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Political mobilization, veto players, and WTO litigation: explaining European Union responses in trade disputes

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ABSTRACT Given the increasing relevance of judicial politics in the WTO, the relative scholarly neglect of EU performance in WTO litigation stands out as a surprising gap in the literature. With this article we contribute towards filling this gap. We do so by teasing out the conceptual distinction between dispute escalation and dispute outcome and by making plausible how the former may be caused by strong political mobilization and the latter by a high number of veto players in the domestic reform process. We thus combine two explanatory factors into one theoretical framework suggesting that while the degree of political mobilization can account for whether or not a dispute involving the EU escalates, the number of veto players can account for whether or not the EU brings its policies in line with the complainants' demands. We illustrate the plausibility of our argument through an in-depth analysis of four instances in which the EU acted as defendant in a WTO dispute: the ban of hormone treated beef; export subsidies on sugar; bananas III; and butter.

KEY WORDS European Union; litigation; veto players; WTO.

INTRODUCTION

When the contracting parties to the General Agreement on Tariffs and Trade (GATT) created the World Trade Organization (WTO) in 1995, they further developed the GATT's system of dispute resolution into independent third party adjudication accompanied by the threat of multilaterally authorized sanctions in case of non-compliance with WTO rules (Goldstein and Martin 2000). The strengthened enforcement of international trade rules has increased the number and salience of trade disputes, enabling these rules to reach deeply into practices of domestic governance.

The European Union (EU) has been involved in a number of high-profile trade disputes in the WTO. In some of these disputes, the EU has long been, or still is, failing to comply with WTO Dispute Settlement Body (DSB) rulings. Yet, in others, the EU has taken a surprisingly co-operative stance, fully complying with the rulings of the WTO DSB. In fact, despite difficulties

in a small number of cases, the EU has generally succeeded in changing domestic policies to abide by WTO dispute settlement rulings (Wilson 2007). In addition, there is a great deal of variation regarding the stage of the litigation process in which the EU agrees to accommodate foreign trading partners' requests. Sometimes the EU changes domestic policy during the consultation phase of WTO litigation, even before the setting up of a WTO dispute settlement panel. In other instances, the EU meets complainants' demands only after the issuing of a ruling by the WTO dispute settlement body. What is more, just like in disputes involving other GATT/WTO members, a significant number of disputes in which the EU is a defendant are settled prior to the establishment of a panel (Busch and Reinhardt 2003).

This wide variation in EU responses to WTO dispute settlement raises important questions like: Under which conditions does the EU to experience compliance problems when challenged by foreign trading partners through WTO litigation? And under which conditions is the EU eager to settle important disputes early, and when only after having gone through the whole litigation process?

To grapple with these questions, two conceptual dimensions of defendants' responses to WTO litigation have to be distinguished first: the temporal dimension, i.e., whether disputes escalate; and the substantive dimension, i.e., whether the defendant meets the complaint's demands. Through the interaction of these two conceptual dimensions of variation, we are able to identify four courses of action of responses in WTO litigation, moving beyond existing approaches that mostly focus on high-profile non-compliance cases: obstinate non-compliance; compliance after escalation; involuntary non-compliance; and early settlement.

In a second stage, we argue that the factors affecting variation along the temporal and substantive dimensions of responses to WTO litigation need to be first identified separately and then integrated into a systematic explanation, in order to account for these four types of responses. We therefore combine two explanatory factors into one framework: (1) the degree of political mobilization elicited by the issue at stake; and (2) the number of veto players in the domestic reform process. While the degree of political mobilization can account for whether or not a dispute escalates, the number of veto players can account for whether or not the EU brings its policies in line with the complainants' demands.

We contribute to the literature in at least two important ways. First, although the EU is a pivotal player in international trade relations, was one of the key sponsors of the reform of the dispute settlement mechanism, and has since then been one of the most frequent users of this institutional tool, both as complainant and as defendant, the question how the EU behaves in WTO litigation has received relatively little scholarly attention (Young 2010). Second, the existing literature treats a limited number of high-profile non-compliance cases as representative of EU behaviour in WTO dispute settlement, and does not explicitly conceive of dispute escalation and compliance as two conceptually distinct phenomena. We develop an original argument that can explain a wider

empirical universe of cases by disentangling the temporal from the substantive dimension of responses to litigation, and by specifying the factors that are likely to affect variation along these two dimensions.

The article proceeds as follows. In the first section, we critically review the existing literature on EU performance in WTO dispute settlement. In the second section, we present the argument. In the third section, we illustrate it through an in-depth analysis of four WTO dispute settlement cases in which the EU acted as defendant in a WTO dispute: the hormone treated beef ban; sugar export subsidies; African, Caribbean and Pacific (ACP) countries banana preferences; and spreadable butter quota. We close by summarizing our key findings, speculate about possible extensions of our argument, and thus address the question of generalizability beyond the EU.

