

The European Union, Preferential Trade Agreements, and the International Regulation of Sustainable Biofuels*

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Abstract

The EU has increasingly turned to PTAs (Preferential Trade Agreements) to spread environmental norms internationally. We argue that the rationale for this strategy is to be found in the tensions between the rigidity of the domestic dynamics of positive integration in the EU and the increased bindingness of WTO negative integration commitments. Consensual decision-making procedures in the EU both drive the stringency of environmental regulation and make it resistant to change. When such environmental standards are challenged in the WTO, incentives arise for the EU to push for international environmental rules that can grant immunity from WTO legal challenges. When changing WTO rules is not an option, PTAs become a valid alternative. We illustrate the plausibility of our argument through an in-depth case study of the EU's attempt to include provisions defining environmental sustainability criteria for the production of biofuels in the ongoing negotiations for a PTA with Malaysia.

Keywords: European Union; environmental; regulation; sustainable biofuels; WTO

Introduction

Analysts concur in pointing out that the European Union has become a leader in international environmental governance in the past two decades, replacing the United States as the most prominent green *demandeur* in international politics. Indeed, several studies convincingly show that, since the early 1990s, the EU has consistently argued in favour of institutional reforms to strengthen global environmental governance, stressing its role as an environmental norm promoter in the UN (Vogel, 2002; Vogler and Stephan, 2007; Falkner, 2007; Kelemen and Vogel, 2010; Zito, 2005) and in the WTO (World Trade Organization) (Poletti and Sicurelli, 2012; Kelemen, 2010).

While the EU's efforts within these fora have received ample attention, other important means with which the EU seeks to spread environmental norms internationally have been largely overlooked. Since the early 1990s, PTAs (preferential trade agreements) have proliferated in the international arena, and there are no signs that this dramatic growth will slow down in the near future (Dür *et al.*, 2014). Interestingly, not only the quantity, but also the quality of these agreements has changed. PTAs increasingly extend beyond traditional tariff trade liberalization to include provisions on so-called 'deep' trade issues, and increasingly aim to harmonize the regulatory practices of contracting parties in a number of different areas, such as services, investment, public procurement, intellectual property rights and environmental issues (Young and Peterson, 2006). After the failed attempt to expand the WTO's regulatory reach through the Doha round, states started to

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look at PTAs as means to pursue regulatory harmonization even more decisively. Various studies suggest both that the EU is particularly keen on pushing for such a deep trade agenda through PTAs and that environmental issues figure prominently on it (Bartels, 2013; Marin Duran and Morgera, 2012).

Why does the EU strongly support the inclusion of environmental norms in PTAs with third countries? The literature on the EU's role as an international actor suggests two broad possible answers to this question. According to the first perspective, the EU's support of environmental norms in PTAs may be interpreted as the result of the interests, values and, more generally, preferences of EU policy-makers, who are both willing and able to act autonomously and push their preferences forward. A second perspective suggests that the EU's strategy may also be explained as the result of the preferences and patterns of political mobilization of organized economic groups that have an interest in exporting costly environmental regulatory standards.

While not disputing the potential validity of these analytical perspectives in accounting for EU's action in global environmental politics, we believe that a number of problems cast doubt on their individual explanatory power when it comes to assessing why and how the EU supports certain environmental regulatory standards in PTAs. In our view, a more compelling explanation of this behaviour can be developed by highlighting the tensions between the rigidity of the domestic dynamics of positive integration in the EU and the increased bindingness of negative integration commitments undertaken under the WTO. In short, we contend that European attempts to promote environmental norms through PTAs can also result from the twofold pressure of domestic and international institutional incentives. Consensual decision-making procedures in the EU provide an institutional environment in which societal pressures can both easily drive the stringency of environmental regulation in the EU and make it very resistant to change. When these dynamics of positive integration produce rules that are inconsistent with negative integration commitments undertaken under the WTO, incentives arise to push European policy-makers to export the EU's environmental standards to the international level as a means to achieve immunity from legal challenges.

Trying to change WTO rules to accommodate domestic environmental measures is one way in which the EU can achieve such immunity from international legal challenges. However, when the chances of succeeding in WTO multilateral trade negotiations are low or non-existent, a more rational strategy is to turn to other available fora. PTAs represent such an alternative. If the EU engages in PTA negotiations with a country that can potentially target domestic environmental regulation through WTO litigation, incentives arise for the EU to use its bargaining power and compel its counterpart to accept environmental provisions granting immunity to the EU. In other words, the constraints brought about by WTO commitments might feed into the EU's domestic regulatory politics, ultimately spilling back into the international realm in the form of sustained efforts by EU policy-makers to promote the inclusion of environmental norms in PTAs. Our argument is in line with the large research agenda that brings together analysis of domestic politics and international relations, showing how bargaining in international politics is frequently dominated by the logic of two-level (Putnam, 1988) or, as in the case of the EU, three-level games (Patterson, 1997). Indeed, our argument systematically combines the domestic, EU institutional and international levels of analysis into a single framework.

