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What's New in EU Trade Dispute Settlement? Judicialisation, Public-Private Networks and the WTO Legal Order

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Judicialisation, Public-Private Networks and the WTO

Legal Order

Gregory Shaffer*


There is a recursive relationship between the judicialisation of international trade relations and the development of public-private partnerships in the EU to address international trade claims. The more legalized international trading system creates stronger incentives for well-placed private actors to engage public legal processes. At the same time, to litigate effectively in the WTO system, government officials need the specific information that businesses and their legal representatives can provide. Officials therefore strive to establish better working relations with industry on trade matters. As a result, the EU’s decision-making process for the investigation, litigation and settlement of trade claims has become a dynamic, ad hoc, hybrid, multi-tiered process in which private interests are deeply implicated. The process is neither purely intergovernmental nor purely private, but rather involves public-private networks operating in the shadow of international trade law. The process changes and adapts through trial and error.

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In 1995, with the creation of the World Trade Organisation (WTO), international trade rules became broader in scope and more legalized in their enforcement. With cross-border trade and investment constituting a rising proportion of national production around the world (commonly referred to as economic globalisation), the WTO legal order has increased in importance. The European Union (EU) and United States (US), as the world’s two largest economies and trading powers, have been the most active shapers and users of this legal system. The WTO has expanded in membership, comprising 150 members at the start of 2006, compared to the 23 original contracting parties of its predecessor—the General Agreement on Tariffs and Trade (GATT), founded in 1948. WTO rules now cover intellectual property protection and trade in services, as well as trade in goods, and they are more detailed in addressing non-tariff barriers to trade, such as health measures and technical regulations. The WTO dispute settlement system now has compulsory jurisdiction and includes appellate review. While a party to a dispute could block formation of a panel or adoption of its ruling under the GATT, this option is no longer available. The resulting WTO case law has burgeoned, and, in the process, become significantly more complex and demanding on participants. In short, WTO law involves greater legalisation along the dimensions of binding obligation, precision of rules, delegation to a dispute settlement institution, and use.

The EU has responded in three major ways to this legalisation and judicialisation of international trade relations. First, it has become more active in its use of international
trade law to pursue market access abroad, reflecting a more outward-looking trade policy than an inward protectionist one. Second, the European Commission’s Trade Directorate General (DG) has dedicated more resources to law, creating a new dispute settlement unit in 1998 and working more closely with the Commission’s Legal Service. As of December 1, 2005, the EU had been a complainant seventy times before the WTO, far exceeding its activity during the 48-year history of the GATT. Third, in order to use the system effectively, the Commission has sought to work closely with private businesses and trade associations. The result has been more active EU engagement in the maintenance and pursuit of a liberalized, capitalist international trading order.

The Commission has understood that, to use the WTO legal system successfully, it must develop cost-effective mechanisms to perceive injuries to its trading prospects, identify who is responsible, and mobilize resources to bring a legal claim and use trade law as leverage to negotiate favorable settlements. It has mobilized resources through intra- and inter-service coordination and networking with European trade associations and companies. In particular, it has attempted to develop new informal and formalized legal mechanisms to work with the private sector, including pursuant to its Market Access Strategy and Trade Barrier Regulation, examined below. Developments in WTO procedure and case law have pressed it to do so. The time lines are tight, the need for factual support intensifying, and the case law to be mastered expanding. As one Commission official states, ‘the reality of [WTO] panels is that they seem to drown in facts.’ The Commission has thus sought to work more closely with trade associations, companies and their lawyers to obtain the information it needs in a timely fashion to defend EU trading interests effectively.
These changes have provided new opportunities and incentives for private parties, increasing the potential for greater private input into, and influence over, trade policy (Cutler 1999). Because the prospects for successful legal challenge of foreign trade barriers has increased, private businesses have greater incentives to help government officials identify and challenge them, both directly through the more legalized system, and indirectly through bargaining in the system’s shadow. Private businesses and trade associations have engaged private law firms to assist them. International trade law practice in Brussels has correspondingly expanded.

The Commission, however, must balance its desire for greater private sector support and its need to channel that support to serve its perception of broader European goals. On the one hand, the private sector’s incentive to collaborate weakens the more that the Commission diverges from private sector demands, so that there is a structural incentive for the Commission to be responsive. The Commission benefits politically by working with private companies to use the WTO dispute settlement system successfully. Winning cases increases its stature internationally (in relation to non-EU countries) and internally (in relation to EU member states). On the other hand, the private sector depends on the Commission to defend its interests before the WTO’s intergovernmental system, so that the Commission is in a privileged position. In Robert Putnam’s two-level game framework, the Commission is a ‘COG’ (chief-of-government) able to exploit its position of being present at both negotiating tables, international and internal (in this case the EU), to advance its policy preferences (Putnam 1998; Pollack and Shaffer 2001: 21-23). While the balance of influence in the resulting public-private partnerships can
become a negotiated one, the Commission has held the upper hand, in particular compared to practices in the US.