POLITICAL MOBILIZATION, VETO PLAYERS AND RESPONSES TO WTO LITIGATION

Given the increasing relevance of judicial politics in international trade relations, a large body of literature has analysed issues such as the determinants of dispute initiation, strategic behaviour by dispute settlement panels, the choice of institutional venue for resolving trade disputes, why disputes escalate, how litigation affects the domestic balance of trade-related interest groups, and under what conditions parties comply with decisions adopted through third-party review (for a review of this literature see Bernauer et al. [2010]).

A smaller number of studies on EU responses in WTO litigation fall into two types of arguments. First, some focus on a number of high profile non-compliance cases and subscribe to the view that powerful constituencies make it impossible for policy-makers to overcome domestic opposition (Davis 2003; Pollack and Shaffer 2009; Princen 2002). This approach is problematic because it effectively selects on the dependent variable, treating these as representative of all EU's responses to WTO litigation. In fact, the EU has a high rate of compliance with WTO dispute settlement rulings (Wilson 2007) and has taken a surprisingly co-operative stance in particularly difficult cases involving strong concentrated producers' interests, e.g., sugar export subsidies. Conversely, it remains an open question why disputes involving marginal EU-internal economic interests cause severe compliance problems, like in the case of the WTO-illegal EU's bananas import regime.

Second, other studies focus on the role of EU decision-making rules. For some, EU compliance problems are prominent when the consent of the European Parliament is required to process domestic policy change (Daugbjerg and Swinbank 2008). Others argue that internal decision rules of EU policy-making favour the emergence of regulatory peaks when harmonized product regulations are required and make these very resistant to change, explaining when and why clashes between EU and WTO rules occur (Young 2004). While these institutionalist arguments point the way to overcoming the above-mentioned problems, they treat dispute escalation as solely determined

by defendants' inability to comply. Yet, understanding why sometimes concessions are achieved during the consultation stage, while in other cases only after a panel ruling, is also key to understand the dynamics of WTO litigation (Davis 2012; Guzmann and Simmons 2002). Indeed, escalation is not necessarily only a function of whether defendants are able to change domestic policy in response to complainants' demands. Disputes sometimes do not escalate, despite the fact that the defendant makes no concessions in the consultation phase. Also, defendants sometimes push a dispute to the panel stage and fully comply after an adverse ruling, showing that the (in)ability to change domestic policy is not necessarily the only reason for the defendant to go along the litigation route.

From the total of 80 disputes in which the EU acted as a defendant in the period between 1995 and 2010, 36 got resolved during consultations (45 per cent). Out of the 44 disputes that escalated to the panel stage, 38 (47.5 per cent) did not present compliance problems, whereas only 6 disputes were characterized by compliance problems leading to subsequent action by the complainant (7.5 per cent), of which 3 were concerned with similar measures.[1]

In order to systematically account for the full range of EU potential responses in WTO litigation, the factors that affect variation along the dimensions of dispute escalation and dispute compliance need to be first identified separately and then integrated into a systematic explanation.

Dispute escalation

Several reasons may explain why disputes escalate. First, disputes involving pairs of democracies are less likely to escalate than those involving one non-democracy (Busch 2000). Yet, EU responses also vary greatly when it faces complainants with the same type of political regime. Second, escalation might be more likely when the subject matter of a dispute has an 'all-or-nothing' character, i.e., when the issue at stake is not divisible in tradable units (Guzmann and Simmons 2002). However, the 'all-or-nothingness' is not an objective property of an issue, as all issues are divisible into tradable negotiating units, but the transfers between parties may be relatively easy (i.e., tariffs and quotas) or difficult (i.e., regulatory barriers) to achieve. Moreover, this view is also problematic because it conceives of dispute escalation as entirely determined by parties' inability to reach a settlement in consultations.

These problems can be solved by focusing on whether a dispute elicits political mobilization at the societal level or not. Rather than seeing societal pressures as a cause for non-compliance, we submit that it is more fruitful to see these as affecting the likelihood of dispute escalation. Disputes involving strong interest groups in the defendant and the complainant are more likely to escalate (Davis 2012). If we assume politicians to be primarily concerned with re-election and public officials with re-appointment, policy-makers' choice to go for litigation can be thought of as a signal of their commitment to defend politically powerful domestic producers, rather than merely as the result of defendant's (in)ability to meet the complainant's demands in the consultation phase. Policy-makers in

the EU may well be willing and able to change domestic policy to meet the demands of the complainant, but may nonetheless decide to do so only after an adverse WTO panel ruling in order to maximize their chances for re-election or re-appointment. Hence, we conceive of dispute escalation as a tool for the European Commission to maximize the ability to manage conflicting objectives: signalling a commitment to protect domestic interests, while eventually complying with a panel ruling to avoid reputational and economic costs of continued misbehaviour. By treating dispute escalation as a dichotomous variable, we simplify the different discrete steps in WTO disputes, going from the establishment of a panel, over appeal, all the way up to suspension of concessions, because the passage from consultation phase to panel stage can be considered the key turning point for how policy-makers determine the balance between their two conflicting objectives.