We illustrate the plausibility of our argument through an in-depth case study of the ongoing negotiations for a PTA and for a Partnership and Cooperation Agreement (PCA) between the EU and Malaysia, which began in 2010. The empirical analysis illustrates how EU policy-makers strongly pushed for the inclusion of a sustainability standard for the production of biofuel in the negotiations for the conclusion of the PTA with a key biofuel-producing country such as Malaysia, as a result of the political dynamics generated by a clash between the dynamics of positive integration in the EU concerning the regulation of biofuel production, and WTO negative integration commitments.

I. Existing Arguments

The existing literature on the EU's role as a global actor suggests two explanations for why the EU sometimes promotes an environmental agenda in the PTAs. Representations of the EU as a promoter of a normative foreign policy (Lucarelli and Manners, 2006; Vogler and Stephan, 2007), or that focus on the interests and ideas of bureaucratic actors within its institutional set-up (Elsig and Dupont, 2012; Silles-Brügge, 2011), offer examples of the first possible line of argument. According to this view, preferences of EU policy-makers in support of an environmental agenda in PTAs are largely autonomous from societal pressures.

A number of problems cast doubt on the explanatory power of these arguments. Analyses that conceive the EU's international environmental policy as a reflection of its normative aspirations find it difficult to account for the fact that the EU's international environmental agenda is often consistent with domestic economic interests and criticized as disguised protectionism (Falkner, 2007; Afionis and Stringer, 2012). Stressing normative aspirations also fails to account for choices concerning the different available international venues where environmental standards can be promoted, as well as for differences in the types of environmental rules promoted across these venues.

Analyses that focus on the liberal preferences of the European Commission are also problematic. It is unclear why 'liberal' preferences would translate into support for the inclusion of environmental rule in the PTAs, particularly in light of the fact that international environmental regulatory harmonization may end up restricting international trade (Afionis and Stringer, 2012). More generally, attributing preferences to policy-makers raises the question as to where these preferences come from (Dür, 2008).

A second perspective suggests that the EU's promotion of environmental rules internationally can be understood by relying on a model of regulatory politics that combines the effects of domestic politics and international regulatory competition (Falkner, 2007; Kelemen, 2010; Kelemen and Vogel, 2010). According to this view, the EU engages in positive integration efforts at the international level because the presence of strict environmental standards at the domestic level creates incentives for domestic producers to push EU policy-makers to impose similar costly standards on foreign competitors. While this line of argument accounts for the reason why the EU might wish to support processes of environmental regulatory harmonization in multilateral fora, its explanatory power for the case of PTAs appears limited. The tendency of regulatory agreements to produce opaque and diffuse distributive effects creates significant impediments for the political mobilization of domestic interests favouring such rules (De Bièvre, 2006). While the significant gains that multilateral environmental rules can bring about can be expected to

compensate for and outweigh these collective action impediments, the prospective gains for domestic producers of including environmental norms in PTAs are much more limited. Moreover, the huge market size of the EU often suffices to compel its trade partners to voluntarily upgrade their regulatory standards to gain access to that market, engendering the ‘California effect’ (Vogel, 1995; Young, 2003). Most importantly, as we show throughout the article, the regulatory politics argument has difficulties explaining environmental regulatory strategies that seem to be largely driven by defensive concerns. Empirical evidence indicates that domestic actors and policy-makers in the EU aim at creating the conditions for maintaining the domestic regulatory status quo rather than obtaining material gains from exporting costly regulatory standards.

II. Searching for Immunity Under the Shadow of WTO Law

After the mid-1990s, conflicts between free trade rules and EU domestic environmental rules became apparent when a number of ‘trade vs. environment’ WTO disputes were initiated or threatened against the EU (Poletti, 2012).¹ It seems fair to argue that the roots of these disputes lie in the tensions between the domestic dynamics of positive integration and the incisive force of WTO negative integration commitments.

Consensual decision-making rules in the EU tend to create political dynamics that press for upward regulatory approximation (Scharpf, 1988). Indeed, in this institutional context a blocking minority in favour of stricter standards can easily drive the ‘trading up’ of EU rules (Vogel, 1995), particularly when it comes to issue areas such as risk management in the field of food safety and environmental protection, where harmonized product regulations are required (Kelemen, 2010; Kelemen and Vogel, 2010; Poletti and Sicurelli, 2012; Pollack and Shaffer, 2009; Young, 2004).

These dynamics of positive integration produce rules that are also very resistant to change. The veto of a small minority of governments or the European Parliament can prevent the others from correcting or abolishing rules in response to changed circumstances or preferences. Moreover, because consumer, health, safety and environmental regulatory policies tend to be salient for the mass public in the EU (Vogel, 2002), Baptist-bootlegger coalitions between producers and diffuse interests are likely to arise to defend stringent domestic regulatory standards (DeSombre, 2000).

