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World Trade Organization judicialization and preference convergence in EU trade policy: making the agent's life easier

Arlo Poletti

ABSTRACT Some feared that judicialization in the World Trade Organization (WTO) would decrease WTO members' propensity to support multilateral trade liberalization. Yet, in 2001 WTO members launched a new round of multilateral trade negotiations, fervently supported by the European Union (EU) despite the influence of domestic protectionist forces. This contribution offers an explanation of why judicialization elicited increased convergence of policy preferences between a liberalizing agent (Commission) and multiple principals (economic interests). I identify three judicialization-led rationales for this: the empowerment of exporters relative to protectionist forces; the enhanced attractiveness of the WTO as an institutional location for international regulatory standards; and the strengthening of incentives to engage positively in negotiations to offset the likely costs of adverse panel rulings. I show the plausibility of this argument through an empirical analysis of EU politics in three negotiation areas in the Doha Round: services; agriculture; and the 'Singapore issues'.

KEY WORDS Doha Round; European Union; judicialization; negotiations; principal–agent framework; WTO.

INTRODUCTION

With the establishment of the World Trade Organization (WTO) a lively scholarly debate has emerged about the effects of replacing the General Agreement on Tariffs and Trade's (GATT) model of political–diplomatic dispute settlement with a model of judicialized dispute settlement.[1] Two lines of inquiry dominate this literature. The bulk of this literature investigates the so-called politics of dispute settlement: why do states decide to initiate (or not to initiate) litigation (Busch and Reinhardt 2000; Guzman and Simmons 2002), what are the patterns of decisions when conflicts among parties are brought to adjudication (Busch and Reinhardt 2003; Reinhardt 2001), what power relationships take place between actors in the process of adjudication (Kelemen 2001), and, finally, how and why do parties comply with decisions adopted through third party review (Daugbjerg and Swinbank 2008; Davis

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2007; Goldstein and Steinberg 2008; Zangl 2008). Another strand of literature investigates how judicialization affects the prospects for co-operation in the present international trade regime. A prominent argument that has been put forward in this context is that increased judicialization does not necessarily augur increased multilateral trade co-operation. More specifically, Goldstein and Martin (2000) warned us about the potential downsides of judicialization, suggesting that the unintended effects of judicialization on the activities of domestic economic actors could interfere with the pursuit of progressive liberalization through the adoption of multilateral trade agreements.[2] In particular, they suggested that more transparency about the distributional consequences of trade agreements and increased 'bindingness' of trade rules would likely decrease the propensity of trade-related domestic interests in WTO members to support new multilateral trade agreements.[3]

Empirical evidence, however, suggests that such pessimism was ill-founded. In November 2001, a new round of multilateral and comprehensive trade negotiations was launched in Doha. Not only did governments agree to a new round of trade negotiations, but did so on the basis of a comprehensive and far-reaching negotiating agenda. In this context, particularly striking is the way in which the European Union (EU) approached the new round. Despite the strength and relative influence of key import-competing groups (i.e., farmers), the EU supported broad and comprehensive negotiations (Kerremans 2004; Van den Hoven 2004). This is puzzling because these negotiating settings are widely regarded as providing policy-makers increased opportunities to overcome domestic pressures for protection (Davis 2004). Moreover, the EU has so far taken a fairly liberalizing stance even in the sensitive area of agriculture, including substantial offers on market access and domestic support as well as a commitment of highly symbolic relevance to phase out its export subsidies by 2013 (see Conceição-Heldt 2011). Also, the EU has undergone a transformation from reluctant leader in the Uruguay Round to key sponsor of wide ranging liberalization in the Doha Round. Indeed, after the adoption of the Uruguay Round Commissioner Lamy gave shape to the so-called 'multilateralism first' approach for EU trade policy and put in place a moratorium on bilateral trade agreements (Elsig 2007). In sum, despite the expectation of increased obstacles on the path towards further multilateral trade co-operation, judicialization has neither deterred one of the most important trade actors from advocating a new global round of comprehensive trade negotiations with an inherent liberalizing potential in key import-competing sectors, nor undermined the materialization of a consensus on this idea among WTO members.

While it remains to be seen whether the Doha Round will ever come to a successful conclusion, these empirical developments provide for sufficient room to question the validity of existing pessimist claims about how WTO judicialization affects the prospects for further co-operation in the international trade regime. First, the causal chain this argument describes runs from judicialization to the domestic politics of trade in WTO members and only then to

negotiation outcomes. That WTO judicialization did not constrain the EU from supporting far-reaching multilateral trade co-operation therefore contradicts the central claim of these arguments, namely that WTO judicialization decreases domestic propensity to co-operate. This puzzle cannot be solved by claiming that the peculiar nature of the EU's political system sets the EU aside the scope of these authors' predictions. Indeed, in the trade policy realm the political power structure as well as the dynamics of delegation in the EU are functionally equivalent to that of traditional states (De Bièvre and Dür 2005). Second, understanding how judicialization affects the domestic politics of trade in the EU is particularly relevant because, despite formal consensual decision-making rules governing these negotiations, powerful trade actors such as the EU and the United States (US) can use a range of power tactics to generate consensus support for co-operation not available to other actors (Steinberg 2002). Third, recent studies demonstrate that the EU's decreased enthusiasm in the ongoing negotiations is largely attributable to the effects of the enlargement process rather than to the alleged influence of WTO judicialization (Elsig 2010).