Focusing only on economic interests however, risks overlooking another important factor that may affect incentives of policy-makers to use dispute escalation as a signalling device. When publicly salient issues are at stake, diffuse interests, public opinion or the electorate at large may succeed in overcoming collective action problems, mobilize politically and create incentives for policy-makers to respond to their preferences.

We thus distinguish between disputes that trigger a low and a high degree of political mobilization, whereby political mobilization is conceived of as a function of both the public salience of a dispute and its distributive effects. Disputes are more likely to generate political mobilization when they touch upon issues that, for a variety of reasons, rank high in public opinion preferences, endangering policies that reflect values deeply entrenched in a given polity. In addition, the likelihood that producers mobilize and lobby policy-makers increases when the anticipated distributive effects of disputes are substantial and concentrated, i.e., borne by a limited set of actors (Olson 1965). In sum, a high degree of political mobilization is more likely to be observed when the economic stakes are high and concentrated, or the dispute is publicly salient, or both.[2]

Substantive outcomes of disputes

As mentioned, a number studies suggest that non-compliance in the EU is owing to the influence of powerful constituencies. However, since some disputes with strong constituency mobilization do not lead to compliance problems and some disputes with weak constituency mobilization do, we need to look for alternative explanations. Whether or not a defendant meets the complainants' demands may be dependent on the latter's retaliatory capacity (Bown 2004). Yet, the EU responded in very different ways in disputes involving the same complainant or complainants with similar levels of retaliatory capacity.

Concentrating on domestic institutional factors is a promising route to account for different ways in which the EU changes domestic policy. The concept of veto players captures the logic that underlies existing institutionalist

arguments considered above. According to veto players theory, the potential for policy change in a given political system depends on the number of veto players, namely individual or collective actors whose consent is necessary to change the *status quo* (Tsebelis 2002). The more veto players, the smaller the set of alternative policies that can beat the *status quo*, and the less likely that policy change will take place.[3]

Applying these expectations is useful to analyse EU behaviour in WTO dispute settlement. Dispute settlement cases touch upon a number of different issue areas, governed in the EU by different decision rules. These range from the highest decision-making hurdles foreseen for the adoption of certain international trade agreements, requiring *unanimous* approval in the Council *and* a majority in the Parliament, to policy areas in which implementing decisions only requires Commission approval (Young 2010). In between these two extremes, decision-making rules vary greatly, including issues requiring approval only by qualified majority vote (QMV) in the Council, issues requiring unanimous approval in the Council, and issues requiring *both* a QMV approval in the Council *and* a majority in the European Parliament ('co-decision'; 'ordinary legislative procedure' under Lisbon Treaty).[4]

We simplify this complexity by distinguishing two types of EU decision-making rules to comply with WTO partners' requests in WTO litigation. We conceive of domestic policy change to be decided upon by a *high* number of veto players in the EU, whenever such change requires unanimity in the Council of Ministers, or adoption by both the Council and the European Parliament. The unanimity rule in the Council minimizes the chances of policy change by only allowing for Pareto-optimal movements away from the *status quo* (Scharpf 1988). When the European Parliament holds veto power as under 'co-decision', policy stability in the EU also significantly increases. In both cases we hypothesize that the EU faces high hurdles to bring domestic legislation in compliance with WTO rules.

Conversely, we consider domestic policy change to involve a *low* number of veto players in the EU whenever only one forum is involved and unanimity is not required therein. Essentially, this definition concerns any situation in which only qualified majority voting (QMV) in the Council or even lower decision-making thresholds apply.

Table 1 summarizes the two hypotheses that allow us to identify the conditions under which four scenarios of EU responses in WTO litigation are likely to occur.

EU RESPONSES TO WTO LITIGATION

We show the plausibility of our argument by assessing empirical evidence concerning how the EU responded in four cases in which it acted as a defendant in WTO litigation: the hormone treated beef ban; sugar export subsidies; ACP banana preferences; and spreadable butter quota.

