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Drowning Protection in the Multilateral Bath: WTO Judicialisation and European Agriculture in the Doha Round

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The existing literature on the EU's participation in the agricultural negotiations of the Doha Round assumes that EU policy-makers develop autonomous preferences in favour of liberalising agricultural trade, thus going against the preferences of the agricultural sector. This article challenges this view and argues that WTO judicialisation—the strengthened enforcement of rules introduced with the creation of the WTO—affects the domestic politics of trade in WTO members. My key contention is that WTO judicialisation confronts societal interests and public authorities with legal vulnerability, and that this elicits a willingness to co-operate with other WTO members and thus pre-empt foreign challenges to domestic policies. Empirically, the article shows that negotiations centred on offsetting the potentially disruptive effects of foreign legal challenges to EU farm policies.

Keywords: agriculture; European Union; negotiations; WTO

Introduction

Much scholarly attention has been devoted to explaining the European Union's stance in the context of agricultural negotiations in the so-called Doha Round. The subject is indeed puzzling. Quite surprisingly, the EU has so far taken a fairly liberalising stance including substantial offers on market access and domestic support as well as a commitment of highly symbolic relevance such as the willingness to phase out its export subsidies by 2013. Also puzzling, in light of the influence farmers have traditionally had in the EU trade policy-making environment, is that the EU set itself as the most fervent supporter of broad and comprehensive negotiations. Indeed, it is widely acknowledged that these negotiating settings make it easier for negotiators to overcome societal pressures (Putnam 1988; Moravcsik 1994; Davis 2004). Both outcomes therefore call into question the explanatory power of standard political economy readings that view policy-makers as transmission belts of societal demands. Recalling that Article 20 of the Uruguay Round Agreement on Agriculture (URAA) mandated WTO members to start a new round of negotiations on agriculture by the end of 1999 does not make these puzzles any less relevant. In the last instance, the EU could have opted for a less liberalisation-prone negotiating setting such as an agriculture-only mini-round.

It should come as no surprise, then, that a number of authors have explained the EU's stance on agriculture in the Doha Round by stressing the causal relevance of

policy preferences defined by policy-makers autonomously from and at least partly in contrast to farmers' lobbying. Implicitly or explicitly, all existing explanations cast doubts on the traditional view that conceives of the EU trade policy-making system as strongly receptive of farmers' demands and, conversely, support recent claims of the decreased influence of European farmers in such a system (see Swinnen 2008). Some authors point to ideas and value-based motivations of policy-makers such as the preference for a 'multilateralism first' approach (Elsig 2007), the influence of a 'post modern trade paradigm' (Falke 2005) or the importance of the intrinsic values of the EU system (Van den Hoven 2006). Other authors take a more nuanced view, stressing the importance of the strategic use of a development discourse by the European Commission (Van den Hoven 2004). Yet other analyses take a more rationalist view with respect to the motivations driving public actors. Anders Ahnlid (2005), for instance, explains the EU's approach to the Doha Round as the result of the Commission's efforts to provide effective leadership to move the EU position in a free trade-oriented direction and of its capacity to do so in the context of a three-level negotiating game. Similarly, Eugenia Conceição-Heldt (2009) points to the Commission's ability to exploit divisions within member states and to play an autonomous role in the negotiating game as the driving factor behind the EU position on agriculture. Johan Swinnen tackles this question indirectly, conceiving of the EU's approach to agricultural negotiations in the Doha Round as the direct consequence of Commissioner Fischler's ability to exploit domestic and international pressures to overcome existing opposition to a radical reform of the Common Agricultural Policy (CAP) (Swinnen 2008). Finally, other authors suggest that the EU policy preferences in agricultural negotiations were influenced by institutional pressures at the World Trade Organisation (WTO) level. Some, for instance, point to the influence on EU agricultural institutions of a liberal WTO-led paradigm underpinning global farm trade (Skogstad 1998; Daugbjerg and Swinbank 2009), while others suggest that EU agricultural concessions reflected the desire not to lose credibility in the eyes of its WTO partners by causing a breakdown in the negotiations (Swinbank and Daugbjerg 2006).

This article challenges these arguments' underlying assumption, namely that the strategy pursued by EU policy-makers was not driven by a desire to protect European farmers. I argue that existing accounts overlook the impact of the strengthened enforcement mechanisms of WTO rules introduced in 1995 on how the trade-related domestic interests in WTO member states define their policy preferences in relation to different negotiating venues available to them. With the creation of the WTO in 1995, the GATT's model of political-diplomatic dispute settlement was replaced by a judicial one.[1] While in the GATT consensus was required to form a panel, adopt a report and authorise retaliation for non-compliance, under the new scheme the adoption of legal rulings and the authorisation of retaliation is no longer conditional upon consent by the defendant (see Hudec 2000; Goldstein and Steinberg 2008; Zangl 2008). In other words, WTO judicialisation increased the bindingness of WTO rules because WTO members that breach those rules face a more credible threat that costs will be imposed on them for their misbehaviour.

