, WT/DS160/R, adopted 27 July 2000
8	Restrictions on export and import of leather	1997	Argentina	Consultations (DS77)
9	Restrictions on imports of Sorbitol	1998	Brazil	Consultations (DS183)
10	Restrictions on textile products	1998	Brazil	N/A
11	Restrictions on shipping of swordfish	1998	Chile	Consultations (DS193)
12	Marketing requirements for cosmetics and toiletries	1998	Korea	N/A
13	Discriminatory measures for pharmaceutical products	1999	Korea	N/A
14	Restrictions on imports of textile and clothing	1999	Argentina	WTO Panel Reports, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R, adopted 16 February 2001
15	Proex export financing	1999	Brazil	N/A
16	Failing to protect Parma Ham international property rights	1999	Canada	N/A
17	Tax discrimination of imported motor vehicles	2000	Colombia	N/A
18	Restriction on the prepared mustard	2000	US	N/A
19	Lack of protection of the wines with geographical indication 'Bordeaux' and 'Medoc'	2002	Canada	N/A
20	Subsidization of shipbuilding industry	2002	Korea	*Korea – Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, adopted 11 April 2005
21	Measures concerning import of pharmaceutical products	2003	Türkiye (Turkey)	N/A

(*Continued*)

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Table 2. (*Continued.*)

	Basis for the TBR complaint	Year	Country	WTO Proceeding
22	Subsidisation of oilseed production	2003	US	N/A
23	Import ban and financial penalties on imported retreated tyres	2004	Brazil	*Brazil – Measures Affecting Imports of Retreated Tyres*, WT/DS332/R, circulated on 12 June 2007 (see also the WTO Appellate Body Report WT/DS332/AB/R, adopted 17 December 2007).
24	Restrictions on the Scotch whisky	2004	Uruguay	N/A
25	Measures concerning imports and sale of wines and spirits	2006	India	Consultations (DS 352; DS 380)
26	Compulsory licensing of patents for CD-R technology	2007	Taiwan	N/A
27	Internet gambling	2008	US	N/A
28	Imports of uncoated wood free paper	2017	Turkey	N/A
29	The import of ceramic tiles	2020	Saudi Arabia	N/A
30	Exportation of Tequila	2021	Mexico	N/A

Source: Elaborated by the authors from various public sources.

one of these barriers progressed to a TBR investigation. Another observable shift occurs in the pattern of TBR investigations from 2009 to 2020, where marginalization of TBR investigations was notable, with the majority occurring before 2008 and only a handful initiated after 2010.[69] This number indicates a relative disengagement from the TBR mechanism in addressing trade disputes, potentially reflecting a reliance on alternative dispute resolution mechanisms or strategic recalibration within the EU's trade policy framework. However, from 2020 onwards, the EU renewed its interest in this instrument, launching two separate enquiries.[70] The revival of TBR is an outgrowth of the EU's strategic reassessment of its toolkit in addressing trade barriers amid evolving global trade dynamics.[71] Along these lines, the EU has also adopted other measures directed at politicized trade barriers, including a Public Procurement Instrument, passed in 2022, and Anti-Coercion Regulation, passed in 2023. Their distinct names and objectives notwithstanding, these measures similarly aim to respond to unfair trade practices and the weaponization of trade obstacles.

within the Access2Markets platform, to submit complaints about (potential) trade barriers or noncompliance with commitments on trade and sustainable development and the EU's GSP Regulation, https://trade.ec.europa.eu/access-to-markets/en/barriers?isSps=falseandtable=sectormeasure (accessed 15 July 2024).

[69]P.J. Kuijper and G. Vidigal (2021) 'The European Union and the Multilateral Trade Regime: Reciprocal Influences', in M. Hahn and G.V.D. Loo (eds.), *Law and Practice of the Common Commercial Policy: The First 10 Years after the Treaty of Lisbon*. Brill.

[70]Notice of Initiation Union examination procedure on obstacles to trade within the meaning of Regulation (EU) 2015/1843 applied by the Kingdom of Saudi Arabia consisting of measures affecting the import of ceramic tiles, OJ C 210/30, 25 June 2020; Notice of initiation Union examination procedure following a complaint on obstacles to trade within the meaning of Regulation (EU) 2015/1843 applied by the United Mexican States consisting of measures affecting the import of 'Tequila', OJ C 265, 13 August 2020.

[71]European Commission, '2022 Implementation and Enforcement Report', COM(2022)730 final, 11 October 2022, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022DC0730andqid=1665592785684 (accessed 15 July 2024).

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3.1.3 China's Tactical Use of Trade Barrier Investigations: Economic Strategies and Geopolitical Considerations

Despite China's active role in trade defense measures globally, TBI has been sparingly utilized, with only three investigations completed and one ongoing. The first TBI investigation was initiated in 2004, filed by the Jiangsu Laver Association and focusing on Japanese import quotas for laver (seaweed).[72] Eight years later, the second investigation addressed US' measures related to subsidies for the renewable energy sector. This petition was filed by the China Chamber of Commerce for Imports and Exports of Machinery and Electronic Products and the China New Energy Chamber of Commerce of the All-China Federation of Industry and Commerce.[73] The third TBI investigation, which was launched by MOFCOM on 13 April 2023 and concluded on January 2024, centres on Taiwan's restrictive trade measures targeting Chinese products.[74] The investigation was triggered at the request of three Chinese trade groups, encompassing the treatment of 2,455 Chinese products.[75] Many of the targeted trade restrictions stem from Taiwan's longstanding non-compliance with WTO rules and the Cross-Strait Economic Cooperation Framework Agreement (ECFA) between China and Taiwan.[76] However, China had for long turned a blind eye to these trade barriers.[77] The MOFCOM initially aimed to conclude the investigation by October 2023 but extended the deadline to 12 January 2024, the day before the next presidential election in Taiwan.[78] Hence, given its timing and context of cross-strait relations, this investigation subtly indicates a blend of economic and political considerations, shaping the deployment of the TBI mechanism.

More recently, upon receiving complaints again from China Chamber of Commerce for Import and Export of Machinery and Electronic Products, the MOFCOM initiated another prominent trade barrier investigation, targeting the EU's foreign subsidies regulation.[79]

The infrequent use of TBI, juxtaposed against the backdrop of China's broader engagement in trade defense,[80] signals a strategy towards utilizing TBI for matters of considerable economic or strategic significance. Therefore, normative realignment in China's application of domestic trade barrier procedures is characterized by a strategic and selective approach. This approach underlines the integration of economic objectives with broader geopolitical considerations, marking

[72]See a detailed analysis of this case in H. Gao (2014) 'Public–Private Partnership: The Chinese Dilemma', *Journal of World Trade* 48, 983.