In this contribution, thus, I investigate why the theoretical expectation of a decreased propensity of domestic actors to support multilateral trade liberalization proved inaccurate in the EU case with a view to broaden our understanding of how judicialization affects the domestic politics of trade in WTO members. In a nutshell, this contribution suggests that judicialization impacts on the trade-related interests in WTO members in multiple ways, providing them not only new constraints but also new incentives to commit to multilateral trade agreements. To support this claim, I use a principal–agent framework and investigate how delegation of both adjudication and enforcement powers of WTO rules to the WTO Dispute Settlement Body[4] affected the informal contractual relationship linking policy-makers (agents) and key economic interest groups (principals) in the EU.[5] Much attention is paid in the principal–agent literature to investigate the factors that lead to preference divergence among principals and how, in turn, these affect principal–agent relations (Dür and Elsig 2011). In this contribution I take a different stance and look at how the international institutional incentive structure brought about by WTO judicialization leads to increasing convergence of policy preferences among principals and, in a second step, between principals and agents.

More specifically, I argue that three judicialization-led dynamics contributed towards increasing convergence of policy preferences between the principals and agents in the EU in the run up to the Doha round: (1) an empowerment of exporters relative to protectionist forces as a result of an increased certainty about the distributional consequences of trade agreements; (2) an enhanced attractiveness of the WTO as an institutional location for the adoption of international regulatory agreements; and (3) the creation of compelling incentives for import competing groups that enjoy protection through WTO-incompatible policy tools to support a positive engagement in international trade negotiations.

The contribution proceeds as follows. First, I review the existing literature on this topic to set the ground for further discussion. Second, I develop a theoretical argumentation to elucidate how and under what circumstances judicialization enhances agents' capacity to pursue multilateral trade co-operation together with collective principals. Third, I subject my argumentation to a plausibility probe through an empirical discussion of trade politics dynamics in the EU in three key issue areas – services, agriculture and the so-called 'Singapore issues' – in the period between the creation of the WTO in 1995 and the launch of the Doha Round in November 2001. Principals' policy preferences will be analysed by examining the policy stance of key European economic interest groups organizations. For reasons that I explain in more detail in the remainder of the contribution, I confine my treatment of agents' preferences to an empirical investigation of the European Commission's behaviour.

JUDICIALIZATION, TRADE LIBERALIZATION AND DOMESTIC POLITICS: A PESSIMISTIC VIEW

A decade ago, Goldstein and Martin (2000) engaged in the first attempt to systematically analyse how an increase in the judicialization of the international trade regime interacts with the trade-related interests of domestic actors. Judicialization, they argued, would likely reduce the incentives of domestic groups to co-operate within the trade regime. In their 'cautionary note' about the causal pathways linking judicialization, domestic politics and liberalization, the authors stressed two elements by which judicialization is expected to decrease domestic propensity to conclude new multilateral trade agreements. First, a more judicialized trade regime provides more and better information about the distributional consequences of trade agreements thereby affecting the incentives of economic interest groups to mobilize for and against trade agreements. More information, the argument goes, empowers protectionists relative to free traders on issues relating to the engagement in new agreements. The assumption upon which this argument builds is that key economic interest groups are differentially mobilized prior to the process of judicialization and, more specifically, that increased information will have the larger marginal effect on protectionist groups strengthening the incentives to mobilization of anti-trade forces relative to already well-organized pro-trade groups.

Second, judicialization increases the predictability of trade agreements by reducing the ability of governments to opt out of commitments, therefore 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 the system offers. As the authors point out, 'if enforcement is too harsh states will comply with trade rules even in the face of high economic and political

costs, and general support for liberalization is likely to decline (Goldstein and Martin 2000: 620–1). To put it in principal–agent (PA) terminology, WTO judicialization is expected to elicit principals' (interest groups) opposition against any agents' (policy-makers) attempt to commit to new multilateral trade agreements. Because WTO judicialization increases transparency about the effects of trade agreements and enhances their bindingness, one should expect economic interest groups to pressure policy-makers to abstain from engaging in further multilateral trade co-operation.

Depending on policy-makers' preferences, this PA relationship would therefore be of two kinds: conflictive and strained in case policy-makers were to pursue multilateral trade co-operation, and non-conflictive or even co-operative in case policy-makers were merely to act as transmission belts of societal demands and abstain from pursuing multilateral trade co-operation. What this line of argumentation rules out is a scenario in which principals do not oppose or even support agents' attempts to pursue multilateral trade co-operation. This does not necessarily imply that the WTO would be completely unable to contribute to the removal of existing barriers to trade. The increasing relevance of judicial law-making in the WTO may well serve the purpose of liberalizing world trade (Goldstein and Steinberg 2008). WTO judicialization, though, is expected to decrease the prospects that such liberalization will be achieved through the adoption of multilateral trade agreements.