In sum, the politics of EU trade policy has responded to the growing legalisation-- and, in particular, judicialisation-- of international economic relations in a globalizing economy. This judicialisation has affected the handling of all trade-related issues, whether the ‘newer’ ones (such as trade and labor, environment, consumer protection and public health), or the more traditional ones. In either case, the judicialisation of international trade relations has spurred new European public-private collaborations in the dispute settlement field. This article, building on interviews with Commission and member state officials, private lawyers and representatives of European trade associations and businesses, assesses the dynamics of EU trade dispute settlement strategies, including greater public-private coordination in response to the legalisation of international trade relations.

**Background: The shift to a market access strategy**

From the creation of (what is now) the EU in 1958 through the creation of the WTO in 1995, European trade policy was often defensive in posture, reacting to foreign imports and domestic demands for protection on the one hand, and to new trade liberalisation proposals advanced by the US, often to dismantle those European barriers, on the other. The original proposal for establishing a liberal trade regime under the GATT was driven by the US, which continued to play a leading role in the negotiation of seven rounds of multilateral trade negotiations, culminating in the completion of the Uruguay Round and the creation of the WTO. During the Uruguay Round negotiations, European negotiators
often were pressed to respond to US proposals as opposed to taking the initiative (Paemen and Bensch 1995; Woolcock and Hodges 1996: 321). From time to time, the EU, which had long preferred a more diplomatic to a legalistic approach to dispute settlement, blocked the formation of GATT panels and the adoption of panel decisions, especially over agricultural matters (Hudec 1993).

Following the WTO’s establishment in January 1995, the US was quick to employ the WTO’s more legalized dispute settlement system, while the EU was initially on the defensive. The US, working in conjunction with private enterprises and trade associations, initiated a series of high profile cases against the EU, challenging long-standing, politically-sensitive EU barriers to the importation of bananas and beef. The US brought eight of the first fifteen WTO complaints resulting in panel decisions. The EU, on the other hand, was challenger only twice (and those were cases also brought by the US) against Japan’s alcohol taxes and Indonesia’s national car regime.

The EU’s role was soon to change, as the Commission felt pressured to take an initiative. In February 1996 it did so, announcing a new ‘Market Access Strategy’ whose aim was to focus the EU’s trade policy more proactively on opening foreign markets for European firms, rather than on defending the EU’s domestic market from foreign goods. The Commission began to target more resources on opening export markets. The strategy’s essence was to identify foreign barriers to EU imports in a comprehensive manner, prioritize them, and press foreign governments to eliminate them. Sir Leon Brittan, the EU’s liberal Trade Commissioner at the time, officially announced the Market Access Strategy not before an audience of member state bureaucrats, but at a business symposium to which he invited executives from major EU exporting companies.
There, he declared a ‘D-Day for European Trade Policy,’ promising ‘We are going onto the offensive, using our trade powers forcefully but legitimately to open new markets around the world.’ These highly publicized remarks marked a significant change from the relatively more prudent, diplomatic, inward-looking, and reactive EU trade policy of the past. It marked a new opening for export-oriented private business input and influence.

The EU was soon to become much more engaged in using the WTO legal system to advance EU public and private interests. Although it got off to a relatively slow start, the EU requested slightly more WTO consultations than the US (59 to 58) after January 1, 1997, and far more than any other WTO member. Twenty-two of these complaints had resulted in adopted panel or Appellate Body reports by February 2006, compared to 17 for the US.

**Figure 1: Complaints Filed by and against the US and the EU**
The EU’s successful challenge of $4 billion in annual export tax subsidies for US ‘foreign sales corporations’ (FSCs) was a wake-up call to American politicians, helping to neutralize aggressive use of dispute settlement by the US, especially against the EU (Hudec 2003). The EU brought the complaint in November 1997, which it won before the Appellate Body in February 2000. When the US failed to comply with the decision, the WTO authorized the EU to sanction the US by withdrawing trade concessions in an amount of $4.043 billion dollars per year. As one Washington trade lawyer remarked, ‘the way to understand the FSC case for the EU is not about getting $4 billion, but to emasculate US trade policy and force the United States to deal with the EU in a bilateral
relationship. Even though the US passed two sets of revised legislation, the Extraterritorial Income Exclusion Act in November 2000 and the Jobs Act of 2004, the EU successfully challenged both of the modified tax measures.

The EU has successfully challenged an array of US legislation and administrative measures. They have included the infamous US Section 301 that the US had repeatedly used to threaten and retaliate unilaterally against the EU and others, the Bush administration’s huge steel safeguard (which the administration immediately withdrew after the Appellate Body decision), the so-called Byrd amendment on the provision of antidumping and countervailing duty awards to the petitioning US industry, the US Antidumping Act of 1916, numerous individual countervailing duty, antidumping and safeguard decisions, and provisions of US copyright and trademark law. Although its main target has been the US, which is by far the most important market for European products, the EU also brought successful cases against a number of other WTO members, including Argentina, Australia, Canada, Chile, India, Korea, Japan and Mexico. In 2005, the EU initiated new complaints against Brazil and Argentina respectively concerning a Brazilian ban on retreaded tyre imports and an Argentine countervailing duty against EU agricultural products.

