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**RULE ENFORCEMENT AND COOPERATION IN THE  
WTO: LEGAL VULNERABILITY, ISSUE  
CHARACTERISTICS, AND NEGOTIATION  
STRATEGIES IN THE DOHA ROUND**

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# ABSTRACT

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In the current multilateral trade regime, members often negotiate under the shadow of WTO law. In this article, we develop a systematic explanation of how the legal vulnerability of members' domestic policies affects the prospects for cooperation in the trade regime. First, we show that, contrary to conventional wisdom, increased enforcement does not necessarily make actors shy away from further cooperation. Legal vulnerability can ignite a positive dynamic of cooperation because it can increase the set of feasible agreements of WTO members. In a second stage, we set out how the nature of the issue at stake, i.e. whether it can be easily disaggregated into negotiable units, crucially determines whether this positive dynamics of cooperation takes place. We illustrate the cogency of the argument by way of four in-depth case studies of how potential defendants and potential complainants in WTO disputes responded to the incentives brought about by legal vulnerability and negotiated in the Doha round.

*Keywords: WTO; trade, legal vulnerability, Doha Round, judicialization.*

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# 1. Introduction

Members of the World Trade Organization (WTO) often negotiate under the shadow of WTO law. The principal mode of interaction in international trade relations has for long been reciprocal negotiations. These include negotiations about the reduction and/or elimination of tariffs and quantitative restrictions to trade in goods, as well as negotiations to harmonize existing domestic regulatory practices. In the current international trade regime, however, reciprocal trade negotiations are not the only means through which WTO members can deal with existing barriers to trade among them. The legalization or judicialization of the trade regime, i.e. the replacement of the GATT's model of political-diplomatic dispute settlement with a quasi-judicial model of dispute settlement in the WTO, has strengthened enforcement mechanisms of existing trade rules and created stronger incentives for WTO members to increasingly resort to the judicial arm of the WTO to challenge barriers to trade in foreign countries.

WTO members therefore increasingly negotiate multilateral trade rules from a position of legal vulnerability, i.e. they engage in multilateral negotiations while foreign partners could challenge them through WTO litigation. This has important implications for how WTO members define their positions and policy preferences in such negotiations. It is well established in the literature that the degree to which a prospective agreement can be enforced is a key factor affecting actors' propensity to commit to such an agreement (Fearon, 1998; Koremenos et al., 2001). Some authors suggest that a high degree of bindingness of trade rules may decrease the propensity of WTO members to commit to new agreements (Goldstein and Martin 2000) while others have argued in the opposite direction (De Bièvre, 2006; Poletti, 2011; Rosendorff, 2005). When negotiating under the shadow of WTO law, however, members of the trade regime not only face a choice between committing or not committing to a new binding agreement. Since members already are bound to binding and highly enforceable agreements, whenever they violate such rules and foreign partners can credibly threaten them to resort to WTO litigation to challenge such illegal measures, the choice these actors

face is one between getting sucked in litigation by foreign partners or negotiate the potentially targetable policy in multilateral trade negotiations.

Journalist accounts, policy-oriented researches, but also scholarly studies on the Doha round of multilateral trade negotiations, have often hinted at the 'shadow of WTO law' as a key determinant of policy preferences, bargaining strategies and tactics of parties prior to and during negotiations. For instance, different studies concur in pointing out that the prospect of the expiration of the so-called 'peace clause' of the Uruguay Round Agreement on Agriculture (URAA) strongly affected the strategies of both the EU and the US in the Doha round negotiations concerning agriculture (Poletti, 2010; Porterfield, 2006). Similarly, some authors have suggested that the EU's strong support for the inclusion of an environmental agenda in the WTO was largely driven by a desire to immunize itself from actual and potential WTO legal challenges to its domestic precautionary risk regulatory framework (Kelemen, 2010; Skogstad, 2003). The dynamics triggered by Brazil's legal challenge to US subsidies for upland cotton are also an example of the interplay between WTO litigation and multilateral trade negotiations (Sumner, 2005).

In spite of this acknowledgement that the shadow of WTO law affects multilateral trade negotiations, there is surprisingly little systematic research on how the prospect of a WTO dispute affects cooperative dynamics in the WTO. Existing research tends to focus on the effects of legal vulnerability on the preferences of potential defendants to the exclusion of potential complainants in WTO disputes, making the straightforward point that potential defendants may have an interest in drowning potential disputes in broad-based multilateral negotiations (Poletti, 2010). Yet, this does not answer the question whether legal vulnerability increases the likelihood of cooperation at the bargaining table of the multilateral trade regime. An exclusive focus on one side of the dyadic relationship leaves open the question why the potential complainant in a WTO dispute would acquiesce to letting rest a judicial case that it can reasonably expect to win, and opt for negotiations with a more uncertain outcome.

This article offers a systematic investigation of the causal mechanisms that link legal vulnerability and cooperation in the WTO. We develop our argument in two steps. First, we show that, contrary to conventional wisdom, increased enforcement does not necessarily make actors shy away from further cooperation, as it can increase the set of feasible agreements of WTO members. In a second stage, we set out that the nature of the issue at stake, i.e. whether it can be easily disaggregated into negotiable units or not, crucially determines whether legal vulnerability can trigger this positive dynamics of cooperation. Only when issues are relatively continuous such as tariffs, nonzero quotas, and subsidies, potential disputants may prefer negotiations over litigation. When the issues at stake are relatively discontinuous, such as health and safety regulations, product classification issues, bans and the absence of required laws, legal vulnerability does not increase the set of negotiated agreements that the two sides are ready to accept.

More specifically, potential disputants may come to regard negotiations as a strategy that serves their interests better than litigation only insofar as they are able to disaggregate the issue at stake into tradable units, making it possible for the two parties to reach a middle ground compromise falling between the preferred outcome of a potential defendant, i.e. the status quo, and the preferred outcome of a potential complainant, i.e. the full removal of WTO-incompatible trade barriers. When it is impossible or very difficult to disaggregate the issue at stake into tradable units however, the potential for negotiations lapses and the issue at stake is likely to lead to protracted WTO litigation.

We illustrate the strength of this argument in an in-depth qualitative analysis of how potential defendants and potential complainants in WTO disputes respond to the incentives brought about by legal vulnerability in the WTO. We look into four cases of negotiations between pairs of WTO members taking place under the shadow of WTO law. In all cases, we consider two WTO members that are respectively a potential defendant and a potential complainant in a WTO dispute. The first two cases concern negotiations on the reduction of tariffs and domestic support schemes regarding agricultural trade, typical cases of continuous issues, showing how two potential defendants in WTO disputes, EU, the US, and a potential challenger of their WTO incompatible policies, Brazil,

approached agricultural trade negotiations in the Doha round. In the two other cases, we consider discontinuous issues. On the one hand, we trace negotiations over the WTO-incompatible practice of zeroing in US antidumping policy as challenged by Japan and the EU. On the other hand, we analyze trade-and-environment negotiations between the EU and the US, whereby the EU's health and safety regulations were legally challenged by the US.

## **2. Legal vulnerability and cooperation**

Legal vulnerability arises when cases are brought to policy makers' attention in a given WTO member state by interested private parties mobilizing against losses from such WTO-incompatible policies. When existing policies deemed to be WTO-incompatible in foreign countries engender concentrated costs for producers in a given WTO member, these producers mobilize and exert pressure on their government to take action to try and remove such trade barriers. What then are the effects of legal vulnerability on members' propensity to pursue cooperative agreements in the WTO? We answer this question by analyzing the likely distributional implications of alternative policy scenarios for different economic groups in potential defendant and complainant WTO members, and by speculating on how these are likely to influence decision makers' choices whether to litigate or negotiate a given issue in the WTO.

