

1. Introduction

With the establishment of the World Trade Organization (WTO), a lively scholar debate has emerged about the wisdom of replacing the GATT's model of political-diplomatic dispute settlement with a model of legalized dispute settlement. The strengthened enforcement mechanism of WTO rules means that WTO members can expect to have to bear high costs if they breach those rules. Despite existing terminological differences – judicialization, legalization etc.¹ – the trade policy literature converges on the idea that the introduction of independent third party adjudication and the credible threat of sanctions brought about by the creation of the dispute settlement mechanism (DSM) of the WTO represents one of the key features of the present international trade regime. Unsurprisingly, therefore, scholars interested in investigating the question of why and under which conditions cooperative agreements are possible in the WTO, have increasingly focused on how judicialization affects the trade-related interests of and the trade policy-making dynamics among domestic actors (key economic interest groups and policy-makers alike).

This phenomenon has been approached from a wide array of theoretical angles. One strand of the literature, for instance, has focused on the effects of legalization on domestic politics. In this context, some authors have come to pessimist conclusions suggesting that increased legalization might inhibit further liberalization (Goldstein and Martin 2000), while others have taken a more optimist view stressing that judicialization may well end up facilitating the adoption of cooperative agreements by making the WTO an attractive institutional location for governments willing to negotiate regulatory issues demanded by their constituencies (De Bièvre 2006, De Bièvre and Thomann 2009). Some attention has also been devoted to assessing judicialization's impact on business-government relations (Shaffer 2006, Woll and Artigas 2007). Yet another strand of literature instead focuses on the so-called politics of dispute settlement: why do states decide to initiate (or not to initiate) litigation (Busch and Reinhardt 2001), what are the patterns of decisions when conflicts among parties are brought to adjudication (Reinhardt 2001), what power relationships take place between actors in the process of adjudication (Kelemen 2001), and, finally, how do parties comply with decisions adopted through third party review (Daugbjerg and Swinbank 2008, Davis 2007).

Despite the growing richness of this literature, it is striking how little attention has been paid to integrate the above-mentioned lines of inquiry by investigating an important second-order effect of judicialization: how the prospect of litigation increases domestic actors' propensity to further cooperative dynamics through the adoption of new agreements in the WTO framework (but see Falkner 2007, Poletti forthcoming). In fact, empirical evidence seems to suggest that an important aspect of the judicialization/domestic politics nexus is missing in the above mentioned accounts. Judicialization does not only feed-back into the domestic politics of trade by increasing or decreasing actors' propensity to bring new issues under the jurisdiction of the WTO. Neither does it do this only by bringing trade actors into dispute settlement dynamics and, therefore, by favoring the removal of

¹ Judicialization hereafter.

existing trade barriers or discouraging the setting up of new ones. Arguably, the most relevant effect of WTO judicialization stems from a second-order feed-back effect on the domestic politics of trade: the prospect of litigation increases domestic actors' propensity to engage positively in negotiations for an expansion and/or deepening of cooperative agreements already undertaken. In a nutshell, my contention is that under given circumstances states that breach WTO rules seek to avoid or to minimize the costs of their 'misbehaviour' by pushing for an expansion of WTO reach. More specifically, when the adjustment costs of complying with a violation ruling are high, non-compliant countries may rather prefer the adoption of new agreements in the WTO framework as a means to neutralize or minimize the costs that would result from successful legal action undertaken by WTO partners. In other words, I suggest that judicialization exerts pressure on trade-related domestic political actors to ignite a positive dynamic of cooperation insofar as it creates high expectations that states breaching rules already agreed upon will pay a cost for their misbehavior.

In order to test the explanatory power of this hypothesis, this paper investigates how the European Union (EU) defined its policy preferences in two different areas of negotiations in the Doha Round: agriculture and trade-and-environment. A comparative analysis, in fact, allows to explore whether the hypothesized relationship between judicialization and domestic politics is consistent across different issue areas, namely traditional 'at the border' trade policies (agriculture) and regulatory 'behind the border' trade policies (trade and environment) thereby potentially providing the argument proposed with additional analytical leverage. In both contexts the EU has been involved in a number of politically sensitive conflicts with WTO partners. However, contrary to the expectation of high obstacles to further cooperation in both areas of negotiations, evidence seems to suggest that 'the shadow of litigation' resulted in an increase of trade actors' propensity to engage positively in international cooperative efforts in the WTO.

The paper proceeds as follows. First, I review some of the literature that deals with the question of how judicialization in the WTO affects the domestic politics of trade policy-making. Second, I develop some theoretical speculation about why, under given circumstances, an increase in domestic actors' propensity to expand WTO's reach is to be expected as a result of judicialization. In doing so, I show how judicialization influences the policy preferences of key domestic actors with respect to both traditional and regulatory trade policies. Third, in order to subject my argumentation to empirical scrutiny, I carry out an in-depth qualitative analysis of two instances of politics of preference formation. In this context, the evolution of the EU's negotiating stance on agriculture and trade-and-environment in the Doha Round represent interesting case studies because there is an evident mismatch between what one would have expected on the basis of conventional theoretical wisdom and actual empirical developments. In the final section, a few concluding thoughts and some suggestions for further research on these topics are proposed.

2. Judicialization and cooperation in the WTO

Two main arguments can be identified in the context of the literature that investigates how judicialization in the WTO impacts on trading entities' willingness and capacity to pursue cooperative agreements. First, in a seminal article Martin and Goldstein (2000) warned us about the potential downsides of judicialization suggesting that as a result of it the incentives of domestic groups to cooperate within the trade regime would likely reduce. The authors stress two elements by which

judicialization is expected to decrease domestic propensity to conclude new multilateral trade agreements. On the one hand, a more legalized trade regime provides more and better information about the distributional consequences of trade agreements thereby affecting the incentives of groups to mobilize for and against trade agreements. More information, the argument goes, empowers protectionists relative to free traders on issues relating to the conclusion of new agreements. The assumption this argument rests upon is that key economic interest groups are differentially mobilized prior to the process of judicialization and, more specifically, that increased information would have the larger marginal effect on protectionist groups strengthening the incentives to mobilization of antitrade forces relative to already well-organized pro-trade groups. On the other hand, judicialization increases the predictability of trade agreements by reducing the ability of governments to opt out of commitments, thereby making international trade rules more tightly binding. Increased “bindingness”, it is suggested, makes it difficult for leaders to gain support from free-trade majorities at home and, therefore, constrains their capacity to commit to new trade agreements. Since in a judicialized international trade regime it is more difficult for states to get around international trade obligations, governments may find out that the costs of signing such agreements outweigh the benefits this system offers. In sum, both increased transparency concerning the distributional implications of trade agreements and enhanced bindingness of trade rules are pointed at as the two most relevant implications of judicialization which, in turn, are expected to provide incentives for domestic actors, economic interest groups and political leaders alike, to abstain from engaging in further trade liberalization.