[73]MOFCOM Announcement No. 69 of 2011, 25 November 2011 (Decision to launch a trade barrier investigation into the US policy support and subsidies for its renewable energy sector), http://english.mofcom.gov.cn/aarticle/newsrelease/significantnews/201111/20111107852624.html (accessed 28 March 2024).

[74]Jennings and Wong, supra n. 4.

[75]Which are China Chamber of Commerce of I/E of Foodstuffs, Native Product and Animal By-products, China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters, and China Chamber of Commerce for Import and Export of Textiles.

[76]The text of ECFA is available at http://rtais.wto.org/rtadocs/713/TOA/English/Combined%20ECFA%20Text.pdf (accessed 15 July 2024). For an introduction to ECFA, see P.L. Hsieh (2011) 'The China–Taiwan ECFA, Geopolitical Dimensions and WTO Law', *Journal of International Economic Law* 121.

[77]See K. Chen et al. (2021) 'Learning from the Past Ten-Year Effects of Economic Cooperation Framework Agreement (ECFA)', *Advances in Economics, Business and Management Research* 203, 2144; See an analysis of this event in J. Chaisse and X. Su (2024) 'Weaponization of Trade Barrier Investigations: Economic Coercion in China-Taiwan Relations', *Journal of World Trade* 521.

[78]The State Council Information Office of the PRC, Commerce Ministry Launches Investigation against Taiwan Trade Restrictions (13 April 2023), http://english.scio.gov.cn/pressroom/2023-04/13/content_85226952.htm (accessed 15 July 2024).

[79]MOFCOM (2024) 'Announcement of the Ministry of Commerce on the Investigation of Trade and Investment Barriers in the EU Investigations on Chinese Enterprises under the Foreign Subsidies Regulation, Announcement of the Ministry of Commerce [2024]', No. 28, www.mofcom.gov.cn/zwgk/zcfb/art/2024/art_d2a237a0cd204ea6b89559470a630744.html. For an analysis of FSR, see X. Su (2023) 'A Critical Analysis of the EU's Eclectic Foreign Subsidies Regulation: Can the Level Playing Field be Achieved?', *Legal Issues of Economic Integration* 50, 67.

[80]Y. Yu (2021) 'The Issue of Non-market Economy Status in China's Anti-dumping Investigations Against Imports: A Development for the Implementation of New Rules or A Balancing Strategy?', *Journal of World Trade* 55, 943.

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a cautious, yet significant, shift in China's leverage of trade barrier investigations within its trade policy arsenal.

The analysis portrays domestic trade barrier procedures as an infrequently used tool in trade policy instruments. However, all three jurisdictions demonstrate a normative realignment of their domestic trade barrier procedures over time, reflecting a broader trend towards leveraging these mechanisms for strategic interests within the global trade context. Looking closer at the concluded investigations, the following subsection examines the influence of private sector initiation on the limited use of these procedures, as well as its role in the observed procedural realignment.

3.2 Corporate Inertia and the Underutilization of Trade Barrier Procedures

Understanding the private sector's participation in trade barrier procedures is crucial because it highlights the gap between legal mechanisms and their practical utilization by businesses, revealing the status quo of the system. This insight is key to reforming and optimizing trade policies to better serve the dynamic needs of the global trading environment.

To start with, Section 301 mandates that all petitions be published in the Federal Register.[81] An examination of the registry data reveals a significant decline in private petitions, with a shift towards government self-initiated cases. Historically, from Presidents Ford to Clinton, there was a higher incidence of private petitions, reaching their peak during Ronald Reagan's tenure with 39 petitions.[82] However, this trend was reversed by George W. Bush's presidency, with a noticeable absence of private petitions and a rise in government-initiated investigations from then onwards.[83] This shift underscores the transition from private to government-led enquiries under Section 301. The latest petition recorded was in October 2022,[84] further emphasizing the ongoing gap in private initiation of Section 301 investigations.

Considering permissible administrative discretion, the subsequent logical enquiry is whether the absence of the petition results from the USTR's official, formal objections. Upon closer inspection, the USTR has rarely refused to investigate formally and this happened only under specific circumstances. In the past investigations, the USTR might object to an official investigation if the company filing the complaint had no standing in the petition filed. This occurred in 2011, when the USTR received a complaint against certain measures adopted by the Dominican Republic.[85] The USTR dismissed these petitions because the petitioner lacked standing on their claims. The second situation occurs when the petitioner fails to provide sufficient evidence to support their claims. In 2011, the USTR received a complaint against Germany. However, the USTR decided not to initiate any action since the petition did not include sufficient information on the burdens or restrictions on US commerce arising from the alleged requirements for access to the German bar aptitude examination. The third and last reason is that the petitioner was correct in providing sufficient evidence and standing, but the USTR refrained from taking action since it was addressing the issue through other means. For instance, in 2004, the USTR received a few petitions seeking inquiry into certain unreasonable labour practices and policies in China.[86]

[81] Federal Register, available at www.federalregister.gov/.

[82] S. Lincicome et al., 'Unfair Trade or Unfair Protection? The Evolution and Abuse of Section 301', CATO Institute (14 June 2022), https://www.cato.org/policy-analysis/unfair-trade-or-unfair-protection-evolution-abuse-section-30 (accessed 27 July 2024).

[83] Ibid.

[84] Federal Register (2022) 'Mexico's Acts, Policies, and Practices Concerning Seasonal and Perishable Agricultural Products. 10/28/2022', www.federalregister.gov/documents/2022/10/28/2022-23502/section-301-petition-on-mexicos-acts-policies-and-practices-concerning-seasonal-and-perishable.

[85] USTR (2011) '2012 Trade Policy Agenda and 2011 Annual Report, Chapter – Trade Enforcement Activities', https://ustr.gov/sites/default/files/FULL%20REPORT%20-%20PRINTED%20VERSION.pdf (accessed 15 July 2024).

[86] USTR (2004) '2005 Trade Policy Agenda and 2004 Annual Report, Chapter – Trade Enforcement Activities', https://ustr.gov/archive/Document_Library/Reports_Publications/2005/2005_Trade_Policy_Agenda/Section_Index.html (accessed 15 July 2024).

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However, the USTR decided not to initiate any investigation. The reason cited was that the US was already involved in ongoing efforts to address currency valuation issues with China.[87] However, these precedents do not mean that the lack of petition has nothing to do with the exercising of discretion of the USTR. How informal determination affects domestic petition will be further explored in Section 4.1.