The assumption underpinning the analysis is that governments' choices over trade policies can be conceived of as a function of the preferences and political pressures emanating from key economic interest groups society defined as a result of a rational calculation about the expected distributional consequences of cooperative agreements (Milner, 1988; Rogowski, 1989). We thus conceive of political actors as generally not having a specific trade policy preference independent of constituency demands, but rather view them as office-seekers, seeking to avoid the mobilization of political enemies. Accordingly, we expect policy makers to primarily seek to satisfy the demands of groups with concentrated interests such as exporters and import-competing groups, on which they



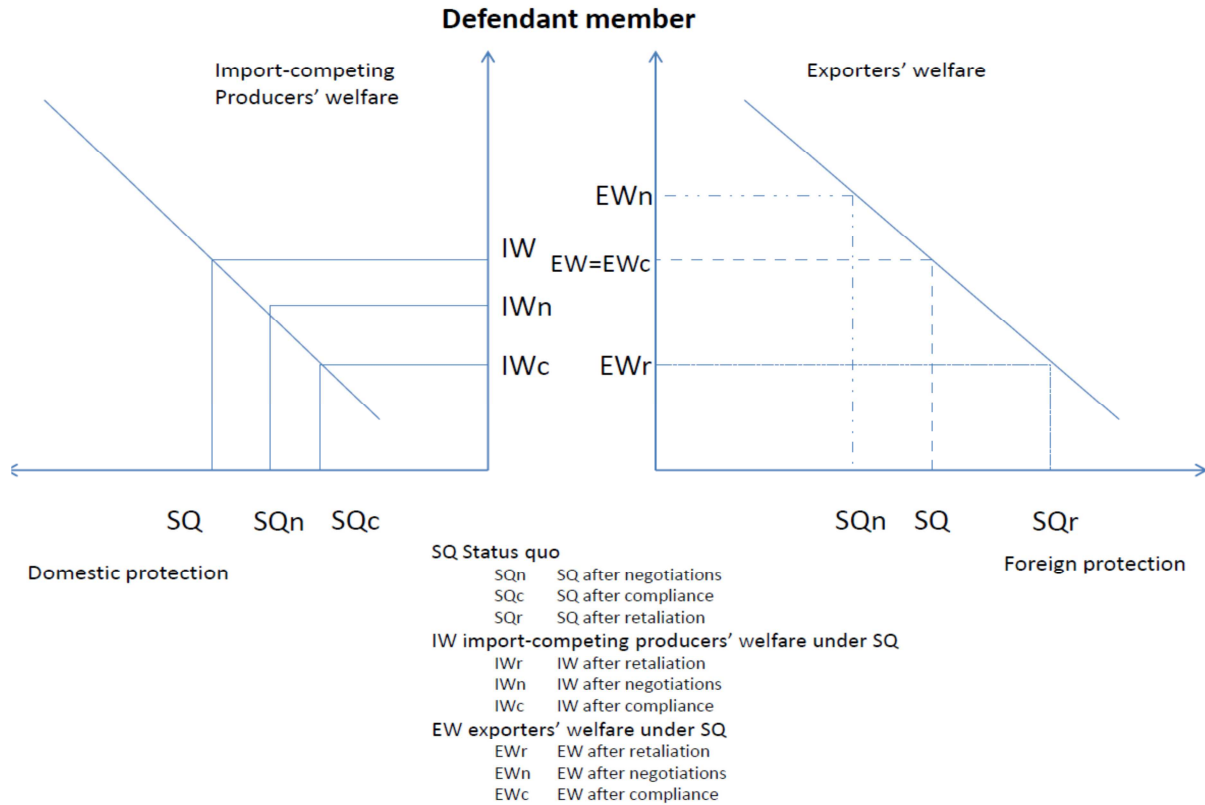
want to bestow concentrated benefits in exchange for resources which can be essential for maintaining office (De Bièvre and Dür, 2005). Of course, legislators are confronted with often competing demands. When confronted with choices among alternative policies, we expect these policy makers to choose the course of action that ensures the minimal amount of concentrated negative distributional implications for societal groups.

The effects of legal vulnerability that we describe should take place provided that the following scope conditions are met. First, the two sides need to be relatively certain that the potential complainant will win a case. In general, complainants in the WTO are relatively successful in WTO disputes (Hoekman et al., 2008). Still, some violations are more egregious and obvious than others (Thompson, 2010), leading actors to anticipate losses from litigation with an even higher degree of certainty. Second, the two sides must be in an interdependent trading relationship. Only then do they value each other's market as a destination and are they in a position to pursue – or threaten to pursue – policies that can generate concentrated losses for the other side's domestic producers.

### *Constellations of actors' preferences*

A potential defendant. Figure 1 shows why it is quite straightforward to expect policy-makers in a potential defendant to prefer negotiations over litigation. If two WTO members were to litigate the matter, two possible scenarios would follow: either the defendant complies with the ruling, or it decides not to implement and face retaliation.

**Figure 1**



In the first scenario, the defendant member lowers the level of domestic protection by  $SQ-SQ_c$ , which leads to a loss for import-competing groups of  $IW-IW_c$ . In the second scenario, the complainant retaliates by raising tariffs on goods originating from the defendant ( $SQ-SQ_r$ ), leading to a reduction of exporters' welfare of  $EW-EW_r$ .  $SQ-SQ_c$  and  $EW-EW_r$  are equivalent, since WTO rules require retaliation to have an effect proportional to the adverse effects of the WTO-incompatible measures.

In this context, we can expect domestic producers to have the following order of preferences. Import-competing producers prefer non-compliance in litigation, because it allows them to remain protected while exporters bear the costs of retaliation. Their second best option is negotiations. Among the forms these can take, multi-lateral and multi-issue WTO Rounds are most attractive to them, as these settings increase the likelihood that a smaller set of concessions in the vulnerable sector have to be made because of the potential for trade-off deals. Among possible negotiation settings, bilateral single-issue negotiations like consultations in litigation, are the least attractive form of negotiations for them. The worst case scenario for them is compliance.

The defendant's exporters can be expected to prefer negotiations over any alternative scenario in litigation, as these entail no costs and may even entail increased foreign market access. Compliance in WTO litigation would equally not be costly for them, but no chance for foreign market access would open up. The worst case scenario for them is non-compliance leading to retaliatory measures hurting their exports.

As for policy makers, one can expect them to prefer negotiations as long as  $SQ-SQ_n < SQ-SQ_c$ . Both scenarios under litigation are equally unpalatable to public decision makers, since proportionality would lead to the same amount of concentrated costs being imposed on exporters in case of retaliation, as on import-competing groups in case of compliance ( $IW-IW_n < IW-IW_c = EW-EW_r$ ). In addition, in negotiations the defendant can ask for concessions in areas in which it has offensive interests, in exchange for concessions in the area where it has defensive interests and is subject to legal vulnerability, hence also obtaining some gains for its exporters ( $EW-EW_n$ ).

A potential complainant. While it is plausible that a WTO member anticipating to lose a WTO case has an interest in drowning the issue at stake in broad-based negotiations, it is not obvious that the potential complainant would accept to get sucked into negotiations, instead of trying to win a clearly defined legal case.