These institutional innovations at the WTO level have received very little attention among scholars who aimed at providing a theoretically grounded account of the

EU's approach to agricultural negotiations in the Doha Round. This is particularly striking both because a growing body of literature suggests that WTO judicialisation is indeed a key factor shaping the domestic politics of trade (Goldstein and Martin 2000; Rosendorff 2005) and because a large amount of journalist and non-scholarly records acknowledge that the shadow of WTO law impinged on EU negotiators' preferences. This article seeks to fill this void. In a nutshell, the argument I propose is that WTO judicialisation elicits a positive dynamic of co-operation by forcing WTO members to develop anticipatory strategies to cope with legal vulnerability. My key contention is that multilateral and multi-issue negotiating settings represent the best alternative for policy-makers who care about defending import-competing groups from WTO legal challenges in so far as they provide them with the following strategic opportunities: displacing the costs of a likely adverse WTO panel ruling to an indefinite future, negotiating new rules that 'legalise' the targeted policy instruments, reforming domestic policies to make them compatible with WTO norms, and trading off concessions in exchange for concessions from WTO partners. This WTO-level institutionalist account portrays a somehow paradoxical scenario: under the incentives and constraints brought about by WTO judicialisation, liberalisation may well result from an attempt to satisfy import-competing groups' demands for protection. This is not to argue that WTO judicialisation turns protectionists into liberalisation seekers. Rather, my claim is that WTO judicialisation changes the strategic context within which protection can be more efficiently provided. In such a context, a constructive engagement in multilateral and comprehensive negotiations can be deemed the most rational course of action to provide protection. In other words, under given circumstances the shadow of the law elicits defensive strategies that bring about an inherent liberalising potential.

The analysis proceeds in three steps. First, I speculate theoretically to support the view that both the choice for multilateral and multi-issue negotiating settings and the seemingly far-reaching concessions made by the EU can be consistently portrayed as a rational pre-emptive strategy, the ultimate goal of which was to defend European farmers. Second, in order to support my claims, I discuss some of the available empirical evidence concerning the relationship between EU agricultural support schemes and WTO rules as well as the EU's evolving negotiating strategy on agriculture in the Doha Round. The assumption that underlies my empirical analysis is that the EU's role in multilateral trade negotiations can be conceptualised as functionally equivalent to that of traditional states and that the EU can therefore be conceived of as a unitary actor in such contexts.[2] Third, I seek to corroborate further my argument by systematically showing that existing explanations fall short of providing a convincing account of observed empirical developments. In the conclusion, I summarise the key findings of the article.

1. The Logic of Protection through Comprehensive Multilateralism

As briefly mentioned above, existing explanations of the EU's stance in agricultural negotiations of the Doha Round assume that both the strong support for a broad and comprehensive trade round and the proposals put forward during negotiations clearly tell us that farmers' protection was not EU negotiators' key objective. The

puzzle these studies seek to account for, implicitly or explicitly, is the logical contradiction between what one would have expected on the basis of the existing constellation of economic interests within the EU, namely negotiating strategies more suitable for protecting import-competing interests, and actual empirical developments. In doing so, these studies inevitably have to assume *a priori* that policy-makers have preferences over trade policies independent of societal demands. However, attributing preferences to policy-makers is theoretically problematic because it only raises the question of where these preferences come from (Dür 2008). These studies are largely silent on this, presuming that the pursuit of international policy objectives flows directly from policy-makers' preferences. Even when the sources of policy-makers' preferences are specified, by pointing to the role of institutional pressures at the WTO level for instance, there remains the problem of explaining how and why policy-makers can overcome existing pressures for protection. In addition, while attributing vaguely defined policy preferences (i.e. global justice, liberalisation) to policy-makers can tell us something about why some negotiating venues are chosen over others, it does not help much in accounting for the specifics of the evolving negotiating strategy. Liberalisation in agricultural trade can take different shapes. What explains different preferences in this regard? As I demonstrate in the remainder of this section, factoring the effects of WTO judicialisation into the analysis provides a corrective to these problems. More specifically, I argue that pointing to the embeddedness of the EU trade policy-making environment in the quasi-judicial dispute settlement mechanism of the WTO allows for a specification of the sources of policy makers' preferences by showing how WTO-driven pressures change the strategic context within which policy-makers seek to defend farmers' interests.

1.1. Domestic Actors' Preferences over Negotiating Venues in the Absence of the 'Shadow of the Law'

Standard political economy approaches tend to conceive of governments' choices over trade policies as a function of the preferences and political pressures emanating from key economic interest groups, which, in turn, are defined as a result of a rational calculation about the expected distributional consequences of co-operative agreements (Milner 1988; Rogowski 1989; Frieden 1991; De Bièvre and Dür 2005). When it comes to deriving expectations about these groups' preferences over alternative venues for trade negotiations, it is generally assumed that import-competing interests have a preference for negotiating settings in which the opening of new markets has only a marginal effect on their domestic market position. Therefore, import-competing industries are expected to lobby for the status quo and, if trade agreements are to be undertaken, to prefer bilateral over inter-regional and inter-regional over multilateral frameworks (Aggarwal and Fogarty 2004). A further distinction concerns the number of issues to be discussed during negotiations. Again, import-competing interests are expected to have clear policy preferences against multi-issue negotiating contexts. As Christina Davis (2004) has shown, 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. In sum,

multilateral and comprehensive negotiating venues represent the worst case scenario for groups that have a strong interest in maintaining the status quo.