The EU’s new market access and dispute settlement units

In some ways, the Commission has replicated strategies for public-private coordination developed in the US (Shaffer 2003). Yet the Commission has had to adapt its approach to a quite different political structure and social context. Business input and influence over US trade policy benefits from a longer legacy of federal government-business relations
reflective of the US’ more unified market structure over a longer period of time. The US political structure is also more conducive to private influence through lobbying than that in the EU because of the role of Congress. As Clyde Wilcox (1998: 89) states, ‘If political scientists were charged to design a national legislature to maximize interest group influence, they would be hard pressed to improve on the American Congress’. The ‘revolving door’ administrative culture in Washington further induces the US Trade Representative (USTR) to be responsive to private sector lobbying on international trade matters, since US government officials tend to follow career patterns that bring them in and out of the public and private sectors. The pressure on public officials to respond positively to private sector requests stems not just from a calling to serve the ‘US interest,’ but also, consciously or unconsciously, from an economic incentive to prop up one’s personal career prospects. Businesses in the US are also more comfortable with a litigation-based approach in which private lawyers play a central role, while European businesses operate more discretely, deferring more to government officials on foreign affairs matters (Shaffer 2003: 102-125). EU public-private trade networks thus operate quite differently than those in the US. Yet, although they differ, Commission-dominated public-private networks have developed and, in the process, been quite successful in making use of the WTO legal order.

An important reason for the EU’s success has been its adaptation of a new ‘Market Access Strategy.’ To implement it, Commissioner Brittan established within the DG Trade a new ‘market access unit’ whose primary role was to engage with and help defend EU business interests regarding the trade problems that they faced. The unit created an immense database listing foreign trade barriers by sector, country, and by type
of measure. Businesses could notify barriers through direct contact with the market access unit or indirectly through a sector-specific or country desk within the Commission, through a member state official, through a member state foreign embassy, or through one of the EU’s foreign missions. Use of the site rose exponentially. The Commission estimated that businesses or their trade associations reported over ninety percent of the identified trade barriers.\(^7\)

By promoting its export-oriented strategy through the market access unit, DG Trade hoped to forge new and better links with the private sector that otherwise were under-developed or did not exist. In this way, it would be better positioned to challenge US and other foreign market access barriers. While the USTR responded to onslaughts of private sector lobbying reinforced by Congressional phone calls and committee grillings, DG Trade had to contact firms to contact it. DG Trade hired consultants to provide detailed sectoral reports on trade barriers, hosted well-publicized informational fora on trade policy which it urged business executives to attend, distributed glossy brochures and otherwise solicited European businesses to work with it on trade matters.

The market access unit has provided a primary contact and voice within the Commission to defend and work on behalf of European exporting interests.\(^8\) The unit compiles, investigates and coordinates interdepartmental investigations of barriers to EU trade. In these investigations, it determines the nature of the trade barrier, its economic impact, whether the barrier constitutes a violation of a WTO, bilateral or other legal commitment, what further factual information is needed for a claim, whether the EU can most effectively address the matter diplomatically or legally, and, if so, how. In 2005, the unit was receiving about 5-10 contacts per month that would trigger new
interdepartmental discussions concerning the allocation of responsibility for the matter’s investigation and potential resolution.⁹

The market access unit can obtain preliminary legal analysis from DG Trade’s ‘dispute settlement unit,’ which was created in mid-1998, as to whether the EU has a viable complaint under WTO rules. Its primary role is to investigate and prepare potential WTO complaints on behalf of the EU, including pursuant to the Trade Barrier Regulation (examined below). It also provides advice on WTO legal matters to other units within the Commission.

When the market access unit identifies a trade barrier, the Commission can deploy a number of tools to press for its removal. It will first determine whether the issue may be settled through bilateral or multilateral negotiations. Most frequently, it will raise concerns bilaterally, perhaps using existing bilateral trade agreements or negotiations as leverage. In some cases, it can raise the issue as part of a package in multilateral trade negotiations (such as the current Doha round) or resolve it as a requirement for WTO accession, as for China, Chinese Taipei and Russia.

Unlike the US, the EU has yet to publish all barriers systematically in an annual trade report and attempt to use this publication as a tactical means of leverage for their removal (Shaffer 2003: 40-44; 102-103). Rather it has hired consultants to conduct periodic studies of trade barriers faced by a particular sector, and prepared country reports (approximately 90) on an ad hoc basis (Crowell and Moring 2005: 18).

When the EU has grounds for a legal complaint, it can use the threat of filing a claim to press for the barrier’s removal. The WTO dispute settlement system remains the best option because of its legalized orientation, its extensive use and general acceptance,
and the greater pressure and publicity spurred by a complaint in a multilateral forum. Yet, although earlier EU bilateral trade agreements did not include legalized dispute settlement mechanisms, the newer ones do, including those with Mexico and Chile and the draft negotiating text with Mercosur.