**Figure 2**

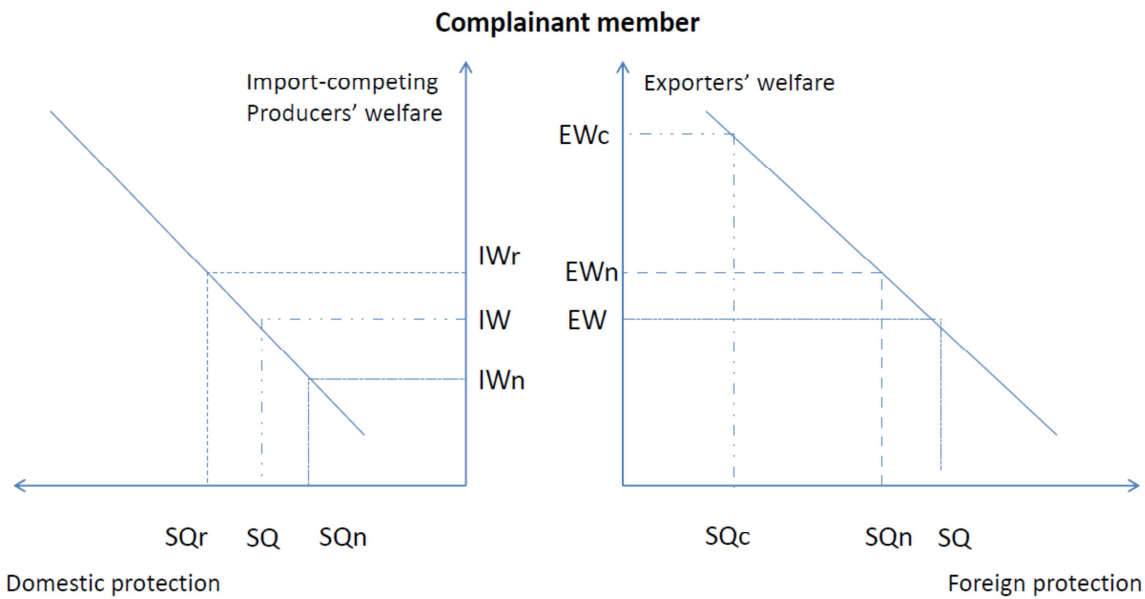


Figure 2 shows that export-oriented groups face restrictions to entry into the defendant's market due to WTO-incompatible measures ( $SQ-SQ_c$ ), which leads to a welfare loss of  $EW-EW_c$ . Their preferred scenario is one in which the controversy is litigated, the complainant wins the case, and the defendant complies. In this case, exporters are fully satisfied, because barriers to entry in the defendant's market are removed.<sup>1</sup> Yet, the defendant may still decide not to comply. In this case, retaliatory measures ( $SQ-SQ_r$ ) would hit those sectors where the potential complainant faces competition from the defendant, while not reducing costs incurred by exporters. In short, retaliation offers no relief to exporters and may even generate a benefit for import-competing groups in the complainant member ( $IW-IW_r$ ).

Import-competing groups in the complainant can be expected not to oppose litigation. As argued above, they might even benefit from litigation when non-compliance results in the imposition of retaliatory measures. Negotiations on the contrary, might lead these groups to incur costs as the defendant is likely to ask for something in exchange for concessions in the sector subject to the

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<sup>1</sup> These exporters may even anticipate that retaliation would motivate exporters in the defendant to mobilize against sanctions (Goldstein and Steinberg, 2008).

dispute.

### *Conditions for cooperation*

The reasoning developed so far suggests that legal vulnerability may lead two potential disputants to negotiate a given issue rather than litigate it when two crucial conditions are met: a potential complainant anticipates that compliance by the potential defendant is unlikely, and the issue at stake can easily be disaggregated into negotiable units.

First, the expectations about the likelihood of compliance are key to deriving the preferences of policy makers in the potential complainant. In litigation, the potential complainant faces a choice between a course of action that may provide either full or no relief to its exporters. If however, the complainant's policy makers deem non-compliance to be likely<sup>2</sup>, they have incentives to prefer negotiations, as they are likely to prefer partial relief to no relief at all. They can expect such a middle-ground negotiated compromise to be achievable as the potential defendant can be expected to prefer a negotiated deal allowing domestic producers in the potential defendant to suffer less concentrated costs than in any possible scenario in litigation ( $SQ-SQ_n < SQ-SQ_c$ ).

In addition, the expectation that compliance is unlikely tilts policy makers' preferences towards a particular type of negotiations, namely multilateral trade negotiations. To be sure, litigation also allows parties to find a negotiated solution to a dispute in the consultation stage.<sup>3</sup> Yet, single-issue, bilateral negotiations such as those during early settlement increase the visibility of the issue to

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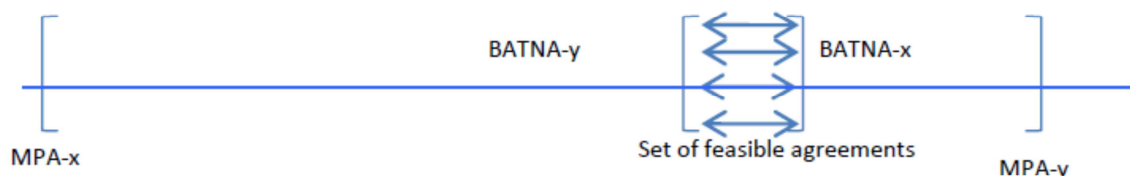
<sup>2</sup> Such a complainant's assessment can be based on past experience with the defendant's reform processes, its domestic institutional obstacles to reform, the perceived political influence of the affected constituencies, and the likely salience of the issue for the general public.

<sup>3</sup> When there is uncertainty about each sides' preferences WTO litigation might encourage early settlement before the dispute escalates to the panel stage and increase the likelihood that the defendant will partially or fully concede to the complainant's requests (Busch and Reinhardt, 2000).

domestic constituencies (Davis, 2008) which in turn increases the likelihood that decision-makers will have to posture, making it more difficult to concede (Stasavage, 2004). This scenario is unpalatable to both sides as they both prefer an institutional setting that facilitates the potential defendant's ability to make some concessions and reach a middle ground compromise that makes them both better off than litigation. On the contrary, broad based negotiations increase the number of constituencies with a stake in the negotiations, increasing the likelihood of domestic pressures for protection to be overcome in the potential defendant (Davis, 2004).

Second, the nature of the issue at stake is also key to whether this dynamic will take place or not. As we have shown, negotiations become desirable as an alternative to litigation only when a deal falling within the potential defendant's range of acceptable agreements also reduces the costs incurred by domestic exporters in the potential complainant. In short, the likelihood of cooperation increases only insofar as the two sides can reach a negotiated deal comprised within the area in which their respective sets of feasible agreements overlap. We represent this change in the range of possible negotiated agreements in Figure 3, which pictures a simple zero sum negotiation game between two WTO members in the absence and in the presence of legal vulnerability.

**Figure 3**



MPA-x and MPA-y represent the most preferred outcomes of member x (potential defendant) and y (potential complainant), while BATNA-x and BATNA-y represent their best alternatives to a negotiated agreement, i.e. the minimum outcome each actor is ready to accept. Note that the distance between BATNA-x and BATNA-y equals the distance  $IW-IW_c$  in figure 1 and the distance

EW-EW<sub>c</sub> in figure 2. According to our reasoning, cooperation is only possible when a negotiated agreement can be struck in the shaded area, i.e. the negotiated deal allows both the potential defendant to minimize costs with respect to any possible scenario in litigation ( $IW > IW_n > IW_c$  in Figure 1) and the potential complainant to partially reduce the costs incurred by domestic exporters ( $EW_c > EW_n > EW$  in Figure 2).