Table 1 EU responses in WTO litigation

		B – Number of veto players	
		High	Low
A – Political mobilization	High	1. Obstinate non-compliance A. High incentives to signal commitment through dispute escalation B. Low ability to meet complainant's demands Case: Hormone treated beef ban	2. Compliance after escalation A. High incentives to signal commitment through dispute escalation B. High ability to meet complainant's demands Case: Sugar export subsidies
	Low	3. Involuntary non-compliance A. Low incentives to signal commitment through dispute escalation B. Low ability to meet complainant's demands Case: ACP banana preferences	4. Early settlement A. Low incentives to signal commitment through dispute escalation B. High ability to meet complainant's demands Case: Spreadable butter quota

By choosing a case-study approach, we show the internal validity of the postulated causal relationships. Whereas such a choice would seem to raise questions about the external validity of our argument, i.e., whether the causal mechanisms extend to the broader population of cases, this approach seems particularly appropriate, because without in-depth knowledge of the dispute settlement cases it is difficult to gauge whether there has been compliance (this is private information to the litigating parties) and whether such compliance can be attributed to litigation (Mavroidis 2012).

Consistent with the logic of factor-centric research design, we select the four cases on the basis of our independent variables (Gschwend and Schimmelfennig 2007), picking cases that reflect the interaction of both the degree of political mobilization and the number of veto players. At the same time, our case selection allows us to keep constant and control for important exogenous, potential sources of variation in EU responses in WTO litigation.

First, we select cases where complainants dispose of credible retaliatory capacity, because the two sides are in an interdependent trading relationship. Only then do they value each other's market as a destination for some of their exporters, putting them in a position to pursue, or threaten to pursue, policies that can generate adjustment costs for the other side. In the absence of a complainant's retaliatory capacity, defendant's incentives to comply can be expected to be nearly non-existent. We control for this potential source of

variation by selecting cases in which the complainants have credible retaliatory capacity *vis-à-vis* the EU. Even though there are differences in market size of the complainant, in all four cases the complainant is able to impose concentrated costs on some EU sector, making its threat of retaliation credible.

Second, defendants' strategies concerning dispute escalation can also be crucially affected by their expectations about the chances to win or lose the case. Defendants may simply decide not to compromise during consultations, because they think the complainants' claims would be rejected by the panel. We control for this potential source of variation by selecting cases of dispute escalation in which we can show empirically that the EU knew beforehand that it would lose the case. Third, we control for the type of the complainant's political regime. As argued above, the nature of the complainant's political regime can affect the likelihood that defendants let the dispute escalate. This additional potential source of variation is controlled for as all selected cases concern disputes in which the EU faced democratic complainants.

Obstinate non-compliance: the dispute on the EU hormone-treated beef ban

The dispute concerning the EU's ban on the importation of hormone-treated beef represents a typical case of WTO disputes with strong political mobilization and a high number of veto players, leading to obstinate non-compliance.

In 1996, the United States (US) and Canada filed a dispute settlement case against the EU, claiming that its ban on hormone-treated beef was inconsistent with the rules of the WTO agreement on Sanitary and Phytosanitary Standards (SPS). The US had already raised the issue in vain under the GATT, as the EU had blocked the US's request to establish a dispute settlement panel in 1987. The issue was certainly a highly salient for the European public, as in the mid-1990s a number of food safety issues had raised the question of risk regulation to the level of high politics. At the time, Eurobarometer polls repeatedly showed a growing scepticism towards the use of technologies that might endanger food and consumer safety (Pollack and Shaffer 2009). Moreover, opening up the gates of the European market to imports of US hormone-treated beef would have certainly had a negative impact on EU producers who had adjusted their production process to the requirements of the EU's regulatory framework.

European farmers indeed joined consumer organizations in their support for the bans on importations of hormone-treated beef (BEUC and COPA-COGECA 1999). By defending a precautionary approach to food safety legislation, the EU signalled its commitment to these societal constituencies now that WTO non-discriminatory trade requirements threatened the credibility of the Commission in a time of contestation of the legitimacy of the EU food safety legislation.[5]

At the same time, the dispute involved a high number of domestic veto players, as a change of the domestic regulatory *status quo* would have to be

processed through co-decision, i.e., QMV in the Council *and* a majority in the European Parliament.

Both the WTO panel and the Appellate Body supported the US claims, respectively in April 1997 and February 1998, finding that the EU had failed to base its case on adequate risk assessments. Although policy-makers in the Commission and in many member states believed the EU should comply with the ruling (Davis 2003), there was no support for lifting the bans in the European Parliament and among a significant number of member states, reflecting public opinion's and producers' support for the bans and the widespread belief that hormone-treated beef was not safe (Princen 2002; Young 2004).[6]

Given this high degree of political mobilization and the high number of veto players on the issue, it is not surprising that the Commission interpreted the WTO's ruling narrowly, conducting an adequate risk assessment rather than changing the substance of the policy. Interestingly enough, the EU also signalled its resolve to domestic audiences by refusing to negotiate a compensation in the form of increased tariff rate quotas for Canadian and US hormone-free beef (Kerr and Hobbes 2005).