A NOTE OF CAUTION ON THE CAUTIONARY NOTE

While these arguments certainly provide a useful and provoking starting point for the debate on the processes through which domestic actors define their preferences over trade policies in a more judicialized international trade regime, empirical developments, namely the launching of the so-called Doha Development Round and, more importantly, the EU's stance in this context, seem to contradict such a pessimist view. Indeed, the ambitious liberalizing agenda with which, thanks to the broad mandate granted by the member states, the European Commission (thereafter the Commission) approached the Doha round was met with surprisingly little resistance from key economic interest groups. On the contrary, its strategy was quite consistently supported by both key export-oriented economic groups and import-competing ones. How can this mismatch between theoretical speculation and actual empirical developments be accounted for? A tentative answer to this question is proposed in this section. More specifically, I highlight three arguments that seem to allow for a more optimist understanding of how judicialization affects domestic actors' propensity to commit to multilateral agreements. From the PA perspective adopted here these arguments suggest that judicialization may contribute to the capacity of agents endowed with the task of negotiating international trade agreements to pursue their liberalizing trade policy preferences. Indeed, rather than increasing preference heterogeneity among principals, judicialization may foster preference convergence. This is so because, under given circumstances,

it simultaneously defuses opposition to and strengthens support for multilateral trade co-operation.

Judicialization and the incentives to mobilization: empowering whom?

As already argued above, Goldstein and Martin (2000) assume that increased information strengthens anti-trade forces relative to already well-organized pro-trade groups. This expectation is based on two assumptions. First, economic actors are more easily informed about losses than about possible gains. As a result, these groups are more likely to mobilize politically against policies with costly distributional implications than in favour of policies which potentially involve positive distributional stakes. Second, exporters dominate the policy process. There seems to be an inherent inconsistency in this argument. Standard political economy approaches concur in predicting that import-competing interests dominate over exporting ones in the trade policy-making process (Dür 2010). This is so because, as the authors themselves acknowledge, exporters face more obstacles than import-competing interests when deciding to engage in political action – costly information gathering concerning market access opportunities as well as uncertainty about the amount and the distribution of the benefits deriving from lowering foreign trade barriers. Consistently with this argument, if any generalization were to be derived, *ceteris paribus* it would be more logical to expect that the balance of domestic forces between pro- and anti-trade groups prior to judicialization be tilted in favour of the latter group. More simply, if it is true that losses are more easily ascertained than gains, it is more plausible to expect anti-trade groups to hold a structural advantage over pro-trade ones in the trade policy-making process. It is not surprising that most accounts of exporters 'winning' over protectionists are stories about why liberalization occurs 'despite' the expected bias in favour of import-competing groups in the domestic trade policy-making process.

Both predictions, however, rely on *a priori* assumptions as to what economic group (import-competing or export-competing) dominates the policy-making process that do not necessarily portray empirical reality. Different countries have different domestic balances of interests and the same country can experience a change in its domestic balance of economic forces over time. A more logically consistent way to deal with the question of how judicialization affects the domestic balance of economic interests is to argue that increased information has effects on both groups and that the effect of increased transparency resulting from judicialization depends on the balance of interests in a given country. In fact, this is what Goldstein and Martin (2000) implicitly posit when they argue that increased information should lead to a relatively greater mobilization of the less involved in the policy-process. For the argument I seek to advance here, this means that expecting greater mobilization of import-competing groups relative to export-competing ones is as much plausible as it is to expect the opposite. If this is true, WTO judicialization does not necessarily elicit greater principals' opposition to agents' efforts to pursue multilateral

trade liberalization. Judicialization may well lead to this outcome if the constellation of interests in that country is one in which exporters are already fully mobilized and import-competing ones are not. But it can also lead to the opposite outcome in case the domestic politics of trade were dominated by protectionist interests.

Judicialization and regulatory issues in international trade

In addition to the above, by focusing only on traditional business–government relations (lobbying for protectionism or liberalization), the authors fail to capture the empirically complex reality of the 'new trade politics', namely the increasing propensity of constituencies in advanced industrialized societies to demand that trade agreements be supplemented with regulation of behind the border issues through the construction or harmonization of new international regulatory regimes (Dymond and Hart 2000; Young and Peterson 2006). The implications of these changes are diverse, ranging from a broadening of the set of actors involved in the trade policy-making process (Hocking 2004) to an evolution towards more co-operative non-hierarchical types of business–government interactions (Woll and Artigas 2007).

In this context, judicialization can play an important role for two reasons. First, by increasing transparency of trade agreements judicialization may have particularly relevant effects on the incentives and constraints key economic interest groups face when deciding to mobilize politically to support international regulatory agreements. In general, one would expect producers in states with stringent domestic regulatory standards 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 (Kelemen and Vogel 2010). However, a number of obstacles stand in the way of political mobilization to support international race-to-the-top strategies. As widely acknowledged, the distributive effects of regulatory policies tend to be diffuse and opaque (Wilson 1973). Regulation, moreover, often involves highly technical issues which require expertise and specialist knowledge (Shaffer 2006). In addition, these producers 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 (Dür 2010). These elements represent an obstacle for interest groups to engage in political action given the difficulty they have in anticipating the costs and the benefits of alternative policy choices. In that it increases the transparency of trade agreements, therefore, judicialization may enhance these groups' propensity to seek the opening up of market access opportunities through the adoption of international regulatory agreements.

Second, judicialization makes the WTO an attractive institutional location for governments willing to negotiate regulatory issues demanded by its constituencies in exchange for concessions that liberalize access to their own markets (De Bièvre 2006). While regulatory agreements entail high implementation costs,

especially with respect to enforcement, the WTO offers the possibility to cross-retaliate against non-compliant countries, thereby 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.