Interestingly, the institutional context within which these dynamics of positive integration take place can also create incentives for the EU to engage in attempts to foster upward regulatory harmonization at the international level. More specifically, these incentives arise when domestic regulations in the EU are inconsistent with WTO negative integration obligations. The reform of the trade regime’s DSM (Dispute Settlement Mechanism) in 1995 greatly enhanced the ability of members of the trade regime to challenge WTO-inconsistent policies pursued by other trading partners (Zangl, 2008). As a result, members of the trade regime are increasingly subject to international pressures whenever they pursue domestic regulatory policies that are not consistent with WTO rules.

¹ For instance, the disputes initiated by the US against the EU’s ban on imports of hormone-treated beef in 1996, and by Canada in 1998 against EU measures affecting asbestos, as well as the US threats to initiate a dispute against the EU’s moratorium on imports of GMOs.

Under these domestic and international institutional constraints, compelling incentives arise for the EU to 'search for immunity' by supporting processes of international regulatory harmonization that entail exporting its own domestic regulatory standards to the international level. On the one hand, an external threat to the domestic regulatory status quo such as a WTO dispute is likely to elicit the mobilization of a wide array of societal actors. Domestic producers are likely to mobilize if a reversal of the domestic regulatory status quo may cause adjustment costs for them. Diffuse interests such as consumers and NGOs are also likely to mobilize because environmental and health and consumer safety issues tend to be salient in the EU (Vogel, 2002). Therefore, the Baptist-bootlegger coalition that mobilized to promote stricter regulation is also likely to mobilize in response to external challenges to demand that negative integration commitments in the WTO do not endanger the domestic regulatory status quo.

On the other hand, the EU institutional environment amplifies the influence of those with a stake in maintaining the status quo at the expense of the actors that might prefer domestic regulatory reform to meet international obligations. The *de facto* consensual procedure through which the EU adopts its negotiating position in international trade negotiations (Woolcock, 2010) provides an environment favourable for societal groups with a stake in maintaining the regulatory status quo, because capturing one or a few Member States ensures that their requests will be included in the negotiating agenda (Dür, 2006). In sum, when the dynamics of positive integration in the EU are found to be inconsistent with WTO law, powerful incentives arise for domestic constituencies and decision-makers to adopt a defensive strategy with the aim of immunizing the domestic regulatory status quo.

Of course, not all WTO challenges to the EU's domestic regulatory status quo are equally likely to produce these effects. These incentives are likely to arise if two crucial scope conditions are met. First, the challenge to the EU's domestic regulatory status quo needs to be credible. This means EU trading partners dispose of retaliatory capacity to credibly threaten the imposition of costs in case of non-compliance with a WTO ruling by the EU. Second, such WTO challenges should either be expected to entail significant economic adjustment costs for domestic producers, or touch upon issues that rank highly in public opinion preferences, or both. Only when these two conditions are met can societal actors in the EU be expected to overcome collective action problems (Poletti and De Bièvre, 2014).

The most efficient way to gain such immunity is to press for changes to, or different interpretations of, negative integration commitments undertaken in the WTO. Rather than adapting domestic regulations to WTO rules, the EU may try to convince its trading partners to agree on changes to WTO rules to accommodate the EU's regulatory status quo. The EU's negotiating position on the trade-and-environment chapter of the Doha round was largely motivated by these defensive concerns (Kelemen, 2010; Poletti and Sicurelli, 2012). Yet getting other trading partners to agree to these changes may prove difficult or impossible, particularly in light of the increasing heterogeneity of WTO members' preferences, due to the growing number of states that have joined the WTO, and the rising economic power of emerging economies (De Bièvre and Poletti, 2014).

When changing WTO rules is not an option, actors involved in the EU policy process need to consider alternative strategies. An alternative could be to press for the adoption of new MEAs (multilateral environmental agreements) that would grant immunity to the

domestic regulatory status quo outside the WTO framework. For instance, the EU's support for the Cartagena Protocol on Biosafety was largely motivated by the desire to institutionalize a definition of the precautionary principle at the international level that could legitimize its own domestic regulatory status quo (Kelemen, 2010; Poletti, 2012). These multilateral negotiations, however, are very costly, potentially long-lasting, and characterized by uncertain outcomes due to the large number of actors involved. More importantly, as the experience of the Cartagena Protocol shows, the chances of this strategy being ineffective are high because it is unlikely that those who have an interest and can resort to WTO litigation would acquiesce to becoming part of a MEA that is likely to be detrimental to their interest.²

A preferable alternative is to push for an environmental agenda in the PTA negotiations with the country negatively affected by the EU's domestic regulatory status willing to initiate a WTO dispute against the EU. A successful outcome of this strategy would ensure that the partner country accepts rules in the PTA that would de facto commit it to recognizing as legitimate regulatory practices in the EU. The downside of this option is that regulatory export in this venue only insures the EU against legal challenges from that partner country.