If the case cannot be settled, then the Commission can either bring it directly to the WTO, after first notifying and receiving informal member state approval, or commence an internal investigative legal procedure pursuant to the EU’s Trade Barrier Regulation. The Commission and private parties typically commence legal procedures only if they have exhausted local and diplomatic alternatives or if they feel that further diplomacy and lobbying efforts are either fruitless or can be enhanced through taking legal action. They typically make these decisions in consultation with each other.

Once the Commission decides to proceed to full litigation before the WTO and once a dispute settlement panel has been formed, the Legal Service takes the lead on the file, but it continues to work closely with those assigned to it in DG Trade, and, when needed, with the private sector and its counsel. Many private lawyers maintain that the Legal Service is less accessible than the lawyers in DG Trade’s dispute settlement unit, finding that its lawyers think more in legal than in commercial terms. Nonetheless, the Legal Service does work with private counsel in preparing legal submissions and responding to issues arising at the hearings.
Alternatives for challenging foreign trade barriers

The Commission uses one of two internal EU procedures before filing a WTO complaint against a foreign trade barrier. Under the more ‘political’ Article 133 procedure, the Commission obtains informal approval from member state representatives before launching a WTO case. Alternatively, under the EU’s more ‘legal’ Trade Barrier Regulation (TBR), European private enterprises may petition the Commission to investigate foreign trade barriers and represent their interests before the WTO in a manner analogous to US Section 301 of the 1974 Trade Act. DG Trade promotes business use of the TBR, and, in practice, often advises companies when to commence the procedure. This section first assesses the Article 133 process, then the TBR private petition process, and then the reasons that public and private actors prefer one mechanism over the other to advance their reciprocal interests in WTO litigation and negotiations in the shadow of a potential or actual legal complaint.

The Article 133 process

The traditional means for the EU to initiate trade complaints in the GATT (and now the WTO) is through what is known as the Article 133 process. Under Article 133 of the Treaty Establishing the European Community, the Council makes all decisions for ‘implementing’ the EU’s ‘common commercial policy’ in response to proposals from the Commission. The Commission, which represents EU member states on trade matters that fall within the EU’s competence, consults with a committee of member state representatives, known as the Article 133 Committee. In practice, the Article 133 Committee has largely delegated implementation of EU trade policy to the Commission,
which, in turn, has provided European enterprises with a central contact in Brussels, facilitating the formation of EU public-private partnerships on trade policy.

Although the Commission maintains that it is solely competent to decide whether to bring a trade complaint in implementation of WTO agreements,\textsuperscript{14} the treaty is silent on this point, and member states could attempt to amend it to formalize the Council’s role were the Commission to disregard member state views. Consequently, to maintain good relations with the Council, the Commission obtains \textit{de facto} approval of at least a ‘qualified majority’ of the Article 133 Committee before initiating a WTO complaint. The Commission uses the Article 133 Committee ‘as a sounding board’ to ensure that it is ‘on the right track.’\textsuperscript{15} The Commission has only once filed a submission before a WTO panel that was not supported by a qualified majority of member states, and then only as a third party. The complaint concerned Canada’s and Brazil’s aircraft subsidies, which adversely affected the German aircraft manufacture Dornier Luftfahrt, although firms based in other member states supplied the Canadian and Brazilian firms and so benefited from the subsidies.\textsuperscript{16}

Because of the Commission’s \textit{de facto} administrative powers, European businesses can work more effectively with a central contact in Brussels on international trade matters, either bypassing national authorities or working in coordination with them. Businesses may thus play more active roles, despite the reputation of the Article 133 process as a state-centric ‘political’ procedure, and despite the fact that Article 133 meetings take place behind closed doors without private parties present. If needed, guided by a Commission representative, informed businesses can ensure sufficient support within the Article 133 Committee prior to the Commission’s submission of a proposal.
They can coordinate positions with businesses in other member states so that each respectively contacts its representative for endorsement.

Consequently, the 133 Committee typically ratifies a Commission decision that has effectively already been made. For example, although the UK’s Scotch Whisky Association (SWA) played the lead role in the Japan, Korea and Chile alcohol cases, it also worked with the European-wide trade association CEPS (the Confederation of European Producers of Spirits) and CEPS’s constituent members. These included French cognac producers who contacted French representatives. The process, according to Tim Jackson of the SWA, “involved preparing, researching and communicating our case effectively on a persistent basis, for a very long period of time, to our respective governments and to the Commission.”

Commission officials maintain that it is a mistake to think that, because it is less legalistic, the Commission does not require industry input when using the Article 133 route. The Commission will not file a WTO complaint without being confident that it has a winning case. It typically needs private sector input to prepare the case, especially to its factual underpinnings. Thus, in the three successful EU challenges against allegedly discriminatory alcohol taxes in Japan, Korea and Chile, the Commission required intensive input from the affected EU trade association, the Scotch Whisky Association. As Tim Jackson states,

We must...be ready to assist the Commission (which sadly does not have unlimited resources to pursue such matters) often at very short notice when a WTO case is under way. For example, during the Japan case we had to
commission market research to help the Commission refute some of Japan’s initial submission… [We also assisted] the Commission by gathering market information/research for their Korea and Chile cases... It is a ‘partnership’ exercise with other industry colleagues, respective Governments and the Commission.¹⁸

According to SWA’s outside legal counsel, it arranged for the econometric studies of the cross-elasticity of demand of the foreign and domestic products that played a crucial role in these cases.¹⁹ The Commission and industry respectively benefited politically and economically from these WTO decisions, which gave them leverage to challenge and reduce taxes and other trade barriers to EU spirits around the world.