In both the EU and China, the initiation of the mechanisms is more reliant on private complaints. In the EU, most of these investigations were based on complaints lodged by EU business enterprises. An earlier comprehensive assessment of the TBR revealed that approximately half of the complaints eventually led to EU investigations.[88] This underscores the fact that official private complaints are outnumbered by the actual trade barriers that European companies encounter.

A similar scenario has been observed in the case of TBI in China. Similar to Section 301 and the TBR, the underuse of TBI is largely attributed to the unwillingness of private parties to submit complaints. According to observers, the authority received only two meagre enquiries from the private sector over a six-year period following the Japan–Laver case, none of which resulted in the submission of a formal complaint. It is also noteworthy that the industry associations involved in the Taiwan and Foreign Subsidy Regulation investigations have extensive political ties with the Chinese government and thus are hardly 'private'. Moreover, since 2005, the role of TBI as a government–private communicative forum has been replaced by an informal scheme called the 'Quadrilateral Coordination Mechanism' (*si ti lian dong*) (QCM).[89] The primary legal basis for the QCM is the Regulations on Responding to Anti-dumping Cases against Exports as opposed to TBI.[90] The QCM does not entail formal petitions or investigations.

3.3 Evaluating the Outcome: The Forms of Responses to Trade Barriers

As outlined in section 2, trade barrier procedures can result in various responsive measures, one of which is the initiation of WTO proceedings. Therefore, evaluating the correlation between domestic trade barrier procedures and subsequent WTO litigations reveals states' perception of the relations between the mechanism and rules-based multilateralism.

The data show that across the US, the EU, and China, there is no consistent direct link between the initiation of trade barrier investigations and the pursuit of WTO disputes. This is evidenced by the limited number of investigations that have progressed to WTO litigation across these jurisdictions.

Of the 35 Section 301 investigations initiated after 1994, only three were WTO dispute proceedings. Importantly, most of the claims that the US brought to the WTO did not stem from prior formal Section 301 investigations.[91] In the period from 1994 to the present, the US filed more than 70 cases at the WTO, with only three being preceded by a Section 301 investigation. Nonetheless, it is worth noting that the US frequently initiated WTO claims concurrent with the publication of Section 301 and Special 301 annual reports.[92] These cases typically followed the

[87]Ibid.; see also, USTR (2006) '2007 Trade Policy Agenda and 2006 Annual Report, Chapter – Trade Enforcement Activities', https://ustr.gov/archive/assets/Document_Library/Reports_Publications/2007/2007_Trade_Policy_Agenda/asset_upload_file278_10622.pdf (accessed 15 July 2024).

[88]Crowell and Moring, Interim Evaluation of the European Union's Trade Barrier Regulation (June 2005), https://trade.ec.europa.eu/doclib/docs/2005/october/tradoc_125451.pdf (accessed 15 July 2024).

[89]China's QCM represents an elevated private–public cooperation mechanism. It involves four bodies: the MOFCOM, the local governments, commerce chambers and associations (intermediaries), and enterprises involved in the case have initially formed. MOFCOM, *Guidelines on Responding to Trade Remedy Investigations*, Chapter 2, http://images.mofcom.gov.cn/trb/accessory/201105/1304649757363.pdf (accessed 15 July 2024).

[90]Ibid., The Mechanism has taken shape in practice but was inscribed in the Regulations on Responding to Anti-dumping Cases.

[91]J. Trachtman (2003) 'Whose Right Is It Anyway? Private Parties in EC–US Settlement at the WTO', in E.-U. Petersmann and M. Pollack (eds.), *Dispute Prevention and Dispute Settlement in the Transatlantic Partnership*. Oxford University Press.

[92]Shaffer, supra n. 11.

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release of information from these reports. Moreover, despite Section 301's explicit authorization of unilateral measures, the period from the creation of the DSU to the Trump Administration witnessed a rare utilization of Section 301 for imposing unilateral sanctions.[93] Even before 1994, only 15 out of 119 (approximately 12%) Section 301 investigations ultimately resulted in actual trade sanctions.[94]

In the EU, the TBR procedures demonstrate a closer link to WTO proceedings. Approximately half of all investigations conducted under the TBR advanced to the WTO dispute settlement system (Table 2). A considerable number of these cases halted at the consultation stage, with only five leading to the establishment of a WTO Panel. In terms of dispute resolution, a significant portion of TBR investigations were resolved through negotiation.[95] Intriguingly, since 1994, a substantial proportion of WTO disputes involving the EU, whether as a complainant or defendant, have bypassed TBR proceedings. Of the 39 trade barriers that the EU claimed to have resolved in 2021,[96] only two were subjected to TBR investigations and yielded reports. This is in stark contrast to the EU's extensive utilization of the WTO's dispute-resolution mechanism. From 1995 to 2021, more than 600 formal dispute settlement procedures were adjudicated through the WTO, with the EU participating as either a complainant or a defendant in approximately one-third of them.[97] At present, the EU appears to perceive TBR as a measure of last resort to address trade barriers.[98] In its 2022 implementation report on trade agreements, where the European Commission listed available instruments and fora to address trade barriers, dispute settlement at the WTO and investigations under the TBR are listed in tandem as final options to address unfair trade.[99] This juxtaposition of the TBR and the WTO dispute settlement mechanism indicates the EU' perception of the former as an alternative to the latter.

In China, of the three closed investigations, only the *US – Renewable Energy Subsidy* investigation led to WTO litigation,[100] while the *Japan Laver* investigation was resolved through bilateral negotiations and the *Taiwan* investigations was concluded without further retaliation thus far.[101]

The data and the broader legal context reveal that the link between investigations under domestic trade barrier procedures and WTO litigation is driven by strategic considerations.

[93]Schwarzenberg, supra n. 64.

[94]S.W. Chang (2000) 'Taming Unilateralism under the Multilateral Trading System: Unfinished Job in the WTO Panel Ruling on US Sections 301–310 of the Trade Act of 1974', *Law and Policy in International Business* 31, 1151.

[95]EU Trade and Investment barriers report 2019, https://trade.ec.europa.eu/doclib/docs/2020/june/tradoc_158789.pdf (accessed 15 July 2024). This pattern is in line with country practice. M.L. Busch and E. Reinhardt (2000) 'Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes', *Fordham Journal of International Law* 24, 158; M.L. Busch and E. Reinhardt (2002) 'Testing International Trade Law: Empirical Studies Of GATT/WTO Dispute Settlement', in D.L.M. Kennedy and J.D. Southwick (eds.), *The Political Economy of International Trade Law: Essays In Honor of Robert E Hudec*. Cambridge University Press, 474, note that 'upwards of 55 percent of disputes end in consultation…', and the positive impact of the 'shadow of the law … [on] concessions'.