Export-oriented groups' preferences, instead, are much less clear-cut and depend on their degree of competitiveness, strategic orientations and their experiences with a multilateral approach. A preference for multilateralism, for instance, should be prominent among export industries with high levels of export dependence and multinationality (Milner 1988). However, these groups face a number of important obstacles to mobilisation. The costs attached to information gathering, the uncertainty concerning the benefits from lowering foreign trade barriers and the vagueness of distributional effects of liberalisation among exporters increase the costs of mobilisation and engagement in political action to improve foreign market access (Dür 2007). In addition, exporting business groups may prefer inter-regional approaches when in need of larger-than-national markets to take advantage of economies of scale or to develop production-sharing networks (Chase 2003). Thus, given the clear preferences of import-competing groups against multilateral and comprehensive trade negotiations and the not-so-clear preferences of export-competing groups for such a strategy, one should expect a bias against multilateral and comprehensive approaches (Elsig 2007).

1.2. Factoring in the Effects of WTO Judicialisation

The judicialisation of enforcement mechanisms within the WTO changes this picture. Under the new dispute settlement mechanism, WTO members are provided with a more stringent tool to act against states violating existing rules, and, as a result, the status quo cannot be considered a cost-free strategy any more by the latter group. The country seeking the removal of WTO-incompatible policies can both unilaterally determine the negotiation forum by pursuing adjudication and impose costly retaliation on the responding state (Hudec 2000). As a result, the respondent government has little choice in the matter of a negotiation forum if the initiating government decides to file a complaint. As Davis (2005, 19) stresses, 'being singled out in a violation ruling issued by a WTO dispute settlement panel is the worst case scenario for the respondent state. A violation ruling represents an authoritative recommendation for an end to the protectionist policy'. In this context, the order of preferences of both import-competing interests and policy-makers that seek to satisfy their demands for protection may tip over. Two strategic options are available to states that become vulnerable to legal challenges brought by WTO partners: face litigation with a high probability that a WTO panel will issue an authoritative recommendation to put an end to the targeted policy instrument or carry out a defensive negotiating strategy aimed at neutralising and offsetting these external threats. When the adjustment costs of complying with a violation ruling or the costs of retaliation in case of non-compliance are high, and, more importantly, when the targeted country holds substantial agenda-setting power within the WTO, compelling incentives arise to push forward a pre-emptive strategy that makes it possible to offset the potentially disruptive effects of an adverse WTO panel ruling. What is relevant in this context is that multilateral and multi-issue negotiating settings offer the best chances to succeed.

First, multilateral and comprehensive negotiations allow domestic actors to move from a worst case scenario setting to a negotiation forum that promises the most

time and flexibility. While being brought to adjudication implies a high probability of having costs imposed in the near to medium term, multilateral and comprehensive negotiations bring desirable delays by adding complexity to the negotiating process (Davis 2005). Existing research shows that the pattern of WTO rulings has consistently favoured the complainants over time (Reinhardt 2001; Holmes et al. 2003; Hoekman et al. 2008). It is therefore fair to expect policy-makers in legally vulnerable states to prefer any strategy that allows the dispute to be brought away from a juridical dispute settlement context to a more politically oriented one.

Second, lengthy negotiations also provide governments the necessary time to seek consensus on new rules that 'legalise' such policy instruments. A new round of negotiations may well end up setting new international rules that allow for the use of policy instruments previously prohibited. At first glance it may look irrational for a complaining state to accept a negotiating outcome that legalises a policy instrument that could be successfully targeted through legal action. In multi-issue negotiating contexts, however, the complainant state may be brought to accept such an outcome through issue-linkage strategies that enable it to obtain substantial gains in other issue areas.

Third, in the event of a failure of the strategy described above, lengthy negotiations offer defendant states the opportunity to implement processes of domestic reform of the targeted policy instruments which, while making it possible to abide by international rules, keeps the overall level of support provided to the sector substantially unchanged. A restructuring and a redefinition of the set of policy instruments in place to provide support to producers does not necessarily imply a reduction of the overall level of support provided to import-competing groups. Even if the overall level of support were to decrease as a result of reform, the strategy could still be considered rational if the costs of reform were to be lower than the potential costs imposed on the given sector as a result of an adverse WTO panel ruling.

Finally, multilateral and multi-issue negotiations facilitate trade-off deals that potentially enable actors to reach an agreement on fewer-than-expected costly concessions in the vulnerable sector in exchange for more concessions in less sensitive ones (Kerremans 2004). In this way the preferences of import-competing groups and those of export-oriented ones can be reconciled into a comprehensive negotiating package. Any negotiating outcome implying fewer costs than those expected as a result of potential and probable retaliation following adverse rulings in a non-reform scenario would represent a Pareto-superior outcome for these domestic actors. Even in the worst case scenario, namely an outcome of the negotiating process implying as many costs as those that would result from an adverse WTO panel ruling, a multilateral and comprehensive negotiating setting allows the defendant state to bargain its own concessions in exchange for counter-concessions from negotiating partners within and beyond the targeted sector. As a result, both import-competing groups and export-oriented ones would be better off with respect to alternative scenarios.