The Trade Barrier Regulation

European businesses have a more direct ‘legal’ track to solicit Commission representation of their interests—the Trade Barrier Regulation (TBR), enacted in December 1994 in anticipation of the WTO’s formation.²⁰ The TBR is designed to give greater certainty to EU businesses and trade associations that the Commission will act on their behalf to use law, or the threat of invoking law, to defend their market access interests abroad. Specifically, it grants them legal rights to petition the Commission to investigate trade matters and bring trade claims. The TBR prescribes a timetable for this investigation, so that the enterprise will be certain that a decision is made within a relatively short time period, although private lawyers press for even more speed and greater certainty (Bronckers and McNelis 2001: 446; Crowell & Moring 2005: 98, 104). The Commission provides them with all non-confidential information available, conducts
a hearing at which arguments may be presented, and publishes the relevant decision in
the EU’s Official Journal. The Commission’s decision is subject to review by the
European Court of First Instance, with a right of appeal to the European Court of Justice.
In sum, the TBR provides a legal framework that strengthens exporting businesses’
leverage in their relations with the Commission and member states, thereby furthering a
liberalized trading order.

The TBR replaced an earlier analogous regulation that European businesses
largely ignored: the New Commercial Policy Instrument (NCPI). The French
government promoted and the Council enacted the NCPI in 1984 in response to measures
taken by the US under Section 301 against European steel and agricultural interests
(Bronckers 1984: 719). But European businesses were not enticed. They filed only seven
NCPI petitions during its ten-year history. Moreover, the Commission rejected two of the
seven petitions, one brought by pharmaceutical interests and the other by a federation of
oil processors, on the alleged grounds that the complainants failed to present sufficient
evidence of an ‘illicit commercial practice.’ Member states interfered with others, as in a
Dutch company’s complaint against the discriminatory nature of US import restrictions
on intellectual property grounds.

Because the NCPI was ineffective, the French pressed for a new regulation with
more flexible procedural requirements. Germany, the Netherlands and the United
Kingdom initially objected, fearing that the regulations would be used for protectionist
purposes (Molyneux 2001: 236, 242). The TBR nonetheless was enacted, ultimately by
consensus, as part of an internal EU package pursuant to which the French and
Portuguese supported signature of the Uruguay Round Agreements (Devuyst 1995).
Unlike the former NCPI, the TBR permits individual businesses to petition the Commission to initiate a WTO complaint, so that they do not require the support of an entire ‘Community industry.’ The TBR also relaxed the proof of injury requirement to that of a ‘material impact on… a sector or economic activity… of the Community or a region’ (emphasis added)

Since the TBR’s inception, the Commission has initiated 25 investigations, one of which was carried over from the NCPI. It recommended action in 21 of the 23 new investigations that it had completed as of November 2005 (Crowell & Moring 2005: 33). These investigations covered a broad array of industrial sectors, including wines and spirits, leather goods and textiles, cosmetics, pharmaceuticals, music copyrights, autos, shipping and steel, and involved the EU’s largest trading partners, including the US, Canada, Japan, Korea, Brazil and India. The Commission has deployed the TBR only to challenge foreign trade barriers, and not to protect EU firms in the internal market.

The TBR process begins with a ‘preliminary meeting’ between members of DG Trade’s dispute settlement unit and the affected industry, which is typically accompanied by outside legal counsel. At the meeting, the Commission offers advice as to whether a legal complaint could (and should) be pursued. It may advise the party not to file a TBR complaint or explain how to draft the complaint, and what type of supporting evidence is required. If the company or trade association decides to proceed, then the dispute settlement unit will send it questionnaires to complete in order to build a factual record, and will send follow-up questions as needed.22

Although the TBR grants businesses the legal right to force the Commission to act, businesses need to collaborate with the Commission as a partner, since they depend
on it to represent their interests before foreign governments and WTO panels. Moreover, the TBR contains provisions that grant the Commission some discretion on whether or not to proceed, including in weighing whether a complaint would be in the ‘Community interest.’ The Commission thus continues to retain the upper hand, and most firms realize that antagonism is self-defeating. As a consequence, there has been only one legal challenge to a Commission decision under the TBR to date. In 2004 the Federation des Industries Condimentaires de France did not accept the Commission’s advice not to proceed with a TBR complaint concerning US sanctions in the beef hormones case. The Commission’s decision not to pursue a complaint was upheld by the Court of First Instance.