When, by the deadline defined by the WTO DSB, the EU did not succeed in completing its scientific review, the EU decided not to remove the ban before conducting additional reviews. When, following authorization from the WTO DSB, the US implemented 117 million dollars-worth of trade retaliatory measures against the EU in July 1999, these sanctions produced little domestic policy change. Indeed, the European Commission never tabled a legislative proposal on hormone-treated beef that was entirely in conformity to the rulings of the WTO DSB to a vote in the Council. Instead, the EU changed its policy in 2003 in the form of Directive 2003/74/EC, introducing comprehensive risk assessment procedures, confirming its ban on one hormone and provisionally banning the other five hormones for growth promotion until more complete scientific evidence were to become available. This led Canada and the US to continue to apply trade sanctions. The impact of this retaliation in the hormones dispute became increasingly relevant in 2009, when the US announced it would use 'carousel' provisions against the EU.[7] However, this move was also insufficient to force the EU to meet their demands. In May 2009, the EU and US reached an agreement on compensatory measures that put an end to the dispute, and yet again policy change did not amount to substantial compliance by the EU. The parties reached an agreement on the abolition of sanctions in exchange for increased access for hormone-free beef from the US and elsewhere (WTO 2009), but this did not change the EU's ban. The obstinacy with which the EU failed to comply, even in the face of trade sanctions, can hardly be explained without considering the institutional context within which EU rules on food and consumer safety are processed. Some of the member states adversely affected by retaliation sought to diffuse the dispute (Young 2004). The sanctions were targeted at large member states, such as France and Germany, that were deemed to be able to change the balance in the Council of Ministers in favour of lifting the ban (Sien 2007). However, since the

involvement of the European Parliament meant that policy-making became more susceptible to public sentiments (Daugbjerg and Swinbank 2008), a large number of member governments continued to argue that the hormones in question were not safe and compliant policy change could not be achieved (Princen 2002; Young 2004). In sum, because those who opposed compliant policy change could access an additional veto point in the form of the European Parliament, a potential change in the balance of forces within the Council that sanctions might have triggered could be prevented.

Compliance after escalation: the dispute on EU sugar export subsidies

The dispute regarding EU export subsidies on sugar elicited the political mobilization of influential concentrated sugar producers and involved a low number of veto players. In line with our expectations, the dispute was characterized by escalation, while ending in compliance.

In late 2002, Australia and Brazil, joined in early 2003 by Thailand, began a joint WTO dispute against the EC sugar regime. When establishing its export subsidy commitments in the Uruguay Round, the EU chose to notify its commitments by excluding exports on sugar produced in excess of established quotas (known as C sugar) because these were not subsidized, and netted out its preferential imports from the ACP states and India. The complainants argued that the EU was subsidizing exports in excess of the volume and expenditure limits set in the Uruguay Round, contending both that re-exports of preferential sugar imports from developing countries and that C sugar exports should be counted in the maximum quantities benefiting from export subsidies under the Uruguay Round rules. In addition, the complainants also argued that C sugar exports should be considered as cross-subsidized.

The EU could reasonably expect to lose the case, as the academic community had long noted that C sugar exports were effectively cross-subsidized, and because, in an earlier dispute brought by the US and New Zealand against Canadian dairy exports, the WTO panel and Appellate Body had also considered similar export subsidies as cross-subsidized (Ackrill and Kay 2009).

At the same time, the potential distributional effects of an adverse panel ruling elicited strong political mobilization by sugar growers (Europolitics 2005). The reform's commercial impact on the sugar sector was likely to be even more severe than any relaxation of the ban on growth hormones would have been to the beef sector (Daugbjerg and Swinbank 2008: 649), leading to consolidation, factory closures and a major reallocation of production between factories and countries (Bureau et al. 2008). Given the high industrial concentration in the sector,[8] the considerable power of sugar growers' lobbies and the EU's role as world leading exporter of sugar, the EU was expected to be unable to overcome resistance to comply with WTO panel and Appellate Body rulings (Ward et al. 2008).

The EU signalled its commitment to try to defend the strongly mobilized sugar growers' interests by letting the dispute escalate beyond the panel stage and refusing to make substantial concessions during consultations held with

the complainants in 2002 and 2003, who then requested the setting up of a panel. The panel and the Appellate Body in 2004 and 2005 respectively reiterated that the EU's subsidized exports were in excess of its bound commitments. The EU was thus requested to curb its subsidized exports by May 2006.