In contrast to this pessimist view, some authors have come to analyze WTO judicialization’s influence on the domestic politics of trade from a different angle suggesting that judicialization may spur cooperative dynamics within the WTO framework. A pioneering and illuminating argument developed within this literature posits that judicialization makes the WTO an attractive institutional location for governments willing to negotiate regulatory issue demanded by their constituencies in exchange for concessions that liberalize access to their own markets (De Bièvre 2006). While positive integration on regulatory issues is generally assumed to be very difficult to achieve because of several characteristics – high transaction costs regarding policing, measurement and enforcement, time differences in implementation and asymmetrical implementation costs – that make them difficult to enforce, the high degree of judicialization in the WTO is assumed to change the picture by giving ‘higher certainty, stability and predictability to commitments and issue linkages made under the WTO’ (De Bièvre 2006:856). Indeed, since trade non-compliance can be reciprocated with trade retaliatory measures, regulatory commitments can be institutionally linked with trade agreements with a view to make them enforceable. Because the WTO’s dispute settlement mechanism offers the possibility to cross-retaliate against countries not complying with regulatory commitments through the imposition of trade sanctions, it is suggested, judicialization increases the enforceability of agreements concluded under the WTO jurisdiction. In other words, judicialization in the WTO creates compelling incentives for members to cooperate in the WTO framework with a view to pursue race-to-the-top international regulatory strategies eventually demanded by domestic constituencies.

In sum, scholarly reflection developed so far on the impact of judicialization on the domestic politics of trade policy-making is not unidirectional. As far as traditional trade politics is concerned, judicialization is expected to interfere with the pursuit of cooperative dynamics. When it comes to regulatory trade politics, on the contrary, judicialization is assumed to provide incentives for domestic trade-related interests to seek cooperative agreements in the WTO framework. These accounts, however, overlook

an important route of causation linking WTO judicialization and the domestic politics of trade in WTO members. As already mentioned above, arguably the most relevant effect of judicialization is that it strengthens enforcement mechanisms, that is WTO members that breach rules know that the probability is high that costs will be imposed on them for their misbehavior. Thus, the judicialization/domestic politics nexus cannot be investigated only by asking ourselves whether judicialization increases or decreases WTO members propensity to cooperate in the international trade regime. This question needs to be further specified and reframed to account for the simple matter of fact that increased “bindingness” potentially adds one category of economic interests besides import-competing and export-competing ones, namely import-competing enjoying protection through legally challengeable policy instruments. To put it differently, acquiring a comprehensive understanding of whether WTO judicialization obstructs or facilitates cooperation in the present international trade regime requires also an analysis of its effects on the policy preferences of domestic actors in WTO members that find themselves in a position of legal vulnerability.

3. Cooperation and legal vulnerability in the WTO

What are, then, the effects of judicialization on the propensity to pursue cooperative agreements of WTO members that are vulnerable to legal challenges brought by their WTO partners? This question has only seldom been addressed and even less often from a theoretical-grounded perspective. Indeed, while journalist and non-scholarly accounts often refer to the effects of legal vulnerability on the policy preferences of WTO members throughout negotiations, very little effort has been made to speculate in a theoretically rigorous manner about how the order of preferences over alternative policy options of the trade-related interests of domestic actors in WTO members changes and/or is affected by the ‘shadow of the law’ (but see Davis 2005, 2006, Poletti forthcoming 2011). In this section, I seek to advance this debate and suggest that, despite the expectation of high obstacles to further cooperation, there are strong theoretical reasons to expect that the prospect of litigation arising from legal vulnerability increases trade actors’ propensity to engage positively in international cooperative efforts in the WTO context. More specifically, I contend that judicialization’s potential in spurring cooperative dynamics is consistent across both traditional and regulatory issue areas. In the first case, I show why, for states protecting relevant economic sectors through WTO-incompatible policy instruments, deepening agreements already undertaken becomes the most rational defensive strategy aimed at minimizing and/or offsetting potential legal challenges brought by WTO partners. In the second case, I contend that powerful incentives may arise to push for the adoption of new regulatory agreements to ensure compatibility between internal and international regulatory standards whenever internal regulatory developments in a given state end up being inconsistent with already agreed upon WTO regulation.

3.1. Traditional trade politics and judicialization: the ‘liberalization to protect’ paradox

Traditional trade politics can be defined as the domestic process through which trade actors decide about policies that concern maintaining, reducing and/or removing existing ‘at the border’ barriers to trade among them (i.e. tariffs and quotas). Standard political economy approaches tend to conceive governments’ choices over these policies as a function of the preferences and political pressures emanating from key economic interest groups society which, in turn, are defined as a result of a rational calculation about the expected distributional consequences of cooperative agreements (De Bièvre and