As the argument outlined above suggests, states that breach WTO rules, that have reasonable expectations that legal challenges could be successfully brought against them by WTO partners and that are aware that the costs of either complying with a violation ruling or facing retaliation would be high, have compelling rationales to

see multilateral and comprehensive trade negotiations as the optimal framework within which a pre-emptive protectionist strategy can be pursued. Moreover, the above argument also allows us to predict the content of negotiating proposals that the vulnerable state will develop in the negotiation process. Indeed, this reasoning suggests that these WTO members will be much more prone to take a constructive stance in those areas where they are vulnerable to external legal challenges, either because they have enacted domestic reforms already or because they want to get something in exchange, than they would be in areas in which protection is provided through WTO-compatible policy tools.

2. The European Union and Agricultural Negotiations in the Doha Round

So far, I have developed a theoretical argument to support the view that judicialisation in the WTO may provide WTO members with compelling stimuli to deepen existing co-operative agreements through multilateral and comprehensive negotiations. More specifically, I argued that faced with the choice of either confronting adjudication or seeking to overcome legal vulnerability through positive engagement in co-operative dynamics in the WTO framework, this latter choice may well end up being considered to be the most rational course of action by key domestic actors. In the next sections, I explore the plausibility of the argumentation proposed both by showing that at the time a decision on whether a new round of multilateral negotiations was to be undertaken the EU was indeed in a legally vulnerable position and also through an empirical investigation of how the EU approached the Doha Round of negotiations on agriculture[3] and the interplay between international negotiations and the domestic reform process. These empirical findings seem indeed to lend support to the view that EU negotiators tried to pursue the most rational course of actions available to them to defend farmers' interests given the constraints provided by WTO judicialisation. Consistent with the logic outlined in the previous section, the Doha Round allowed EU policy-makers to displace the costs of liberalisation in the future, to secure a large share of legally vulnerable policy instruments through internal reform, to lobby for changing or keeping existing international rules with a view to preserving the status quo and to get something in exchange for the few concessions that were to be made independently from the negotiating process.

2.1. The Vulnerability of the EU's Agricultural Sector

During the Uruguay Round WTO members committed themselves to restart the negotiating process for further liberalisation of agricultural trade by a clear deadline. Article 20 of the Uruguay Round Agreement on Agriculture (URAA) mandated WTO members to start a new round of negotiations on agriculture by the end of 1999. The URAA contained another provision that is of particular relevance in this context. As laid out in Article 13, countries against which legal action could be initiated on the basis of the provisions of the Agreement on Subsidies and Countervailing Measures (SCM) were granted immunity for a given period. In the Uruguay Round, two sets of rules and commitments concerning the use of subsidies

were negotiated and laid down in two separate legal texts, namely the SCM and the URAA itself. The first was meant to discipline the use of subsidies and to regulate the actions countries could take to counter the effects of subsidies. Under the SCM agreement a country can use the WTO's dispute settlement procedure to seek the withdrawal of the subsidy or the removal of its adverse effects. The second text was designed to define a number of reduction commitments with regard to the three pillars of agricultural negotiations, namely export subsidies, domestic support and market access.[4] In essence, Article 13 of the URAA, the so-called 'peace clause', prohibited most challenges to agricultural subsidies under the SCM agreement so long as countries complied with their obligations under the URAA.[5]

The peace clause, however, had a precise expiration date: the end of 2003. The primary result of the expiration of this provision would be to open up the possibility for many EU policy instruments to be successfully challenged under WTO rules. As has been argued, 'when the peace clause expires, the full substantive and procedural legal apparatus of the WTO may be used to challenge EC and US agricultural subsidies' (Steinberg and Josling 2003, 370). This argument rests on the idea that the URAA is not legally prevailing over subsidy rules defined in the SCM agreement (Porterfield 2006). Practically, this would have resulted in all kinds of trade-distorting subsidies being challengeable under the provisions of the SCM agreement, irrespective of compliance with URAA reduction commitments. To get a picture of the degree of vulnerability of the EU, it may be useful to look at the composition of the support provided to European farmers. The data available show that in the pre-2003 CAP reform the EU's producers support estimate (PSE)[6] was roughly composed of 25 per cent blue box spending, 45 per cent amber box spending, 20–25 per cent green box spending and 5–10 per cent export subsidies (Elliott 2006; Hart and Beghin 2006; Hoekman and Messerlin 2006).[7] Since the largest bulk of the aggregate measurement of support (AMS)[8] is accounted for by the market support component, it is possible to estimate that roughly 35–40 per cent of the EU's support to agricultural producers was potentially to become vulnerable to legal challenges.[9] Reaching the peace clause's expiration date without developing any strategy aimed at minimising its potentially disruptive effects would have represented the worst case scenario for EU agricultural interests. As was noted at the time, the expiration of the peace clause might open up the possibility that a succession of hostile panel reports would lead CAP to a 'death by a thousand cuts' (Swinbank 1999, 45).

