EUROPEAN UNION REGULATORY POLITICS IN THE SHADOW OF THE WTO: A CRITICAL HISTORICAL INSTITUTIONALIST PERSPECTIVE

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ABSTRACT

This paper focuses on an increasingly important aspect of European Union (EU) trade policy: the interface between internal regulation and international trade. More specifically it looks at how World Trade Organisation (WTO) rules influence regulatory politics in the EU. While WTO law has no direct effect, it is assumed by rational functionalists that its rules are enforced in a decentralized way by exporters that want to avoid retaliation against their exports resulting from a negative dispute ruling. I challenge the actual plausibility of this mechanism and offer an alternative perspective rooted in critical historical institutionalism. From this perspective it is argued that vague WTO rules may be used by interest groups and decision-makers as resources in domestic policy battles to oppose trade-restrictive/burdensome regulation. Such instrumentalization may in the long run lead to internalization and institutionalization of WTO rules but also strengthened opposition against the organisation. To empirically test the explanatory value of the proposed perspective I process-trace three decision-making processes on EU regulation of which WTO-consistency was contested: the trade in seal products ban, REACH, and a carbon border tax in the framework of the EU emissions trading scheme post-2013.

INTRODUCTION

The interface between international trade, the international trading system and domestic regulation has become one of the most important current issues for international trade negotiators and scholars. *For one thing*, international differences in domestic regulation are perceived as the most significant remaining barriers to further international trade expansion. *For another*, the effect of international economic integration and of World Trade Organisation (WTO) rules in particular on domestic regulatory autonomy provokes controversy. The view that WTO agreements impede the ability of governments to protect the environment and their citizens' health is widespread among non-governmental organisations and also some critical scholars. However, neither WTO law nor its dispute settlement rulings enjoy direct effect[1]. Nonetheless, few would argue that WTO law is inconsequential.

In the literature it is reasoned that WTO agreements are enforced in a decentralized way. The dominant explanation is that the threat of authorized retaliation mobilizes exporters in the contravening country to lobby for WTO-consistency. In this paper I challenge the actual plausibility of this rational functionalist argument. I suggest an alternative, less elegant and more contingent perspective on the influence of WTO law on domestic regulatory politics. A critical reading of historical institutionalism will be advocated as conceptual approach. The core argument following from this perspective is that often vague WTO rules may be used by governmental actors and societal interest groups as resources in domestic decision-making processes to advance their interests. Through such instrumentalizations this may lead to internalization of WTO rules by domestic actors and even to domestic institutionalization, but also to enhanced opposition against the organisation and its rules. Empirically, I process-trace three European Union (EU) decision-making processes on regulation with trade-restrictive consequences to explore the plausibility of the proposed perspective. First, the EU trade ban in seal products demonstrates the inadequacy of the rational functionalist mobilization-of-exporters argument by not fitting its expectations in a very-likely case. Subsequently, the decision processes on REACH and the carbon border tax proposal in the framework of the EU's emissions trading scheme (ETS) are presented to demonstrate the explanatory value of the critical historical institutionalist perspective.

The remainder of this paper is structured as follows. First, the relevance of studying domestic regulation in a trade workshop is briefly explained. Second, the rational functionalist argument about the influence of WTO law on domestic politics is introduced and critically evaluated and an alternative perspective is proposed rooted in critical historical institutionalism. third, three decision-making processes on EU regulation with a significant (potential) impact on trade flows are analysed to test this perspective.

[1] I conceive 'direct effect' in its meaning as it is used as a principle of EU law: meaning that international law can be invoked not only by states before a third party dispute settlement body but also by individuals in national courts.

THE INTERTSECTION OF INTERNAL REGULATION AND TRADE (POLICY)

The units of analysis of this study are EU environmental and health regulation. Why should we bother about these in the context of trade policy? As is well known, domestic regulation has made its way to the top of the international, and especially the EU's, trade agenda since the mid 1980s (e.g. Sauvé & Zampetti 2000; Young & Peterson 2006). This has several origins. *First*, increased economic interdependence in general has expanded the possibility of regulatory conflict. *Second*, the trade-relevance of regulatory measures is reinforced by changes in the nature of international economic transactions, namely the increased importance of foreign direct investment and trade in services. *Third*, domestic regulations have become more salient obstacles to trade in goods due to the reduced importance of traditional trade barriers as tariffs and quotas. And *fourth*, governments around the world have, to diverging degrees and in different tempos but certainly with the EU in the vanguard, displayed greater activism in environmental and health regulation since the 1980s.

In today's integrated world economy, it is not inordinate to state that domestic rules regulating tradable goods or services almost by definition affect trade. *To begin with*, as regulation normally raises the costs of production, it impacts on the competitive position of the domestically regulated firms. *Furthermore*, mostly unintentionally, diverging rules between countries are trade-restrictive by enhancing costs for firms that supply multiple markets by obliging them to develop different product or production process lines. *Last but not least*, domestic rules may be strategically designed by governments with the objective to shelter domestic firms from foreign competition, albeit without being explicitly discriminatory.

These considerations have led export-oriented firms and trade officials – in the absence of global political consensus for positive integration (i.e. rule harmonisation) – to advocate multilateral disciplines that go beyond non-discrimination on the autonomy of governments to set domestic rules. Their efforts led to multilateral agreements resulting from the Uruguay Round (1986-1994) imposing disciplines on domestic rule-making. Both the Sanitary and Phytosanitary Measures (SPSA) and Technical Barriers to Trade (TBTA) Agreements impose transparency requirements on WTO member states' regulatory processes (Howse & Tuerk 2001). The TBTA also contains the substantive criterion of least trade-restrictiveness, while the SPSA moreover includes the obligation to use international standards when appropriate to reach the intended regulatory objective and the conditions of scientific basis and sound risk assessment. As with the Uruguay Round agreements also the dispute settlement mechanism of the multilateral trade system was strengthened, this narrowing of the meshes of international trade law resulted in greater discipline on domestic regulatory sovereignty under the WTO in comparison with the GATT era. The perception of the consequent impediment to the autonomy of national governments to protect the environment and the health of their

citizens was one of the most important mobilizing factors for protesters at the notorious 1999 WTO Ministerial Conference in Seattle[2].