A number of factors make this option attractive, however. Transaction costs associated with this strategy are likely to be much lower due to the often bilateral rather than multilateral nature of these negotiations. Moreover, in this case the question is adding an item to negotiations that have already started for other reasons, rather than spending energy and resources to kick-start a new set of negotiations for the conclusion of a MEA. Moreover, the odds that the negotiating counterpart might give in to the EU's demands are higher since discussion on regulatory harmonization linked to a broader agenda might bring about significant benefits for the EU's trading partner. In other words, in this context the EU can entice the partner country with significant benefits in terms of increased access to its market, in exchange for concessions in the form of regulatory harmonization with a view to granting the EU immunity from legal challenges. These dynamics of issue linkages also explain why this strategy of regulatory harmonization can effectively bring about immunity. Indeed, while from a purely legal perspective the partner country could still take action under WTO law, such action would entail contravening the rules of the PTA and would jeopardize the benefits that the PTA brings in terms of increased market access.

III. The EU and the International Promotion of Sustainable Biofuels

In this section we examine the plausibility of the argument developed so far through analysis of the EU's attempts to include a sustainability standard for the production of biofuel in the PTA negotiations with Malaysia.

Using a combination of congruence testing and process tracing (Dür, 2008; George and Bennett, 2005) we show that: 1) consensual decision-making procedures have contributed to the stringency of the EU rules on biofuel production; 2) such procedures have made European legislation resistant to change; and 3) societal groups have successfully

² The US did not sign the Protocol and resorted to the WTO DSM against the EU bans on imports of hormone-treated beef and GMOs.

mobilized to push policy-makers in the EU to try and export its regulatory approach to biofuel to avoid legal challenges in the WTO, seeking to promote the distinction between sustainable and unsustainable biofuel in the Doha round in a first stage, and in the context of PTA negotiations with Malaysia in a second stage.

The case study, which serves as a plausibility probe, aims to demonstrate the empirical relevance of our argument by identifying one significant case in which it can be concretely applied (Eckstein, 1975). Plausibility probes play a crucial role in the process of theory development, particularly when used as preliminary studies on relatively untested theories and hypotheses such as the ones presented in this article. They serve as an intermediary stage before moving from hypotheses construction to time-consuming empirical tests (Eckstein, 1975, pp. 108–13; George and Bennett, 2005, p. 75; Levy, 2008, p. 7). While this type of case selection is not designed to allow for generalizations across all instances in which the EU seeks to include environmental norms in PTAs, we briefly address concerns about the external validity of our argument. More specifically, we show that the political dynamics we trace in our case study are by no means limited to the area of biofuel regulation, but can also plausibly shed light on how the EU approaches PTA negotiations with other key trading partners willing to challenge its domestic environmental regulations in the WTO.

Besides secondary sources such as media, policy-oriented and scholarly publications, we relied on three sets of empirical evidence for our analysis, namely official documentary records from relevant institutions, policy statements by interest groups and NGOs and interviews with first-hand participants in the processes under investigation.

EU Consensual Decision-making: The Ratcheting-up of the Biofuels Production Regulatory Framework

International biofuel policy has only recently become a contested issue. At first (late 1990s–early 2000s) there was broad consensus among scientists and international policy-makers that biofuel is a source of low-cost and renewable energy able to contribute to the fight against climate change (Commission, 2000). In this context, in 2003 the EU attempted to accelerate the existing policy approach toward biofuels with a view to reducing its dependency on foreign sources of energy, reducing greenhouse gas (GHG) emissions and supporting farmers' incomes by providing new outlets for agricultural products. As a result, it adopted the Directive EC 2003/30, which aimed to promote the use of biofuels or other renewable fuels for transport by setting a target of 5.75 per cent for biofuel use in the transportation fuel market by 2010. Moreover, in order to support Member States' compliance with the target set by Directive EC 2003/30, the Commission introduced Directive EC 2003/96, which allowed Member States to reduce excise duties so as to compensate for the higher costs of producing biofuels. Further to these developments, the Commission put forward the Biomass Action Plan in 2005 and the EU Strategy for Biofuels in 2006, to promote the use of biofuels and familiarize the public with the availability of biofuels.

However, in 2005, environmental NGOs began to criticize the potential risks related to biofuels regarding food safety and biodiversity. These groups questioned the positive effects of biofuel in reducing climate change, pointing to the positive relationship among biofuel production, deforestation and climate change. On this basis, NGOs started to

advocate a precautionary approach to biofuel, which found scientific support in reports from the European Environmental Agency (2006) and the Intergovernmental Panel on Climate Change (2007).