Whether and how these factors had an impact on the EU's approach towards and during negotiations in the Doha Round will be dealt with in more detail in the next sections. Suffice to say here that at the time the EU perceived it was going to face strong substantive and legal arguments that made threats to its subsidy policies emanating from competing exporting countries credible and pressing. Indeed, EU negotiators were aware that other relevant trade partners, such as the US and the Cairns Group, strongly favoured the elimination of the blue box and export subsidies and were ready to use the full array of legal instruments at their disposal to challenge these policy instruments after the expiration of the peace clause (Potter and Burney 2002). As a Commission official put it, 'we knew that with the end of the peace clause we would start having problems with the Common Agricultural Policy. We were aware that it was highly probable that without a new round of

negotiations our WTO members would have started to resort to the DSM against CAP' (interview with DG Trade Official, Brussels, 22 February 2009). Unsurprisingly, the prospect of an expiration of the peace clause ended up lighting a fire under negotiations on trade-distorting agricultural subsidies and, more generally, on the whole negotiating process concerning agriculture (Steinberg and Josling 2003, 372). It is in this context that the EU had to decide whether to go for a mini-round on agriculture or, rather, for broad and multi-issue negotiations.

2.2. The First Phase of Negotiations: A Dynamic Defence of the Status Quo

The stance of the European Commission, as well as the positions adopted by agricultural interests and national agricultural ministers up to and immediately after the adoption of the Doha declaration corroborate the claim that EU policy-makers' choice for a long-lasting exercise of negotiations on a multiplicity of issues was indeed motivated by defensive concerns.

The analysis of the position developed by the EU in the months before the launch of the Doha Round shows that its approach was twofold. On the one hand, it established itself as a fervent supporter of a new round of talks. On the other hand, it sought to set the agenda in line with its farmers' interests. The first document elaborated by the Commission, in order to outline its approach towards the incoming Millennium Round in July 1999 (Commission of the European Communities 1999), put as much emphasis as possible on the preservation of the status quo, thereby indicating that those—both interest groups and member states—favouring a more liberal approach could not impose their views (Agra Europe 1999). The position outlined in the document—defence of the blue box as an essential element to ensure implementation of CAP reform, renewal of the peace clause, renewal of the special safeguard provisions and recognition of the concept of multifunctionality and of non-trade concerns—was wholly defensive. To further corroborate this perception, Commissioner Fischler made it clear that the EU would only be able to accept an agreement that would allow it to fulfil its domestic priorities, and that any attempt to push for a global harmonisation of agricultural policy was doomed to failure (Agra Europe 2000). At the same time, the EU was among the most proactive supporters of the talks and was working hard to make an agreement possible on the start of the new round after the Seattle debacle. The EU's unilateral decision in February 2001 to grant duty- and quota-free access to imports from least developed countries through the so-called 'Everything but Arms' initiative was clearly geared towards gaining developing countries' support for the new round (Ahnlid 2005).

A deal on the agenda of the new round of trade negotiations was finally reached on 14 November 2001 at the Doha WTO ministerial meeting. As far as agriculture is concerned, the deal was very close to what the EU had hoped for. The only problematic issue concerned export subsidies but this was solved taking into account EU concerns (Kerremans 2004). Most importantly, while the question of the extension of the peace clause had not been formally addressed, the tacit understanding among negotiators was that while the Doha Round would be in

progress, countries hostile to the CAP and other agricultural policies worldwide would largely avoid mounting new dispute settlement cases that would become feasible following the demise of the peace clause (Swinbank 2005). Unsurprisingly, the deal was greeted with enthusiasm by EU farm leaders and member states' officials. It has been reported, for instance, that behind the scenes EU farm and trade officials could barely hide their glee with the agenda agreed in Doha. There was a general impression that the EU had obtained more than expected (Agra Europe 2001). It is also interesting to note that after having made clear its priorities to the Commission through a number of documents and statements (COPA-COGECA 2000 and 2001a), the leading association representing European farm interests issued a statement during the negotiations, in which full support for the Commission's approach was expressed (COPA-COGECA 2001b). Evidently, European farm leaders felt that their priorities had been defended by the EU negotiators.

Once an agreement on the start of a new round of comprehensive trade negotiations had been reached, the EU's strategy concentrated on defending the status quo as much as possible by attempting to keep the structure of the URAA intact. The Doha Declaration stipulated that negotiations on modalities should come to an end by March 2003 in order to allow for modalities to be adopted during the 2003 Cancun WTO ministerial meeting. Unsurprisingly, the Commission shaped a proposal that by corresponding very largely with the policy reforms already agreed was fundamentally conservative (Agra Europe 2002). This was made clear by Commissioner Fischler himself when he publicly stated that, since previous reforms had created enough negotiating capital, 'what was proposed was a confirmation of the existing situation of the EU and not a commitment to go further' (Agra Europe 2002, 6). In sum, the first phase of the EU negotiating strategy on agriculture was largely aimed at allowing itself to maintain the status quo: none of the proposals advanced to its WTO counterparts were to harm the interests of European farmers. On the contrary, had the EU's proposal been accepted, the European agricultural sector would have found itself protected against the challenges posed by the expiry of the peace clause without any decrease in the sector's overall level of protection.

2.3. Domestic Reform: Changing Everything to Change Nothing

The process through which the EU came to reform the CAP in June 2003 also seems to suggest that a key motivation driving policy-makers was to defend European farmers from WTO legal challenges. This is not to argue that this reform was met with no resistance. The initial plan for reform, for instance, had to be significantly watered down by the Commission in reaction to the political mobilisation both of a number of member states (most notably France and Ireland) and of farmers' organisations (see Agra Europe 2002a and 2002b). As a result of the changes introduced on demand of the most conservative member states, 'the reform package provided new opportunities for member states to shape the CAP in accordance with national preferences' (Swinbank and Daugbjerg 2006, 56).