Dür 2005, Milner 1997, Milner 1988, Frieden 1991, Rogowski 1989). Particularly relevant in this context is the question of how these groups define their policy preferences with respect to alternative negotiating venues. When it comes to this question, it is generally assumed that import-competing interests have a preference for negotiating settings in which the opening of new markets has only a marginal effects on their domestic market position and in which they have the greatest veto power during the negotiations. Therefore, import-competing industries are expected to lobby for the status quo and, if trade agreements are to be undertaken, to prefer bilateral over inter-regional and inter-regional over multilateral frameworks (Aggarwal and Fogarty 2004). A further distinction concerns the number of issues to be discussed during negotiations. Again, import-competing interests are expected to have a clear policy preferences against multi-issue negotiating contexts. As Davis clearly puts it, 'protectionist interests in a position to veto a single issue have less influence over negotiations on a package of multiple issues that presents new distributional stakes and wider policy jurisdictions in the domestic policy process' (2004). In sum, multilateral and comprehensive negotiating venues, the most likely negotiating settings to produce far reaching liberalization, represent the worst case scenario for groups that have a strong interest in maintaining the status quo. Export-competing groups' preferences, instead, are much less clear-cut and depend on their degree of competitiveness, strategic orientations and their experiences with a multilateral approach. A preference for multilateralism, for instance, should be prominent among export industries that are globally competitive. A seminal study of Helen Milner (1988) has shown that industries and sectors with high levels of export dependence and multi-nationality lobby for free trade. However, while at a general level export-competing interests are expected to lobby for opening new markets via multilateral approaches, these groups face a number of important obstacles to mobilization. The costs attached to information gathering, the uncertainty concerning the benefits from lowering foreign trade barriers and the vagueness of distributional effects of liberalization among exporters, increase the costs of mobilization and engagement in political action to improve foreign market access (Dür 2007). In addition, exporting business groups may prefer interregional approaches when in need of larger-than-national markets to take advantage of economies of scale or to develop production-sharing networks (Chase 2003). Thus, given the clear preferences of import-competing groups against multilateral and comprehensive trade negotiations and the not-so-clear preferences of export-competing groups for such strategy, one should expect a bias against multilateral and comprehensive approaches (Elsig 2007).

The judicialization of enforcement mechanisms within the WTO, however, changes the picture. Under the new dispute settlement mechanism, states willing to liberalize are provided with a more stringent tool to act against states violating existing rules. The status quo cannot be considered a cost-free strategy anymore by this latter group. In the present framework, costs can be imposed on non-compliant countries because the country seeking the removal of WTO-incompatible policies can pursue adjudication and implementing costly retaliation on the responding state. As a result, the respondent government has little choice in the matter of negotiation forum if the initiating government decided to file a complaint. As Davis stresses, 'being singled out in a violation ruling issued by a WTO dispute settlement panel is the worst case scenario for the respondent state. A violation ruling represents an authoritative recommendation for an end to the protectionist policy' (2005:19). In this context, the order of preferences of import-competing interests and policy-makers that seek to satisfy their demands for protection may tip over. Two strategic options are available to states that become vulnerable to legal challenges brought by WTO partners: face litigation with a high probability that a WTO panel puts an end to the targeted policy instrument or carry out a defensive negotiating strategy aimed at neutralizing and offsetting these external threats. When the adjustment costs of complying

with a violation ruling are high and, more importantly, when the non-compliant country holds substantial agenda-setting power within the WTO, there are strong incentives to pay the costs attached to a defensive strategy that allows to avoid facing litigation. Interestingly, wide-ranging multilateral negotiating processes may come to represent the best choice to carry out such a defensive strategy. This is so for the following reasons. First, promoting multilateral and comprehensive negotiations allow domestic actors to move from a worst case scenario setting to a negotiation forum that promises the most time and flexibility. While being brought to adjudication implies a high probability of being imposed costs in the near to medium term, multilateral and comprehensive negotiations bring desirable delays by adding complexity to the negotiating process (Davis 2005). Given that the pattern of WTO rulings has overwhelmingly favored the complainants in past decisions (Reinhardt 2001), it is fair to expect potential target groups to prefer a strategy that brings them away from a juridical dispute settlement context to a more politically oriented one. Among these, multilateral and comprehensive settings represent the best possible scenario because trade rounds generally stretch on for many years thereby allowing to displace the costs of liberalization to an indefinite future. Second, lengthy negotiations also provide governments with the necessary time to seek consensus on new rules that 'legalize' such policy instruments. A new round of negotiations may well end up setting new international rules that allow for the use of policy instruments previously prohibited. Third, in the event of a failure of the strategy described above, lengthy negotiations provide defendant states with the opportunity to implement processes of domestic reform of the targeted policy instruments that, while allowing to abide to international norms and rules, keeps the overall level of support provided to the sector substantially unchanged. A restructuring and a redefinition of the set of policy instruments in place to provide support to producers does not necessarily imply a reduction of the overall level of support provided to import-competing groups. Even if the overall level of support were to decrease as a result of reform the strategy could still be considered rational in case the costs of reform were to be lower than the potential costs imposed on the given sector as a result of an adverse WTO's panel ruling. Finally, multilateral and multi-issue negotiations facilitate trade-off deals that potentially enable actors to reach an agreement on less-than-expected costly concessions in the vulnerable sector in exchange for more concessions in less sensitive ones (Kerremans 2004). Any negotiating outcome implying less costs than those expected as a result of potential and probable retaliation following adverse rulings in a non-reform scenario would represent a pareto-superior outcome for these domestic actors. Even in the worst case scenario, namely an outcome of the negotiating process implying as much costs for the productive sector considered as those that would result from a adverse WTO's panel ruling, a multilateral and comprehensive negotiating setting allows the defendant state to bargain its own concessions in exchange for counter-concessions from negotiating partners.

In sum, the argumentation outlined above shows that states that breach WTO rules, that have reasonable expectations that legal challenges could be successfully brought against them by WTO partners, and that are aware that the costs of either complying with a violation ruling or facing retaliation would be high, have compelling rationales to see multilateral and comprehensive trade negotiations as the optimal framework within which a defensive strategy can be pursued. Interestingly, these preeminently defensive dynamics bring about an inherently high cooperative potential. Not only multilateral and comprehensive negotiating settings tend to reallocate political resources in favor of national executives therefore making it easier for governments to overcome domestic pressures in search for an agreement (Moravcsik 1994, Putnam 1988). It needs also be stressed that trade off deals, issue linkage strategies, side payments and the mobilization of a wide array of constituencies altogether make the distributional stakes of these negotiations less transparent thereby spurring cooperative

bargaining dynamics that would be less likely were the distributional stakes to be more easily calculable (Young 1989). Finally, by making itself available to negotiate an increase in market access opportunities for its WTO partners, the defendant states ignites an issue-linkage bargaining dynamic that may well end up opening up market access opportunities beyond the issue area in the context of which legal vulnerability exerts its effects.