Despite escalation, compliance was forthcoming surprisingly quickly. Indeed, the EU adopted an extensive reform of its sugar regime, substantially complying with the far-reaching requirements of the WTO ruling. A political deal on reform was found in the Council of Agricultural Ministers in November 2005 and ratified in February 2006 with the adoption of a new Regulation (318/2006), consisting of WTO-compliant policy changes: a 36 per cent reduction of the reference price for sugar to be achieved by 2010, partial compensation to producers in direct payments, incentives for producers to leave the sector, and prohibition to export in excess of the bound levels the EU committed to in the Uruguay Round.

This Council decision preceded the EU's later offer to phase out all export subsidies by 2013 at the December 2005 Hong Kong WTO Ministerial Conference, suggesting that the WTO judicial proceedings in the sugar case, and not the ongoing WTO Doha negotiations, were the driving factor behind EU sugar policy change (see Bureau et al. [2008]; Daugbjerg and Swinbank [2008]; for a dissenting opinion, see Ackrill and Kay [2011]). Indeed, the Commission had already wanted to reform the sugar sector in 2003, yet decided to leave sugar out of the radical 2003 Fischler and a Commission's reform proposal in 2004, in order to increase its chances of success by leaving the politically sensitive topic of sugar export subsidies out of the reform process.[9] Not only the timing but also the content of the reform suggests that the WTO ruling is key to explaining the policy reversal, as the implementation decision deliberately did not allow for exports of out-of-quota sugar in excess of WTO commitments (Bureau et al. 2008).

The EU's response in the sugar dispute thus shows how a low number of veto players can account for EU compliance, while a high decision threshold in the hormone-treated beef dispute caused it not to be able to do so. As Daugbjerg and Swinbank (2008: 649–50) put it, the sugar reform 'was a *farm* policy issue to be decided by the Council of Agricultural Ministers, without the direct involvement of the European Parliament, since the latter has only a consultative role in decisions on the CAP'. Indeed, overt opposition to the 2005 Commission's reform proposal was voiced by countries whose sugar production was most likely to be hit by the drop in prices, such as Ireland, Italy, Spain, Portugal, Greece, Latvia and Lithuania. Yet, when these countries realized that there was little possibility of resisting ambitious reform under existing voting rules, they pushed for a more ambitious compensation scheme and accepted the reform (Bureau et al. 2008).

Although the high degree of political mobilization created incentives for policy-makers to signal commitment to defend domestic interests and let the dispute escalate, the low number of veto players allowed policy-makers to side-line those who opposed domestic policy change and were able to engineer WTO-compliant policy change, once the panel ruling was issued.

Involuntary non-compliance: the dispute on the EU's ACP banana preferences

The dispute on the EU's bananas import regime involved little EU-internal political mobilization and a high number of veto players. While the EU never deliberately sought to escalate the dispute and rather consistently made itself available to make concessions throughout the entire litigation process, from 1993 until 2010 it proved impossible to get approval for fully WTO-compliant change to the underlying structure and principles of the regime. While political mobilization on the issue was marginal, any Commission proposal for policy change required unanimity in the Council and the consent of a majority in the European Parliament, as it entailed an overhaul of the EU's policy towards African, Caribbean and Pacific countries.

Implemented in July 1993, the European regime on banana imports consisted of a multilayered system of import rules, quotas and import licenses, with strong preferences for European Economic Community (EEC) and ACP bananas at the expense of Latin American producers exporting under the most favoured nation clause (Webber and Cadot 2002).

Five Latin American banana-producing countries (Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela) took legal action under *Bananas I* in June 1993 and *Bananas II* in January 1994, both resulting in condemnations of the EU banana trade regime. While under the GATT rules the EU could block the adoption of these rulings, they provided the basis for the future WTO panel conclusions. Anticipating future legal challenges and realizing that these legal precedents reinforced the likelihood of losing similar challenges under the WTO, the EU showed its willingness to try and accommodate its trading partners' demands by offering a deal to the Latin American banana producers that were part of the GATT case, offering a higher quota for their banana exports to Europe, a lower tariff and a revised system of export licenses (Alter and Meunier 2006). In March 1994, four of these countries – Colombia, Costa Rica, Nicaragua and Venezuela – agreed to the compromise known as the 'Framework agreement'.

In 1995, however, the United States, Guatemala, Honduras and Mexico requested a dispute settlement panel at the WTO, set up in 1996. In its ruling of May 1997, the DSB upheld the EU's right to provide preferential treatment to the ACP countries, because the EU had obtained a waiver for the Lomé's agreement, yet objected to the individual assignment of quotas and the means of allocating licenses for importing bananas within the tariff-rate quota. In July 1998, instead of proposing WTO-compliant policy change, the EU only managed to adopt a slightly revised regime, and even then only by the barest qualified majority. This minimal reform however was also found to be clearly incompatible with WTO rules by a compliance panel set up at the request of Ecuador. In April 1999, the US and Ecuador imposed WTO-approved retaliatory sanctions. The US suspended its retaliatory sanctions in 2001, when the EU agreed to implement a new regime based on a

tariff-only system by 2006, after a transitory period during which bananas would be imported into the EU through licenses distributed on the basis of past trade (Josling 2003).