Despite these tensions, the analysis of the decision-making process as well as of the effects of reform on the negotiating stance of the EU seems to support the claim that the EU policy-makers largely responded to the need to immunise European farmers

from WTO legal challenges. The 2003 Fischler reform, for instance, was finally adopted only once the concerns of the most conservative member states had been taken into account (Swinbank and Daugbjerg 2006). Also, it is worth noting that reform was agreed upon only a few months before the expiry of the peace clause would have opened up the possibility of legal challenges being brought against EU agricultural support schemes. It is not surprising, then, that after the adoption of the reform EU negotiators were ready to insist on the idea that the agreement reached represented a 'significant decision' for WTO talks (Agra Europe 2003). Commissioner Fischler himself declared: 'today we have largely said goodbye to an old system of support which distorted trade. The new agricultural policy is trade-friendly ... this will put us on the offensive at the WTO negotiations in Cancun in September' (Fischler 2003).

As for its economic effects, interestingly CAP reform had the most pronounced impact on the likely targets of legal challenges that accounted for the largest share of the EU's PSE. Indeed, by decoupling most of the direct payments to European farmers, the new Single Farm Payment Scheme (SPS) was explicitly aimed at enabling the EU to allocate the new direct payments into the green box. As a result of reform, most blue box domestic support payments had become eligible for green box expenditure. Whether the SPS will actually qualify for green box status is not clear (Swinbank and Tranter 2005). What matters here, however, is that European negotiators were clearly convinced that this was the case and based their strategy on this assumption. In the 2002 Commission proposal for CAP reform, for instance, it was explicitly stated that the planned reform would provide a major advantage in the WTO context given the green box compatibility of the scheme (Commission of the European Communities 2002). On the other two pillars of the agricultural talks, by contrast, CAP reform did little to appease international critics. Indeed, the reform did not introduce substantial progress in relation to the CAP's reliance on export subsidies and did not allow for a significant reduction in import protection (Elliott 2006; Daugbjerg and Swinbank 2007). In other words, CAP reform transformed the largest bulk of potentially vulnerable support provided to European farmers into WTO legal support and did little to provide the EU with negotiating room on policy areas, notably market protection, that were not legally targetable.

In addition, while the Fischler package clearly had a pronounced impact in terms of a reduction of the distortionary effects of the CAP, it had only a marginal effect on levels of support provided to European farmers (Anania 2007; Swinnen 2008). The data available show that the ratio between the EU's PSE and the total value of the EU's agricultural production is very stable over time and that the impact of the Fischler reform on that figure has been minimal (OECD 2007). While this figure has declined in recent years, the decrease in 1986–2006 was only by a modest 11 per cent (from 43 per cent to 32 per cent). The 2006 figure of 32 per cent implies a reduction of agricultural producers' support of only 1 per cent with respect to the previous year. Changes in these figures in recent years seem to relate more to variations in the amount of agricultural production than to variations in the level of support provided to farmers. Moreover, economic projections of the future effects of CAP reform suggest that these trends will continue to be stable (OECD 2004). In sum, the 2003 CAP reform did much in terms of changing the structure and the composition of European agricultural support but intervened only marginally in the

level of support provided to European farmers and transformed the largest share of legally vulnerable direct payments to EU farmers into WTO-compatible ones. In light of these figures, it should come as no surprise that the huge opposition to previous CAP reforms was not similarly voiced on this occasion by EU farm unions.

2.4. The Second Phase of Negotiations: Something in Exchange for the New Status Quo?

As suggested by the theoretical argument proposed above, domestic reform came to define the content of the subsequent negotiating agenda. Indeed, the analysis of the positions of policy-makers in the EU as well as of the evolving negotiating platform following the adoption of the 2003 CAP reform shows that the strategy adopted by European negotiators was to maximise the new negotiating room provided for by the reform process while remaining within its parameter.

In the aftermath of the adoption of the reform Commissioner Fischler clearly stated that any future compromise would have to respect the mandate received by the member states, stressing that an essential element for the definition of such a mandate would be the decisions regarding the reform of the CAP (Agra Europe 2004). This position was later restated in documents elaborated by the European Commission (Commission of the European Communities 2005), by Commissioner Mandelson (Mandelson 2005) and by the Council of Ministers (see Conceição-Heldt 2009).