3.2. Regulatory trade politics and judicialization: strengthening incentives to pursue race-to-the-top international regulatory strategies

Differently from traditional trade politics, regulatory trade politics refers to the domestic process through which decisions are taken with respect to how to deal with existing non-tariff barriers to trade as well as with negative externalities arising from different domestic regulatory standards in a wide range of areas. Regulatory trade politics, thus, deals with 'behind the border' issues and reaches deeply into traditions and practices of domestic governance (Dymond and Hart 2000, Young and Peterson 2006). While an analysis of the implications of the expansion of the international trade agenda to include these new issues is beyond the scope of this paper (for an overview see Young and Peterson 2006), it is worth stressing that the politics dynamics that characterize the policy process in relation to these issues is more complex and politicized than that concerning traditional trade politics (Hocking 2004).

Again, before speculating about how the prospect of litigation affects domestic actors' policy preferences, it is useful to provide an overview of what structure of order of preference these groups are expected to hold in the absence of the 'shadow of the law'. In general, it is held that domestic interest groups' preferences over the prospect of cooperation to uphold international regulatory standards follow the so-called logic of 'international regulatory competition'. To put it simply, this view posits that governments are likely to support international regulatory cooperation whenever such cooperation either advantages domestic producers in international competition or does not impose additional costs on them (Kelemen and Vogel 2007). Producers in states with stringent domestic regulatory standards have an incentive to support the export of costly regulation abroad because this would reduce the competitive advantage of producers in countries with lower regulatory standards as well as open up market access opportunities in foreign markets. As Kellow puts it, 'so-called first mover strategies, whereby states impose tighter regulation, create incentives to pressure other into adopting the same standards, in order both to create export markets [...] and to ensure that laggards do not gain comparative advantage over vanguard states' (2000:15). On the contrary, producers in countries with lower domestic regulatory standards have strong incentives to oppose the setting up of new international regulatory standards for exactly the same reasons. In sum, the more costly domestic regulatory standards, the higher the incentives for both domestic producers and policy-makers to support comparable international standards to create a level playing field through a race-to-the-top strategy.

However, a number of obstacles stand in the path towards political mobilization to support international race-to-the-top strategies. First, the effect of setting up new international regulation for producers in highly regulated countries would consist mainly in opening up new market opportunities rather than in avoiding costs arising from increased import penetration. As long as regulatory standards are WTO compatible or enforcement mechanisms in the international trade regime are weak, WTO members know that import protection arising from regulatory barriers can be maintained without paying any

cost. In this context, thus, the costs of political mobilization to pursue race-to-the-top strategies are only weighed against the benefits stemming from increased market access opportunities resulting from an export of costly regulation. However, the costs attached to information gathering, the uncertainty concerning the benefits from lowering foreign trade barriers and the vagueness of distributional effects of liberalization among exporters, altogether increase the costs of mobilization for engaging in political action to improve foreign market access (Dur 2007). As Martin and Goldstein put it, 'exporters only know that some market will open up, not whether they will be able to capitalize on this opportunity in the face of international competition' (2000:608). Of course, this standard political economy approach does not predict export-competing groups to be completely absent from the political process. Rather, the expectation is to see them engaging in active political mobilization only when positive distributional stakes of a given policy are high, discernible and easily accessible. However, it is widely acknowledged that the distributive effects of regulatory policies tend to be diffuse and opaque (Greenwood and Young 2005). Regulation, moreover, often involves highly technical issues which requires expertise and specialist knowledge (Shaffer 2006). Both these elements, further add to existing obstacles for interest groups to engage in political action. Even more so, producers in highly regulated countries are likely to anticipate that the benefits of exporting costly regulation can be obtained without having to shoulder the burden of political mobilization. Under given circumstances, laggard states may acquiesce to voluntarily upgrade their domestic regulatory standards despite a high probability that they would lack competitiveness as a result. This is so because of the so-called 'California effect' (Vogel 2005, Young 2003). In fact, states with lower domestic regulatory standards may be brought to surrender competitive advantages they have derived from lower domestic standards because of the large and attractive internal market as well as the political influence of states pursuing with higher regulatory standards. In sum, in the absence of external challenges to domestic regulatory barriers to trade, incentives to mobilize politically to export costly regulation through the setting up of new international regulatory standards are likely to be low.

Judicialization in the WTO, again, changes this picture. In case regulatory barriers to trade are not compatible with WTO rules, the new dispute settlement mechanisms provides complainants with enhanced capacity to challenge these barriers. An adverse panel ruling may result in an authoritative recommendation to put an end to the targeted policy and, in last instance, in the complainant being entitled with the right to implement costly retaliation. In other words, there are high probabilities that maintaining the status quo will imply costs being imposed on the targeted WTO member. If this is the case, thus, the defendant states can either decide to face litigation and accept its consequences or seek to put into place a defensive strategy aimed at neutralizing the potentially disruptive consequences of an adverse panel ruling. Again, it is likely that the amount of the costs attached to complying with a ruling or a retaliation will greatly influence this choice. As already mentioned in the previous section, one way to overcome legal vulnerability is to seek consensus on new international rules that 'legalize' the targeted policies. In practical terms, in this context this would mean engaging in political action to push for the adoption of new WTO regulation that ensures compatibility between internal and international regulatory standards, either through an amendment of existing rules or through an expansion of regulatory reach. In last instance, what is important to note is that judicialization can change the structure of the costs and benefits domestic producers face when deciding to engage in political action to support race-to-the-top international regulatory strategies. Whenever a given domestic regulatory policy is vulnerable to external legal challenge, the rational calculation domestic producers make when deciding whether to support international race-to-the-top regulatory strategies is not only about the eventual market access opportunities that would arise from exporting costly regulation. The costs of

compliance of likely retaliation need to be added to the equation. When an expansion of WTO regulatory reach is instrumental to offsetting potential or actual external legal challenges, domestic actors are likely to face compelling incentives to weigh the benefits arising from the pursuit of such strategy more than the costs it brings about.

4. The European Union, the Doha Round and the effects of judicialization

So far, I sought to develop a theoretical argumentation to support the view that judicialization may provide WTO members with compelling stimuli to deepen and/or expand WTO's reach. More specifically, I argued that faced with the choice of either confronting adjudication or seeking to overcome legal vulnerability through positive engagement in cooperative dynamics in the WTO framework, this latter choice may well end up being considered as the most rational course of action. Showing that these dynamics consistently apply across issues areas is meant to provide the argumentation additional leverage. The plausibility of the above argumentations is explored in the following sections through a brief analysis of the EU's trade politics dynamics in context of two negotiating areas in the Doha Round: agriculture and trade-and-environment.

