

The European Union's Use of the World Trade Organization's Dispute Resolution Process

A Briefing Paper

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The European Union (EU) is a key player in the World Trade Organization's dispute settlement process. During the nine-and-a-half years that the WTO has existed, the EU has used the dispute settlement process primarily to target traditional trade barriers, and it has focused mostly on other advanced developed countries. The high degree of delegation to the European Commission and the distributive character of the politics involved have enabled the EU to initiate complaints effectively, despite its essentially divided system of governance. Thus the EU's slightly lower level of usage than the US, despite accounting for a larger share of global exports, seems to be due to factors other than lower capacity. Both the institutional arrangements and the character of the politics involved make enforcing WTO decisions through the imposition of sanctions more complicated, but the EU has been able to overcome these obstacles when the stakes have been sufficiently high.

Overview of the EU's use of WTO dispute resolution

The EU is the second most prolific initiator of WTO complaints, after the United States (see Table 1). As of 30 June 2004, it had initiated 63 complaints, accounting for 19% of all complaints. This is in line with the EU's share of world merchandise exports in 2002.¹

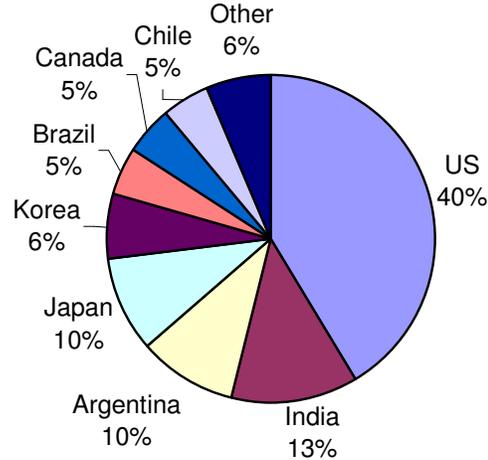
¹ WTO *International Trade Statistics 2003*. Excludes intra-EU trade.

Table 1. The principal users of WTO dispute resolution

Rank	Complainant	Number of complaints	Share of complaints
1	US	77	23%
2	EU	63	19%
3	Canada	26	8%
4	Brazil	22	6%
5	India	15	4%
6	Mexico	14	4%
=7	Japan	11	3%
=7	Korea	11	3%
9	Thailand	10	3%
10	Argentina	9	3%
	Rest of the World (30)	82	24%
	TOTAL	340	100%

Note: As of 30 June 2004, there had been 312 WTO complaints, but some involved multiple complainants. Counting each complainant individually yields 340 complaints.

The EU's WTO complaints have involved 12 different countries, although the US has been the respondent in 40% of them. Japan, Canada and Australia collectively have been the respondents in a further 16% of the EU's complaints (see Figure 1).

Figure 1. The principal targets of EU WTO complaints

Nearly a quarter of the EU's WTO complaints have involved agricultural and food and drink products (see Table 2). Complaints involving steel account for a further 13% of EU complaints, as do those concerning clothing, textiles, footwear, hides and skins. The EU has also initiated a number of complaints that affect multiple industries ('horizontal') and others that affect how the WTO system functions, such as the adoption of unilateral or extra-territorial measures ('systemic').²

² Some of these classifications are subjective. For example, general issues that have particular relevance for a specific industry have been classified by that industry rather than designated as 'horizontal.'

Table 2. Products involved in EU WTO complaints

Product	Number of complaints	Share of complaints
agricultural products (including spirits)	15	24%
steel	8	13%
clothing, textiles, footwear, hides & skins	8	13%
chemicals and pharmaceuticals	5	8%
automobiles	4	6%
electronic goods	3	5%
music	2	3%
machinery	1	2%
shipbuilding	1	2%
aircraft	1	2%
carton board	1	2%
'horizontal'	7	11%
'systemic'	7	11%

³ Most WTO complaints are brought under more than one agreement. The classifications here are based on the first agreement cited in each complaint.

The preponderance of EU WTO complaints target traditional trade measures: trade defence instruments (anti-dumping duties, countervailing duties, safeguard measures); traditional at-the-border measures (tariffs, customs valuations, quantitative restrictions); and discriminatory taxation and practices (see Table 3).³ Thus far the EU has pursued relatively few complaints under the new rules agreed during the Uruguay Round.