The analysis of the EU's offer during negotiations further corroborates this view. On domestic support, for instance, none of the offers put forward by the EU were to represent a binding constraint on the new CAP (Kutas 2006). On market access, while the EU made substantial efforts to meet the demands of its trading partners both in relation to the tariff reduction formulae to be used and in terms of the level of magnitude of the tariff cuts envisaged, it also sought to make sure that a large share of tariff lines could be designated as 'sensitive'. As is widely acknowledged, besides tariff reduction formulae and their parameters, the way countries can define 'sensitive products' is crucial for a final agreement to result in some genuine liberalisation (Anania and Bureau 2005; Jean et al. 2006). Unsurprisingly, to compensate for the acceptance of a 'tiered formula' the EU obtained the 2004 July Framework Agreement specification that 'members may designate an appropriate number to be negotiated of tariff lines to be treated as sensitive' (WTO 2004). In the EU's subsequent proposals, the tariff cut offers have been consistently coupled with the request to allow a large share of tariff lines to be self-designated as sensitive. That market access represented the real 'red line' for the EU seems confirmed by the reactions of the main defenders of agricultural interests to the offers on market access and by the dynamics that led to the suspension of the negotiating process in July 2006. Predictably, the EU was subject to a strong and consistent lobbying from European farmers against concessions that would substantially increase market access opportunities for foreign producers (COPA-COGECA 2005 and 2006). Some member states, particularly France and Ireland, also strongly voiced their opposition to any offer on market access that would exceed the negotiating mandate (Agra Europe 2005b). In July 2006, the talks collapsed mainly as a result of both the EU's

inability to meet demands for further concessions in the area of market access and of the US' unwillingness to reform its domestic farm support programme (Agra Europe 2006). It is worth noting that what distanced the EU from its WTO partners in relation to market access was not only the extent of the tariff cuts but also, and probably more importantly, the position concerning 'sensitive products'. In other words, the EU preferred to let the talks collapse rather than oppose European farmers' demands for continued protection.

EU proposals on export subsidies seem to contradict the above claim that EU negotiators remained within the parameter defined by CAP reform. In fact, since May 2004 the EU has made itself amenable to agreement on a phasing out of export subsidies. A few comments, however, need to be put forward here. First, while many countries had been pressing for the elimination of export subsidies by 2010, the EU succeeded in setting 2013 as the elimination date (Agra Europe 2005a). This date coincides with both the adoption of the next financial perspectives and the period when the current CAP reforms will be fully operational. Second, the EU offered a rapidly 'depreciating' asset to its WTO partners (Hoekman and Messerlin 2006). The ratio of export subsidies to EU production has been declining to the point of becoming negligible (1 per cent or less) and the ratio of export subsidies to the EU's PSE has consistently decreased from 7.6 per cent in 1995 to around 2 per cent in 2006 (Commission of the European Communities 2007; OECD 2007). Third, EU negotiators 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, therefore, it was rational to try selling this concession in return for counter-concessions in the negotiation game. In other words, while it is true that the offer to eliminate its export subsidies by 2013 brought the Commission beyond the 2003 CAP reform parameter, and technically beyond its negotiating mandate, the agreement did not worsen the EU's situation with respect to a non-phasing-out scenario. On the contrary, using export subsidies as a bargaining tool allowed the EU to capitalise on the inevitable adjustments that would have resulted even in the absence of the Doha talks.

It should also be noted that the 'linkage strategy' pursued by the Commission was instrumental in reconciling potentially conflicting preferences in the EU. Comprehensive negotiations allowed the Commission to please European farmers and their defenders among the member states. At the same time, the concessions that could be made because of negotiating room provided by domestic reform could be traded off for concessions on areas in which the EU had offensive interests. In this way, support from export-oriented groups and their defenders among the member states could also be secured.

3. Alternative Explanations

In order to corroborate further the claims put forward so far, I proceed by assessing whether more convincing and plausible accounts of observed patterns of policy-making and policy outcomes can be provided by alternative explanations. As already mentioned, all these studies concur in stressing that EU policy-makers had

other motivations than defending European farmers. One group of explanations assumes that EU negotiators are liberalisation seekers and that they act strategically to pursue this objective, at least partly, in opposition with respect to interest groups' demands (Ahnlid 2005; Swinnen 2008; Conceição-Heldt 2009). As widely discussed, however, had WTO partners reached an agreement on the last proposal put forward by the EU, the EU's agricultural sector would not have suffered from a substantial reduction of the level of protection provided, either in terms of direct payments or in terms of market protection. On the contrary, it is more plausible to argue that the 2003 internal reform process avoided the imposition of larger costs on European farmers. As has been noted, the Fischler reforms contributed to the survival of the CAP and not to its demise (Swinnen 2008, 165). In addition, rather than use the international negotiating context as a constraining tool against protectionist demands, European negotiators seem to have exploited the opportunities it offered to capitalise on the reduction of the CAP's distortionary effects resulting from reform. In sum, the empirical evidence provided here does not support the claim that EU public actors pursued liberalising preferences against farmers' wishes.