Nevertheless, it should be clear that neither WTO rules nor its dispute rulings enjoy direct effect. WTO dispute verdicts do not nullify a measure found inconsistent[3], nor can WTO rules be invoked in EU or national courts, as is also the case in most or all other WTO member states. This seems sometimes misunderstood by some NGOs and anti-globalization movements, and even some IPE scholars[4] and trade lawyers[5]. However, the absence of direct effect does not mean that the WTO is completely inconsequential. In the political science literature, its rules are believed to be enforced in a decentralized way. In the next section I introduce and criticize the dominant rational functionalist perspective explaining such decentralized enforcement and propose an alternative approach.

CONCEPTUALIZING THE INFLUENCE OF THE WTO ON DOMESTIC REGULATORY POLITICS: TOWARDS A CRITICAL HISTORICAL INSTITUTIONALIST PERSPECTIVE

Notwithstanding the absence of direct effect, few would dispute the importance of WTO rules for domestic regulatory politics. It is often argued that the WTO has the most powerful dispute settlement mechanism of all international organisations. It is believed that its rules and rulings are enforced in a decentralized way. Not in the judicial sense of interpretation and application by domestic judges (e.g. Desmedt 2000; Petersmann 2000, 2008; Neyer, 2005), but by providing incentives for domestic interest groups to lobby against WTO-inconsistent governmental action (e.g. Hoekman & Mavroidis 1999; Goldstein & Steinberg 2008). Such decentralized enforcement of WTO rules has been mostly explained from a rational-functionalist perspective[6]

[2] In the Guardian of Wednesday October 6 1999, an article on the protests in Seattle spoke about '[t]he awesome power of the World Trade Organisation to rewrite national laws to favour global business […] being challenged at the grass roots' (Rowell 1999).

[3] Or as has been so aptly articulated by Bello: '[w]hen a panel established under the WTO Dispute Settlement Understanding issues a ruling adverse to a member, there is no prospect of incarceration, injunctive relief, damages for harm inflicted or police enforcement. The WTO has no jailhouse, no bail bondsmen, no blue helmets, no truncheons or tear gas' (1996: 417).

[4] See for example Gill (1995; 2002) when writing about the neoliberal disciplinary effect of international organisations as the WTO that bind the hands of future governments (the political-juridical counterpart to disciplinary neoliberalism is called 'new constitutionalism').

[5] For an interesting discussion, see Lang: '[m]ost trade lawyers tend implicitly to talk about the causative effects of the trade regime as if it were an "intervening causal variable"' (2006: 112).

[6] Although often implicitly. Rational functionalism (also called (neo)liberal institutionalism) perceives international institutions as a solution to international and domestic political market failures that lead to Pareto inefficient outcomes. However by far most of rational functionalism's and liberal institutionalism's focus has been on the

(e.g. Goldstein 1996; Goldstein & Martin 2000; Goldstein & Steinberg 2008). Central in these explanations is the compliance mechanism of 'mobilizing exporters'.

The rational functionalist model of decentralized enforcement through the mobilization of exporters can be summarized as follows. When a complainant member state wins a WTO dispute, it may be authorized to impose retaliatory sanctions against the contravening country that is unwilling to bring a measure found WTO-inconsistent into conformity. Such sanctions normally take the form of raising tariffs on goods originating from the member state in breach of its WTO obligations. In the rational functionalist perspective, a legitimized retaliatory threat is supposed to reconfigure domestic politics in the contravening country by mobilizing exporters who would be affected by retaliatory sanctions, and through this mechanism lead to WTO-consistent reform. As Goldstein and Steinberg phrase it: '[s]ince countries publish a list of products that will be affected by the sanction, this has the effect of pitting those politically powerful, export-oriented producers against the industry that champions the contravening measures. If targeted smartly, the proposed retaliation list mobilizes sufficient political muscle within the contravening country to result in WTO-consistent reform' (2008: 276). However, I argue that this elegant mechanism is implausible to actually account for the domestic influence of WTO rules for two reasons.

First, I challenge that this mechanism can explain WTO-consistent *reform*. As '[t]he level of the suspension of concessions or other obligations authorized by the DSB [Dispute Settlement Body] shall be equivalent to the level of nullification or impairment' (GATT 1994: 369), it is unclear why (the threat of) retaliation should result in such reform. Since the harm suffered by exporters in the contravening country shall never be more than equivalent to the rents enjoyed by import-competing interests (understood as the value of trade respectively missed out and sheltered from), only by adding other assumptions or conditional variables can the outcome of interest-group conflict be decided. For example, it could be hypothesized that WTO-consistent reform will result from retaliatory threats *only if* the exporters targeted for retaliation are better organized than the importers protected by the measure found inconsistent[7]. However, I argue that in addition to this logical fallacy of the rational functionalist compliance model, also the *mobilisation* of exporters in decision-making processes on trade-restrictive regulation is unlikely.

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systemic level, explaining how international institutions alter otherwise suboptimal strategies of states by providing information, monitoring compliance, increasing iterations, facilitating issue linkages, defining cheating, etc. (see e.g. Keohane 1984; Katzenstein, Keohane, & Krasner 1998: 662).

[7] Another hypothesis might be that compliance with a WTO judgment against regulation that benefits a large group of diffuse interests is more likely than in a case of regulation benefitting a specific sector. Rational functionalism does a better job in explaining trade negotiations as a solution for the domestic political market failure that leads to a protectionist bias in unilateral trade politics. In that context, it is possible for governments to design an agreement that benefits more exporters (more) than it hurts import-competing firms.