4.1. Agriculture

During the Uruguay Round WTO members committed themselves to restart the negotiating process for further liberalization of agricultural trade by a clear deadline. Article 20 of the Uruguay Round Agreement on Agriculture (URAA), in fact, mandated WTO members to start a new round of negotiations on agriculture by the end of 1999. In addition, the URAA contained another provision which is of particular relevance in this context. As laid out in Article 13, countries against which legal action could be initiated on the basis of the provisions of Agreement on Subsidies and Countervailing Measures (SCM) subsidies were granted immunity for a given period. This provision, also known as "peace clause", however, was due to expire nine years after the start of the implementation of URAA on December 2003. The prospect of its expiration ended up lighting a fire under negotiation on trade-distorting agricultural subsidies (Steinberg and Josling 2003:372). Given its share of global subsidy expenditures, the EU was clearly at the front row of this debate (Anania 2007). The expiration of the peace clause could potentially open up the possibility for many EU policy instruments to be successfully challenged under WTO rules (Anania 2007, Kerremans 2005, Steinberg and Josling 2003), thereby putting it in a very uncomfortable position. As Swinbank puts it,

if the Peace Clause is not rolled-over, we can readily predict that from 2004 the CAP will be subject to a succession of hostile panel reports which will progressively limit the EU's ability to grant export subsidies and provide domestic support to the farm sector, over and above the bound tariffs. This would lead to a radical CAP reform, but it would be a "death by a thousand cuts" (1999:45).

While some authors have contended that the expiration of the peace-clause would not immediately open up the possibility of EU agricultural subsidies becoming "actionable" on the basis of the SCM agreement (Chambovey 2002, Delcros 2002), what matters here is that at the time the EU was indeed greatly concerned about the fact that in a few years the protection provided by peace-clause was going to expire (Blandford 2001, Interview with DG Trade Official, 22 February 2009) and that other relevant trade partners, such as the US and the Cairns Group, were ready to use the full array of legal

instruments at their disposal to challenge its trade distorting policy instruments (Potter and Burney 2002). It is against this background that the EU's strategy needs to be evaluated. As a result of judicialization, keeping the status quo could not be considered a cost-free strategy anymore. Thus, the EU had strong incentives to take a proactive stance by promoting comprehensive multilateral negotiations. To embark in a presumably long-lasting exercise of negotiations on a multiplicity of issues would provide negotiators with a battleground in which the EU could exert its leverage to gain support from other members to develop new rules that could make CAP instruments "legal" or, alternatively, it would to put forward the necessary adjustments to CAP with a view to make it consistent with WTO rules. In addition, bringing agriculture within a broader negotiating context would have allowed the EU to gain concessions in other sectors in exchange for its own concessions. Viewing the EU's negotiating with hindsight, this interpretation seems to fit well with actual empirical developments.

First, the EU sought to shape the agenda of agricultural negotiations in line with its conservative preferences. In the documents elaborated by the Commission in the run-up to Doha emphasis was put as much as possible on the preservation of the status quo (Commission 1999, WTO 2000). As far as agriculture is concerned, the Doha Declaration was very close to what the EU had hoped for. The only problematic issue concerned export subsidies and was solved by taking into account EU concerns (Kerremans 2004). Importantly, there was also a tacit understanding among negotiators that while the Doha Round would be in progress, countries hostile to the CAP and other agricultural policies worldwide would largely avoid mounting new Dispute Settlement cases that would become feasible following the demise of the peace clause (Swinbank 2005). Unsurprisingly, the deal was greeted with enthusiasm by EU farm leaders and member states' officials (Agra Europe 2001). This defensive approach continued throughout the first phase of the negotiating process.

Second, in parallel to these developments, in July 2002 the EU started to get involved in a further reform of CAP. The mid-term review (MTR) of Agenda 2000 which was initially thought of as a minor adjustment to Agenda 2000 and was transformed by the European Commission in a proposal for the most important reform of European agriculture (Swinbank and Daugbjerg 2006). While the June 2003 agreement on the so-called Fischler reform significantly watered down the initial Commission's proposal, it dramatically changed the structure of CAP and put the EU in a strong position to meet international demands in the Doha Round by decoupling most of direct aid from production requirements. Of course, international negotiations were not the only driving factor behind the Fischler reform and the prospect of accession of 10 new member states in 2004 created enormous pressures for a structural reform of CAP (Elliott 2006). Some factors, however, suggest that overcoming the likely effects of the expiry of the peace clause was also a key motivation. Interestingly, the 2003 CAP reform had the most pronounced impact precisely on the likely targets of legal challenges and, more specifically, on those that accounted for the largest share of the EU's Producer Support Estimate (PSE)². Indeed, the new Single Farm Payment Scheme (SPS) was explicitly aimed at enabling the EU to allocate the new direct payments into the WTO-compatible green-box³. It has been estimated that up to

² An indicator created to provide a summary measure of the producer subsidy that would be equivalent to all the forms of support provided to farmers including direct farm subsidies that may or may not encourage production domestically, as well as market price support provided by import tariffs and export subsidies

³ The URAA introduced a distinction between different types of domestic support to agriculture. All domestic support measures that are considered to distort production and trade fall into the Amber Box (art. 6 of the URAA). These include subsidies and price support directly related to production. These support are subject to limits (5% of agricultural production for developed countries and 10% for developing countries). In the Blue Box (art.6 of URAA) is placed any support that would normally be in the Amber Box but that requires farmers to limit production. At present there are no limits on

90% of the EU's blue box payments could be switched to the green box as a result of the reform (Swinbank 2005, Kutas 2006). On the other two pillars of the agricultural talks in the Doha round, market access and export subsidies, CAP reform did little to appease international critics (Swinbank and Daugbjerg 2006, Daugbjerg and Swinbank 2007, Elliott 2006, Anania 2007). In other words, with the exception of export subsidies, CAP reform transformed the largest bulk of potentially vulnerable support provided to European farmers, roughly one third of the EU's PSE, into WTO-legal support and did little to provide the EU with negotiating room on policy areas, that were not legally targetable. In addition, while the Fischler package clearly had a pronounced impact in terms of a reduction of the distortionary effects of the CAP, it had only a marginal effect on levels of support provided to European farmers (Anania 2007, Elliott 2006, OECD 2007). The data available show that the ratio between the EU's PSE and the total value of EU's agricultural production is very stable over time and that the impact of the Fischler reform on that figure has been minimal. Whether the SPS will actually qualify for green-box status is still open to debate (Swinbank and Tranter 2005). What matters here, however, is that European negotiators were clearly convinced that this was the case and based their strategy on this assumption (Fischler 2003, Interview with DG Trade Official, 23 February 2009).