[96]European Commission (2022) '2022 Implementation and Enforcement Report', COM(2022)730 final, 11 October 2022k https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022DC0730andqid=1665592785684 (accessed 15 July 2024).

[97]World Trade Organization (2022) 'Chronological list of disputes cases', www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (accessed 15 July 2024).

[98]The EU has a number of channels to receive complaints from industries and companies, formally and informally. Likewise, it has two internal mechanisms to decide on the launch of WTO ligation, one of which is through TBR; another is the former Article 133 process. Under this process, EU Member States meet with European Commission trade officials on a weekly basis to monitor the Commission's implementation of common commercial policy.

[99]European Commission, '2022 Implementation and Enforcement Report', COM(2022)730 final, 11 October 2022, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022DC0730andqid=1665592785684 (accessed 15 July 2024).

[100]*United States – Countervailing Duty Measures on Certain Products from China* – Request for Consultations by China, WT/DS437/1, 30 May 2012. The MOFCOM's final decision on the Renewable Energy Subsidy investigation, issued on 20 August 2012 found that US measures violated WTO anti-subsidy laws, prompting China to initiate WTO proceedings, subsequently resulting in the United States' Countervailing Duty Measures on Certain Products from China.

[101]Gao, n 72.

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The bulk of trade barrier investigations do not lead to WTO litigation; and the decision to escalate disputes to the WTO hinges on various factors, not just the outcomes of the investigations. Furthermore, it is also clear that trade barrier procedures are not a purely unilateral, retaliatory tool. The vast majority of trade barrier investigations lead to negotiation and consultation rather than substantive retaliation. The shift towards domestic trade barrier procedures therefore underscores a normative realignment in handling trade disputes, favouring unilateral actions and non-institutionalized bilateral engagements over direct litigation.

To recapitulate, three key insights emerge from the findings of this section. *Firstly*, the resurgence of such mechanisms indicates a strategic reconsideration of unilateral trade barrier tools geared towards unilateralism and bilateralism. *Secondly*, the scant initiation of formal investigations reflects a reluctance among private entities to engage in these procedures, highlighting a disconnect between the initial design of the mechanisms and their actual utility. *Lastly*, the relationship between the use of trade barrier procedures and WTO cases illuminates a growing preference for unilateral interventions over multilateral dispute resolution mechanisms. Collectively, these observations reveal that while domestic trade barrier procedures were envisioned as tools for linking private complaints and multilateral dispute resolution, a notable realignment towards unilateralism and a redefinition of their operational ethos are evident, signalling a critical re-evaluation of their role and effectiveness in contemporary international trade architecture. Having laid down the tendency for normative realignment, in the next section we explore the potential of domestic trade barrier procedures in solving trade disputes in the absence of a multilateral framework.

4. A Rules-based Domestic Approach: Unpacking Trade Barrier Procedures

Section 3 has highlighted a normative realignment of domestic trade barrier procedures. This observation necessitates a shift in analytical focus: moving from questioning the efficacy of private–public partnerships in advancing market access, the enquiry pivots towards understanding potential in addressing harmful trade practice within the current geopolitical context.

In this section, an examination of the reasons behind the limited use of formal trade barrier procedures reveals a complex interplay of formalistic, legalistic, and political dimensions that curtail their effectiveness. The following analysis seeks to understand the power dynamics in the operation of domestic trade barrier procedures and questions the underlying assumptions of their dominant legal and economic theories. The section sheds light on the limitations of the current frameworks while setting the stage for contemplating the future of domestic trade barrier procedures.

4.1 Inhibitors to Action: Dissecting Reluctance in the Private Sphere

Insights from section 3 suggest that the underutilization of formal trade barrier procedures can, by and large, be attributed to private parties' reluctance to engage with these mechanisms.[102] However, in some jurisdictions, such as the US and China, authorities are accorded with *ex officio* power to launch a procedure and can play an active role. Therefore, to understand the underuse of trade barrier procedures, it is imperative to pin down the domestic power dynamics underneath trade barrier investigations and resolution.

To start with, it is a common knowledge that in practice trade agencies are often under-resourced. Trade barrier investigations, however, are a highly resource- and time-consuming procedural means constrained by time limits. This resource incompatibility invariably dissuades authorities from using frequently trade barrier procedures. As observed, although Section 301

[102]It is axiomatic that countries often deal with market access barriers through means outside the WTO, and private–public cooperation and information exchange frequently occur informally. C.L. Davis (2012) *Why Adjudicate? Enforcing Trade Rules in the WTO*. Princeton University Press.

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contains an 'investigation' process, 'neither the USTR nor any other government agency in fact conducts – or has the resources to conduct – any meaningful investigation'.[103] In contrast, if government agencies pursue informal complaints, they are not saddled by timelines and can avail themselves of more flexibility.

For private actors, filing petitions does not address any trade nuisance. Instead, of interest to petitioners is whether or not the government would take necessary measures against these market access barriers. Traditionally, solving a market access barrier for private complaints is more about persuasion and pressure lobbying than idly waiting for a formal decision from government officials.[104] In this way, businesses procure a voice in formulating a policy issue while governments obtain information and political support.[105] These informal paths also offer a handy black box for firms or industry representatives to exert pressure on politicians and, consequently, capture trade policy-making agendas.[106] This means that companies can communicate and coordinate with trade agencies before formally filing a petition. Also, if an agency considers a formal investigation undesirable or that there exist better-off alternatives and communicates its preliminary decision informally to private parties, the private actors involved are unlikely to push for a formal investigation.

Of course, this interaction varies depending on a country's political culture. In China, for instance, one of the reported causes for the inadequacy of TBI is the absence of a direct link between private enterprises and government authorities. Consequently, private companies are unaccustomed to seeking official aid when confronted with trade obstacles. In the EU, although the Commission is generally open and accessible, European industries are not as proactively and broadly engaged in trade policymaking as US industries.[107] According to studies, the TBR procedure can be avoided in cases where there is a close relationship between the governments of the Member States and the company and it is evident that the foreign state has violated its commitments under the treaty.[108] Hence, in a country where private–public connections are underdeveloped, neither formal nor informal channels are demonstrably more effective. Overall, enhanced transparency and procedural guarantees in administrative proceedings might, to an extent, help countries with unstable state structures to convince business representatives to invest time and resources.[109] However, whether businesses would do so ultimately hinges on the government's credibility and ability in problem-solving.