However, not all issues can be as easily disaggregated into tradable units to enable transfers between the two parties. Guzmann and Simmons have convincingly shown that issues that have an ‘all-or-nothing’ character, i.e. are discontinuous variables, are more likely to escalate in WTO dispute settlement than issues that permit greater flexibility, i.e. are continuous variables (Guzmann and Simmons, 2002). When states negotiate over a dispute at the WTO, their negotiations are focused on the specific sources of the dispute. Representatives indeed lack the authority to make commitments in other areas, extend the potential benefits of trade concessions to other WTO members due to the most favored nation (MFN) clause, and there is a traditional reluctance in global trade diplomacy to compensate in the form of direct cash payments. All this makes it difficult to engage in transfer payments beyond the subject matter of the dispute. Under these circumstances, the parties can reach a negotiated settlement rather than proceed to a panel only if the subject matter of a dispute is a continuous and thus can be easily disaggregated into negotiable units (e.g. a tariff). Indeed, by adjusting the relevant policy appropriately, the parties can construct a transfer payment that makes both parties better off than they would be if they proceeded to a panel. On the other hand, if the subject matter of the dispute features a discontinuous policy (e.g. product and process regulations) it may be very difficult to engage in concession exchanges.

This line of reasoning can be extended to the argument about the effects of legal vulnerability on the propensity to negotiate such actionable issues in a WTO round. When an issue has a discontinuous character, i.e. is extremely difficult to disaggregate into negotiable units, the two parties cannot reach an agreement that reduces costs for a potential defendant and provides relief to exporters in the potential complainant. This means that for a potential defendant  $IW_n$  will not be

situated between  $IW$  and  $IW_c$ , but will coincide with either the latter or the former (see Figure 1). Similarly, for a potential complainant  $EW_n$  will coincide with either  $EW$  or  $EW_c$  (see Figure 2). Both distances  $IW-IW_c$  and  $EW-EW_c$  equal the distance between  $BATNA-x$  and  $BATNA-y$  in Figure 3. In other words, a necessary condition for the two sides to reach a negotiated agreement is the possibility to strike a deal in the areas between  $BATNA-x$  and  $BATNA-y$ . If this condition is not met, however, there is no room for the two sides to try and reach a negotiated solution to the potential dispute through negotiations outside WTO litigation.

### **3. Empirical analysis: negotiating under the shadow of WTO law in the Doha round**

Our comparative case studies are all characterized by the fact that the potential complainant conveyed a credible threat to resort to the DSM to the potential target and that WTO member could reasonably expect to lose the case, while in some cases this threat was made all the more credible by sometimes effectively resorting to litigation. The cases also concern pairs of WTO members with large and attractive markets in a position of trade interdependence, a necessary condition for a potential defendant to worry about the threat of retaliation by a potential complainant. Our empirical narrative lends support to the argument that potential complainants' expectations about the likelihood of compliance generate a positive dynamic of cooperation when the issue at stake can be easily disaggregated into negotiable units, and not when an issue has a all-or-nothing character.

#### *Agricultural negotiations and the pending expiration of the peace clause: the EU and Brazil*

Agricultural negotiations in the Doha Round have been approached and conducted by key WTO members under the shadow of WTO law, namely in a position of legal vulnerability. The Uruguay Agreement on Agriculture (URAA), bound WTO members to a set of clear commitments limiting



export subsidies and domestic support, and ensuring market access. The quantitative impact of market access enhancing tariff reductions in the URAA on agricultural trade was marginal, because the cuts in import tariffs took place from a base level that was frequently inflated to high levels – a practice known as ‘dirty tariffication’ (Tangemann, 1999). Yet, on export subsidies and domestic support, the agreement was of great importance and also contained a so-called ‘peace clause’ (Art. 13). This clause granted immunity to countries against which legal action could be initiated on the basis of the provisions of Agreement on Subsidies and Countervailing Measures (SCM). This WTO agreement disciplines the use of subsidies and regulates the actions countries can take to counter the effects of subsidies. In essence, the ‘peace clause’ protected domestic and export subsidies programs actionable on the basis of the SCM agreement until the end of 2003, provided that reduction commitments contained in the URAA were complied with.<sup>4</sup> The expiration of the peace clause at the end of 2003 would open up the possibility for potential complainant WTO members to successfully challenge agricultural domestic and export subsidies through WTO dispute settlement (Steinberg and Josling, 2003; Swinbank, 1999). WTO members could clearly anticipate that all kinds of trade distorting subsidies would become challengeable under the provisions of the SCM agreement, irrespective of URAA reduction commitments being complied with.

This prospect was particularly relevant for middle-income agricultural exporting countries such as Brazil, who would reap the largest share of the benefits arising from the elimination of agricultural protectionist policies by high-income developed countries (OECD, 2005). Unsurprisingly, in the late 1990s, Brazilian organizations representing agricultural interests started to exert pressure on their government to take action and seek further agricultural trade liberalization, particularly to increase their market access opportunities in the highly protected markets of developed high-income countries such as the EU and the US (Cairns Group Farm Leaders, 1998, 1999a, 2000).

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<sup>4</sup> The peace clause relates only to the domestic subsidy provisions listed in Annex 2 (the Green Box) and Article 6 (covering Blue and Amber Box payments) and to the export subsidy payments detailed in Part V of the Agreement.

The question that faced representatives of organized agricultural interests as well as public decision makers in Brazil was what strategy would better serve their interests. Even though Art. 20 of the URAA mandated new negotiations on agriculture to start by the end of 2000, this did not commit members with agricultural export interests like Brazil to accept a negotiation outcome on unfavorable terms. On the other hand, the expiration of the peace clause provided these actors with the possibility to seek the removal of agricultural trade barriers through WTO litigation. This put Brazil in a comfortable position as litigation could be used as a threat to extract concessions in the negotiating game and as a default option in case negotiations were to fail to deliver a reduction of concentrated costs for domestic agricultural producers.

The National Agriculture Confederation of Brazil indeed conceived of negotiations as the best means to pursue a significant reduction of trade distorting policies, especially export subsidies and domestic support, and opposed any extension of the peace clause (Cotta, 2005). Legal vulnerability was thus clearly deemed by Brazilian farmers as a bargaining asset, as they asked to delay the start of another round of talks until an acceptable negotiating agenda for agriculture was agreed (Cairns Group Farm Leaders 2001).

These private sector positions were reflected in policy-makers positions, as the Cairns group in the period preceding the launch of the Doha combined calls for the elimination of all trade-distorting subsidies and a substantial improvement in market access with an explicit reference to the prospect that the expiration of the peace clause would eliminate all constraints against the use of the DSM to attack export subsidies and trade distorting domestic support (Cairns Group, 2000a, 2000b; Ragawan, 2001).

As the largest provider of trade-distorting agricultural subsidies, the EU was one of the main targets of those potential complainants. Organizations representing European farmers' interests as well as public decision makers in DG Agriculture realized that these domestic policies were indeed likely to be deemed WTO incompatible by an eventual ruling following a dispute in the WTO (Interview at COPA-COGECA, 16 June 2010; Interview with DG Trade Official at the European Commission, 22

February 2009). It is estimated that in the late 1990s roughly 45% of the EU's producers support estimate (PSE)<sup>5</sup> was vulnerable to legal challenges (Poletti, 2010). Hence, as was noted at the time, compliance with a succession of hostile panel reports following the expiration of the peace clause might lead to a death of CAP by a thousand cuts (Swinbank, 1999:45).