Given the support of such authoritative research bodies, those groups were easily able to make their voices heard in the EU's legislative process for the adoption of a new Directive on the Promotion of the Use of Energy from Renewable Sources that started in 2007 (Bozzini, 2012; Genovesi, 2011). Their concerns concentrated on the potential negative effects for the environment of the 2007 Commission's proposal to set provisions to ensure that energy from renewable sources accounts for at least 20 per cent of EU average final energy consumption by 2020, and at least 10 per cent of Member States' transport energy consumption. Since the underlying belief was that these targets would be met by increasing biofuel production, these provisions generated considerable disquiet among NGOs concerned with the adverse impact of biofuel production both on the environment, given data suggesting poor emissions savings, and on global food commodity prices.

Two factors facilitated these groups' influence in the policy-making process. On the one hand, the European Commission opened public consultations in order to include all the stakeholders in the policy process after tabling its proposal. While participating in consultations as such is not a sufficient condition for influence, it provides NGOs with an opportunity to increase the visibility of their demands, especially when they match the positions of powerful industry associations, such as in this case (COPA-COGECA, 2008; Renewable Energy Association, 2007; Cocereal, 2007).³ On the other hand, the need to adopt the directive through a co-decision procedure ensured that environmental groups were able to exert their leverage through the European Parliament. Indeed, the Industry Committee of the Parliament was of key importance in ensuring that sustainability criteria for biofuels production were included both in the Renewable Energy Directive and in the Fuel Quality Directive (FDQ) finally adopted in 2009 (Swinbank, 2009).

As a result of these pressures, the EU biofuels legislation included three important sustainability criteria. First, the GHG emission savings from the use of biofuels must be at least 35 per cent compared to fossil fuels, increasing over time to 50 per cent from 2017 onwards, and to 60 per cent from 2018 onwards. Second, biofuels may not be made from raw materials grown on land with high biodiversity value. Finally, and most importantly, the above sustainability criteria apply to feedstock sources within and outside the EU.

In sum, in the debate that started in 2007 and culminated with the adoption of the Renewable Energy Directive, advocates of stringent sustainability criteria for the production of biofuels managed to drive the stringency of the EU's domestic regulatory framework.

The Debate on WTO Compatibility and the Doha Round

Throughout the EU legislative process on renewable energy, the European biofuel industry and public authorities expressed concerns about the WTO compatibility of biofuels sustainability criteria. Analysis of the documents submitted to the Commission in the

³ Associations of palm oil importers also expressed growing support for those criteria due to their interest in increasing the public acceptability of their products (Interview, DG Energy, 26 January 2015).

framework of the consultation exercise in 2007 shows that the actors pushing the EU to adopt stringent sustainability standards in the biofuel sector were also widely concerned about the compatibility of sustainability criteria with WTO law.

In line with the empirically observable implications of our argument, for these groups, the potential WTO incompatibility of biofuel sustainability criteria called for urgent action to support the spread to other trading partners of similar regulatory standards. The European farmers' association COPA-COGECA (2007) first noted that 'sustainability criteria have not been generally accepted by WTO' and suggested that the EU should try to defend the competitiveness of European biofuel products by ensuring that 'sustainability criteria apply not only to biofuels produced in Europe, but also to imported ones' (COPA-COGECA, 2008). Similarly, the Renewable Energy Association (2007) argued that 'the EU should be in a position to show a lead globally on the need to ensure that biofuels are produced sustainably', while Cocereal (2007), the European association representing the trade in cereals, specified that 'To have a real impact on sustainability, the European Union needs to engage with the rest of the world in this debate'. Furthermore, according to the European landowners association, 'the Commission should be prepared to lead on the wider agenda by imposing standards at the outset'. Also, Friends of the Earth (FOE) (2007) stated, 'WTO rules need to be changed to enable governments to legislate to protect their natural resources and people's rights'. Among the EU Member States, the Netherlands, which is home to major biofuel companies, was the most active sponsor of exporting the European approach to sustainable biofuels internationally. The document that it submitted to the consultation stated: 'The European Union should take an active approach to develop the use of sustainability criteria in WTO and EU regulations' (The Netherlands 2007).

Other contributions to the consultation considered the hypothesis of promoting norms in bilateral arenas. The Low Carbon Vehicle Partnership (2007) argued that, in order to avoid a WTO challenge, the EU should develop its sustainability criteria 'through an inclusive process' and involve 'potentially affected countries'. According to the NGOs BirdLife International (2007), the European Environmental Bureau and the Transport and Environment Network, 'The EU should also provide support for the development of government structures in developing countries that would be able to develop and enforce appropriate land-use rules. This would help minimize WTO challenge of this policy'. Finally, the UK Nature Conservation and Landscape Agencies (2007) identified potential venues for the promotion of the European approach to biofuel, namely 'WTO ongoing negotiations on the Doha Development Agenda and/or regional/bilateral free trade agreements'.