Another prevailing concern for private actors is the level of transparency adjacent to the domestic trade barrier procedures.[110] Businesses in Europe have reported that the TBR is a burdensome mechanism that requires the transmission of sensitive information to the DG Trade and the opening of the door to open-ended requests for more data.[111] Unlike trade defense measures, the main focus of trade barrier procedures is trade hindrances in foreign country markets. When operating in a foreign country, companies depend on close and amicable ties with local governments. Such dependence results in the inclination of businesses to eschew a high-profile presence

[103] Shaffer, supra n. 11, at 30, citing R.O. Cunningham (1998) 'Trade Law and Trade Policy: The Advocate's Perspective', in A.V. Deardorff and R.M. Stern (eds.), *Constituent Interests in US Trade Policies.* University of Michigan Press, 282.

[104] The school of economic regulation, which continues to dominate trade policy studies, explains that trade decisions result from industry lobbying. See, in general, G.J. Stigler (1971) 'The Theory of Economic Regulation', *Bell Journal of Economics and Management Science* 5, 359.

[105] C. Woll and A. Artigas (2007) 'When Trade Liberalization Turns into Regulatory Reform: The Impact On Business–Government Relations In International Trade Politics', *Regulation and Governance* 1, 121.

[106] See in general, J.M. Buchanan et al. (eds.) (1980) *Towards a Theory of the Rent-Seeking Society.* Texas A&M University Press.

[107] Shaffer, supra n. 11, at 94, pointing out that the shift toward enhanced public–private coordination in Europe also prompted greater use of the less transparent Article 133 procedure.

[108] R. Sherman and J. Eliasson (2007) 'Privatizing Commercial Diplomacy: Institutional Innovation at the Domestic–International Frontier', *Current Politics and Economics of Europe* 18, 355.

[109] S. Maxfield and B.R. Schneider (eds.) (1997) *Business and the State in Developing Countries.* Cornell University Press.

[110] Bronckers and Mcnelis, supra n. 11; Kuijper and Vidigal, supra n. 69.

[111] Sherman and Eliasson, supra n. 105.

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against foreign governments. For this reason, informal complaints are advantageous in terms of guaranteeing anonymity for individual companies.

In a nutshell, the initiation of a trade barrier investigation is by no means dependent on private petitions, and viewing it as a burdensome procedural tool, trade agencies are unlikely to engage with this mechanism frequently. After all, if a trade barrier is in outright violation of WTO law, it can be directly referred to the WTO without an interim, official investigation at the national level.

4.2 A Sweeping Tool for Power Politics

However, it is clear that in some instances, trade agencies indeed look upon trade barrier procedures as a plausible and effective avenue to solve trade barriers. This subsection attempts to explain when this happens.

Based on the analysis above, similar to WTO adjudication, the inauguration of trade barrier procedures has the effect of inducing compliance without resulting in unilateral sanctions. Arguably, the process of determining violations in a legal proceeding potentially raises compliance pressure. Therefore, the commencement of investigation procedures is often sufficient to draw attention from the targeting state or sometimes from the international community. In the past, Section 301 solved more trade barriers through a deterring effect than actual sanctions.[112] It has been well discussed in the literature how the USTR deployed Section 301 investigations to ratchet up pressure on trade partners by way of wielding a sequence of deadlines.[113] Oftentimes, the prospect of incurring penalties from the US, rather than the penalties themselves, is sufficient to induce trade partners to alter their conduct.[114] Similarly, the TBR was demonstrated to be efficient in propelling the EU's trading partners to resolve disputes in a timely and amicable manner.[115] For private parties, filing a complaint under the procedures could press a foreign government for a more favourable hearing for their concerns.[116] Compared to full-fledged litigation, such interim settlements are usually preferable for private complainants as they are time- and resource-saving.[117] Therefore, when a seasoned trade official suggests the pathway of trade barrier procedures, the official does not intend for it to lead to a full-scale litigation.

As a result, although linked to litigation, trade barrier procedures address trade barriers through a distinctive logic. Functioning through deterring and signalling effects, it is a separate pacific dispute resolution path independent from formal litigation. By initiating trade barrier investigations under the procedures, a country seeks to signal the targeting countries, exhorting or propelling them to correct their behaviours during the probes. The EU's recent conception of the TBR as a parallel tool to WTO litigation is a testament to this point. Compared to trade defense measures, which primarily serve the purpose of alleviating the adverse effects of unfair trade practice, trade barrier procedures function differently. The objective of using this mechanism is to primarily induce countries, rather than individual companies, to alter their conduct. This explains why such a mechanism is not used as frequently as trade defense measures.

Second, the signalling and deterring function of trade barrier procedures defines their formidable role in politicized cases. Given the highly legalistic and resource-consuming nature of the procedures, domestic trade barrier investigations are inevitably directed at potent and prominent cases. In these situations, by means of initiating trade barrier investigations, government agencies also demonstrate to their domestic constituencies their commitment to trade obstacle elimination.[118] As Davis noted, kicking off legal proceedings against a foreign government, even if

[112]Sykes, supra n. 17.
[113]Shaffer, supra n. 11, at 45.
[114]Ibid..
[115]Bronckers, supra n. 1.
[116]Ibid.
[117]Ibid.
[118]Davis, supra n. 99.

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primarily for show, can be a practical way to handle international relations and internal pressure.[119]

The present analysis reveals the inherent contradictions and potential of domestic trade barrier procedures. These procedures are constructed to serve as a mechanism for private actors to petition their governments to resolve trade barriers. However, this internal function is inherently intertwined with the external function of enabling state action against foreign nations for various other purposes. Therefore, there remains the prospect that authorities might encourage private companies to utilize these formal procedures, not as a primary recourse, but as a means to leverage the external functionalities of the mechanisms in broader trade negotiations or disputes. This approach highlights the potential strategic use of domestic trade barrier procedures in the broader context of tactical and opportunistic trade policy engagement.

5. Redefining Trade Barriers Procedures: Further Adaptation for Modern Global Trade

Section 4 explored the role and inherent potential of trade barrier procedures. It revealed the redundant role of private initiation in the procedures given the transitioning (geo)political environment. Furthermore, it highlighted that the genuine value of domestic trade barrier procedures lies in its formidable deterring and signalling effects. On this basis, this final section transitions from theoretical exploration to strategic consideration of the potential for a new generation of domestic trade barrier procedures. This potential is underpinned by international economic law and new policy realities. Acknowledging the changing international economic environment and adhering to the foundational, limited functions of domestic trade barrier procedures is neither practical nor beneficial. The current geopolitical environment, characterized by heightened rivalries and the competitive pursuit of technological dominance,[120] requires a revised approach to these frameworks. The ongoing normative realignment further demands a forward-thinking adjustment, recognizing the necessity of defending national economies against protectionism and economic coercion, and addressing vulnerabilities highlighted by geopolitical tensions.