This is because, s*econd*, the compliance that rational functionalists model is compliance as *reform* of *existing* legislation consistent with WTO dispute settlement *rulings*, or 'second-order compliance' (Fisher 1981 in Simmons 1998: 78). The question arises if this mechanism is transposable to explain decentralized enforcement of *standing*, substantive WTO *rules* in *initial* decision-making processes on trade-restrictive regulation, i.e. 'first-order compliance'. I argue that 'uncertainty about future losses' decimates the probability of the compliance mechanism of mobilizing exporters in initial decision-making processes[8]. This uncertainty has three cumulative sources. *First*, when a measure is deemed illegal by a WTO member state, it does not follow automatically that it will decide to pursue litigation[9]. *Second*, if it decides to initiate a dispute, due to the vagueness of WTO rules it is often uncertain if a measure will be found inconsistent by the WTO Appelate Body[10]. *Third*, even in the case exporters think the probability of a WTO dispute *and* condemnation high, during the initial decision-making process they will often be uncertain about which exports will eventually be targeted for retaliation. And while the first and third uncertainty factors may be reduced by exporting countries by already indicating during the initial decision-making process that they will pursue litigation and which products they will retaliate against if authorized (a tactic that may be called 'proactive smart targeting'), the (il)legality of a measure will in most cases (except the most blatant discriminatory measures) be indecisive.

Notwithstanding the foregoing, I argue that WTO law does affect regulatory politics. However, not by providing a mechanism that prevents WTO-inconsistent measures from being adopted through the automatic mobilization of exporters. But by serving as resources for a larger group of domestic actors that may be instrumentalized in domestic decision-making processes to (try to) translate their preferences into policy[11]. The mechanism is that governmental actors and societal interest groups may appeal to WTO rules to further their own interests. WTO law's influence is in this perspective not automatic but dependent on its activation in the domestic arena by governmental actors and/or societal interest groups.

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[8] This qualification has been implicitly acknowledged by Goldstein (e.g. 1998:150, emphasis added): 'if export groups *know with certainty* that they will face foreign retaliation as a result of a protectionist act by their government, they will counter the rent-seeking efforts by import-competing groups'.

[9] For a discussion of the literature on the determinants of litigation and alternative argument see e.g. Davis & Shirato (2007).

[10] This is one of the reasons why the European Court of Justice has been unwilling to review the legality of EU acts in the light of WTO obligations. EU legal advocates have claimed that 'it is difficult to point out one specific moment at which it can be established beyond doubt that WTO rules have been breached, even after a decision of a panel or report of the Appelate Body' and 'that it is rarely or never possible to speak of a sufficiently serious breach of WTO law' (in: Petersmann 2008: 378).

[11] Cortell and Davis (1996) offer a similar argument, but do not embed it in a historical institutionalist perspective.

From a critical historical institutionalist perspective, WTO rules can be conceptualized as part of the *strategically selective context* that favors certain regulatory strategies and outcomes over others (Hay & Wincot 1998; Hay 2002; Jessop 2005). WTO rules are strategically selective by serving as *resources* as well as as a *frame of reference* for actors in regulatory decision-making processes. They constitute norms rather than precise rules that may be *instrumentalized* by actors involved in such processes, and through iterative instrumentalizations may become *internalized* and even *institutionalized*. In this perspective the influence of WTO rules is mediated by ideas. Not WTO law as such but actors' perceptions of WTO rules and how these define what is feasible, legitimate, possible and desirable in domestic regulatory politics matter. It follows that the analytical role of *strategic action* is crucial: 'its analysis encompasses calculation, action informed by such calculation, the context within which that action takes place and the shaping of the perceptions of the context in which strategy is conceived in the first place' (Hay & Wincot 1998: 955). In this perspective the range of actors involved in decision-making processes on regulation with trade consequences is extended vis-à-vis in the rational functionalist model. I discuss below which public decision-makers and societal interest groups may be expected to become active in regulatory decision-making and what the effect of WTO rules on their preferences and strategic action might be.

Before that, it should be stressed that from this critical historical institutionalist perspective the relationship between WTO rules and domestic regulatory politics is viewed as *dialectical* and *historically embedded* at any given moment. This historical and dialectic relationship has several dimensions. *First*, perceptions of WTO rules are influenced by past disputes through learning processes[12]. *Second*, domestic events may alter actors' positions in the nexus of international trade and domestic regulation, inter alia through what might be called subsystem spillover (Howlett & Ramesh 2002: 36-37) from the regulatory to the trade subsystem[13]. Third, the domestic interest structure (Falkner 2007) as well as domestic institutional rules and reform to these

[12] Thus, shortly after the panel report in the tuna-dolphin dispute, then EU Trade Commissioner Leon Brittan answered to a written question on the 'effect of WTO deals on EU animal welfare provision' that 'World trade organization (WTO) agreements do not prevent the introduction of measures which are considered to be necessary for the protection of animals on the territory of the Community. However, *it is the Commission's view* that it cannot unilaterally impose the Community's welfare-based production standards on third countries. Under WTO rules *as currently interpreted* there is a conflict between WTO agreements and Community animal welfare provisions if the Community's welfare-based production standards are made a condition for imports from third countries' (Brittan, 1998, emphasis added). This view spurred the European Commission headed by its DG Trade to negotiate agreements on leghold trap standards with the US and Canada to replace its earlier proposed unilateral ban (see Princen 2002; 2003).

[13] So the regulatory crises in the EU in the second half of the 1990s (BSE, dioxine) led the EU to advocate more intensely the precautionary principle internationally (cf. Vogel, 2003; Kelemen, 2010).

may influence an entity's position in this nexus[14]. Finally, also a territory's position in the international economic structure will affect its and its constituents' positions as regulatory autonomy is dependent on market power (Drezner 2007; but while it is a necessary condition, it is not sufficient, see Bach & Newman 2007: 828). To sum up, WTO rules are continuously reproduced and modified (Koslowski & Kratochwil 1994: 227) through domestic decision-making processes in its shadow. This may both lead to stronger domestic internalization and institutionalization of WTO rules as well as increasing opposition against the organisation.