In the end, the recognition that those demands came from the majority of the stakeholders, including both organized economic interests and NGOs, induced the Commission to try and persuade its international partners to adopt similar standards (Interview, DG Energy, 27 January 2015). In a first stage, the Commission sought to promote the legal recognition of a distinction between sustainable and non-sustainable biofuels (Hardacre, 2010) in the WTO. In that venue, however, the EU was unable to overcome the fierce opposition of key biofuel exporters and to build international consensus on its position (Josling *et al.*, 2010). The most contentious issues were the definition of sustainability standards and the technical regulations required to meet those standards (Albà and Cárdenas, 2007).

Legal Challenge and the Shift from Multilateralism to Bilateralism

After this failed attempt to get its trading partners to agree on including sustainability standards in the WTO, the EU began to seek to export sustainability criteria in PTAs with biofuel-producing countries. The stalemate in the multilateral negotiations was a key factor in making European negotiators 'more realistic about the potential of the WTO to deliver norms in the context of environmental protection' (Interview, DG Trade, 8 July 2011). However, the need to engage in regulatory export was made all the more pressing by the fact that biofuel-producing countries had started to threaten a legal challenge against the EU in the WTO.

Biofuel had been a contentious issue in EU–Malaysia relations since the beginning of the debate on the sustainability criteria in Europe. In fact, in 2007 Malaysia had been the only third country that participated in the consultation exercise run by the European Commission. Once the Directive on renewable energy 28/2009 had been approved, the Malaysian government expressed its concerns about the protectionist implications of the European sustainability criteria. It argued that the directive effectively foreclosed market access in the EU because the loss of incentives due to the Malaysian producers' inability to meet sustainability criteria would render the country's biofuel production uncompetitive, since its prices were well above fossil fuel prices (Delgado Rivera, 2010). Moreover, from this perspective, Malaysian palm oil should be considered sustainable, because the government was a member of the Roundtable on Sustainable Palm Oil. Despite the fact that the Roundtable had elaborated comprehensive criteria to evaluate the sustainability of biofuel (Daugbjerg and Swinbank, 2014), however, the European Commission did not consider Malaysian membership of such an association of biofuel producers to be a guarantee that the country would fulfil the sustainability requirements adopted by the EU (Interview, DG Environment, 18 September 2009).

In 2009, following a vote in the European Parliament Committee on Industry, Research and Energy and pressures from the UK in the Council in September 2008 (Interview, DG Environment, 18 September 2009), the Commission opened a second consultation exercise concerning biofuel for a directive on indirect land-use change (ILUC), biofuels and bioliquids.⁴ Malaysia, as well as Brazil and Argentina, participated as third countries in the consultation. The Brazilian and Argentinean documents warned that the introduction of indirect land-use change must not contravene WTO provisions.⁵ A document expressing the views of various Malaysian stakeholders, including the Malaysian Palm Oil Board, the Malaysian Palm Oil Council and the Malaysian Biodiesel Association, further argued against the European precautionary approach to ILUC, stating that 'Malaysia does not agree to the inclusion of this indirect land use change factor unless it can be proven that the computations are scientifically reliable and verified' (Malaysia, 2009).

The risk of a WTO challenge also emerged in the positions of interest groups and Member States participating in this second consultation exercise. In order to avert this risk, the European Biodiesel Board (2009) argued that 'the introduction of ILUC should

⁴ ILUC effects concern the implications of land conversion from biofuel crops to food crops. The results may include deforestation and an increase in CO₂ emissions.

⁵ Documents submitted to the 2009 European Commission's consultation are available at <http://ec.europa.eu/environment/air/transport/fuel.htm>

be assessed against the WTO's rules'. According to the document submitted by the Netherlands (2009), 'it is desirable to convince third countries to adopt the measures taken by the EU'.

In August 2010, after the Communication from the Commission on the practical implementation of the EU biofuels and bioliquids sustainability scheme and on counting rules for biofuels, Malaysia and Indonesia started preparations for the initiation of a WTO dispute against the EU sustainability criteria (Delgado Rivera, 2010). A month later, EU–Malaysia negotiations for a PTA and for a PCA were launched.

The EU–Malaysia Negotiations

Backed by the demands of producer associations and NGOs, the EU started to promote the sustainability criteria at bilateral level. The European Commission's mandate for the PTA negotiations with Malaysia covered tariff barriers on biofuels and comprised a chapter on sustainable development which, in contrast to most PCAs so far concluded by the EU, contained an explicit reference to biofuels.