We contend that the normative realignment, rather than signalling an impasse, opens new horizons for reimagining domestic trade barrier procedures in alignment with contemporary trade dynamics. This suggests that amidst these shifts, there is an unprecedented opportunity to further upgrade domestic trade barrier procedures to enhance their adaptability, relevance, and effectiveness.

This section argues that to enhance the effectiveness of trade barrier procedures and restore their relevance in line with the normative realignment, the mechanism should be revaluated in two significant ways: recalibrating the role and mechanism of private engagement in the procedural design and a systematic readjustment of its configuration, scope and procedural rules.

5.1 Debunking the Relevance of Private Initiation

To devise an elevated trade barrier procedures, we must first reconsider and reconstruct their procedural design, the role of private engagement, and the discretion of trade agencies inherent to the mechanism, as these elements define the modus operandi of current trade barrier procedures.

To begin with, we first inquire into the legalistic nature of domestic trade barrier procedures. The wisdom of political economy theories tells that trade barrier procedures are essentially an institution. States establish such institutions to reduce transaction costs in instances where market failures can impede cooperation.[121] Institutions perform two general functions: aggregation and

[119] Ibid., 2.

[120] See G. Dimitropoulos (2022) 'Law and Digital Globalization', *University of Pennsylvania Journal of International Law* 44, 41.

[121] R.O. Keohane (1984) *After Hegemony: Cooperation and Discord in the World Political Economy*. Princeton University Press.

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delegation.[122] They mediate and transform the pressures inflicted by organized interests and the general public, which in turn affect policymaking. Institutional complexity is conceived of with distributional circumstances and the subject's externalities in mind.[123] Cross-border trading implicates complex technicalities and externalities, and as the principal-agent theory indicates, when the intricacy of an issue drives up the costs of decision-making, the legislature often finds it helpful to rely on specialized agents who develop the necessary competence. In the meantime, legislatures, as principals, must control the behaviour of their agents through, among other means, legislation.[124] Yet, in this process, the legislature must balance administrative flexibility and constraints against bureaucratic drift susceptible to future political intervention.[125]

Putting these considerations in a legal jargon, the necessity of a highly institutionalized trade barrier resolution mechanism is deeply rooted in the requirement of legalization with a view to controlling trade agencies. The empowerment of private industry is merely an additional layer of fire alarm that will bring the legislature's attention to the undue performance of the bureaucracy.[126] In the realm of foreign affairs, domestic checks and balances in advancing legalization is a typical pattern.[127]

However, as demonstrated in section 4, the necessity for a high degree of legalization in fostering private–public cooperation on trade issues is open to debate;[128] it is unlikely to yield the perceived result of bridging private complaints to trade barrier removal. For influential political groups, the availability of informal channels obviates the need for formal procedures. And for small and medium-sized enterprises, the utility of these formal mechanisms will always remain conditional, largely dependent on the economic impact of the barriers concerned.[129] Hence, it is evident that the initiation of the trade barrier procedures by no means depends on private complaints. Rather, private actions play a secondary, facilitatory role in the initiation and investigation procedures.

However, this is not to suggest that private participation in trade barrier procedures could be sidestepped. In fact, these mechanisms are more accurately characterized as platforms for facilitating public–private collaboration, encompassing activities such as fact-gathering, strategizing, negotiating, and potentially litigating foreign trade restrictions. In recent years, as pointed out, '[f]aced with regulatory stakes and increasing legalization, the exchange between business and government is therefore based on the exchange of technical expertise and legitimacy inter pares'.[130] Therefore, in two significant ways, private actors are playing an indispensable role in trade barrier elimination: *first*, it informs the competent authority of the existence or emergence of trade barriers or the threat thereof and facilitates the investigations by providing information on the ground. *Second,* as explained above, it serves as an extra level of political check, ensuring that the trade authority

[122] J. Frieden and L.L. Martin (2002) 'International Political Economy: Global and Domestic Interactions', in I. Katznelson and H.V. Milner (eds.), *Political Science: The State of the Discipline*, 2nd edn. WW Norton and Company, 118–146.

[123] L.L. Martin (1992) 'Interests, Power, Multilateralism', *International Organisation* 46, 765; B. Koremenos et al. (2001) 'The Rational Design of International Institutions', *International Organisation* 55, 761.

[124] D. Epstein and S. O'halloran (1994) *Delegating Powers: A Transaction Cost Politics Approach to Policy Making Under Separate Powers*. Cambridge University Press.

[125] T.M. Moe (1990) 'Political Institutions: The Neglected Side of the Story', *Journal of Law, Economics, and Organization* 6, 213.

[126] M.D. McCubbins and T. Schwartz (1984) 'Congressional Oversight Overlooked: Police Patrols versus Fire Alarms', *American Journal of Political Science* 28, 165.

[127] R.W. Grant and R.O. Keohane (2005) 'Accountability and Abuses of Power in World Politics', *American Political Science Review* 99, 29.

[128] J. Goldstein and L.L. Martin (2001) 'Legalization, Trade Liberalization, and Domestic Politics', in J.L. Goldstein et al. (eds.), *Legalization and World Politics*. The MIT Press. The authors have focused on a caution against legalisation at international level.

[129] T. Sattler and T. Bernauer (2011) 'Gravity or Discrimination? Determinants of Litigation in the World Trade Organization', *European Journal of Political Research* 50, 143.

[130] Woll and Artigas, supra n. 102; Shaffer, supra n. 11.

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responses are effective and timely to the demands of domestic industries. On these premises, any adaptation of the procedures should consider and seek to maximize these two functions.

First of all, trade authorities have an ultimate voice in deciding whether to initiate action against a particular foreign trade barrier and which actions are appropriate, and this margin of autonomy should remain. Given that the initiation of trade barrier procedures usually entails massive political and economic manoeuvres, it is unreasonable to require trade authorities to respond to each case individually. A higher degree of administrative discretion is also intrinsic to the technical nature of trade barrier elimination. Therefore, while it is imperative to recognize the limits of private oversight in the case of trade barrier regulation, we propose that the mechanism and procedural design could be reinforced to ensure the legitimacy of trade barrier elimination. This could include establishing clear guidelines for prioritizing cases based on their potential impact, creating a feedback loop to keep complainants informed, and ensuring transparency in the decision-making process.

More importantly, to enhance the communicative and precautionary functions of private participation, and especially small and medium-sized enterprises, efforts should be steered towards a more systematic approach. Instead of collecting information in a 'person-to-person' manner, an online platform based on big data analysis is more efficient. This platform could bring the attention of the authorities to cases with significant economic and political implications. Such platforms already exist in many countries; the EU's Access2Market platform serves as a telling example. However, these existing platforms are currently not synchronized with the trade barrier procedures, leaving them as two separate mechanisms. To address this, it is advisable to integrate the platforms with different phrases of the trade barrier procedures, including initiation, investigations, and retaliation, to ensure seamless communication and efficiency. In each of these phases, as different interest group may be affected, their voices should be heard to achieve a holistic solution.