In the remainder of this theory section I outline which domestic groups may be expected to become active in regulatory decision-making processes in the shadow of the WTO and their expected roles. The influence of WTO rules on *governmental actors* has been reluctantly acknowledged in the rational functionalist literature on compliance with WTO law. For example Goldstein and Steinberg write '[t]here has been no de jure delegation to the regime in the sense that most countries have not given up legal authority under domestic law to maintain trade rules they deem appropriate. But there is "behavioral" delegation, meaning that countries have de facto begun to act as if they have given authority to the regime' (2008: 258). Countries that are convinced that the multilateral trading system is advantageous will refrain from infringing its rules. The mechanism at play is known as 'reputation costs', which has been called 'the linchpin of the dominant neoliberal institutionalist theory of decentralized cooperation' (Downs & Jones 2002: 95). The standard argument is that the major reason why states keep their international commitments is because they fear that any evidence of unreliability will damage their current international relationships as well as lead other states to reduce their willingness to cooperate in the future and what they are willing to commit in return for commitments (a 'risk-of-defiance premium'). This system-level liberal institutionalist explanation of compliance can and should be translated to the domestic level to understand the influence of WTO law on domestic regulatory politics. If governments are concerned with their reputation in the international trade system, they will try to avoid the adoption of WTO-inconsistent measures domestically. However, by transposing the mechanism of reputation cost avoidance to the domestic level, the black box of the government has to be opened. In my critical historical institutionalist perspective, not every governmental actor will be equally worried about the EU's reputation in the world trade system. A decision-maker's preference on trade versus non-commercial (e.g. environmental and health protection) objectives is dependent on her position and concomitant goals and concerns. A policy-maker (a minister, an M(E)P, an official in a ministry or Commission DG) dealing with environmental affairs will usually place ecological security goals above commercial goals, while the opposite goes for policy-makers dealing with trade. This has rational as well

[14] Hanson (1998) argued that the Single European Act resulted in unintended liberalization of European external trade policy, while Young (2004) qualified this argument by stressing that the single market program has also led to 'regulatory peaks'.

as sociological sources. In trade-restrictive regulatory decision-making, the EU should therefore be divided into different policy subsystems (Sabatier 1998; cf. Princen 2002). *First*, the 'trade subsystem', consisting of trade policy decision-makers. Actors in this subsystem will generally oppose trade-restrictive regulation, especially if it is believed to lead to a WTO dispute. *Second*, the 'regulatory subsystem', constituted by regulatory decision-makers. Policy makers in this group will give priority to protection first, and care less about commercial consequences. *Third*, the 'European competitiveness subsystem', composed of decision-makers that are responsible for a specific sector (e.g. industry, agriculture, transport). Actors from this subsystem will evaluate proposed regulation case by case on its expected economic impact on the performance of the sector they are responsible for.

At the *societal level*, I hypothesize that the most important role is played by transnational business. The argument that increased international economic interdependence has made insufficient the distinction between exporters and import-competing interests to understand trade policy has been made convincingly by among others Milner in her book *Resisting Protectionism* (1988). According to the author, the trade policy preferences of a firm are based on a cost/benefit analysis of a trade policy measure that has three sources: the consequences of *policy* reactions by foreign governments (i.e. retaliation); the *economic* effects of the opening or closing of markets; and the effects of a trade policy change on its *domestic market position* (Milner 1988: 21, italics in original). These sources of costs and benefits are differential for firms based on their international position. This position has two variables: export dependence and multinationality (operationalized as direct foreign investment and intra-firm trade). The higher a firm's export dependence, the less likely it is to prefer protection of the home market. Likewise, the higher a firm's multinationality, the less likely it is to prefer protection of the home market. This leads Milner to discern four types of firms with different trade policy preferences (1988: 24 et passim). Type I firms, with minimal export dependence and multinationality will view protectionism as very desirable. Firms that are significantly export dependent but not very multinationalized (Type II) will be likely to resist protectionism, primarily because they are interested in the opening of markets abroad (and avoiding retaliation) and only secondarily because they are interested in the opening of the home market. Firms with substantial export dependence and integrated multinationally (Type III) will resist protectionism most fiercely. Type IV, multinational firms with little export dependence and intrafirm trade but that face strong competition at home will have mixed interests. I argue that type III firms, what I call transnational business, will play an important role in decision-making processes on trade-restrictive regulation. They have a *direct* incentive for resisting trade-restrictive regulation vis-à-vis exporters' more indirect interest of avoiding retaliation. Another type of firms with a direct incentive for resisting protectionism that Milner overlooked are industrial users of imports and retailers (Destler & Odell 1987; De Bièvre & Eckhardt 2011). But as transnational businesses incorporate all three reasons for resisting protectionism (avoiding (potential)

costs stemming from: retaliation, higher import prices and different regulations), they have the greatest incentive for lobbying against trade-restrictive regulation, while they also have the greatest capacity to do so.

Finally, regulatory politics is about more than commercial effects and considerations and decision-makers and firms advocating and resisting protectionist standards. The trade-effects of regulation are often a byproduct of a decision taken for non-commercial policy reasons as health, environmental and consumer protection. This implies that also non-profit non-governmental organisations (such as environmental or consumer organisations) will be involved in the struggle for influence in the decision-making process.

I summarize my arguments. WTO rules and rulings do not have direct effect. The rational functionalist hypothesis that WTO law will be decentralized enforced by exporters under the threat of retaliation is little plausible since they are insufficiently certain about future losses to invest in collective action in initial decision-making processes. However, when viewed from a critical historical institutionalist perspective, WTO rules form an important component of the strategically selective context in which decision-making about regulation with external trade effects takes place. Policy-makers in the regulatory, trade and competitiveness subsystem, and import-competing firms, exporters, importers, retailers, transnational firms and NGOs all strategically interact under the shadow of WTO law. The central mechanism of WTO influence in domestic regulatory politics is that opponents of stringent regulation may leverage WTO law in the service of domestic policy battles[15].

EMPIRICAL TEST

Trade ban in seal products

Seal hunting has been a controversial issue since the late 1960s. Seals are killed and skinned mainly in Canada, but also significantly in Greenland, Namibia, Norway and Russia. In 1983, the European Community banned the import of seal pups' furs and fur skin products[16]. However, this turned out to be insufficient to satisfy animal welfare rights activists and the public. In a declaration of 26 September 2006[17], the European Parliament requested the Commission to immediately draft a regulation to ban the import and sale of all harp and hooded seal products, with derogations for traditional Inuit seal hunting.