The concerns about the WTO incompatibility of a substantial share of EU policies supporting agriculture explains why European farmers, an import-competing group which could be expected to oppose a liberalizing-prone setting such as broad-based multilateral negotiations, nevertheless supported the strategy of comprehensive negotiations in the Doha round (COPA-COGECA, 1999a, 1999b). Given the position of legal vulnerability of the EU, this type of negotiations became appealing to these producers as trade-off deals increased the likelihood of a compromise entailing a smaller amount of concessions in agriculture (Interview at COPA-COGECA, 16 June 2010). Moreover, the awareness that agricultural negotiations would be undertaken under the shadow of WTO law created additional incentives for producers with offensive interests from the industrial and the services sectors to mobilize and push decision-makers to widen the negotiation agenda (UNICE, 1999; European Services Forum, 1999).

In line with these societal preferences, decision makers consistently made clear that extending the scope of negotiations beyond agriculture was a key priority ever since 1998 when Trade Commissioner Leon Brittan first floated the idea of a new round of trade talks,<sup>6</sup> later on explicitly acknowledging that the prospect of the expiration of the peace clause was a key factor influencing the EU's position (Brittan, 1999).<sup>7</sup>

When a deal on the agenda of the new round of trade negotiations was reached at the Doha WTO Ministerial meeting in November 2001, agricultural negotiations became part of a single

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<sup>5</sup> 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.

<sup>6</sup> Financial Times, 18 May 1998.

<sup>7</sup> Also, Agra Europe, 2 November 2001.

undertaking supposed to end by January 2005. Although the text was understandably vague and ambiguous, it already identified the parameters within which both the EU and Brazil could expect to reach a negotiated agreement on agriculture preferable to any scenario under litigation by setting the aims of substantial improvements in market access, reductions of, with a view to phasing out, all forms of export subsidies, and substantial reductions in trade-distorting domestic support (WTO, 2001).

In a first phase, the two sides took very different positions. The first proposal tabled by the EU in 2003 was very defensive and sought to maintain the structure of URAA as much intact as possible (WTO, 2003), whereas the position adopted by Brazil and other members of the Cairns Group was very aggressive, including requests for a complete phasing out of export subsidies by a three-year implementation period, the elimination of blue and amber box direct payments by a five-year implementation period, a tighter definition of green-box payments, significant tariff cuts and, an opposition to any extension of the peace clause (Cairns Group, 2000).

In parallel to these developments, the EU started a further reform of CAP. With the June 2003 agreement on the so-called Fischler reforms, the structure of CAP was significantly transformed by decoupling most direct aid from production requirements, turning the largest share of potentially actionable policy instruments into WTO compatible ones, while reducing support provided to European farmers only marginally (Swinnen, 2008). Overcoming the likely effects of the expiry of the peace clause was clearly a key driving factor behind this reform as it had the most pronounced impact precisely on the likely targets of legal challenges in the WTO and was explicitly aimed at enabling the EU to allocate the new direct payments into the WTO-compatible green-box (European Commission, 2002; Poletti, 2010).

This reform paved the way for a gradual convergence of positions between the two sides. The EU and the US launched a new joint proposal in August 2003, which offered to eliminate export subsidies of particular interest to developing countries. The proposal prompted an immediate response from what became known as the G20 group of developing countries. The G20 presented a

framework proposal for directing agricultural negotiations, proposing a number of drastic measures such as the abolishment of the blue box, a tighter discipline of the green box and the elimination of export subsidies for all products.

As the September 2003 ministerial in Cancun ended up in a failure, the G20, led by Brazil, made clear that it was in a position to extract substantial concessions from the EU, and did not want to approve of an extension of the 'peace clause'.<sup>8</sup> Moreover, Brazil had made clear in 2002 that its threat to resort to WTO litigation was credible when it had challenged the export subsidies provided by the EU in the framework of its Common organization of the Market for sugar in the DSM, arguing that the EU was subsidizing exports in excess of the volume and expenditure limits set down in the Uruguay Round.

As a result, the EU decided to put export subsidies on the negotiating table, in order to forestall being forced to dismantle these instruments as a result of legal rulings (Interview with former DG Agriculture Official, 25 June 2010). In May 2004, in an attempt to re-launch negotiations, the EU made itself available to discuss a complete phasing out of export subsidies (European Commission, 2004).

Remarkably, and in line with the empirical implications of our theory, the EU's offer on export subsidies was supported by European farmers as COPA-COGECA declared that the July 2004 Framework Agreement allowed European agriculture to be safeguarded and represented a solid basis for the continuation of WTO agricultural talks.<sup>9</sup> At the same time, the deal on export subsidies was greeted by the Brazilian government as a victory that would entail significant reductions of costs for the domestic agricultural industry, while only being the beginning of the end of agricultural subsidies.<sup>10</sup>

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<sup>8</sup> Agra Europe, 8 August 2003.

<sup>9</sup> Agra Europe, 6 August 2004.

<sup>10</sup> Ibidem.

Although Brazil wanted to extract significant concessions also on market access and domestic support (G20, 2005), after the Fischler reforms, the EU was in a position to refuse the terms of a negotiated agreement that would require further adjustments to CAP, making clear where the ground for an acceptable compromise between Brazil and the EU was. While in Hong Kong, the two sides were still somewhat remote from each other, by the July 2006 Ministerial in Geneva, EU Trade Commissioner Mandelson positioned himself as an ally of the G20, and Brazil *de facto* accepted the reality that the EU was not in a position to offer more market access and that the concessions it extracted on export subsidies and domestic support were a sufficient basis to strike a deal (Blustein, 2009).<sup>11</sup>

Although a deal could not be struck in Geneva – mostly as a result of the US inflexibility in both asking for greater market access concessions to the EU, and refusing to meet EU demands for greater domestic support reductions -, Brazil continued to strive for a negotiated compromise with the EU in the Doha round, rather than shifting to a fully-fledged strategy of litigation, mostly because of fears that powerful farm lobbies in the EU would make compliance unlikely (Camargo, 2008). Further developments in negotiations confirm that the parameters of an eventual compromise had been already identified in substantial concessions on domestic support, without going further on market access. Indeed, in the last document that sets the limits of a potential compromise of agricultural negotiations, the Revised Draft Modalities for Agriculture of December 2008, the figures were roughly similar to those identified in the July 2006 Ministerial (WTO 2008). This shows that the two sides have so far been able to move close precisely on topics subject to legal vulnerability. Whether a deal on the Doha round will ever be reached remains to be seen, but our narrative suggests that the chances for agreement on the contentious agricultural issues would have been even slimmer in the absence of legal vulnerability.

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<sup>11</sup> Also, Agra Europe, 28 July 2006.

*Agriculture negotiations and the pending expiration of the peace clause: the US and Brazil*

Similarly to the EU position on agriculture, the US position in agricultural negotiations of the Doha round can be described as an attempt to strike a delicate balance between the significant pressure from Congress to protect farm subsidies and the constraints of legal vulnerability in the WTO. A variety of analyses have demonstrated that, just like in the EU case, a wide array of domestic support schemes for farmers in the US would likely become challengeable by third parties in the WTO after the expiration of the peace clause (Porterfield, 2006; Steinberg, and Josling 2003). Consistent with our expectations, the US strategy in these negotiations has been to minimize the likely effects of the legal vulnerability after the expiration of the peace clause.

With the approval of the 1996 Farm Bill, agricultural domestic support schemes were transformed by eliminating deficiency payments and replacing them with production flexibility contract (PFC) payments, fixed payments that would gradually decrease over a period of seven years. While The United States Department of Agriculture projected that this new approach to farm subsidies would keep the United States far below the \$19.1 billion URAA amber box ceiling, these estimates proved inaccurate. Indeed, when commodity prices collapsed in the late 1990s, Congress responded with a series of supplemental bills that provided market loss assistance (MLA) payments to producers of the same commodities that were eligible for PFC payments (Porterfield, 2006).