5.2 Substantive and Procedural Enhancements

As set forth, trade barrier procedures fare not only as a prominent self-help and deterring mechanism, but also a discursive and communicative forum for problem-solving. Whether one agrees with their propriety or not, reprisals and bilateral consultations have always been popular tools in international affairs. Indeed, the establishment of the WTO's dispute settlement mechanism curbs certain forms of unilateral actions, as evidenced by the foregoing Section 301 case.[131] However, due to the demise of the multilateral mechanism, the resurgence of unilateral measures such as domestic trade barrier procedures is inevitable. States who suffer from actions under such procedures may challenge them at the WTO, if conditions permit, but this may come to no avail given the paralysed dispute settlement mechanism. Moreover, trade barrier procedures also span many instances outside the ambit of WTO agreements. Hence, the adherence to original concepts is inadequate as geopolitical tensions escalate, and it is probable that nations will increasingly use domestic trade barrier procedures, not just for economic reasons, but as part of a wider strategic arsenal.[132] It is therefore worth inquiring into the possibility of adjusting trade barrier procedures

[131] P. Mavroidis (2000) 'Remedies in the WTO Legal System: Between a Rock and a Hard Place', *European Journal of International Law* 11, 763.

[132] Experts in international economic law can readily envision scenarios where cutting-edge technologies such as AI, advanced semiconductors, and quantum computing prompt countries to defensively employ these trade mechanisms. Consider a purely hypothetical scenario where the US counters measures by Country A that obstruct US firms from competing in Country A's semiconductor market through subsidies and restrictive standards aimed at their domestic semiconductor companies, ostensibly for national security reasons. The US, leveraging Section 301, investigates these practices as unjustifiable constraints on US commerce, responding with targeted tariffs or technology export restrictions to safeguard its semiconductor industry – a cornerstone of national security and technological leadership. In another hypothetical case, the EU confronts Country B's ban on importing AI-based diagnostic tools, citing unfounded safety concerns – a move that significantly limits EU companies' market access, despite their compliance with the highest international standards

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in the face of rising protectionism and global instability. Ultimately, trade barrier procedures possess the potential to serve various objectives, from influencing geopolitical adversaries or allies to protecting critical sectors and maintaining technological sovereignty.

Overall, the analysis starts from a critical postulate that the evolution of domestic trade barrier procedures should aim to achieve a balanced goal. On the one hand, the improvement should aim to enhance their adaptability, responsiveness, and strategic significance as a trade policy tool vis-à-vis emerging harmful trade practice. On the other hand, the deployment of such measures should yield pacific solutions instead of escalated tensions. Bearing that in mind, without exceeding the scope of this article, it is possible to identify five areas where substantive adaptation could be made. In general, the wide coverage of trade barrier procedures and the enhancement of specificity and agility should be espoused.

5.2.1 Strategic Refinement of Trade Barrier Mechanisms

Due to the increased fragmentation of trade policy tools, the first necessary step is to reevaluate and recast trade barrier procedures, aligning them with other domestic regulations, instruments, and policy goals. As explained, the advantage of using this approach is that it could induce countries to change their conduct. Consequently, such an approach ought to be employed sparingly and distinguished from other instruments addressing trade harms such as trade defense measures. The analysis in this article also indicates that the mechanisms are increasingly serving not only market access but also security considerations. Therefore, the incorporation of economic security evaluations into the analysis of trade barriers and further policy and scholarly enquiry into additional strategic and defensive refinements of domestic trade barrier procedures are warranted. Given the profound implications of controlling and distributing cutting-edge technologies on national security and economic competitiveness, this approach would involve crafting guidelines to scrutinize the national security implications of trade practices related to advanced technologies. Such guidelines would aim to ensure that economic policies are in harmony with wider security goals.

Furthermore, in some jurisdictions, such as the EU, there is a significant overlap in functionality between TBR and other emerging instruments. In this regard, instead of devising additional instruments, it is critical to identify the potential of TBR and use it more consistently. This strategic refinement could be projected on the wider institutional engagement during the trade barrier investigations. For instance, in the past, lower-ranking officials or authorities are typically assigned to handle private complaints. For instance, China's TBI is controlled by a relatively low-level division under the Bureau of Fair Trade. In China, such a disposition makes it almost impossible for the TBI Division to take significant action or make substantial judgments. Given the influence and strategic interest associated with trade barrier handling under the auspices of trade barrier procedures, higher level of departments or inter-agency cooperation should be involved.

5.2.2 International Harmonization

One of the major functions of trade barrier procedures is to root out non-compliance with trade agreements. This process seeks to induce compliance by exerting pressure on the recalcitrant countries. Where international rules and standards exist, the investigations and examination should reflect existing rules to ensure coherence and consistency. Indeed, divergence in the

for AI safety and ethics. The EU, through its TBR, could challenge Country B's AI import ban. Should the ban prove unjustified, the EU might negotiate its removal or impose countermeasures on high-tech imports from Country B, thereby protecting its AI sector and promoting evidence-based regulation of AI technologies. Lastly, imagine China finding that Country C has suddenly cancelled export licenses for quantum computing components, citing dual-use concerns. This action severely disrupts China's quantum computing R&D, vital for its technological and security future. China could use its TBI to investigate Country C's export license revocations. If found to be unfairly targeting China's quantum computing sector, China might impose export restrictions on rare earth metals critical to Country C's technology industries, aiming to reverse the export policy. Such a move would defend China's interests in the pivotal field of quantum computing.

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interpretation of international rules is unavoidable, but a clear manifestation of international norms demonstrates warranted deference to international commitments and enhances the external legitimacy of the measures. Moreover, it serves as a discursive process, which could potentially facilitate the evolvement of international norms. In the situations where international rules are lacking, attention should be paid to the development of collaborative international standards, aiming at harmonizing regulations and promoting a cohesive approach to trade barriers, especially in sectors marked by emerging technologies.

5.2.3 Extending Scrutiny to Extraterritorial Trade Barriers

In all the jurisdictions examined in this article, trade barrier procedures cover a wide range of trade obstacles, including IPR, trade in services, and investment. However, it is doubtful whether such mechanisms could be used to counter measures with extraterritorial effects. A wide range of emerging trade and investment policies and tools possess the capacity to affect companies, not only in the imposing country, but also the third country and even domestic activities of companies. Salient examples include, for instance, the US' varying sanction schemes, the EU's Carbon Border Adjustment Mechanism, and the emerging outbound foreign investment screening mechanisms. Many of these measures are new and inchoate. As they are susceptible to protectionism and lack international scrutiny, such measures easily incite negative resentments and even counter-retaliation. The rules-based trade barrier procedures provide a formal mechanism for countries who incur from these measures to look into these new schemes and voice their grievances.