[15] The language is borrowed from Alter (2001 in Capoccia & Kelemen 2007: 366), who applies it to the use of EU law in Member States.

[16] Council of the European Communities (1983) Council Directive 83/129/EEC of 28 March 1983 concerning the importation into Member States of skins of certain seal pups and products derived therefrom, OJ L 91, Brussels, 9.4.1983.

[17] European Parliament (2006) Banning seal products in the European Union. Declaration of the European Parliament on banning seal products in the European Union, OJ C 306 E/194, Brussels, 15.12.2006.

In the meantime, some EU member states were in the course of establishing a ban on trade in seal products. In March 2007, Belgium adopted the first EU national seal trade ban. A few months later, the Netherlands approved a similar decree. In both countries, the government was hesitant to propose a ban but was eventually pressurized by the legislative. On 25 September 2007, Canada requested consultations with the EU concerning these national trade bans.

The Belgian and Dutch bans increased the pressure on the Commission to come up with a proposal for an EU-wide ban. Hindrances to intra-communitarian trade resulting from a national derogation from a harmonised measure may be justified on exceptional grounds, as in this case public morality. Pursuant to Articles 14 and 95 TEC[18], the Commission shall then immediately examine the need to adapt the harmonized measure. Consequently, although the Commission had stated in May 2006 that 'there is no scientific basis linked to the conservation of the harp and hooded seals for extending the scope of application of Council Directive 83/129/EEC'[19], the de facto agenda-setting power of the EP and two Member States forced it to act. It requested the European Food Safety Authority (EFSA) for a scientific position on the method of killing and skinning seals. The EFSA concluded that many seals are killed rapidly and effectively without causing avoidable pain but in practice, effective humane killing does not always occur[20]. As a way to help ensure the humane killing of seals, a three-step method of hunting completed with effective implementation through independent monitoring was recommended.

Subsequently, on 23 July 2008 the Commission came forward with its proposal[21]. On the basis of the EFSA's opinion it decided that the best way to meet the overarching objectives of animal welfare, concerns of the general public and international obligations was a conditional ban. Trade in seal products would generally be prohibited but allowed under certain conditions, which concern the manner and method whereby seals are killed and skinned. The Commission proposal was thus designed to give incentives to countries with seal hunts to review and adapt their legislation on the killing and skinning of seals. It is only reasonable to assume that an important objective for the Commission of issuing a less trade-restrictive proposal than the Belgian and Dutch bans and the EP's request was to avoid a WTO dispute. Especially with regard to Canada the EU

[18] Articles prior to the Treaty of Lisbon, which still applied during this case.

[19] Committee on Technical Barriers to Trade (2006) Minutes of the Meeting of 7 – 9 June 2006 – Note by the Secretariat (G/TBT/M/39).

[20] EFSA (2007) Scientific Opinion of the Panel on Animal Health and Welfare on a request from the Commission on the Animal Welfare aspects of the killing and skinning of seals. *The EFSA Journal*, 610, pp. 1-122.

[21] Commission of the European Communities (2008) Proposal for a Regulation of the European Parliament and of the Council concerning trade in seal product. Brussels, COM(2008)469 final.

had good reasons to evade trade tensions as both entities were in the course of preparing free trade agreement negotiations.

Within the European Parliament, the rapporteur for the Internal Market and Consumer Protection committee (IMCO) in her draft report[22] proposed to replace the Commission's conditional ban by a labelling requirement. This was suggested as the most effective policy option to 'ensure that the Community's international commitments as regards trade in seal products are fully respected'[23]. However, the final report adopted by the IMCO was of a complete different slant than the draft report[24]. It provided for a total ban instead of the conditional ban as proposed by the Commission and was thus in total contradiction to the labelling scheme originally proposed by the draft. The report considered that commercial seal hunts are inherently inhumane and humane killing methods cannot be effectively and consistently applied and monitored. The IMCO report was fully in line with the opinion of the Environment, Public Health and Food Safety (ENVI) committee. The draft opinion of the International Trade (INTA) committee was also in line with the ENVI opinion but was narrowly outvoted. The trade in seal products ban has been a divisive dossier for the European Parliament. The issue of WTO-consistency has been central in that respect. Despite continuous differences of opinion in especially the conservative and liberal groups, the regulation on which a compromise was found with the Council on 24 April has been adopted by the EP on 5 May 2009 by 550 votes against 90.

In the Council, the discussions on the seal trade ban were less public than in the EP. The clear vote for a total ban in the EP and the overwhelming support by the public opinion made it difficult to block the adoption in the Council. On 27 July 2009 the Council approved the regulation with Denmark, Romania and Austria abstaining. Sweden, Finland and Estonia wished to express explicitly their concerns about the negative trade policy implications of the ban.

The seal trade ban has been an enormous victory for animal welfare groups. Coordinated action between animal welfare organisations on Member State, European and international level has been instrumental in the process leading to the EU trade in seal products ban. By contrast, European exporters have been conspicuous by their absence in the decision-making process, against the rational functionalist hypothesis. However, this should have been a very-likely case, as Canada was clear about its determination to initiate a WTO dispute against an EU ban (as it did against the Belgian and Dutch bans) and in the context of

[22] Diana Wallis (2008) Draft Report on the proposal for a regulation of the European Parliament and of the Council concerning trade in seals products. Committee on the Internal Market and Consumer Protection, 2008/0160(COD).

[23] In amendment 7 of the Draft Report.

[24] Diana Wallis (2009) Report on the proposal for a regulation of the European Parliament and of the Council concerning trade in seals products. Committee on the Internal Market and Consumer Protection, A6-0118/2009.

upcoming EU–Canada free trade negotiations. However, as I argued in the theory section, uncertainty about future losses prevented exporters from becoming active. The Canadian government never targeted certain 'swing' member states or pivotal export sectors for future retaliation to influence the intra-European decision-making process. Neither did the Canadian government explicitly threaten to change its mind on the planned FTA negotiations. This should not be surprising given the importance of increasing trade with the EU as the cornerstone of Canada's trade diversion strategy with the aim of diminishing its dependence on the US, which imports almost 80% of its exports.