As a result of this reform, EU started playing on the offensive on a number of negotiating issues. The analysis of the evolving negotiating platform of the EU following the adoption of the 2003 CAP reform shows that the strategy adopted by European negotiators was to maximize the new negotiating room provided for by the reform process while remaining within its perimeter. On domestic support, for instance, none of the offers put forward by the EU were to represent a binding constraint on the new CAP (Kutas 2006). On market access, while the EU made substantial efforts to meet the demands of its trading partners both in relation to the tariff reduction formulae to be used and in terms of the level of magnitude of the tariff cuts envisaged, it also sought to make sure that a large share of tariff lines could be designated as 'sensitive'. As widely acknowledged, besides tariff reduction formulae and their parameters, the way countries can define 'sensitive products' is crucial for a final agreement to result in some genuine liberalization (Swinbank 2005, Anania and Bureau 2005, Jean et.al. 2006, Anderson et.al. 2006). Export subsidies represent an exception here. In fact, since May 2004 the EU made itself available to agree on a phasing out of export subsidies. At a first look the EU's offer contradicts the claim the no additional cost would have been imposed on the EU's agricultural sector as a result of the adoption of an eventual agreement at the WTO level. A few comments, however, need to put forward here. First, it has been questioned whether, in light of the decreasing use of export subsidies, the EU has offered a rapidly 'depreciating' asset to its WTO partners (Hoekman and Messerlin 2006). In fact, the ratio of export subsidies to EU production has been declining to the point of becoming negligible (1% or less) and the ratio of export subsidies to the EU's PSE has constantly decreased from 7.6% in 1995 to around 2% in 2006 (OECD 2007). Second, EU negotiators were aware that export subsidies were the main and most vulnerable target of potential legal challenges from WTO partners. Instead of having to dismantle this instrument without getting something in exchange, therefore, it was rational to try selling this (non)concession to trading partners to obtain counter-concessions in the negotiation game. In other words, while it is true that the offer to eliminate its export subsidies by 2013 brought the Commission beyond the 2003 CAP reform perimeter, and technically beyond its negotiating mandate, the agreement did not worsen the EU's situation with a respect to a non-phasing out scenario.

spending on blue box subsidies. Finally, in the Green Box(Annex 2 of the URAA) are placed all subsidies that do not distort trade or at most cause minimal distortion. These have to be government funded and must not involve price support.

In sum, this brief overview of both internal and external dynamics on the European agricultural front suggest that judicialization prompted the EU to take a cooperative negotiating stance that resulted in a reduction of the distortionary effects of CAP and, therefore, in a more liberalized agricultural international market. The Doha round allowed the EU to displace the costs of liberalization in the future, to secure a large share of legally vulnerable policy instruments through internal reform, to lobby for changing or keeping existing international rules with a view to preserve the status quo, and to get something in exchange for the little concessions with respect to policy instruments that arguably were unlikely to survive even in the absence of negotiations at the international level.

4.2. Trade-and-environment

Throughout the 1990s environmental concerns became a central topic of discussion about the future of the multilateral trading system. During these years, an increasing public awareness and attention towards environmental issues prompted governments to more forcefully address existing bi-directional links between trade and environmental protection, consisting of both the impact of environmental policies on trade as well as the impact of trade on the environment. To be fair, the trade-environment debate was not new. In 1971, for instance, in preparation of the United Nations Conference on the Human Environment to be held a year later, GATT members decided to ponder the connection between trade and environment by creating the Group on Environmental Measures in International Trade (EMIT). At that time, however, there were little overlaps between the two policy areas and environmental concerns were not a controversial topic in the context of multilateral trading discussions. Unsurprisingly, not a single issue was brought to the attention of the EMIT by a GATT member during the first two decades of its existence. During the 1990s, however, a number of developments resulted in the raising of the trade-environment debate profile. In 1992 a UN Conference on Environment and Development (Rio Earth Summit) was convened, which resulted in the recognition of the substantive links between international trade and environment. In addition, the entry into force and implementation of several major multilateral environmental agreements (MEAs) that included trade restrictions as enforcement measures was starting to draw the concern of the trade community. More importantly, the increasing politicization of the trade-environment debate resulted from two GATT panel decisions at the beginning of the 1990s.⁴ In this context, environment came into the work program of the nascent WTO. At the GATT's April 1994 ministerial meeting, when the Uruguay Round was formally ratified, and the WTO established, agreement was reached to undertake a systematic review of "trade policies and those trade-related aspects of environmental policies which may result in significant trade effects for its members." A Committee on Trade and Environment

⁴ The first case was brought before the GATT by Mexico, which argued against a United States (U.S.) law imposed in 1990 that prohibited tuna imports from countries lacking appropriate dolphin conservation programs. Mexico believed that the U.S. legislation violated its GATT rights by prescribing extraterritorially how it should catch its exported tuna. The U.S. defended its action on the grounds that its neighbor was taking insufficient measures to prevent the accidental capture of dolphins by its tuna fishers. The GATT panel ruled in 1991 that the U.S. could not suspend Mexico's trading rights by prescribing unilaterally the process and production methods (PPMs) by which that country harvested tuna. The U.S. eventually lifted its embargo following an extensive domestic "dolphin safe" labelling campaign and negotiations with Mexico. A subsequent case brought against the U.S. tuna embargo by the European Union (EU) on behalf of the Netherlands Antilles in 1992 found that the U.S. *dolphin conservation policy* was GATT-consistent and could be applied extraterritorially. However, it broadly upheld the first panel decision by ruling that the *actual measure used* (i.e., the tuna embargo) was neither "necessary" (along the lines of Article XX), nor GATT-consistent.