Between 2010 and 2011 several European pressure groups published reports on the negative implications of Malaysian palm oil for the EU and pushed for the inclusion of sustainability criteria in the EU–Malaysian trade negotiations. COPA-COGECA stressed the negative impact of Malaysian unsustainable biofuel production for European farmers, considering EU farmers to be 'well placed to meet the sustainability requirements of the EU's Renewable Energy Directive' and arguing that the directive would 'reduce both biofuel imports and dependence on imported' biofuel input 'from non-EU countries' (Agritrade, 2010). COPA-COGECA (2011) urged the EU Member States to respect the sustainability criteria, and criticized the effects of the 'cheap imports' of palm oil which are 'subsidized by' Malaysia (COPA-COGECA, 2012). FOE (2011) promoted the inclusion of sustainability criteria for biofuel production in the EU–Malaysia dialogue and filed a complaint with the Advertising Standards Agency about an internet banner advert from the Malaysian Palm Oil Council bearing the slogan 'Sustainable. Food Security. Societal Advancement. This is Palm Oil'.

Empirical evidence suggests that these demands were successful in shaping the European Commission's agenda in the negotiations with Malaysia. In response to these demands, in 2011 the Commission published an annex on Malaysia in the trade sustainable impact assessment of the PTA between the EU and ASEAN (Commission, 2011) noting the lack of compliance with sustainability criteria by Malaysian biofuel companies, despite their membership of the Roundtable on sustainable palm oil, and calling for promotion of the EU biofuel sustainability criteria in the bilateral negotiations with Malaysia. In addition, the aim of this strategy was clearly to immunize the EU from WTO legal challenges. According to an official of DG Trade, through the PTA negotiations the EU could explain why European sustainability criteria were not discriminatory and persuade Malaysia not to formalize a legal challenge against the EU (Interview, 6 June 2014). An official from the EEAS (European External Action Services) further commented that a PTA would open new channels to establish a bilateral dialogue on sustainable development which would lead to better understanding of perceived discriminatory risks associated with the EU regulatory approach (Interview, 9 July 2014).

The trade and PCA negotiations stalled in 2012 during the campaign for the national elections in Malaysia. The government blocked decisions on the trade negotiations because of the potential implications of positions on politically sensitive issues such as public procurement, services and intellectual property rights. In the same year, the threat of a Malaysian legal challenge against the EU in the WTO became a more concrete option, since on 19 August Argentina took the first step in a dispute against the EU over restrictions on biodiesel import.

Meanwhile, following a third consultation on the effects of biofuel, on 17 October 2012, the European Commission (2012) published a proposal for a directive amending Directive 98/70/EC relating to the quality of petrol and amending Directive 2009/28/EC on the promotion of the use of energy from renewable sources. The proposal addressed the adverse effects of biofuel production on food prices by encouraging the transition from first-generation biofuels – produced from food-crops such as wheat, sugar, rapeseed and oil crops – to second-generation biofuels – produced from non-food sources. Such a proposal made a legal confrontation with Malaysia in the WTO even more likely by potentially increasing existing obstacles to the import of palm oil from non-EU countries (Erixson, 2013). At present, the decision-making process concerning this proposal is stalled due to the lack of a majority position in the European Parliament.

The effects on EU–Malaysia negotiations of these domestic developments are visible. On 11 September 2013, the European Parliament (2013) issued a resolution containing its recommendation to the Council, the Commission and the EEAS on the negotiations for an EU–Malaysia PCA where it reiterates that ‘palm oil cultivation for biofuels must be carried out in a sustainable manner, avoiding forest conversion and loss of biodiversity, respecting the land rights of indigenous people and providing opportunities for the poorest communities to raise their living standards’.

Meanwhile, two developments made it all the more pressing for the EU to search for immunity against WTO legal challenges. Firstly, in May 2013 Argentina formally filed a dispute within the WTO against the 35 per cent threshold of GHG emissions saving used by the EU to consider biofuel sustainable, and filed another dispute on December 2013 against EU anti-dumping measures on biofuel. Second, Indonesia attacked EU biofuel policy by initiating a WTO dispute in June 2014. The EU could not attempt to immunize itself through the inclusion of environmental clauses in bilateral negotiations with Argentina and Indonesia because it had concluded PCAs with these countries, in 1990 and 2009 respectively, before the adoption of biofuel sustainability criteria (Interview with DG Trade official, European Commission, June 2014).

Yet these developments were important in that they further strengthened the perception, widespread among political commentators and industry groups, that an imminent Malaysian challenge against the EU was likely. According to an official of DG Trade (Interview, DG Trade, 6 June 2014), one reason why Malaysia has not yet filed a formal dispute against the EU despite its reiterated threats is the fear of compromising the outcome of the trade negotiations.

Negotiations for a PCA with Malaysia resumed in April 2014 with the new government. At the time of writing the two parties have expressed their interest in restarting the trade negotiations. Our line of argument suggests that discussion of inclusion of sustainability criteria for biofuels production will remain high on the agenda on these negotiations.

IV. Extending the Empirical Analysis

The argument regarding how the twofold effect of domestic and international institutional incentives can generate pressures for the EU to support processes of international regulatory harmonization through PTAs is by no means restricted to the area of biofuel regulation and EU–Malaysia relations, and can similarly shed light on the political dynamics that underlie PTA negotiations between the EU and other key trading partners challenging EU environmentally related regulations in the WTO.