These dynamics have important implications for the PA relationship considered here. By increasing transparency and credibility of international regulatory agreements, WTO judicialization may add further weight to the domestic coalition of economic interests who have a stake in pursuing multilateral trade co-operation. Key economic constituencies in developed countries that would gain market access opportunities from setting up new international regulatory standards are more likely to overcome collective action problems they face in a judicialized WTO. Given that the 'new trade politics' is more and more about international regulatory harmonization, WTO judicialization is therefore very likely to elicit increasing support for multilateral trade co-operation in the WTO framework among these principals.

Protection through comprehensive multilateralism: offsetting legal challenges

In the third place, I contend that acquiring a comprehensive understanding of whether WTO judicialization obstructs or facilitates co-operation in the present international trade regime requires also an analysis of its effects on the policy preferences of economic groups in WTO members that are vulnerable to legal challenges brought by their WTO partners. In other words, any assessment of the judicialization/domestic politics nexus needs to account for the simple matter of fact that increased 'bindingness' potentially adds one category of economic interests besides protectionists and free traders, namely protectionists enjoying protection through legally challengeable policy instruments. Doing so highlights how WTO judicialization may end up defusing a key source of opposition to multilateral trade co-operation, namely opposition of key import-competing groups. Indeed, there are compelling theoretical reasons to claim that import-competing groups in a situation of such legal vulnerability will likely support engaging in multilateral and comprehensive negotiations.

When explaining interest groups' preferences over government negotiation strategies, we can assume that import-competing sectors are likely to prefer an institutional setting in which liberalization has only a marginal effect on their domestic market position and in which they have the greatest veto power (Elsig 2007). More specifically, these groups are likely to anticipate that multilateral and comprehensive settings tend to reallocate political resources in favour of national executive,s thereby making it easier for governments to overcome domestic pressures for protection (Moravcsik 1994; Putnam 1988). This is even more so when multilateral negotiations are multi-issue. Indeed, 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 (Davis 2004). Accordingly, it is fair to expect non-legally vulnerable import-competing groups to deem multilateral and comprehensive settings the worst negotiation scenario.

The judicialization of enforcement mechanisms within the WTO, however, may well lead import-competing groups' preferences over negotiating venues to tip over. First, promoting multilateral and comprehensive negotiations allow these groups to move away from a worst case scenario, namely one in which an authoritative recommendation for an end to the protectionist policy is highly likely to be issued (Reinhardt 2001), towards one that promises time and flexibility (Davis 2005). Second, lengthy negotiations provide domestic actors with an opportunity to devise a negotiating strategy aimed at reaching a consensus on new international rules that 'legalize' the targeted policy instruments. A new round of negotiations may end up setting new international rules that allow for the use of policy instruments previously prohibited. Third, lengthy negotiations may be appealing to domestic actors because, in the event of a failure of the strategy described above, domestic reforms can be enacted to ensure compatibility with WTO rules without substantially decreasing the overall level of support provided to the targeted sector. Finally, and more importantly, multilateral and multi-issue negotiations facilitate trade-off deals. In such context, domestic reform of legally challengeable policy instruments can be strategically linked to other issues on the negotiation table, therefore potentially enabling negotiators to achieve pareto-superior outcomes in comparison to a domestic reform alone scenario.

These effects of judicialization on the selected PA relationship, therefore, are even more important than those previously described. In the previous sections I argued that judicialization strengthens the incentives to support the adoption of multilateral trade agreements of economic groups who already have a stake in increasing their opportunities to access foreign markets. In this case, judicialization affects the domestic constellation of economic interests more fundamentally: it elicits support for multilateral trade co-operation among those who would most fiercely oppose it in the absence of strong enforcement mechanisms, namely import-competing groups. This is not to argue that WTO judicialization turns protectionist groups into liberalization-seekers. Rather, my claim is that WTO judicialization may compel import-competing groups to frame their demands for protection in terms of a constructive engagement in multilateral and comprehensive negotiations. In other words, the shadow of the law elicits defensive strategies that bring about an inherent co-operative potential.

THE EUROPEAN UNION AND THE DOHA ROUND

So far, I have argued that while judicialization may impinge on the domestic trade policy-making environment in one direction, namely by providing a set of incentives to avoid committing to multilateral agreements, its effects in the

other direction need also be taken into account. WTO judicialization may well increase principals' propensity to co-operate in the WTO and, in a second step, foster convergence between them and agents who seek to achieve further multilateral trade co-operation. In this section, I discuss empirical evidence concerning domestic politics dynamics in the EU relating to three key issue areas – services, agriculture and the 'Singapore issues' – in the period between 1995 and the adoption of the Doha Declaration in 2001. As already mentioned, the way in which the EU approached the Doha Round seems to contradict early theoretical expectations about WTO judicalization's influence on the domestic politics of trade in WTO members. The choice to focus on these three areas of negotiations is consistent with the theoretical argumentation developed in the previous sections concerning the relationship between mobilization dynamics of import-competing and export-oriented groups, the incentives WTO members face to support the adoption of regulatory agreements in the WTO and the effects of vulnerability to WTO legal challenges on import-competing groups' policy preferences.