5.2.4 Enhancing Technological Expertise and Capacity Building

As trade barriers are increasingly technologized, modification of procedures to address the distinctive challenges presented by digital trade barriers is imperative. Such modifications may entail establishing specialized investigative units within trade regulation agencies equipped with the technical acumen required to assess the impact of trade barriers on strategic technology sectors and to execute swift, focused interventions. The creation of responsive regulatory frameworks is essential to facilitate rapid adjustments to the swiftly changing landscape of global trade and technology.

5.2.5 Ensuring Procedural Legitimacy and Transparency

Above all, procedural guarantees of trade barrier elimination should be reconstructed and reinforced. While trade barrier procedures should not replicate the WTO dispute settlement system or trade remedy laws, the importance of procedural design for unilateral measures cannot be neglected. It is imperative to ensure the internal and external legitimacy of the mechanism, and moreover to ensure its effectiveness in achieving the intended goal of signaling discontent, resolution, and inducing compliance of trading partners.

Firstly, ensuring that these processes are transparent and the measures are proportionate can help build trust among international partners and reduce the likelihood of retaliatory measures. It ratchets up pressure by following a clear timeline and sending an unmistakable signal as to how the investigation would proceed. Furthermore, publishing detailed reports on the investigations and decision-making processes related to trade barriers can provide greater understanding of the rationale behind these actions. The increased transparency and accountability, in turn, demonstrate to the broader international community the imposing countries' concerns, resolve, and legitimacy.

Apart from this external dimension, procedural guarantees are likewise important for the international legitimacy of the mechanisms. In many jurisdictions, the competence over trade issues is traditionally bestowed upon administrative authorities.[133] As argued, the need for

[133] J. Galbraith (2013) 'International Law and the Domestic Separation of Powers', Virginia Law Review 99, 987; P.C. Reed (2001) 'Expanding the Jurisdiction of the US Court of International Trade: Proposals by the Customs and International Trade Bar Association', *Brooklyn Journal of International Law* 26, 819.

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sufficient procedural safeguards is hence inherent in trade barrier procedures to avoid arbitrary decision-making in administrative actions. This would demand transparency, with investigations open and procedure rules manifestly provided.[134] Notably, the imposition of deadlines and the establishment of action procedures ensure that the bureaucratic agent implements the desired policies. Some trade barrier procedures, such as Section 301, are already equipped with detailed procedural requirements. Furthermore, due to the vast implications of trade barrier investigations, their regulatory impact on various sectors should be analysed to weigh its pros and cons. A remedial path in line with due process requirements should also be provided for companies and business operations affected by trade barrier investigations and implementation, whether they are domestic or foreign. In this regard, improving the transparency and clarity of trade barrier procedures is critical to enhance their legitimacy and accountability towards domestic stakeholders.

In addition, while the article has primarily focused on China, the US, and the EU, due to the wealth of available data, it is important to recognize that numerous other jurisdictions also face trade barriers. Consequently, it is plausible that countries, such as Canada, Japan, India, and Brazil, might similarly refine their domestic rules. Pioneers of these reforms will likely establish new benchmarks, fostering wider international acceptance and refinement of this new generation of domestic trade barrier procedures.

6. Conclusion

The evolution from the original concept to the modern application of domestic trade barrier procedures has experienced a significant transformation far from its initial principles. Beginning with a foundational enquiry into whether these mechanisms effectively serve as bridges between private grievances and WTO litigation, the analysis reveals a profound shift. This evolution, characterized not by the expansion of multilateral dispute resolution but by the ascendancy of unilateral strategies, underpins the core of our findings.

Initially designed as an institutional pathway to facilitate market access, domestic trade barrier procedures promised a legal framework within which private actors could address grievances. However, the practical applications of these procedures deviate significantly from their original intent. Instead of catalyzing complaints into actionable WTO disputes, these mechanisms have increasingly mirrored the unilateral tendencies of their host nations. This pivot away from multilateralism towards a more insular approach to trade policy reflects a nuanced 'normative realignment' within the law governing these procedures.

Central to understanding this realignment is recognizing the underutilization of these procedures by the private sector. Despite the mechanisms in place for companies, both large and small, to lodge formal complaints, there is a palpable reluctance. This hesitancy stems not from a lack of grievances but from a calculated disinterest in pursuing formal investigations. The preference for informal negotiations over the rigidity of formal procedures underscores the broader critique of the existing legal framework, highlighting its inadequacy in addressing international trade disputes. Moreover, the transformation of trade barrier procedures into tools of unilateralism does not occur in isolation, but as part of a strategic adjustment by nations to protect their trade interests.

In the face of escalating geopolitical tensions and the race for technological supremacy, a return to the original, narrow confines of domestic trade barrier procedures is not only impractical, but also counterproductive. Attempts to enhance private sector engagement or simplify compliance procedures under the old paradigm fail to address the strategic nature of contemporary trade disputes, particularly those involving advanced technologies. The dynamic international

[134]M.C. Stephenson (2003) '"When the Devil Turns … ": The Political Foundations of Independent Judicial Review', *Journal of Legal Studies* 32, 59.

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arena demands further normative realignment, emphasizing the strategic enhancement of these frameworks to address emerging economic and security challenges. This evolution, prioritizing the protection of innovation, the integration of economic security assessments, and agility to respond to high-tech sector disputes, underscores the imperative for thoughtful reengineering of domestic trade barrier mechanisms. Far from seeking a return to past practices, the moment calls for advancement towards a new generation of domestic trade barrier procedures.

This analysis, while delineating the encysted unilateralism within domestic trade barrier procedures across the US, the EU, and China, should not be misconstrued as heralding the demise of multilateral trade governance. Indeed, the findings underscore a critical juncture at which enhancing domestic trade barrier procedures becomes imperative, not at the expense of, but in tandem with, the reinforcement of multilateral frameworks. The strategic realignment of these procedures presents an opportunity for economies to safeguard their economic interests while upholding and strengthening international trade order. It posits that a harmonious balance between national priorities and international cooperation is not only feasible, but also essential for the sustainability of global trade dynamics. Consequently, the recommendations aim to invigorate this balance, advocating for reforms that respect sovereign rights, while defending the collaborative spirit that underpins multilateral trade agreements. Ultimately, the evolution of domestic trade barrier mechanisms can serve as a cornerstone of a more resilient and equitable international trade system.

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