(CTE) was formed to undertake this task (Vogel 2002). That environmental concerns had entered the multilateral trade agenda was further reiterated with the adoption of the Doha Declaration in November 2001 when, in setting out the mandate for a new comprehensive round of multilateral trade negotiations, members of the WTO decided to devote an entire chapter to Trade and Environment.

In this period, the EU experienced a transformation from laggard to leader in international environmental governance and replaced the US as the most prominent green *demandeur* in international politics (Falkner 2007, Vogler 2005, Vogler and Stephan 2007, Zito 2005). In fact, in all major global environmental fora the EU has been one of the few actors to consistently argue in favor of institutional reforms and the speedy and accountable implementation of existing commitments to strengthen global environmental governance (Vogler and Stephan 2007). As far as the WTO is concerned, the EU set itself as the most prominent advocate of the inclusion of an environmental agenda in the multilateral trading system before, during and after negotiations for the adoption of the Doha Declaration. What is interesting to note is that the EU position with respect to the trade-environment debate before November 2001, when the Doha Declaration was adopted, went through a substantial change. Two phases can be identified. In the first period, between 1995 – when the CTE was established after the ratification of the Uruguay Round – and 1998, the EU supported only timidly the idea of an inclusion of environmental concerns in the multilateral trading regime. Indeed, throughout this period the position of most WTO members, including the EU, was more about protecting trade concerns from potential environmental incursions in reaction to the perception of environmental groups' growing success in promoting environmental regulation than about allowing the WTO to address environmental concerns and to integrate them into trade law (Shaffer 2001, Thomas 2004). In fact, the EU's concern seemed more that of paying lip service to NGOs demands than to effectively seek to mould the negotiating context to attain environmental objectives (Shaffer 2001).

Starting in 1998, however, the EU strategy changed substantially and trade-and-environment became a key component of the managed globalization doctrine with which the EU came to approach the Doha Round (Meunier 2007). Indeed, the EU set itself as the most vocal and consistent advocate of the opening up of “environmental windows” in the WTO framework to ensure that it would be guaranteed that the trade measures taken pursuant to MEAs would be accommodated in the functioning of the world trading system.. In the 1999 Commission Communication which laid down the priorities of the EU in the wake of the Seattle WTO Ministerial Conference, one entire paragraph was devoted to “trade and environment” (European Commission 1999). Moreover, in the subsequent months the EU submitted a number of proposals to the WTO through which the concepts of the 1999 Communication were further elucidated. Arguably, this shift in the EU position represented the single most important explaining factor to account for the emergence of environment at Doha as a topic for negotiation (Cameron 2007).

What explains this change of strategy? Different explanations have been provided to answer this question. Some accounts point to ideational factors as the main explanatory variable (see Lucarelli and Manners 2006), other point to changes in the political economy of bio-technology regulation in the EU (Falkner 2007), yet others stress other elements such as the increasing political influence of green movements (Kelemen 2007) or institutional developments within the EU (Gabler 2005). My contention is that while these accounts certainly tell part of the story, a key explaining variable needs to be identified in WTO judicialization. More specifically, I suggest that a key motivation for the EU to upgrade the trade-and-environment debate into a central negotiating item of the Doha Round was to

take itself out of a situation of legal vulnerability. An analysis of the content of the EU's negotiating platform in this period against the background of mounting political tensions between the EU and the US concerning the regulation of the EU's bio-technology sector in the same period seems indeed to bear witness to this argument.

In 1998 the EU witnessed the beginning of what has been defined as the "the perfect storm of European biotechnology policy" (Falkner 2007:516). In fact, in the early 1990s policy-makers in developed countries started to confront with the question of how to regulate the growing biotechnology industry. From the very beginning the potential risks of developing such technologies have been a source of disquiet by Environmental Non Governmental Organizations (EMGOs) and broader publics, most notably in the EU. In response to such mounting health, consumer safety and environmental concerns in Europe, the EU established a stringent regulatory regime for GMOs through the adoption of a number of regulations in 1990. Such regulations put the EU at the forefront of developing precautionary risk regulation, at the cost of setting of a dynamic that slowed down the commercialization of agricultural biotechnology in Europe (Falkner 2007). In substance, such regulations and subsequent directives required that genetically modified food seed varieties had to be assessed and authorized prior to being released on the EU market (Kelemen 2007). The salience of this issue was further raised in 1996 when the EU received the first shipment of GM crops from the US. Such an event attracted widespread media coverage and fuelled fears about food safety among European consumers. It must be stressed that these events took place in a context where a shadow had been cast on the use of new technologies in relation to food production as a result of the so-called "mad cow disease". Against this background, the public salience of the issue received a further boost by the US threats to take legal action in the WTO against the EU's regulatory regime on GMOs on grounds that it provided for unjustified trade restrictions, particularly that the EU was not abiding to the provisions on the application of the precautionary principle contained in the WTO agreement on Sanitary and Phytosanitary Standards (SPS) (Kelemen 2007). A popular backlash against "Frankenstein foods" mounted as a result of political mobilization of activists such as Friend of Earth and Greenpeace and succeeded, unlike in the US where public remained largely indifferent to GMO food, in fostering rising anti-GMOs sentiments among a public concerned more with food safety than agricultural productivity (Falkner 2007). Faced with such domestic pressures, EU policy makers had no choice but to introduce a de facto moratorium on GMO approvals that lasted until 2003. These events made clear to EU policy-makers that environmental priorities – the application of the precautionary principle to biotechnology agriculture in this case – had widespread support among European citizens, arguably more than trade liberalization and competitiveness concerns had. As a result, American threats to open Europe's gates to GM products by bringing a legal case at the World Trade Organization (WTO) served as a catalyst to underline the importance of a strong international treaty that would lend legitimacy, if not full legal cover, to Europe's regulatory framework (Falkner 2007).