Policy preferences of key interest groups as well as of the Commission will be traced in order to assess how WTO judicialization affected the selected principal–agent relationship. I assume that the treatment of agents' preferences can be confined to an empirical investigation of the Commission's behaviour for two reasons. From a theoretical viewpoint, it is reasonable to expect the Commission to anticipate member states' preferences rather than to pursue its own interests (Damro 2007; De Biévre and Dür 2005; Dür 2006, 2008; Kerremans 2004; Meunier 2007). While it is true that the Commission formally holds substantial power in shaping the mandate for international trade negotiations (Meunier 2005) and that the Treaty of Nice extended qualified majority voting to new areas, *de facto* unanimity remains the rule when decisions concerning trade negotiations are at stake. Moreover, the member states not only retain the ultimate authority to reject or ratify the deal but also may refuse to delegate negotiating powers in the future. These requirements create compelling incentives for the Commission to shape an agenda that mirrors member states' preferences. In addition, from a practical perspective, it would be impossible to provide a comprehensive and meaningful overview of all member states' preferences as well as of the Commission in all three issues areas within the space of this contribution.

The following analysis corroborates the theoretical expectations set out above. Judicialization indeed affected principal–agent relations by eliciting a convergence of pro-co-operation preferences among principals. The Commission's approach to the Doha Round was not met with resistance by key economic interest groups. On the contrary, not only export-oriented groups but also key import-competing groups largely backed its far-reaching agenda. This was so because WTO judicialization strengthened European services sector's incentives to mobilize politically in favour of further international liberalization, made the WTO an attractive location to pursue international regulatory strategies, and created incentives for European farmer organizations to support a constructive involvement in negotiations.

Services

This section shows how judicialization elicited increasing support for multilateral trade co-operation among a key set of principals, namely services providers. While the Commission's strategy for services liberalization was met with indifference by services producers during the Uruguay Round, the capacity of the WTO to ensure transparency and predictability of commitments provided incentives for these groups to mobilize politically and strongly back the Commission in the run up to the Doha Round. Comparing these dynamics with those of key import-competing groups lends further support to the claim that judicialization indeed affected the power relations among principals towards increasing the relative weight of actors with a stake in supporting agents' efforts to pursue multilateral trade co-operation.

Services negotiations in the Doha Round were meant to represent the continuation of the efforts towards liberalization of trade in services that had taken place in 1995 with the adoption of the General Agreement on Trade in Service (GATS). In accordance with the approach taken in the Uruguay Round, services were set as a priority of the EU's negotiating strategy in the run-up to Doha (European Commission 1999). Negotiations on services in the Doha Round came up, strongly paralleling the EU's requests, involving a mixture of concessions for reciprocal market access and rule-making (Woolcock 2005: 394). Although EU offers varied greatly across modes of supply, it is fair to argue that the EU took a fairly liberalizing stance throughout the negotiating process (Hoekman *et al.* 2007).

While the EU's negotiating stance on services has been fairly consistent across time, key economic groups approached the Uruguay and the Doha Rounds quite differently. In contrast with the situation in the US where negotiators were fully supported by corporate interests, the European services community was largely absent from negotiations during the Uruguay Round (Van den Hoven 2002, Woll 2006). As it has been noted, 'most business associations either showed no interest in the negotiations or were afraid to confront farmers' unions by supporting the Commission position' (Van den Hoven 2002: 15).

After the signing of the Marrakech agreements and the creation of the WTO, however, things started to change. During negotiations on financial services of the GATS (1995–1997), for instance, there were major consultations with telecommunications providers and with the Financial Leaders' Group, both of which had strongly lobbied the EU (Van den Hoven 2002). In the run-up to the new 'millennium round', service providers in several member states strongly advocated further liberalization of trade in services (Woolcock 2005). In 1999, for instance, the European Services Forum, a network of organizations representing the services industries across the EU, was established arguably with the primary aim of defending the sectors' interests in the new WTO negotiations (Dür 2008). While the Commission itself solicited the creation of this coalition of services industries with a view to building support for the

new trade round (Van den Hoven 2002), it is undisputed that these interests were keen to respond to these demands. Since then, the European Services Forum (ESF) has consistently lobbied for a strengthening of the GATS by monitoring and providing advice to the Commission and member states through detailed research and negotiating proposals (ESF 1999a, 1999b, 2001, 2003, 2005). The Commission itself has acknowledged the key role the ESF has come to play during services negotiations in the Doha Round, both in terms of finding out where the problems lie and in advancing specific requests (Deere 2005). Interestingly, services negotiations in the new round were also supported by industrial producers which perceived them as essential to improving the competitiveness of the European industry (UNICE 2000, 2001a, 2001b, 2003).