Table 3. Types of measures subject to EU WTO complaints

Type of trade measure	Number of complaints	Share of complaints
trade defence instruments	19	30%
border measures	12	19%
discriminatory taxation	6	10%
intellectual property rights	6	10%
investment measures	4	6%
regulations	3	5%
subsidies	3	5%
unilateral measures	3	5%
export restrictions	2	3%
extraterritorial effect	2	3%
discriminatory practices	1	2%
services	1	2%
government procurement	1	2%

Most of the EU's complaints, as with those of other complainants, however, do not proceed all the way to formal panel hearings before the WTO (see Table 4). Most complaints are settled in one form or another, or are not considered worth pursuing for various reasons. When the EU has pursued complaints all the way through the legal process, it has had a better than average success rate, significantly better than the average of the top ten most frequent complainants, although among those Argentina, Brazil, Korea and Thailand have won all of the panels that they have initiated, although they have initiated significantly fewer.

Table 4. EU performance in panels

Complainant	Share of complaints going to panel (excludes complaints since 1.7.03)	Percentage of completed panels won
EU	45%	96%
All	45%	89%
10 most frequent complainants	46%	87%
US	38%	79%

The EU has been quite vigorous in seeking to enforce the rulings that it has won. It has sought, threatened or imposed sanctions on four occasions, all involving the US, more than any other WTO member. Brazil and Canada have each done so on three occasions, but in two of those (US steel safeguards and the Byrd Amendment) the EU took the lead. To date the EU has actually imposed sanctions on only one occasion – the Foreign Sales Corporations complaint – but the potential value of those sanctions is by far the highest authorised thus far. The US has sought and imposed sanctions on two occasions.

The EU's trade dispute institutions

The vast majority of trade disputes never end up before the WTO. Most are resolved through bilateral, plurilateral or multilateral negotiations. Those negotiations, however, take place in the shadow of WTO dispute resolution. Further, the most intractable issues are the ones that tend to end up before the WTO.

As a consequence the EU, as other polities, does not have specific institutions for dealing with WTO disputes, but it has procedures for dealing with trade disputes generally. The key institutions involved in the EU's prosecution of trade disputes are the European Commission and the Council of Ministers, representing the member governments of the EU.

⁴ Council Regulation 3286/94 amended by Council Regulation 356/95. For details of the TBR's procedures see http://europa.eu.int/comm/trade/issues/respectrules/tbr/index_en.htm.

The EU has two principal mechanisms for deciding which trade barriers to pursue and how: the Trade Barrier Regulation (TBR)⁴ and the 'non-procedure' of the 133 Committee. The TBR roughly parallels the Section 301 provisions of the US. It provides a legalistic mechanism through which European trade associations or firms can raise foreign trade barriers formally with the Commission. The Commission is then under a legal obligation to investigate and to propose action if the barrier is causing harm and if it is in the 'Community interest' to do so. The Commission is in the driving seat, but is obliged to consult the member governments, represented in the advisory TBR Committee. The TBR Committee can refer action it dislikes to the Council. The Council requires a qualified majority (a super majority) against to block the Commission's proposed action. As of 30 June 2004 this had not happened.

As of 30 June 2004 there had been 21 TBR complaints. Of these only one has been rejected, although others have been discouraged before they have been brought formally. Eight of the TBR complaints have led to WTO complaints. Two other TBR complaints led to the EU joining other WTO complaints as a third party.

Given that TBR complaints account for less than 13 percent of the EU's WTO complaints, the 133 Committee route is clearly important. This route is not governed by any specific legislation, but is derived from the trade policy powers rooted in the 1957 Treaty of Rome. The Commission again takes the lead, but under this route consults with the Council's 133 Committee of trade experts. Although there is some ambiguity about the legal requirements,⁵ in practice the Commission does not proceed with a WTO complaint unless it has the support of a qualified majority of the 133 Committee. As of 30 June 2004, the Council had approved all of the Commission's proposals to initiate formal WTO complaints.

⁵ The Commission contends that on the basis of the Treaty of Rome, it does not need the Council's approval to initiate a trade dispute. The Council disagrees.

The 133 route is more opaque and more political than the TBR route. Action is likely only if there is strong backing from the Commission or an influential member government. Consequently, only economically important or otherwise politically well-connected industries have been able to make effective use of the 133 route.