Agricultural domestic support schemes were further increased with the 2002 Farm Bill, permitting spending to increase by about 8 billion US dollars per year above the levels projected by the 1996 Farm Bill and institutionalizing additional payments tied to commodity prices, hence creating larger production incentives (Sumner, 2005). The 2002 Farm Bill established that the bulk of US subsidies would be provided through market loan program payments, direct payments, and countercyclical payments.

Under both bills, US domestic farm subsidies were vulnerable to WTO legal challenges. As for support provided in the context of the 1996 Farm Bill, the famous WTO ruling on US cotton

subsidies clearly showed that US was contravening WTO rules. In 2002, Brazil initiated a WTO dispute against the US involving several substantive challenges to US cotton support programs in the period between 1999 and 2002. After two years of consultations, filings and panel meetings with the parties, a WTO panel decision released in September 2004 and an Appellate Body ruling in 2005 upheld Brazil's claims.

Since the dispute settlement panel and appellate body found that certain programs the US claimed were green box subsidies, i.e. production flexibility contract payments and direct payments, were more than minimally trade distorting, the US was found to exceed the \$19.1 billion cap on permissible amber-box support and, because of this, to cause serious prejudice to Brazil's interests by causing significant price suppression in the world market for cotton.

Indeed, this case can be considered as the first 'post-peace clause' challenge to farm subsidies (Josling et al., 2006). Under the standards established in the cotton case, it became clear that farm subsidies provided under the 2002 Farm Bill were also vulnerable to legal challenges. A variety of legal and economic analyses pointed out that, on the basis of the standards set in the cotton case, policy tools created by the 2002 Farm Bill such as marketing loan program payments, counter-cyclical payments, and, to a lesser extent, direct payments would become challengeable under the SCM Agreement on grounds that they cause serious prejudice to foreign competitors in the US domestic market or international markets (Schnepf and Womach 2007).

That the cotton ruling would open up the possibility for agriculture exporting countries to challenge a wide array of US domestic farm subsidies was clear to countries such as Brazil. After the adoption of the 2005 Appellate Body ruling, the link between the cotton case and other potential cases against US farm subsidies was stressed by Pedro Camargo, the former Brazilian Secretary of Production and Trade in the Ministry of Agriculture, when he argued that in the face of a US' refusal to implement the WTO ruling 'the dispute settlement system will again have to produce essential jurisprudence on levels of trade-distorting support acceptable in international competition. Potential cases on rice, wheat or dairy would also have to go this route' (Camargo, 2005:4).



In line with our expectations, the US saw multilateral trade negotiations as an opportunity to engage in trade-off deals that would allow to minimize concessions regarding its legally vulnerable policies, i.e. domestic subsidies, with respect to a scenario of protracted litigation, while pushing forward its offensive interests in the market access pillar of agricultural trade negotiations. Indeed, in the Doha Round negotiations, the United States has been attempting to protect its farm subsidy programs by making limited concessions regarding the permissible levels and classifications of subsidies under the Agreement on Agriculture while trying to secure a new Peace Clause that would limit challenges to farm subsidies under the SCM Agreement (Porterfield, 2006).

For instance, in the July 2003 joint EU-US proposal on agriculture in the run-up to the Cancun WTO Ministerial Conference, an expansion of the scope of the blue box was proposed so as to enable the US shift some of its previously labeled amber box spending into the blue box (Kerremans, 2004). At the same time, while the US has taken a very bold position on market access in these negotiations, it has also sought to minimize concessions on domestic support. The proposal presented by the US in October 2005 in the run-up to the December Hong Kong WTO Ministerial Conference, included bold requests on market access such as a cut of 90% in the highest agricultural tariffs and limiting the number of 'sensitive products' to 1% of tariff lines. Yet, the proposal was very timid in the domestic support pillar, where it offered to cut its AMS spending by 60% and its *de minimis* spending by 50% (USTR, 2005), concessions that in the US' plans would be enabled by shifting most of previously labeled amber box support into WTO compatible blue box. In line with our argument, Brazil deemed multilateral negotiations the best venue to deal with US domestic farm subsidies, rather than turning to a fully-fledged litigation strategy, even after the expiration of the peace clause and the victory in the upland cotton case. In the immediate aftermath of the 2005 Appellate Body ruling against the US, Pedro Camargo explicitly stated that negotiations in the present were clearly preferable to litigation in the future (Camargo, 2005). Moreover, in the aftermath of the cotton ruling, Brazil restated its willingness to seek convergence on domestic farm

support rules in the context of the Doha round, rather than resort to WTO litigation (Cairns Group, 2007).

This does not mean that Brazil passively accepted the terms of negotiations offered by the US. Indeed, Brazil fought hard to resist the US' strategy of shifting trade distorting and legally vulnerable domestic farm subsidies into WTO-compatible spending (Porterfield, 2006). Moreover, while siding with the US in its requests for large cuts in agricultural tariffs, Brazil sought to push the US towards greater concessions with respect to the actual percentage reductions in domestic support (G20, 2005). As Pedro Camargo argues, Brazil had used the cotton dispute more as a tool to demonstrate the unfairness of international agricultural trade and to get a better deal in Geneva, than as an effective means to achieve agricultural trade liberalization (Camargo, 2008). Brazilian officials knew that the road towards implementation of the WTO ruling was loaded with political landmines because of the tremendous political influence of farmers in the US system and the visibility that the cotton issue had acquired in the US (Goldberg et al., 2004).

As mentioned in the previous section, the Geneva 2006 WTO Ministerial Conference failed to identify a common ground for compromise on agricultural trade liberalization. Among the many contentious issues that remained unresolved, the US insistence on greater market access concessions by the EU and its refusal to improve its offers on domestic support stand out as major bones of contention. Consistent with our expectations both parties preferred to tackle existing barriers trade that could be challenged in the WTO DSM through negotiations rather than litigation and, gradually moved towards a middle ground compromise eventually allowing to minimize costs for the potential defendant and to reduce at least some of the costs incurred by exporters in the potential complainant.

*Trade and environment negotiations and the precautionary approaches to food and consumer safety: the EU and the US*

As the EU emerged as a global precautionary superpower in the course of the 1980-90s, it became subject to legal vulnerability under WTO rules from 1995 onwards. The evolution of European food safety regulations and their troubled relation with WTO rules bear witness of this process.

In the 1980s, economic and political pressures arose for the EC to adopt common rules on the use of hormones in raising beef. While the Commission had proposed in 1984 to ban synthetic hormones and permit the controlled use of natural hormones, an alliance of consumer groups, the European Parliament, the Economic and Social committee and most of the member states forced the Commission to revise its proposal and to ban all hormones (Princen, 2002).

The evolution of EU procedures for GM crops' approval shows similar patterns. In 1990 Directive 90/129 and Directive 90/220 drafted a regulatory framework for the approval and labeling of GM crops. In 1997, a new regulation (258/97) on GMO processing and consumption supplemented this regulatory structure. The EU approval procedure for GM crops was further tightened after a series of food crises boosted opponents of GM products. In 1996 events such as the 'mad cow disease' crisis, the first shipment of US GM crops in the EU, and the world's first successful reproduction of a cloned mammal contributed to generating extraordinary public awareness on food safety issues (Pollack and Shaffer, 2009). Against this background, environmental groups succeeded in building a composite anti-GM coalition with minority farmers' groups, anti-globalization NGOs, consumer groups and some religious organizations which in 1998 forced the hand of the EU to impose a moratorium on production and import of GM food products (Skogstad, 2003).