In sum, the patterns of business mobilization with respect to negotiations on services have moved from relative indifference prior to judicialization to active involvement in the subsequent phase. Of course, this is not to argue that judicialization of the international trade regime was the only cause of greater political mobilization from these constituencies. Since the early 1990s the services sector had more and more become an area of European comparative advantage with the greatest potential for growth in EU exports and this certainly influenced business' readiness to mobilize politically. However, the wording of the various policy statements and policy positions brought forward by these organizations seems to suggest that increased transparency and enhanced credibility of commitments in the WTO were key determinants of their policy preferences. The European Services Forum, for instance, justified its support for combining services and other trade-related issues in a new comprehensive trade round by stressing precision, transparency and bindingness of WTO commitments (ESF 1999a). This position was later further stressed by stating, 'services liberalization with sufficient balances, certainties and transparency . . . will only be achieved in the context of a wider and broad-based WTO round' (ESF 2001:1). The same line of reasoning can be traced in a number of position papers delivered by the organization representing European industrial interests. Indeed, the Union of Industrial and Employers' Confederation of Europe (UNICE) also pointed to the transparency and predictability of the WTO framework as a key reason to negotiate services liberalization in the WTO rather than through bilateral or regional agreements (UNICE 2000, 2001).

Interestingly, these trends stand in stark contrast with patterns of political mobilization in import-competing sectors such as agriculture. Farmers' groups traditionally represent the interest group with the longest and most successful record of political lobbying in Europe and have lobbied EU policy-makers as strongly during the Uruguay Round as they did before and during negotiations in the Doha Round. Thus, judicialization in this case seems to have had the larger marginal effect on export-competing groups' propensity to mobilize politically, thereby empowering them relative to import-competing ones.

The Singapore issues

The following analysis demonstrates that judicialization provided the necessary incentives for key principals in the EU to overcome collective action problems and mobilize to support the agents' regulatory strategies in the WTO. While in the pre-1995 period EU business groups were largely indifferent about the prospect of expanding the WTO's regulatory reach, these groups consistently backed the Commission's attempt to include the 'Singapore issues' in the Doha Declaration. Despite the existence of more functionally specialized fora, the WTO was consistently pointed at by key interest groups in the EU as the most appropriate forum to pursue these regulatory agreements. As De Bièvre (2006) stresses, the possibility of linking enforcement of regulatory agreements to traditional liberalization commitments as well as the increased transparency of rules brought about by WTO judicialization was a driving factor behind these groups' support for the adoption of such regulatory agreements in the WTO framework.

It is widely acknowledged that the EU has been the most prominent advocate of the inclusion of the so-called 'Singapore issues' – investment, government procurement, competition and trade facilitation – in the agenda of the new round of multilateral trade negotiations (De Bièvre 2006; Woolcock 2005; Young 2007). While these issues had already been a matter of discussion in the WTO since 1996, the EU pushed strongly for them to be upgraded to full 'negotiating status' in the run-up to the new millennium round. The EU, however, stood very much alone in supporting this strategy. Given the US's tepid support and the overt opposition by developing countries, it is not surprising that the 'Singapore issues' were dropped off the agenda at the 2003 Cancun Ministerial Meeting.

What matters here, however, is not why the EU strategy failed but rather whether and how judicialization affected relations between policy-makers and interest groups in the EU when the agenda was being shaped. As for competition, throughout the 1990s the EU had consistently supported the view that more active co-operation at the international level was needed to deal with negative spillovers arising from existing territorially distinct national competition policies (Fox 1997). While a general consensus existed among developed countries on the idea that competition policy needed to be 'internationalized', however, by no means such a consensus translated into convergent views on how to achieve such desired ends (Anderson and Holmes 2002; Fox 2003). As far as the EU is concerned, its position in the run-up to the Doha Round can be described as one guided by a desire to pursue binding multilateral measures through the WTO (Damro 2004). This choice was motivated on the basis of the need to ensure credibility of commitments. As Brittan put it, 'a WTO agreement on competition would have no added value unless it was binding on governments. Even if there was consensus on a list of substantive rules, these would have no teeth or credibility if they remained purely paper obligations' (Brittan 1999: 5). The idea of creating a competition regime in the WTO framework was generally supported by European business groups. The European Services Forum, for instance, made its position clear by supporting 'the development

within the WTO of common principles that could be used as standards against which the policies, practices and decisions of supranational and national competition authorities could be judged' (ESF 1999b). UNICE also welcomed 'a WTO agreement on objectives for competition rules which is directed to what is necessary to prevent foreclosure of markets (UNICE 1999).

Similar patterns of principal–agent relations can be traced in relation to negotiations on investments. The Commission was strongly in favour of the establishment of a multilateral framework of rules governing international investment in the WTO. The preference for an investment agreement under the jurisdiction of the WTO was justified by pointing to its enforcement mechanisms. As the 1999 Commission Communication outlining the EU approach to the new round affirmed:

> the WTO appears as the only multilateral forum that can fully take into account the interests of both developed and developing countries ... the WTO has the undeniable advantage of a well-established institutional framework (including the Dispute Settlement Understanding) and of tried and tested basic non-discrimination principles. (European Commission 1999: 9)

Again, the Commission was consistently backed by European business groups, particularly medium-sized firms (Young 2007). The establishment of a global regime in the WTO for foreign direct investments was consistently pointed at as a policy priority by business organizations such as UNICE (UNICE 2001a, 2001b, 2003) and the European Services Forum (ESF 1999a).