The Council's role is significantly greater when it comes to the imposition of sanctions in order to enforce a successful WTO complaint. The Treaty of Rome makes clear that only the Council can impose sanctions (formally withdraw concessions) and that it must decide to do so by a qualified majority.

The politics of EU use of WTO dispute resolution

An important feature of WTO trade disputes, which is not unique to the EU, is that the decision to initiate a dispute largely has the character of distributive politics. When a complaint is initiated, usually all of the costs of adjustment are expected to fall on the foreign country. As a consequence, it is rare for there to be domestic opposition to initiating a trade dispute. The rare occasions of opposition from within the polity are due to domestic firms somehow benefiting from the foreign rule being challenged, for example through investment or by being a supplier to the protected industry. As a consequence, when the Commission proposes initiating a WTO complaint, there is rarely opposition to the proposal. This reinforces the delegation of authority to the Commission rooted in the EU's procedures.

There are, however, a number of other considerations that influence whether and how aggressively the Commission pursues WTO complaints. The Commission, for example, is less likely to pursue aggressively a dispute with a key interlocutor in an ongoing trade negotiation, at least so long as the prospects of the negotiation are good. The Commission also seems relatively reticent about pursuing complaints against developing countries (as Figure 1 suggests). In part this is because their markets are less important to EU exporters and so there is less demand for action, but the Commission is also concerned that developing countries perceive the benefits of membership in the WTO and so remain engaged. In addition, the Commission is sensitive to the perception of 'bullying' developing countries or working at cross purposes to EU aid programmes. The Commission is also less likely to pursue WTO complaints that might set uncomfortable precedents for EU policies. Sometimes this just involves avoiding certain legal arguments, but there are some issues, such as export subsidies, that the Commission seems reluctant to tackle due to the possible adverse implications for EU policies. Lastly, the Commission has limited resources for pursuing WTO complaints, which both limits the number of complaints that can be pursued and encourages the selection of particularly strong or important cases.

The politics of imposing sanctions, however, are very different. Not only do the member governments have a much more important role, but the costs of imposing sanctions fall on EU firms in terms of higher prices for some imports, although other firms will benefit from the resulting protection. Thus decisions to impose sanctions have the character of redistributive politics, with those unlikely to gain from successful enforcement paying the cost of achieving it. Combined with the need for a qualified majority of the member governments in favour, this creates quite a high threshold for action.

As the discussion earlier suggests, however, the EU has been active in seeking, threatening and imposing sanctions. Two factors help to overcome the obstacles presented by the combination of redistributive politics and the need for the support of a qualified majority of member governments. One is that the Commission actively seeks to mitigate the adverse impact of sanctions on EU firms. In imposing sanctions on the US in the Foreign Sales Corporations complaint, for example, the Commission consulted extensively with member governments and European trade associations in drawing up the list of products to be included. Further, it specified that only products for which the US accounts for less than 20 percent of EU imports, and which the EU also exports, would be included. The other factor is that the EU has not raced to impose sanctions, rather it has given the respondent (in all cases thus far the US) time to comply. With the Foreign Sales Corporations sanctions, for example, the EU did not impose sanctions until 19 months after receiving authorisation to do so, and even then phased in the application of sanctions so that they would rise steadily and automatically from a relatively low level. Such an approach helps to persuade European firms that imposing sanctions is the only possible way of ensuring that multilateral rules are enforced. Thus the diffuse benefits of a more effective multilateral system help to dilute opposition to the imposition of specific sanctions.

Conclusions

The EU is a major player in WTO dispute settlement, in terms of complaints initiated, panels won and sanctions sought, threatened and imposed. The EU's effectiveness in initiating complaints and winning panels is a product of a significant degree of delegation to the Commission and the distributive character of the underlying politics. Any reticence seems to be the result of self-restraint rather than incapacity. With regard to the more politically challenging decision to impose sanctions, the Commission's measured approach both reduces the adverse impact on EU firms and persuades them that such action is necessary to realise the benefits of an effective multilateral trading system.

General Notes

This paper is based on the status of WTO complaints as of 30 June 2004.

Information on complaints is taken from the WTO Secretariat's 'Dispute Settlement Gateway,' which is accessible at: www.wto.org/english/tratop_e/dispu_e/dispu_e.htm

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