In practice, businesses work behind-the-scenes with DG Trade to decide whether they should use the TBR or Article 133 process, and if so, how. When Volkswagen, for example, complained about a problem that it encountered with a Colombian sales tax on automobiles, DG Trade advised it to file a TBR complaint. Volkswagen’s attorneys twice came with draft complaints on which DG Trade officials made suggestions for improvement, before Volkswagen finalized its submission. Similarly, in BIPAVER’s 2005 TBR complaint against Brazilian tyres, DG Trade advised the trade association about how to use the TBR process.

In the early days of the TBR, businesses could rely on the Commission’s TBR unit to do more of the work since the Commission was trying to promote business awareness of, and confidence in, the TBR. In the first TBR complaint, the Italian silk federation (Federtessile) had not even heard of the TBR until the Commission, in search of successful test cases, suggested it. Federtessile entirely depended on the Commission
to prepare its complaint and lead it through the procedure.\textsuperscript{27} The federation nonetheless supplied the Commission with factual information. The public-private partnership, formed at the Commission’s instigation, was a success for both parties. US rules of origin for silk products were modified to the Italian silk industry’s satisfaction.\textsuperscript{28} The industry sung the Commission’s praises. The Commission, in turn, touted the case as a great success. The Commission then could better promote business use of the TBR. Similarly, COTANCE, which represents hundreds of small leather tanners, brought TBR complaints against Argentine and Japanese market access barriers. It did so following a Commission-funded consultant’s report concerning foreign trade barriers facing the leather industry.\textsuperscript{29} With the passage of time, however, and in response to the increasing demands of WTO cases, the Commission has attempted to require private companies and trade associations to provide more information in response to Commission questionnaires.

The Commission continues to search for ways to enhance alliances with the private sector to support its market access policies. The TBR appears to be less known in individual companies, among trade associations at the national level, and in the services sector (Crowell & Moring 2005: 64, 70-73, 82, 127). National trade associations appear to continue to find it simpler ‘to contact their national governments regarding trade obstacles’ than the Commission (Crowell & Moring 2005: 64). Commission officials admit that they often lack the knowledge of whom to target within the member states.\textsuperscript{30}

In sum, the TBR is much more than a legal procedure. It is a conduit that helps link the public and the private. Members of the TBR unit within the Commission refer to businesses as their ‘customers,’ customers that, as any good entrepreneur, they seek.\textsuperscript{31} The TBR facilitates the forging of partnerships between business and DG Trade to assess
and challenge foreign trade practices in light of WTO rules. Working together, they can coordinate strategies to induce countries to reduce barriers to EU trade, whether through a legal challenge under a WTO, bilateral or plurilateral agreement, or through a negotiated settlement in the shadow of a potential legal complaint. In this way, the Commission aims to further EU public and private interests in a legalized, liberal trading order.

Business Profile, Case Profile and the Choice of Mechanism

Large multinational businesses and those that are members of EU trade associations with offices in Brussels are best positioned to work the system, whether under Article 133 or the TBR. Perhaps the clearest recent example of an EU public-private partnership in WTO litigation is the interaction between the Legal Service, DG Trade, Airbus and Airbus’ outside counsel in the US-EU aircraft subsidy dispute, commonly referred to as Boeing-Airbus. The Commission assigned around a dozen lawyers to the case from the Legal Service, the dispute settlement unit and the services unit of DG Trade. They in turn were supported by a large team of lawyers from a US private law firm hired by Airbus. In mid-2005, Boeing and Airbus were reputed to be each spending around $1 million a month on the case.

Similarly, the Scotch Whisky Association, one of the EU’s largest export sectors, is renowned for successfully working with the Commission to pry open foreign markets. The industry’s initial success in the 1996 Japan-Alcoholic Beverages case spurred it to work with the Commission in the EU’s successful WTO complaints against South Korea and Chile. A sophisticated repeat player, the SWA likewise worked with the Commission on the WTO terms of accession of China, Chinese Taipei, Russia, and
others, and filed TBR cases against Uruguay and India. Other members of the Confederation of European Producers of Spirits (CEPS) have also deployed the EU’s trade instruments. French associations of cognac producers and of Bordeaux winemakers have each brought TBR complaints, one against Brazil’s non-recognition of the ‘cognac’ geographical indication, and the other against Canada’s failure to protect the ‘Bordeaux’ and ‘Medoc’ geographical indications.