On the two remaining issues, government procurement and trade facilitation, the EU's position was relatively more modest with no reference to the application of the Dispute Settlement Mechanism (DSM). On government procurement the EU sought to enhance transparency of national government procurement, thereby creating a level playing field for international contractors seeking contracts with foreign governments (De Bièvre 2006: 860). On trade facilitation, the EU aimed at reducing costs arising from different administrative burdens by streamlining customs procedures and harmonizing data and documentation requirements on trade facilitation. With respect to both issues there were clear-cut sectoral interests at stake (Woolcock 2005: 395). It should come to no surprise, therefore, that again the Commission strategy was strongly supported by key business groups in Europe (Dür 2008). Indeed the inclusion of public procurement as well as trade facilitation within WTO disciplines was advocate both by large organizations such as the European Services Forum (ESF 1999a) and UNICE (2001a) but also by more sector specific organizations such as the European Information Communications and Consumer Electronics Technology Industry Association (EICTA 2005).

Agriculture

Even among European farmers, a key set of principals, judicialization defused opposition to and even elicited support for multilateral trade co-operation.

Judicialization changed the strategic context within which the interests of key import-competing groups could be defended, turning multilateral and comprehensive negotiations into the most suitable venue to offset the legal challenges that could be brought by WTO partners (Poletti 2010). As a result, the potentially most powerful source of opposition to the agent's multilateral and comprehensive agenda was discarded.

As in the case of services, WTO members committed themselves to restart the negotiating process for further liberalization of agricultural trade after the Uruguay Round by a clear deadline. Article 20 of the Uruguay Round Agreement on Agriculture (URAA) mandated WTO members to start new negotiations by the end of 1999. In addition, Article 13, also known as the 'peace 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 provision was due to expire nine years after the start of the implementation of URAA on December 2003. Unsurprisingly, the prospect of its expiration lighted a fire under negotiation on trade-distorting agricultural subsidies (Steinberg and Josling 2003: 372). Given its share of global subsidy expenditures, the EU was at the front row of this debate (Anania 2007). The expiration of the peace clause would open up the possibility for many EU policy instruments to be challenged under WTO rules, thereby putting a large amount of support provided to European farmers through the Common Agricultural Policy (CAP) at risk (Swinbank 1999). At the time the EU was indeed greatly concerned about the fact that in a few years the protection provided by the peace clause was going to expire (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). As a result of judicialization, keeping the status quo could not be considered a cost-free strategy anymore.

According to the theoretical reasoning developed above one could expect the likelihood of costs being imposed on the European agricultural sector as a result of a set of adverse rulings by the WTO Dispute Settlement Body to elicit a change of these groups' preferences with respect to the question of whether to support or oppose policy-makers' attempts to engage in multilateral and comprehensive trade negotiations. Viewing with hindsight how European farmers' reacted to the Commission' negotiating stance up to the adoption of the Doha Declaration lends support to the view that judicialization indeed elicited such a change of preferences. In abstract, one could have reasonably expected European farmers to have a clear preference for negotiating venues with the lowest potential impact on the status quo. Given that the URAA mandated WTO members to re-start negotiations, the menu of strategies available to policy-makers was restricted to a choice between a mini-round on agriculture and a multilateral and comprehensive one. As already argued, multilateral and comprehensive negotiations offer a number of opportunities for policy-makers to overcome societal demands for protection and, therefore, are likely

to be deemed as the worst negotiating venue by import-competing groups. Quite surprisingly, however, empirical evidence suggests that European farmers not only did not voice opposition to the Commission approach but also supported it.

The Commission clearly presented itself as the most vocal supporter of comprehensive negotiations. Within this context, its position on agriculture evolved over time. At the beginning, the Commission vaguely committed to take a constructive stance on negotiations concerning the so-called three pillars (market access, domestic support and export subsidies) while seeking to incorporate most of farmers demands – to stay within the perimeter set by the CAP reform agreed in 1999, to keep non-trade issues as an integral part of WTO discussions, to maintain or even to expand the scope of the 'blue-box' and 'green-box' payments, and, more generally, to protect the integrity of the European model of agriculture – for a comparison see, European Commission (1999); WTO (2000); and COPA COGECA (2001a, 2001b).

At the time of the adoption of the Doha Declaration in November 2001, it became clear that a breakthrough for negotiations was conditional upon an EU commitment to substantial concessions on export subsidies. In the end, EU negotiators had to accept the unacceptable: the comprehensive agricultural mandate of the declaration included 'reductions of, with a view to phasing out, all forms of export subsidies' (WTO 2001). Although by succeeding in adding to the declaration that such an objective was not to prejudice the outcome of negotiations the Commission could claim that no actual commitment was taken, the Commission move was considered at the time of highly symbolic relevance. Despite this bold move, European farmers did not cause a major political backlash against the Commission. Rather surprisingly the deal was greeted with enthusiasm by European farm leaders. Not only did European farmers issue a statement during the negotiations in which full support for the Commission's approach was expressed (COPA-COGECA 2001a), but it has been reported that behind the scenes EU farm and trade officials could barely hide their glee and that there was a general impression that the EU obtained more than expected (Agra Europe 2001).

A number of elements point to the opportunities these multilateral negotiations provided to offset the likely negative effects of the demise of the peace clause as a key explanation for the surprisingly low level of opposition to the Commission's general approach to negotiations as well as to its move on export subsidies. First, there was an 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). Comprehensive multilateral negotiations, therefore, allowed policy-makers to buy time and delay to an indefinite future the adjustment costs that would likely result from being sucked into adjudication. Second, EU negotiators, and plausibly also farmer organizations, were aware that export subsidies were the main and most vulnerable target of

potential legal challenges from WTO partners. Instead of dismantling this instrument without getting something in exchange, it was rational to try selling this concession in return for counter concessions in the negotiation game: using export subsidies as a bargaining tool allowed the EU to capitalize on the inevitable adjustments that would have resulted even in the absence of the Doha talks.