Disputes initiated by the US against EU food safety regulations created incentives for the EU to fervently support the inclusion of an environmental agenda in the Doha round (Kelemen, 2010; Poletti and Sicurelli, 2012). A more recent WTO dispute initiated by the US against EU barriers to chicken imports has similarly sparked controversies over consumer and health safety standards.

These regulatory controversies and the prospect of legal frictions in the WTO that they have brought about are affecting ongoing talks on the signing of a Transatlantic Trade and Investment Partnership (TTIP) in ways that are consistent with our line of argument. These negotiations sparked the mobilization of NGOs and farmers' groups against the perceived dangers of the proposed deal for public health, safety and environmental regulations. As a result, Trade Commissioner Karel de Gucht was forced to address such fears by saying: 'We are not lowering standards in TTIP. Our standards on consumer protection, on the environment, and on food are not up for negotiation' (Commission 2014a). In January 2014 the Commission launched an advisory group of experts representing a broad range of interests whose aim is to ensure that 'Europe's high standards in, for example, protection for consumers and the environment, are respected and upheld in the negotiations' (Commission 2014b).

Similar dynamics are detectable in the negotiations for the conclusion of the EU–Canada Comprehensive Economic and Trade Agreement (CETA). Just like the US, Canada has challenged EU food and health safety regulatory standards on various occasions during the past two decades (e.g. asbestos, hormone-treated beef and GMOs). The text of the agreement, which will be formally adopted by the EU Council and the European Parliament in 2015, shows that the EU has used these negotiations to shield its domestic regulations from future legal challenges by Canada. It clearly states that CETA does not affect the EU regulatory standards on beef containing growth hormones or GMO and recognizes the EU's precautionary approach (European Commission 2014c).

These examples have two implications: first, that our argument can be extended to other instances of promotion of environmental rules in PTAs by the EU; second, that the argument can be developed further along comparative lines in order to grasp how different types of power relations between the EU and its trading partners may affect the likelihood of its strategy's success. The extent to which the EU can be successful in its strategy can be expected to depend largely on economic power asymmetries between the EU and the partner country. When economic power asymmetries are high, the EU will be able fully to wield its power, as the partner country's resulting benefits from access to its huge market are likely to create incentives to give in to the EU's demands. When power asymmetries are low, there is less likelihood of success. While the characteristics of the trading partner may matter for the probability of the strategy's success, the empirically observable implications of our argument regarding which groups mobilize in support of such regulatory strategies (i.e. both concentrated and diffuse interests), the

rationale for their mobilization (i.e. defense of the domestic regulatory status quo in the face of WTO legal challenges) and why policy-makers give in to their demands (i.e. rigidity of the domestic regulatory status quo) should be fairly constant irrespective of whether or not the trading partner is economically powerful.

Conclusions

In this case study we have shown how the interplay between the dynamics of positive integration in the EU and WTO negative integration commitments created a political dynamic that led societal actors in the EU to push policy-makers to discuss the inclusion of biofuel sustainability standards in the PTA negotiations with key biofuel-producing countries such as Malaysia.

The empirical analysis developed in this article is a plausibility probe that admittedly only establishes the relevance of the argument we have developed in this particular instance of PTA negotiations. Further research is needed to shed light on the wider population of cases in which the EU engages in processes of regulatory harmonization in PTA negotiations. In the previous section, we showed it might be worthwhile to conduct in-depth and systematic analyses of whether and how the ‘shadow of WTO law’ affected, and still affects, the politics underlying the dynamics of regulatory harmonization in the areas of public health, safety, and the environment in the context of PTA negotiations with Canada and the US. Considering a larger number of cases might also enable meaningful comparisons. While we have suggested that differences in economic power between the EU and its trading partners could be a potentially crucial determinant of the degree of success of EU’s regulatory strategies in PTA negotiations, focusing on additional factors such as the nature of the political regime of the trading partner or the previous record of WTO litigation between the EU and particular sets of partners could also help push our argument forward along comparative lines.

Several implications of our argument warrant attention. First, our analysis complements existing accounts that conceive the EU’s stance in international negotiations as the result of three-level games (Patterson, 1997). It shows that the domestic level of policy crucially affects bargaining dynamics between Member States and between the EU and foreign partners, and how institutional incentives at the international level affect domestic preferences in the first place. Second, the article shows that incentives for norm promotion affect not only multilateral fora but also an increasingly important set of alternative fora of global governance such as PTAs. Finally, our argument connects two strands of the literature that to date have remained surprisingly separate. While scholars have concentrated on the EU’s role in global environmental governance and its shift toward a preferential trade strategy, little attention has been paid to the existing links between these two facets of the EU’s external action.

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