In parallel, two waivers from the application of Article 1 and XIII of the GATT were granted in Doha in 2001 for the Cotonou Agreement trade preferences. When the EU implemented the new tariff-only regime in 2006, however, Latin American bananas producing countries again challenged the EU's regime, requesting consultations, arguing that ACP preferences were inconsistent with WTO rules.

After another panel and Appellate Body ruling on a WTO complaint brought by Ecuador, the Commission again informed the WTO DSB in 2009 of its intention to proceed to implementation, as well as to seek agreement on the new bound tariff in the context of a broader agreement on bananas. This Geneva Agreement on Trade in Bananas setting the conditions for the final settlement of pending disputes on the EU import regime on bananas was initialled on 15 December 2009 and signed in May 2010, while a related settlement agreement with the US was signed the following month. Only in November 2012 could the disputing parties notify the DSB of a mutually agreed solution, which definitively put an end to the banana dispute.

The dispute elicited hardly any political mobilization in favour of the *status quo* in the EU, as the economic interests at stake for the EU were marginal at best. Producers who gained from the regime were only banana growers in French and British overseas territories and a few agro-industrial companies, which provided shipping and support services for banana trade (Cadot and Webber 2002). Moreover, one could expect potentially influential actors such as retailers and importers to have a preference for reform of the banana regime. Given this constellation of domestic interests, one could have expected this dispute to cause no particular compliance problem (Alter and Meunier 2006). Despite various attempts to change domestic policy and meet the demands of various complainants, the EU has proven unable to substantially change its policy and bring it entirely in line with WTO obligations for almost two decades.

Despite its repeated attempts, the EU has been unable to make its banana regime WTO-compatible, because of the large number of veto players involved in the process of domestic reform. At first glance, formal decision-making procedures for the reform of the banana regime would seem to only require QMV, which could lead one to conceive of this as a case with a low number of veto players. Yet, because the banana regime was an artefact of overlapping and nested commitments, making the EU's banana regime fully WTO compatible required changing the Lomé Conventions, since a harmonized system of tariff-free bananas would have violated its promise of preferential access to the European market (Alter and Meunier2006). Changing ACP policy required *unanimity* in the Council of Ministers *and* the consent of the European Parliament, making the number of veto players extremely high. Any change of the banana regime that would not entail ACP and non-ACP bananas being provided the same treatment in the EU market would leave the door open for WTO legal

challenges against the EU. This explains why previous attempts to reform the banana regime ultimately failed to produce WTO-compliant policy change. Unlike the sugar subsidy dispute, which did not call into question preferential treatment granted to ACP exporters, the banana complaints always targeted exactly the discriminatory nature of the regime. The 1998 reform and the 2001 reform which foresaw the introduction of a tariff-only regime by 2006 ultimately proved insufficient to produce WTO compliant policy change. While such reforms could be adopted by QMV, only an overhaul of the EU's policy towards ACP countries, which was to be decided by a high number of veto players, i.e., by unanimity, could offer the sufficient policy space to bring domestic rules in compliance with WTO obligations. The negotiated solution between the EU and banana-producing countries was found only after 2008, when the EU started to negotiate EPAs on duty- and quota-free access to the EU market for all agricultural exports from ACP countries. As Daugbjerg and Swinbank (2008: 647) note, the knock-on effects of challenges to the banana regime was that the EU realized that its Lomé Convention was incompatible with its WTO commitments, leading to the decision to try and negotiate a series of WTO-compatible free trade area agreements, namely the EPAs.

In other words, the solution to the banana dispute was reached only when it became possible to reach an agreement the revision of the Cotonou Agreements in 2005, which entered into force in 2008, and ultimately opened up the possibility to start negotiating EPAs. If revising the Cotonou Agreements would have been subject to QMV, agreeing to WTO-compliant policy change to the EU banana preferences would have been possible early on.

Early settlement: the dispute on the EU's spreadable butter quota

The dispute concerning the EU's decision to exclude imports of New Zealand's spreadable butter from the country's specific tariff quota is a case that triggered little political mobilization and involved a low number of veto players. In line with our expectations, the EU fully accepted New Zealand's requests early in the consultation stage, foregoing the stage of a negative panel ruling, and agreeing on a negotiated settlement of the dispute.