CONCLUSION

This contribution seeks to advance the scholarly debate on how the judicialization of the international trade regime affects the incentives and constraints domestic actors face when confronted with the choice of either supporting or opposing multilateral trade co-operation. More specifically, the contribution argues that a proper understanding of the interactive dynamics between judicialization and the domestic politics of trade in WTO members needs to take into account a broad spectrum of causal mechanisms. As shown in the empirical discussion, judicialization provides WTO members a set of new constraints but it also brings about powerful incentives to pursue multilateral co-operation. In the run-up to the Doha Round, WTO judicialization mostly acted as a motor to increase European producers' support for the Commission ambitious agenda. The likelihood of a number of legal challenges being brought against WTO-incompatible agricultural export subsidies compelled European farmers to support the EU's engagement in a comprehensive multilateral trade round. At the same time, by enhancing credibility and transparency of commitments, judicialization elicited increased support among key economic constituencies for both further liberalization of trade in services and for the opening up of market access opportunities in foreign markets through the setting up of new regulatory agreements on the so-called 'Singapore issues'.

These findings cast a light on a largely neglected question in the PA literature. The bulk of this literature focuses on how the existence of multiple principals with often diverging interests affects PA relations. By conceptualizing trade policy-making in WTO members as an ensemble of several hierarchically organized PA relationships, this contribution highlights how international institutional pressures that may counterbalance those factors, the EU's enlargement process for instance, that could be expected to increased preference divergence in domestic-level PA relationships. Contrary to the expectations, the delegation of adjudication and enforcement powers to the WTO brought about a new incentives structure that was conducive to an alignment of policy preferences among key producers with previously diverging interests in the EU. This explains why policy-makers could pursue an ambitious and potentially far-reaching agenda with relative ease.

Finally, this contribution suggests that more research is needed to acquire a systematic understanding of how WTO judicialization affects the domestic politics of trade in WTO members. As most early-stage exercises in trying to grasp the complex reality of particular social phenomena, this contribution probably

raises more questions than it answers. A first question concerns scope conditions. I have argued above 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 for further research. A second line of inquiry that might arise from the argumentation developed here is comparative in nature. Comparing differences in the extent to which WTO members, despite other variables keeping constant, respond to the incentives to co-operation brought by the 'shadow of the law' might well provide interesting opportunities to develop fresh theoretical insights and to conduct innovative research at the crossroads of different strands of research in political science.

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NOTES

1 'WTO judicialization' hereafter. For this conceptualization of the strengthened enforcement mechanisms in the WTO see De Biévre (2006). I choose not to use the term 'legalization' (Goldstein *et al.* 2000) because while legalization is an appropriate concept for the process of law-making, the term judicial and its derivations appears more apt to refer to court-like procedures, such as international dispute settlement and domestic quasi-judicial review procedures. Both terms, however, refer to the same phenomenon, namely the changes introduced to the Dispute Settlement Mechanism with the creation of the WTO. In the GATT, consensus was required to form a panel, adopt a report and authorize retaliation for non-compliance. In the present system, the adoption of legal rulings and the authorization of retaliation is no longer conditional upon consent by the defendant (see Goldstein and Steinberg 2008; Hudec 2000; Zangl 2008).

2 The authors use the term 'legalization'. Consistently with what I argued in note 1, I use the term 'judicialization' when referring to their argument in the text.

3 It needs be stressed here that other arguments can be found in the literature. Rosendorff (2005), for instance, conceives of increased judicialization as an institutional innovation that allows WTO members to compensate their trading partners' losses, if they choose to violate existing commitments. As such, he argues, judicialization may increase flexibility and the stability of co-operation. However, Rosendorff bases his analysis of the WTO DSM on a false dychotomy between the presence or absence of mechanisms for compensation. The GATT dispute settlement

mechanism already provided mechanisms for compensation. These had to be approved by unanimity, i.e., also by the defendant. Under the WTO, such veto option is no longer available, and what is more sanctions can also be authorized against the opposition of the defendant. If flexibility is to mean compensation, no actual increase in flexibility resulted from the creation of the WTO dispute settlement body. Increased judicialization therefore increased the bindingness of WTO commitments, while keeping constant the possibility for compensation during the consultation phase. For these reasons, in assessing whether and how judicialization affects the prospects for co-operation, I side with Goldstein and Martin (2000) in considering increased transparency and enhanced bindingness of trade rules as the two most relevant characteristics of judicialization.

4 A debate exists in the literature as to whether the WTO Dispute Settlement Body (DSB) should rather be conceived as a 'trustee', namely an independent body in relation to which re-contracting tools, and less effective at influencing than in relation to 'agents' (Alter 2008). I take the view here that although the DSB enjoys ample discretion, re-contracting dynamics are still central to its relationship with WTO members and, thus, that the PA framework remains a useful analytical tool in this context.

5 As discussed in the introduction (Dür and Elsig 2011), under specific circumstances it can be useful to conceive of the informal contractual relations between economic actors and political actors as a principal–agent relationship.

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