Although the TBR has gained acceptance, the vast majority of EU WTO complaints proceed through the Article 133 process. As of November 2005, TBR investigations had given rise to ten of the EU’s 70 WTO complaints, representing an increase from the WTO’s early years, when only one of the EU’s first twenty-eight cases went through the TBR process. Many businesses, especially larger ones, continue to prefer the Article 133 process, which tends to be faster. The Article 133 process can avoid the delay of a TBR procedure, which takes at least six or seven months before the Commission will take a claim to the WTO. Thus the Commission reacted immediately in October 2004 to the US filing of a complaint against aircraft subsidies granted to Airbus by filing the EU’s own complaint against US subsidies to Boeing. In addition, the Article 133 process permits businesses to remain less in the forefront. In a TBR complaint, a company must publicly request EU authorities to challenge a country’s practices. Although trade associations can file a TBR complaint, in which case the name of an individual firm will not appear, individual firms may still be perceived as taking a confrontational posture. They may fear that the targeted country will retaliate against them.
The TBR nonetheless can serve important purposes which the figures on its triggering of WTO complaints fail to capture. A principal reason for this is that TBR process creates a factual and legal record that presents a foreign government with a shadow WTO complaint and presents a credible threat that a WTO complaint will follow if a resolution is not reached. 40 Twelve of the first twenty-one TBR investigations in which the Commission recommended action ‘were resolved by the negotiation of some form of bilateral agreement or understanding’ without full WTO litigation (Crowell and Moring 2005: 52). The TBR’s establishment of a factual and legal record arguably provides leverage for the EU to reach a settlement. In addition, the EU prevailed in whole or in part in all five TBR complaints that were fully litigated before the WTO, although it did not prevail on a number of claims in the Korea-shipbuilding case (Crowell and Moring 2005: 54-55). The Commission, working with private industry, thus deploys the TBR more as a ‘problem-solving device’ than a means to litigate outcomes (Bronckers and McNelis 2001: 453). Going to the WTO is a last resort for the Commission and TBR users (Crowell and Moring 2005, p. 42).41

Businesses may also bring a TBR complaint where they feel that a member state could block Article 133 action. This was the case with German company Dornier Luftfarhrt. The member states whose firms benefited from Brazil’s subsidies were unable to stop the initiation of a TBR investigation (Van Eeckhaute 1999: 211; Bronckers and McNelis 2001: 457). Similarly, the TBR route enabled the EU spirits industry to challenge India’s tax policies despite the reluctance of the Trade Commissioner and some member states to do so because of India’s pivotal role in the Doha Round of multilateral trade negotiations.42
The TBR may offer particular advantages to smaller or less politically-connected enterprises. Leather tanners, silk fabric finishers, and producers of Parma ham, for example, are not politically powerful industries.\textsuperscript{43} The TBR increases the likelihood that EU officials will address their problems.\textsuperscript{44} For example, Italian silk producers were not supported by EURATEX, the Europe-wide textile trade association, because some of its members benefited from more stringent US rules of origin. Similarly, the EU successfully defended Irish Music Rights Organisation’s (IMRO) interests before the WTO against provisions of US copyright law, despite only a relatively small amount of royalties being at stake for a trade association from a smaller EU member state (O’Connor and Djordjevic 2005: 129). The Commission’s dispute settlement unit also prefers the TBR for the preparation of many cases precisely because it can help structure collaboration with the private sector and thus help it to prepare its case.\textsuperscript{45}

Conclusion: The recursive relationship of WTO judicialisation and EU public-private-private networks

The development of stronger public-private partnerships in the EU to address international trade claims is a rational response to a more judicialised international trading system. WTO legal rights affect company and industry-specific interests. The more legalized international trading system creates stronger incentives for well-placed private actors to engage public legal processes. At the same time, to litigate effectively in the WTO system, government officials need the specific information that businesses and their legal representatives can provide. Officials therefore strive to establish better working relations with industry on trade matters. The engagement of private firms, in
turn, helps national public officials render international public law more effective—hence the recursive relationship between WTO public law and private interest.

The EU’s decision-making process for the investigation, litigation and settlement of trade claims is no longer (if it ever was) a matter of simply reconciling divergent national and EU perspectives. It has rather become a dynamic, ad hoc, hybrid, multi-tiered process in which private interests can be deeply implicated. It is multi-tiered because private interests network behind-the-scenes simultaneously at the national and supranational levels with member state and Commission representatives in order to profit from the removal of foreign trade barriers. It is ad hoc because private businesses can coordinate their positions among themselves within, through and between trade associations, and form partnerships with EU public officials on a case-by-case basis. It is a hybrid because the process is neither purely intergovernmental nor purely private, but rather involves public-private networks operating in the shadow of international trade law. It is dynamic because the process changes and adapts through trial and error.

DG Trade’s market access and dispute settlement units represent an institutional response to the demands of the WTO legal order. These units create new points of contact and opportunities for European industry on trade policy and its implementation. The Commission has attempted to steer the resulting public-private networks to advance EU public and private interests in trade litigation and settlement negotiations. The Commission continues to hold the upper hand so that any claim of a ‘privatisation’ of EU trade policy has little resonance. The Commission’s predominance in the partnership, in fact, induces some dissatisfaction among private businesses and their lawyers, which would like to have a greater say in litigation and settlement positions.
Yet although the legalisation and judicialisation of international trade relations has opened new entry points for European business into EU trade policy, significant constraints persist in light of European business-government traditions and the EU’s political structure. The European private sector has been less aggressive in pressing EU officials to deploy the WTO legal system than its US counterpart, reflecting traditional European business approaches to international economic relations. Many businesses remain reticent about using the TBR, and are generally less inclined to collaborate with the Commission when doing so entails significant costs. Many EU trade associations find the Commission’s demands for supportive evidence in a TBR complaint too demanding (Crowell & Moring 2005: 45, 52, 67). Even European firms that lobby relatively actively on internal market matters, lobby less on external commercial relations. Rather, European firms tend to be more concerned about remaining anonymous so that they do not face reprisals from the targeted government. As a result, the Commission can receive less private support in bringing WTO complaints than its US counterpart.