On the other hand, the critical historical institutionalist expectation that WTO rules may cause disagreement among governmental actors even in the absence of interest group opposition has been confirmed, both within Member States and within and between the different European institutions. The perception of WTO-(in)compatibility of the different proposals was an important determinant of decision-makers' positions.

Registration, evaluation and authorisation of chemicals (REACH)[25]

In response to growing anxiety about the effects of chemicals on human health and the environment and in the context of low consumer confidence in general due to different regulatory failures in the mid 1990s, European environment ministers in the Council in 1998 requested the Commission to review the EU's chemical safety policy. It was *de facto* DG Environment that elaborated a new EU chemical safety strategy in the following two years. The result was presented by the Commission in a White Paper in February 2001[26]. Sustainability and the precautionary principle were to be the new strategy's central principles. The approach was revolutionary in several respects. *First*, the former distinction between 'old' and 'new' chemicals would be suspended with[27]. All chemicals would have to be registered, evaluated and the most dangerous ones authorised. This new system would be phased-in gradually and distinguish between chemicals based on the presumptive danger, use, exposure and quantity of production or import. *Second*, evaluation would become the

[25] Of course, it is impossible to discuss REACH, about which has been said that it has provoked the greatest lobbying battle in the history of the European Union, anywhere near comprehensively in the space of less than 2.000 words. Therefore, I will focus mainly on the role of WTO-consistency in the decision-making process and on the mechanisms hypothesized in the theory part in general. I am forced to brush aside many details of the REACH regulation and the decision-making process on it. For interesting manuscripts discussing the decision-making process of REACH more generally see inter alia: Lind (2004), Selin (2007) and Fisher (2007).

[26] European Commission (2001) White Paper: Strategy for a Future Chemicals Policy. Brussels, 27.2.2001, COM(2001) 88 final.

[27] In the previous system, only chemical substances marketed after September 1981 had to be tested, thereby providing disincentives for innovation while 'old' chemicals were probably also the most dangerous.

(including financial) responsibility of the industry instead of government. *Third*, producers, importers as well as processing firms would be obliged to provide information on their products. *Fourth*, industry would be liable for chemical safety. And *lastly*, it would become obligatory to replace dangerous chemicals if a safer alternative is available.

The White Paper was given a warm reception by the 'green' member states and MEPs. It was also a Green MEP that became the rapporteur for the responsible ENVI committee and its report supported the Commission wholeheartedly and called on it to further strengthen its proposal. This opinion was not fully shared by the plenary that adopted a slightly less supportive report and cautioned against possible economic costs. Nonetheless, in the meantime, the European Council had in June 2001 in Gothenburg expressed its support for the White Paper and urged the Commission to even strengthen its proposal.

However, in the autumn of 2001 opposition against REACH started to build up within and outside the EU. While the European Chemical Industry Council (CEFIC) had until then acted very modestly in its attempt to influence the new European chemical safety strategy, when it was confronted with the revolutionary White Paper and the supportive reaction by the European Council and the Parliament it changed strategy. Its lobbying became much more aggressive. Simultaneously, with the publication of the White Paper also in the United States (US) the chemical industry had become alarmed. Different US departments and agencies coordinated their actions to try to moderate the new strategy and this was given highest diplomatic priority. Both the American government and CEFIC emphasized that the proposed strategy would be WTO-incompatible. To be fair, this WTO-inconsistency critique has been only one among many arguments directed against REACH by the chemical industry. Other were that REACH: was a 'naïve' Swedish initiative[28]; would be detrimental for downstream users and SMEs; would cost millions of jobs; and would lead to a multiplication in animal tests. In that way, CEFIC managed to gain the support of other interest groups as SME's, trade unions and even animal rights organisations: an impressive Baptist-bootlegger coalition! But the rhetorical artillery that really turned the tide was its framing of REACH as a policy proposal that was diametrically opposed to the competitiveness principle, which had become the EU policy principle of principles with the adoption of the Lisbon strategy in 2000.

The strategy worked. When the Commission presented its proposal at the end of 2003[29], it had significantly accommodated CEFIC's lamentations, and incorporated none of the more stringent adaptations

[28] Sweden was one of the Member States that requested a review of the EU's chemical safety policy in 1998, the then Environment Commissioner was Swedish (Margot Wallström) and so was the rapporteur in the ENVI (Inger Schörling).

[29] European Commission (2003) Proposal for a Regulation […] concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) […].

requested by the EP or the European Council. This only incited the chemical industry to increase its lobbying efforts. In the meantime, the support of EU heads of state and government waned because of competitiveness concerns. In December 2003 British prime minister Tony Blair, French president Jacques Chirac and German chancellor Gerard Schröder in a joint formal letter to Commission President Romano Prodi expressed their anxiety about the effects of REACH on EU competitiveness. Moreover, they wanted the Competitiveness Council to become responsible instead of the Environmental Council. This followed the European Council of October 2003 where REACH was discussed under the denominator 'Creating Favourable Conditions for Growth and Employment – Enhancing Competitiveness of the European Economy'. Under these circumstances the Commission Proposal was further watered down. The battle field then shifted to the European Parliament and the Council (where the Competitiveness Council indeed became responsible), who would co-decide on the proposal. The Regulation was further diluted during co-decision (inter alia on the following points: the produced or imported volumes above which registration obligations apply; requirements for authorizing production or import; and conditions for the substitution of potentially hazardous chemicals with available safer alternatives) notwithstanding attempts to the contrary by the ENVI committee in the EP. In December 2006 the European Parliament adopted the Regulation in second reading[30].