In June 1996, the EU decided that New Zealand spreadable butter produced through the so-called AMMIX[10] process was not eligible for New Zealand's country-specific tariff quota (CSTQ) for butter established by the EU's WTO schedule. Spreadable butter was manufactured under a special process, which allows it to be spread directly from the refrigerator. But to meet the EU's special quota, butter had to be produced under certain processing conditions, one of which stipulated that it has to come directly from milk or cream. According to the Commission, the imports were produced in such a complex manner that they did not constitute 'butter' under the terms of the tariff quota agreement.

The practical effect of the decision was that these products would be subject to a much higher out-of-quota tariff rate. New Zealand disagreed with the EU and

sought redress through WTO dispute settlement. Yet, even before the panel's report was made public, New Zealand requested a suspension of panel proceedings to allow settlement negotiations to take place.

In November 1999, New Zealand notified the WTO that a mutually agreed solution to the dispute had been reached, and on 22 October 1999, a QMV in the Council of Ministers passed a regulation which clarifies that New Zealand exports of spreadable and AMMIX butter do qualify for entry under New Zealand's CSTQ for butter (European Commission 2000).

Despite the setting up of a panel following a request by New Zealand, the parties thus arrived at a mutually acceptable solution before a panel ruling was issued. The dispute generated no significant political mobilization, as spreadable butter had been exported to the EU market since 1991 and the only market substantially affected by these exports was the United Kingdom. Moreover, those British producers had adjusted their production process by 1999, becoming producers of spreadable butter on their own. In accordance with our expectations, the European Commission could go for an early negotiated settlement (Europolitics 1999a).

At the same time, the low number of veto players made it easy to change domestic policy so as to meet the complainant's requests, agreeing with New Zealand and adjusting its interpretation for the quota in question (Europolitics 1999b). As a decision only required a QMV in the Council of Ministers, and not the consent of the European Parliament, and as the economic stakes were low, the UK, which had considered an appeal to the European Court of Justice (ECJ) over the issue, decided to drop its ECJ case and acquiesced to the Commission's proposal.

CONCLUSION

This article offers an analysis of EU responses in WTO litigation. We present the hypotheses that the higher the degree of political mobilization of societal actors with a stake in the issue, the higher policy-makers' incentives to signal their commitment to defend their interests, and thus the likelihood of dispute escalation, while the higher the number of veto players involved in the domestic policy process, the lower the likelihood that the EU meets a complainant's demands.

The theoretical framework developed on the basis of these two hypotheses allows us to fill a gap in the literature on the EU's role in WTO litigation and on the politics of WTO dispute settlement more generally. First, this framework does not suffer from an implicit selection bias, as it can account for cases in which the EU experiences compliance problems, as well as cases in which the EU takes a co-operative stance. Second, contrary to conventional wisdom, this article shows that a high level of politicization of trade disputes is neither a sufficient nor a necessary condition for the EU to experience compliance problems. The presence of political mobilization *per se* does not cause compliance problems, but only when it occurs in combination with a number of veto

players. In addition, compliance problems may arise even in the absence of significant political mobilization.

Finally, our analysis has important real-world implications regarding how the EU interacts with existing structures of global trade governance. The entry into force of the Treaty of Lisbon in December 2009 has significantly expanded the range of EU policies areas subject to the ordinary legislative procedure, in which the European Council of ministers and the European Parliament vote on Commission proposals. If our analysis is correct, irrespective of the relative importance of political mobilization triggered by the dispute, this institutional change may cause the undesired effect of making the EU more impermeable to external pressures brought about by WTO litigation.

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NOTES

1 Based on Horn and Mavroidis (2011).
2 Through our case-study approach, we trace whether disputes actually elicited significant political mobilization, and combine this with proxies of political mobilization, like the Herfindahl-Hirschmann Index (HHI), a measure of the size of firms in relationship to the industry and an indicator of the amount of competition among them, and Eurobarometer polls.
3 Of course, the ideological distance between actors' preferences also matters (Tsebelis 2002). Yet, it is more probable that at least some veto players are closer to the *status quo* in a context where veto players abound (Dür 2007).
4 For a systematic overview, see Hix and Hoyland (2011).
5 Interview with DG Health and Consumers Official, Brussels, May 2011.

6 Interview with DG Agriculture Official, Brussels, February 2009.
7 Interview with DG Health and Consumer Official, Brussels, June 2011.
8 An industry with an HHI above 1,800 indicates that a few firms dominate the market (van der Linde et al. 2000). In Europe, the degree of concentration of the sugar industry is very high, with a Herfindahl-Hirschmann Index of 10,000 in eight members states, 3,500 in three other member states, and in the range of 1,500 to 2,500 for France, Italy and Germany.
9 Interview former DG Trade Official, Brussels, June 2010.
10 AMMIX is a production procedure for butter in which fresh milk fat is mixed with cream and salt and shock cooled.

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