In short, WTO judicialisation has not triggered identical changes around the world, but rather new national (and, in this case, EU) strategies of adaptation to it in reflection of particular institutional, political and cultural contexts. The judicialisation of international trade relations has spurred the formation of public-private coordination strategies in the EU whose dynamic has become more outward-looking and proactive. Yet these EU strategies reflect a distinct, more ‘top down’ European approach to business-government relations in international trade. The dialectic of change and contention in Europe over these ‘new’ trade politics will continue.
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Notes

1 Abbott (2000) incorporates judicialisation (third party dispute resolution) as a component of the legalisation of international relations. Stone Sweet (1999) focuses on judicialisation as a key component in the construction of governance.

2 Formally, the European Communities (EC) is a party to the WTO, but we use the term EU since the EU encompasses the EC as a political entity, and that term is used more frequently.

3 Telephone interview with member of the Dispute settlement unit, Nov. 14, 2005. Confirmed in telephone interviews with other members of DG Trade and private European lawyers, November 2005.


7. Interviews with Dorian Prince, former head of the Market access unit, on March 5, 1998, and confirmed in a subsequent interview with him on June 28, 1999 in Brussels.

8. Telephone interview with member of the Market access unit, Nov. 11, 2005.

9. Telephone interview with member of the Market access unit, Nov. 11, 2005. See also Crowell & Moring (2005: 29).


11. DG Trade’s Dispute settlement unit continues to take the lead during the ‘consultations’ phase. Email from member of the Dispute settlement unit, March 13, 2006.

12. Telephone interviews with private lawyers from three firms that have handled WTO matters on behalf of EU companies, Nov. 14, 16 and 18, 2005 respectively. See also discussion in Shaffer (2003: 120-5).

13. For a comparison of their operation in practice, see Shaffer 2003, p. 89-94.


15. Interview with a DG Trade official, Brussels (June 16, 2001).

16. Interviews with a member state representative to the Article 133 Committee in Brussels (June 23, 1999), a Commission official in DG Trade, Brussels (June 24, 1999), and telephone interview with an official from DG Trade on Nov. 11, 2005.

17. Remarks of Tim Jackson, head of the SWA, at a conference in Geneva, May 1997, distributed at conference (on file with author). Confirmed by a USTR official, interview,
May 10, 2000, and by a member of the Legal Service of the European Commission, interview, June 22, 1999.


22 Telephone interview with member of the Dispute settlement unit, Nov. 14, 2005.

23 Telephone interview with member of the Commission, Nov. 14, 2005.

24 ‘Federation des Industries Condimentaires de France (FICF) v. Commission,’ Case T-317/02 (December 14, 2004).


26 Telephone interview with private legal counsel, Nov. 18, 2005. BIPAVER is the trade association for the retreaded tyre industry.
27. Telephone interview with Mr. Tettamanti, a representative of Federtessile, based outside of Milan, Italy (February 19, 1998).

28. After a side agreement and renewed EU challenge, the dispute finally was settled to the industry’s satisfaction following Congress’ passage of The Miscellaneous Trade and Technical Corrections Act of 1999. See Public Law Number 106-36 § 2423 (1999); and Green 1999, 12.


31. Interview with member of the TBR unit, Brussels, June 21, 1999; and telephone interviews with Commission officials in Nov. 2005.

32. Telephone interview with official from DG Trade, Nov. 11, 2005.

33. Telephone interview with a private counsel assisting Airbus, Nov. 16, 2005.

34. Interview, private legal counsel, July 20, 2005.


38. In matters that require a Commission investigation, the TBR does not necessarily create delay. Telephone interview with member of the Dispute settlement unit, Nov. 14, 2005.
Both complaints were filed before the WTO Dispute Settlement Body on October 6, 2004. See European Communities and Certain Member States - Measures Affecting Trade in Large Civil Aircraft - Request for Consultations by the US; and US - Measures Affecting Trade in Large Civil Aircraft - Request for Consultations by the European Communities, WT/DS317/1.

Telephone interview, Nov. 18, 2005.

Confirmed in telephone interviews with members of the Dispute Settlement unit and private legal counsel, Nov. 2005.

Telephone interview with member of the Dispute settlement unit, Nov. 11, 2005.

1999 Prince Interview, supra note….

Telephone interview with a member of TBR unit (February 1998).

Telephone interview with person involved in the cases, November 2005.

Interview with a Danish representative to the 133 Committee, Brussels (June 24, 1999); chemical industry representative, telephone interview, Nov. 14, 2005. Telephone interview with private legal counsel, Nov. 18, 2005. Telephone interview with member of Dispute settlement unit, Nov. 14, 2005, confirmed in telephone interviews with private counsel representing European clients, Nov. 14, 16 and 18, 2005.

Interview with a member of the TBR unit in Brussels (June 29, 1999); e-mail message from a lawyer in the Legal Service (March 11, 2003).
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