Explanations relying on ideational factors also show important shortcomings. The key feature of these arguments is that public actors' preferences influence policy outcomes and that these preferences reflect public actors' ideas, belief systems and values (Van den Hoven 2004 and 2006; Falke 2005; Elsig 2007). One prominent argument is that the EU's behaviour in the Doha Round was influenced by the intrinsic values embedded in the EU system such as its own belief in global justice, the desire to strengthen global governance and lack of trust in the market as the only instrument to deliver equitable distribution of economic gains. However, the evidence available shows that this was hardly the EU's main concern. As claimed above, the areas in which the EU took a more constructive approach were domestic support and export subsidies. In the area of market access the request to designate a relatively large share of tariff lines as 'sensitive' would have emptied the liberalising effects of the tariff cuts proposed. However, a variety of economic analyses concur in stressing that in terms of agricultural reforms the overwhelming majority of potential gains to developing countries derive from improved market access (Anderson and Martin 2005; Hertel and Keeney 2006). Kym Anderson and Will Martin (2005), for instance, have calculated the relative importance of the three pillars in terms of contribution to global welfare costs of current agricultural distortions and concluded that import tariffs, domestic support and export subsidies account, respectively, for 93 per cent, 5 per cent and 2 per cent. In addition, import barriers account for 85 per cent of the trade-reducing impact of the three measures (Anderson et al. 2006). In other words, an agreement on the basis of the EU's proposal would do very little to decrease existing distortions in the international agricultural trading system. These figures clearly indicate that domestic priorities were crucial in defining the EU negotiating strategy. Had the EU wanted to contribute to a more just and equitable world, as some authors have come to conclude given the EU's acceptance of eliminating its export subsidies, its negotiating position on market access would have been very different. It is also unlikely that the fear of losing credibility represented a major driving factor behind the EU's policy stance because, as the collapse of negotiations in July 2006 demonstrates, the EU was ready to stick to its position when it felt vital economic interests were being

threatened by the prospective agreement. Finally, again, the influence of a market-oriented paradigm seems insufficient to explain why the EU decided to keep high levels of import protection through the possibility to designate a relatively high percentage of tariff lines as 'sensitive products'.

Conclusion

This article challenges existing accounts of why the EU took a fairly liberalising stance with respect to agricultural negotiations in the Doha Round. More specifically, it questions the underlying assumption these analyses rest upon, namely that EU policy-makers, for a number of different possible motivations, negotiated in the Doha Round with a view to reducing European farmers' welfare against their wishes. In order to conceptualise properly how trade-related domestic interests define their order of preference over alternative venue-choice strategies, the effects of the WTO judicialisation process need to be taken into account. Doing so allows us to provide a more compelling explanation of observed empirical developments. For policy-makers who are eager to defend import-competing interests that enjoy protection through a set of legally vulnerable policy instruments, multilateral and comprehensive trade negotiating strategies may well come to represent the best means available to attain their objectives. Empirical evidence drawn from the EU's approach towards agricultural negotiations in the Doha Round lends support to this claim. Indeed, EU policy-makers seem to have acted more to translate agricultural interest groups for protection into policy outcomes than to free their hands to pursue liberalisation in agricultural markets against farmers' wishes. The Doha Round allowed the EU to displace the costs of liberalisation in the future, to secure a large share of legally vulnerable policy instruments through internal reform, to lobby for changing or keeping existing international rules with a view to preserve the status quo and to get something in exchange for the few concessions that were to be made independently from the negotiating process. This strategy enabled policy-makers in the EU to attain a twofold objective: defending a key import-competing sector such as agriculture from WTO legal challenges while keeping economic constituencies with a stake in further world trade liberalisation on board. A comprehensive approach to negotiations in the Doha Round thus served the purpose of reconciling seemingly conflicting interests within the EU. Interestingly, this defensive strategy brought about an inherent liberalising potential. While domestic reform was aimed at immunising a large share of farmers' domestic support from legal challenges it also enabled the EU to play on the offensive in the negotiating game without putting farmers' income at risk. Altogether, these findings suggest that claims about the need to bring economic interests back into the study of EU trade politics should be taken more seriously into consideration.

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Notes

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1. For this conceptualisation of the strengthened enforcement mechanisms in the WTO see De Bièvre (2006). I choose not to use the term 'legalisation' (see Goldstein et al. 2000) because while legalisation is an appropriate concept for the process of law-making, the term judicial and its derivations appear more apt when referring to court-like procedures, such as international dispute settlements and domestic quasi-judicial review procedures.

2. For a thorough argument on this point, with specific reference to a comparison between the EU and the US decision-making procedures governing trade policy, see De Bièvre and Dür (2005).

3. The analysis takes as a reference for the argument all negotiating proposals until the adoption of the Draft Revised Modalities on Agriculture in December 2008.

4. On market access the URAA committed WTO members to reduce their bound tariffs by an average of 36 per cent over six years, with a minimum cut in any one tariff line of 15 per cent. On export subsidies the URAA imposed severe restrictions on the quantities subsidised and the amount of expenditure on these subsidies. New export subsidies are prohibited, there is a clearer definition of what constitutes an export subsidy, and there are reductions in both the maximum expenditure on export subsidies (by 36 per cent) and the maximum quantity of exports that can benefit from the subsidies (by 21 per cent). On domestic support, the URAA classified subsidies to farmers according to their impact on production. Subsidies with minimal linkage to the quantities produced, the inputs used or prices paid were classified in a green box, and not subject to reduction. Specific payments that were linked to quantities produced but subject to output controls were classified in a blue box and were also not subject to production controls. Other subsidies, including market price support, were classified in an amber box. Amber box subsidies are subject to an overall limit called the Aggregate Measure of Support (AMS).

5. These challenges under the SCM could potentially be targeted against trade-distorting domestic support (the subsidy component of the AMS and blue box spending) and export subsidies.

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

7. Only a rough estimate is provided because data differ depending on the source.

8. The reduction commitments applying to the amber box are expressed in terms of an Aggregate Measurement of Support.

9. The figure is obtained by adding export subsidies, a large share of blue box subsidies and the subsidies component of the AMS.

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