When the enforcement mechanism of trade rules was strengthened with the creation of the WTO however, these rules soon became subject to external challenges in the form of actual and threatened WTO disputes. In 1996, the US requested a dispute settlement panel case against the EU, claiming that its ban on hormone-treated beef was inconsistent with the Sanitary and Phytosanitary Standards (SPS) agreement. Both the WTO dispute settlement panel and the appellate body supported US claims, respectively in April 1997 and February 1998.

Also the European moratorium against GM crops in 1997-98 raised concerns in the US, home to major producers and exporters of GMOs. In 1997, US companies began to complain about the EU's slow and opaque approval process, leading industry representative and congressmen from both parties to condemn the EU's regulatory framework as disguised protectionism (Young, 2003). The US government responded to these pressures in 1998, threatening to take legal action in the WTO against the EU's regulatory regime for GMOs on grounds that it provided for unjustified trade restrictions (Kelemen, 2010).

This threat was pressing for a variety of reasons. The hormone dispute had demonstrated that the DSM and the Appellate body could not take the invocation of the precautionary principle as justification to override the provisions of the SPS agreement. Moreover, while in 1998, largely as a result of the moratorium, the EU tried to enhance the legitimacy of its own domestic approach to GMO regulation by institutionalizing the precautionary principle in the Cartagena negotiations, it was clear that new rules in that context could not lend full cover against WTO legal challenges (Falkner, 2007). There was no guarantee that, if activated by a non-member of the Protocol on Biosafety such as the US, the WTO DSB would not rule against EU's policies (Poletti and Sicurelli, 2012).

After the US had threatened to initiate a WTO case against the European GMO regulation, farmers' associations started expressing their concerns asking for new WTO rules. Indeed, expecting the US to take legal action, both small farmer associations and COPA-COGECA took a stance in favor of WTO rules that would immunize the EU from legal challenges and guarantee provide guarantees to European consumers (COPA-COGECA, 1998, 2000). These producers' requests added up to the pressures coming from environmental NGOs (Friends of the Earth 1999; WWF 1999, 2001).

This mobilization was the key driving factor behind the EU strategy on trade-and-environment. Only in 1999, concomitantly with the successful US' dispute on hormones and its threat to initiate legal proceedings in the WTO against European GMOs regulations, did trade-and-environment become a priority for the EU in the new round of trade negotiations (Poletti and Sicurelli, 2012).

- Strikingly mirroring requests of both farmers and ENGOs, beginning in 1999 the European Commission started to strongly advocating the integration of environmental principles in WTO rules, including the recognition that MEAs are not subordinate to WTO rules and advocated the strengthening of the precautionary principle within WTO rules (European Commission, 1999; WTO, 2000). In sum, the EU proposed to negotiate new rules in the WTO that would *de facto* grant immunity from legal challenges against its food and consumer safety regulations.

- In line with our theoretical expectations, the US did not accept to start negotiations on the terms proposed by the EU. As the issue at stake had a clear discontinuous character, i.e. the choice was either to allow US exports enter the EU market or not, the US refused to engage in negotiations and relied on WTO litigation. The European attempt to lend legal cover to its domestic rules was clear to US negotiators, as they explicitly expressed their ‘concern that Europe might use the negotiations in Doha to justify illegitimate barriers to trade, particularly trade in biotechnological products and application of the commercial clauses of present or future multilateral agreements on bio-security’.<sup>12</sup>

- While agreeing to include a trade-and-environment chapter to the Doha Declaration, the US consequently narrowed down the scope of these negotiations by attaching the provision that future negotiations concerning WTO-MEA relations would only affect the parties of MEAs and by refusing to start negotiations for the incorporation of the precautionary principle in WTO law (Eckersley, 2004). As the US was not a party of the Cartagena Protocol on Biosafety, the US made sure that any future agreement on trade-and-environment would not prejudice its right to challenge WTO members’ rules that were not compatible with the SPS agreement and that the US deemed as illegal non-tariff barriers.

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<sup>12</sup> Inside U.S. Trade, 23 November 2001

Meanwhile, given the strong popular support for existing food and consumer safety rules and consensual decision making rules, EU policy makers could not proceed towards bringing domestic legislation in compliance with WTO rules. The WTO ruling on the EU's ban on hormone-treated beef and the subsequent imposition of retaliatory measures by the US did not lead to substantial policy change in the EU. Indeed, when policy change took place in 2003, the EU simply introduced comprehensive risk assessment procedures, but did not lift the ban (Daugbjerg and Swinbank, 2008). Similarly, while in 2000 the EU started a reform of its regulatory framework for GMOs approvals, such reform process culminated in the adoption of Directive 2001/18 and Regulation 1829/2003 which further tightened existing GMO regulations, making things actually worse for US growers (Pollack and Shaffer, 2009).

Although these political developments had made crystal clear that compliance by the EU following litigation was not to be expected, the US insisted on relying on WTO litigation rather seek a compromise in negotiations. As mentioned already, the US government had been under pressures from GM producers since the late 1990s, but had declined to bring a legal case because of the awareness that EU decision makers were severely constrained by societal pressures and because of fears that a dispute would further trigger societal opposition to GMOs in Europe (Pollack and Shaffer, 2009).

Yet, in 2003, the US finally initiated a formal WTO complaint to challenge the EU's de facto moratorium due to increased frustration of US producers over lost sales to the EU and concerns over the impact of EU regulatory restrictions on regulatory developments in third countries. It is important to stress that, unlike Brazil's strategy with the sugar and cotton disputes, the US did not conceive of WTO litigation as a tool to maximize negotiating leverage in negotiations.

Indeed, in response to the US move, in September 2004 Pascal Lamy argued in favour of starting negotiations with a view to devising new WTO rules to allow its members to derogate to WTO obligations when they clash with domestic policies reflecting values that are strongly rooted in a given community, listing environmental protection, food safety and precautions in the field of

biotechnology among Europe's collective preferences (Lamy, 2004). Once again the EU was trying to change international trade rules to lend legal cover to its own domestic regulatory framework. Because of the discontinuous nature of the issue however, the US refused to engage in these negotiations because no middle ground compromise was possible between the two sides and deemed WTO litigation the best tool to achieve its aims.

Because of the discontinuous character of the issues at stake, WTO litigation also proved a rather ineffective tool to find a compromise between the two sides. While in May 2009 the EU and US reached an agreement that put an end to the hormone-treated beef dispute, the solution did not result from substantial compliance by the EU. In the end, the dispute came to an end because the US accepted compensatory measures in the form of increased access for hormone-free beef in the EU market when it became clear that irrespective of retaliation and reputational costs the EU would not lift the ban.

On GMOs, the WTO panel issued a ruling in favor of the complainant in 2006, finding that the EU legislation was consistent with WTO rules, while its applications were not, as the EU had engaged in 'undue delay' in its approval process and the moratoria were not based on risk assessment. As Young (2011) argues, the ruling had the effect of appeasing tensions between the EU and the US. Yet, the EU so far has not implemented any significant policy change. The Commission has on many occasions tried to get the member states to remove their bans on GMOs without succeeding (Euractiv 2010). The stalemate of the EU decision-making process on novel foods regulation, whose compromise agreement between the European Parliament and the Commission failed in March 2011, shows that the EU finds it difficult to change these policies with a discontinuous character.