The question can legitimately be raised if WTO rules have actually influenced the outcome, i.e. contributed to the watering down of REACH, or that they have been only a subordinate factor. This can only be answered by counterfactual reasoning. I argue that WTO rules have been influential. While competitiveness has undeniably been the decisive argument and consideration for lowering the burdens of REACH on the chemical industry, the argument of WTO-consistency was a very important, maybe even essential, complement. For the big transnational firms that dominate CEFIC *domestic* competitiveness understood as a level playing-field *within* the European Union was not the main concern. As these firms are very export-dependent[31] and multinationalized, their competitive position *on third markets* is as –if not more– important as within the EU. Consequently, that imported chemicals would be burdened with the same requirements from REACH accommodated their interests only partially. As the prospect of a California effect that would export REACH to the United States was meagre, and even much less likely in the fast-growing and increasingly chemical-hungry economies in the Middle East and Asia, their real interest was to mitigate the REACH

[30] European Communities (EC) Regulation (EC) No 1907/2006 […] concerning the Registration, Authorisation and Restriction of Chemicals (REACH) […], OJ L 396/49, Brussels, 30.12.2006.

[31] As an indication of the importance of exports for the European chemical industry (and indeed, of the chemical industry for European exports): in 2000 (the year preceding the White Paper) the EU exported chemicals for a value of 103.4 billion Euro, and recorded a trade surplus of almost 50 billion Euro (CEFIC 2001:3). The same year, EU chemical exports represented more than 12% of its total exports (WTO 2001:22).

requirements. This also explains why CEFIC's interest concurred with that of the American transnational chemical industry, which also risked losing competitiveness within the US (vis-à-vis firms that do not export to the EU) as well as in emerging economies by having to conform to stringent regulation in the EU, still their most important export destination. It is revealing that in 2004 CEFIC and the European Association of Chemicals Distributers (FECC) issued a 'Discussion Paper on the Trade Impact of Reach' together with the American Chamber of Commerce to the EU[32]. Under these circumstances WTO-consistency was a convenient, and arguably essential, complementary argument to question at the same time the international legitimacy of REACH and the feasibility of levelling the playing-field within Europe by including imported chemicals and products. In that way CEFIC succeeded in rallying also respectively trade and competitiveness decision-makers, importers and domestic firms (also SMEs) for their cause.

While CEFIC and others (for example the Foreign Trade Association that represents importers and retailers) have been very actively lobbying for a less (trade) restrictive REACH and have underpinned their claims with the WTO-consistency argument, 'pure' exporters, let alone from other sectors than chemicals, have hardly opposed REACH to avoid retaliation. Again, as in the trade in seal products case, the US government has strongly condemned REACH and threatened to initiate a WTO dispute but has never *a priori* specified this threat by targeting member states or products.

As hypothesized by the critical historical institutionalist perspective European decision-makers were divided on REACH and on the WTO-consistency of (parts of) the different versions. That the dominant frame through which REACH was perceived changed during the decision-making process spilled-over to the division of responsibility and control over the process. This had a decisive effect on the outcome. In the first phase of the process, the environmental regulatory subsystem was dominant and this was reflected in a very far-reaching White Paper. When the European chemical industry and trading partners, most importantly the US, began vociferously opposing the proposed regulation, decision-makers from the competitiveness and trade subsystem became involved and gradually took over control. This resulted in a significant watering-down of the regulation.

Carbon border tax in EU-ETS post-2013[33]

A carbon border tax (CBT) is a mechanism that is being discussed within the European Union since 2006 in the framework of the EU's climate and energy policy and more specifically the EU's emissions trading scheme (ETS) post-2013. The EU ETS had first been launched in 2003 to implement the EU's Kyoto Protocol pledge to reduce greenhouse gas (GHG) emissions by 8% in 2012 compared to 1990 levels. Requested to that end by

[32] AmCham EU, CEFIC & FECC (2004) Discussion Paper on the Trade Impact of Reach, Brussels, 30 November 2004.

[33] The same disclaimer as with regard to the section on REACH applies.

the European Council in September 2005, the European Commission started elaborating an integrated climate and energy strategy for the European Union. It presented a Green Paper on the subject in 2006[34] that was welcomed on all sides. Fostered by such support, the Commission subsequently came forward with a very ambitious Communication in January 2007[35]. A double strategic objective was proposed for the European energy and climate change policy: to aim through international negotiations for a reduction of GHG emissions by developed countries with 30% by 2020 compared to 1990 levels underpinned by an immediate and unconditional EU commitment to reduce GHG emissions by 20% in the same period. Therefore, the Communication proposed specifically to increase by 2020 the share of renewable energy in total EU energy consumption to 20% and of biofuels in transport to 10%. These objectives were in the course of 2007 translated into concrete legislative proposals that were presented finally on 23 January 2008 as the 'EU climate and energy package'[36].

The announcement of the package represents the discursive zenith of climate change policy as the EU's latest internally as well as internationally legitimizing *raison d'être*. The title of the press release by which the package was proclaimed is telling: 'Boosting growth and jobs by meeting our climate change commitments'. Until then, the belief was widespread that climate change mitigation and energy supply security policies '[offer] a stepping stone to modernise the European economy, orientating it towards a future where technology and society will be attuned to new needs and where innovation will create new opportunities to feed growth and jobs'[37]. However, when subsequently, with the prospect of intra-European negotiations on the distribution of GHG emission reductions, Member States and industries began to calculate the costs of their prospective efforts, the atmosphere of the discussions changed. Competitiveness concerns soon trumped sustainability considerations and this was amplified when the financial-economic crisis hit Europe after the collapse of Lehman Brothers on 15 September 2008.

Already in the months preceding the Commission proposal, a new buzzword had become omnipresent in European circles: 'carbon leakage'. This term expresses the fear that unilateral EU climate change policies will lead to a global increase in GHG emissions instead of a reduction by spurring energy intensive industries to delocalize production from the EU to countries with less stringent climate change

[34] European Commission (2006) Green Paper: A European Strategy for Sustainable, Competitive and Secure Energy. Brussels, 8.3.2006, COM(2006) 105 final.

[35] European Commission (2007) Communication from the Commission to the European Council and the European Parliament. Brussels, 10.1.2007, COM(2007) 1 final.

[36] European Commission (2008) […] 20 20 by 2020: Europe's climate change opportunity. Brussels, 23.1.2008, COM(2008) 30 final.