The EU strategy, thus, developed on two fronts. On the other hand, in 1998 the EU took the lead in creating the conditions for the ongoing talks of an international protocol to protect biodiversity to take shape and to include stringent standards to regulate the trans-boundary movement of living modified organisms, negotiations which, without US opposition, successfully concluded in 2000 with the adoption of the Cartagena Biosafety Protocol. On the other hand, the EU sought to expand the WTO's regulatory reach in order to have this new international standards concerning trade in bio-technological products incorporated in WTO law. In practice, this strategy was based on two pillars: seeking recognition of principles incorporated in MEAs as an integral component of WTO rules and

supporting an explicit incorporation of the precautionary principle in international trade law (Vogel 2002). The 1999 Commission document states this very clearly. Among the three key issues areas where action on trade-and-environment was recommended, two are particularly relevant. First, it was stressed the importance of achieving greater legal clarity on the relationship between WTO rules and trade measures taken pursuant to Multilateral Environmental Agreements (MEAs). In the proposal submitted to the WTO this concept was clarified by suggesting a number of basic principles regarding the relationship between WTO rules and MEAs, including ‘confirmation that WTO rules and MEAs are separate but equal bodies of international law and that, accordingly, MEAs are not subordinate to WTO rules and vice versa’. Second, a clarification of the relationship between multilateral trade rules and core environmental principles, notably the precautionary principle. The premise upon which the EU approach relied was that it was necessary to maintain the right of WTO Members to take precautionary action to protect human health, safety and the environment while at the same time avoiding unjustified or disproportionate restrictions. Such clarification was to be aimed at securing, within the relevant WTO rules, the importance of the precautionary principle, and to agree on multilateral criteria for the scope of action possible under that principle (WTO 2000a). In sum, by supporting the view that WTO and MEAs were to be conceived as equal bodies of international law, the EU was *de facto* proposing to rebalance the relationship between WTO rules and MEA rules (such as those contained in the Cartagena Biosafety Protocol) in favor of the latter. According to the EU, in addition, environmental concerns were to be given further relevance in the overall legal framework of the WTO by according legal recognition to the precautionary principle and by broadening the scope for the use of trade restrictions on the basis of environmentally-unfriendly production methods. To put it bluntly, had the negotiating process ended up coming to an agreement on the trade-and-environment chapter of the Doha Declaration on the basis of the EU’ initial platform, the EU would have found itself immune from legal challenges against its regulations concerning the bio-technology sector.

In the end, the compromise reached in Doha, significantly narrowed down the scope of negotiations with respect to the agenda proposed by the EU. Neither the US nor developing countries, backed EU efforts. The latter group was skeptical about a strategy that was perceived as an attempt to develop some form of “green protectionism”. The US, on its side, had grown increasingly tepid about the prospect of modifying WTO rules to accommodate environmental concerns alongside the EU proposals (Vogel 2002). More specifically, on the question of WTO-MEAs relations, the US succeeded in limiting the applicability of eventual future WTO rules as among parties to MEAs, therefore clearly undermining EU priorities. As Eckersley puts it, ‘by explicitly preserving the rights of WTO members to bring legal actions under the WTO dispute resolution procedures, the opportunity for changing the trade rules or negotiating a new agreement to exempt MEAs from future WTO challenge was effectively ruled out’ (2004:32). In addition, the EU could not even get the idea of starting discussions on the incorporation of the precautionary principle in the WTO accepted by its partners. This is not to say that the other issues that gained full negotiating status could not have a positive impact on both in practical terms and in increasing the WTO’s capacity to address environmental matters in the longer term. The question of opening up the working of the WTO to the presence of transnational NGOs and civil society actors, for instance, has been pointed at as one means to increasing the WTO democratic legitimacy, responsiveness and efficiency (Esty 1998, 1999). Negotiations on both fisheries subsidies and environmental goods and services offered an opportunity to achieve win-win-win outcomes by addressing simultaneously problems concerning liberalization, development and environmental protection (Halle 2006). From the perspective of neutralizing external legal challenges to the EU’s domestic regulatory framework concerning the bio-technology sector, however, the outcome of Doha

represented a complete failure. What is interesting to note, however, is that although the EU could not satisfy its goals, its strategy brought about an inherent potential for an expansion of WTO's regulatory reach. If the Doha Round will ever come to a successful conclusion, WTO members will have to confront with new obligations concerning environmental issues in trade relations among them.

5. Concluding thoughts

At the broadest level of abstraction this paper seeks to contribute to the scholarly debate about the sources and conditions for cooperation in the present international trade regime. More specifically, this piece of research aims to fill a void in the existing literature that investigates how the domestic politics of trade policy-making in WTO members is influenced by having strengthened WTO's dispute settlement mechanisms. My key contention is that among the multiple ways in which WTO judicialization impinges on the domestic politics sphere, how the 'shadow of the law' influences the prospect of cooperation needs also be taken into account. The argument I propose is that increased bindingness of trade rules makes it rational, across different issue areas, to advance cooperation as a means to offset legal vulnerability. Deepening and/or widening WTO cooperative agreements were indeed seen by the EU as rational strategies to avoid paying the costs attached to likely adverse WTO's panel rulings.

While this analysis looks at the judicialization/domestic politics nexus from a new perspective, further research is certainly needed to cast light on a number of relevant issues that have not been addressed here. One possible first line of research that could be pursued, for instance, concerns the question of what are the scope conditions that make this argument plausible. Throughout the paper I have often contended that there are necessary conditions for the causal mechanisms highlighted to take place. Further efforts to specify these conditions, thus, might be a first step. It seems fair to argue that undertaking research in this direction would need to deal in some way with power-related concepts. Concepts such as agenda-setting power, market power, or more broadly security-related definitions of power certainly represent likely candidates towards the identification of the scope conditions of this argument. A second line of inquiry that might arise from the argumentation developed here is comparative. Comparing differences in the extent to which WTO members, despite other variables keeping constant, respond to the incentives to cooperation brought by the 'shadow of the law' might well provide with interesting opportunities to develop fresh theoretical insights and to conduct innovative research at the cross-roads of different political science sub-disciplines such as comparative politics, public policy and IPE. Undoubtedly, any research on this matters would likely benefit from relying on theoretical insights developed within one of the different strands that characterize institutionalist analysis. In sum, while I have argued that judicialization positively impacts on the development of governing structures of world trade, more research needs to be undertaken in order to understand when it is fair to expect so and how institutional structures in WTO members filter homogeneous systemic pressures.

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