*Rules negotiations and the zeroing practice in antidumping: the US and Japan*

In a fourth and final case study, we show how the legal vulnerability of a relatively discontinuous issue fails to create the conditions for complainants and defendants in actual as well as potential cases fail to find an overlapping win set and strike a compromise providing some relief for the complainants' exporters as well as entailing some benefits for the defendants' import-competing sectors.

Since years, US antidumping authorities have used zeroing as a particular method of calculating antidumping margins, a legally vulnerable practice under extant WTO law. Indeed, the WTO Antidumping Agreement sets limits to the leeway domestic authorities dispose of to find dumping and impose antidumping duties whenever a domestic industry alleges dumping by a foreign exporter. When domestic antidumping authorities investigate whether dumping has taken place, they assess the difference between the price in the home market (the normal price) and the price asked by the foreign exporter (the export price). If an export price is higher than the normal price, then the dumping margin is positive. If it is lower, the dumping margin is negative. So-called simple zeroing, or transaction-to-transaction zeroing as it is also called, is the practice of counting a margin of 'zero' for those transactions where margins were negative when averaging all transactions to arrive at a dumping margin.

The method leads to higher dumping margins and thus higher antidumping tariffs. Understandably, exporters to countries that apply this zeroing method disapprove of the method, as they suffer concentrated losses from it. For years now, WTO members with a lot of such exporters have challenged this practice, first leading the EU to stop its use of the simple zeroing method, consecutively pressuring the US to move along the same path.

Seeing how its zeroing policy was subject to legal challenge by the EU, Japan, Korea, and other WTO members, the US assertively put its position that zeroing should be turned into a WTO-compatible policy on the table of the Doha multilateral trade negotiations.<sup>13</sup> Since the 2001 Doha

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<sup>13</sup> Inside U.S. Trade, 3 August 2007.



Ministerial had decided to clarify and improve disciplines in the WTO Antidumping Agreement<sup>14</sup>, the US actively engaged in getting the so-called Rules Committee to put a ‘legalization’ of zeroing methodology on the negotiating agenda, in order to demine pending WTO cases challenging its policy, forestalling future ones, and cater to the vocal domestic lobby of import-competing industries benefiting from the inflated dumping margins that the zeroing methodology provides.

A group of 12 WTO members led by Japan, however, vehemently opposed any such move, filing briefs to the chair of the Rules Committee as ‘Friends of Antidumping’, while the EU, not member of that group, also voiced concern. It was eminently clear to the US as well as to many targets of US antidumping duties, that zeroing was legally vulnerable. Panels and the Appellate Body had ruled several times against the use of zeroing in US antidumping investigations, especially in so-called administrative reviews and sunset reviews (Vermulst and Ikenson 2007). In 2006, the AB ruled against 16 such US administrative reviews on EU products and deemed them in violation of the Antidumping agreement. This did not amount to a flat prohibition of zeroing however. Since panel and AB rulings can only express themselves on issues brought by complainants, zeroing was only found to be WTO-non-compliant in these concrete cases. In 2007, the AB ruled that ‘simple’ zeroing on Japanese products was in violation of the WTO antidumping agreement. The US sought to comply with such rulings by starting to use another type of zeroing, so-called targeted dumping. Although this method has never been explicitly condemned by a panel or the AB, legal experts agree that it would just as well constitute a WTO-incompatible policy.

In reaction to these WTO rulings, the US consistently argued it would be better to negotiate rather than litigate about this legally vulnerable part of its AD policy. The other side, the ‘Friends of Antidumping’ led by Japan, remained diametrically opposed to any loosening of WTO disciplines on zeroing, and by mid 2007 no agreement between advocates of the outright prohibition, and the US negotiation demand to legalize zeroing methodology could be found.

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<sup>14</sup> Inside U.S. Trade, 5 October 2002.

End of 2007, Guillermo Valles, the chair of the rules committee, tried to move his part of the Doha negotiations forward by suggesting a proposal to rule out zeroing methodology in initial antidumping investigations. Flatly rejected by Japan, the negotiations stalled, especially since American Congressmen came ever more under pressure from import-competing industries, like the steel industry, to constrain the USTR not to cave in to demands for a demise of zeroing.<sup>15</sup>

As by now litigation had run its complete course (Prusa and Vermulst 2011), the EU and Japan became entitled to respond to US non-compliance with the imposition retaliatory tariffs against US exports. The US side now invested its time and energy in trying to convince the EU and Japan not to proceed to retaliation, by proposing not to use zeroing in future reviews, while leaving the antidumping tariffs based on zeroing in place, and leaving it open whether they would use zeroing in future initial antidumping investigations. At the same time, the US was as unwavering as the other side of the negotiation spectrum, Japan, and reiterated its affirmation that all forms of zeroing should be made WTO-compatible through a revision of the antidumping agreement in the ongoing, but by then very moribund Doha negotiations.

## **4. Conclusion**

In this article, we have investigated how legal vulnerability in the WTO affects the likelihood of cooperation in the trade regime. Increased enforceability of trade rules engenders greater incentives for exporters to mobilize for the targeting of WTO-incompatible trade barriers foreclosing access to foreign markets, hence creating higher expectations that WTO members pursuing such policies will be challenged and thus incur costs for their misbehavior. Our argument suggests that when a WTO member threatens another member to legally challenge its WTO-incompatible domestic policies, the set of negotiated agreements that both parties prefer over litigation may increase. Such an

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<sup>15</sup> Inside U.S. Trade, 5 October 2007.

outcome, however, depends on the nature of the issue at stake. Legal vulnerability can increase negotiation propensity of WTO members when the issue at stake has a continuous character, i.e. can be easily disaggregated into negotiable units. Only under these conditions does a potential complainant value multilateral trade negotiations as an institutional venue that can facilitate partial concessions by the potential defendant, hence ensuring that at least partial relief for domestic exporters can be achieved.

Our findings have important implications for the study of the effects of international trade institutions on the domestic politics of trade. First, while a fair amount of literature focuses on actual WTO dispute settlement cases, we shift attention to *potential* WTO disputes. WTO disputes are only the tip of an iceberg as a much greater number of WTO-illegal trade barriers do not come to the surface, because WTO members are not pushed by domestic exporters to challenge them in the WTO DSM. This means that there is a universe of *potential* disputes much greater than the universe of *actual* disputes.

Second, we cast new light on the question how increased bindingness of trade rules affects WTO members' propensity to further tie their hands. Conventional wisdom holds that increased rule enforcement may endanger the stability of the world trading system by decreasing the propensity of WTO members to further commit to trade agreements. While we agree that legalization or judicialization may increase members' reluctance to commit to binding agreements in *new* areas, our argument shows that increased enforcement of rules can also increase members' willingness to deepen *already existing* commitments when these members negotiate under the shadow of WTO law.

Third, the argument has important real-world implications, and casts doubt on whether the expansion of the WTO's regulatory reach is sustainable and hence desirable. On the one hand, our analysis shows empirically that the DSM can be efficient in a very fundamental way. Not only can more disputes get resolved, but the mere threat of litigation may ignite a dynamic of cooperation when existing commitments cast the shadow of WTO-law incompatibility on issues that are politically difficult to solve by means of litigation. On the other hand, we have shown that the

effects of legal vulnerability on cooperation in the WTO systematically vary across issues. When it comes to regulatory commitments states have subscribed to in the WTO, enforceability of rules cannot be expected to trigger such self-sustaining dynamic of cooperation. Not only are trade disputes concerning regulatory issues particularly intractable, the legal vulnerability of domestic regulatory arrangements even stalls, rather than fosters the future prospects for further cooperation in the multilateral trade regime.

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