[37] Ibid., p.2.

regulation. To anticipate such effect, then French prime minister de Villepin already in November 2006 promoted the idea of a CBT on imported products to offset competitiveness losses for European industries following from ambitious EU climate policies. Then EU Trade Commissioner Peter Mandelson immediately rejected this idea in public saying it would lead to trade disputes and even a trade war while Commissioner for Industy at that time Günter Verheugen cautiously welcomed it. A compromise was eventually found within the Commission. In the Directive it was eventually decided that the EU would strive unambiguously towards an international climate change agreement, but that until such agreement is in place, the EU would offset competitiveness losses for European energy-intensive industry by temporarily allocating ETS emission allowances for free to firms that meet certain criteria[38]. It was stipulated that the European Commission would review the situation in June 2011 in the light of the results of the international negotiations, but already in 2010 would signal which energy-intensive sectors are threatened by carbon leakage. Essentially, the decision was put off until after the international climate change negotiations in December 2009 in Copenhagen. During the co-decision procedure, the Council further relaxed the criteria for free ETS allowances in comparison with the Commission proposal. Notwithstanding critique by the Greens that this would create windfall profits, the EP endorsed the climate and energy package on 17 December 2008 by an overwhelming majority. In December 2009, the Commission published its list of sectors that are deemed exposed to the risk of carbon leakage. The list contained more than 100 sectors that are jointly responsible for more than 70% of EU GHG emissions. In that way, the auction principle that was originally the default rule in the EU-ETS post-2013 is being largely eroded.

The decision to decide later on carbon leakage offsetting measures had the effect of keeping the discussions smouldering. Especially French president Nicolas Sarkozy was tireless in promoting the introduction of a CBT. Before the Copenhagen negotiations, a CBT was advocated to serve as a stick to push laggards towards an ambitious international agreement. After the failed negotiations it was promoted to offset competitiveness losses following from the EU's provisional go-alone climate strategy. France gained support from Germany, Italy, the Baltic States and Belgium but other Member States as the United Kingdom, the Netherlands and Austria remained fiercely opposed. Within the Commission, then European Commissioner for Taxation and Customs Union Laszlo Kovacs supported the idea of a CBT. He was objected fiercely by Commissioner for Trade Karel De Gucht and later the idea has also been dismissed by Commissioner for Climate Connie Hedegaard. Within the EP, the INTA committee strongly opposed a CBT that was deemed WTO-inconsistent.

[38] European Communities (2009) Directive 2009/29EC […] to improve and extend the greenhouse gas emission allowance trading scheme of the Community, Brussels, 5.6.2009, OJ L 140/63.

Among societal groups, the European Trade Union Confederation (ETUC), European Environmental Bureau (EEB) and the Platform of European Social NGOs (Social Platform) were supportive of a CBT. What is most striking is that the European associations of energy-intensive sectors strongly opposed a carbon border adjustment mechanism and they vehemently emphasized the WTO-inconsistency of this proposal. Instead, they requested free allocation of emission permits to neutralize the risk of carbon leakage. In that way, they preferred a system where they compete on the EU market against imports that are not subjected to any or equal climate measures above a mechanism that equalizes carbon emission reduction burdens through a CBT. How can we understand this? The explanation is multifaceted. *First*, it is nominally cheaper for them to only have to incur the costs of limiting carbon emissions than on top of that also having to pay for emission permits. *Second*, free allocation of emission permits has produced immense windfall profits for several firms and sectors during ETS I and II and this may induce a desire to continue the system. *Third*, as with REACH, international and middle- to long-term considerations seem to have been essential, especially for transnational firms. These firms, with branches in third markets, would not only have to pay emission permits for their production within the EU but also for their exports to Europe from outsourced production. Moreover, by requesting and acquiring free allocation of allowances within the EU, they may oppose the introduction of carbon taxes or auctioned emission permits also in third countries where they have production located by using the competitiveness-with-Europe ('where we don't have to buy permits') argument.

WTO-incompatibility has been a decisive argument against including a CBT in the EU-ETS III to offset carbon leakage. Immediately after this was first proposed on the highest political level by de Villepin in 2006, then Trade Commissioner Mandelson fiercely rejected the idea. He was joined later by trade ministers in several liberal-minded Member States and the INTA committee in the EP. Even when the WTO and the UNEP released a study in 2009 not ruling out the WTO-consistency of a CBT[39] this did not change the use of the WTO-incompatibility argument against the proposal. When European associations from the energy-intensive sectors realized that the alternative to a CBT, free allocation of emission permits, was more attractive they joined the opposition and also emphasized WTO-incompatibility.

CONCLUSIONS

In this paper I focused on what has become an increasingly important problem of EU trade policy, namely the interface between internal regulation and international trade. More specifically, I seeked to contribute to our understanding of the influence of the WTO on EU regulatory politics, given the absence of direct effect of WTO law and dispute rulings. I argued that the rational functionalist hypothesis that exporters will lobby for

[39] UNEP & WTO (2009) *Trade and Climate Change: A report by the United Nations Environment Programme and the World Trade Organization* (Geneva: World Trade Organization).

WTO-consistency to avoid retaliatory sanction against their exports is, while having the appeal of theoretical elegance, improbable in first-order regulatory decision-making processes. A critical historical institionalist perspective has been advocated as a more contingent but reality-prone alternative. This perspective takes as a starting point the vagueness of WTO rules and infers from that assumption the necessary importance of how actors interpret and represent them. WTO rules are thus conceived as flexible resources that may be put into service by domestic interest groups and decision-makers to advance their interests in regulatory policy battles. WTO-consistency is, for some, a means rather than an end. Through such iterative instrumentalizations, particular conceptions of WTO law may become domestically internalized and institutionalized. While not elaborating profoundly on this in this paper, the influence of WTO law is affected both bottom-up and top-down by domestic and international events and evolutions as respectively regulatory crises, changes to domestic interest structures and decision-making rules and dispute rulings and an alteration to the international economic structure.

The casestudies illustrate the value of the critical historical institutionalist perspective. What I believe is most convincingly validated in the case studies is that WTO rules are used as resources by both interest groups and decision-makers while being themselves the subject of discussion and conflict. I do not claim that the argument of WTO-inconsistency has been the core reason for accomodating REACH and CBT to the regulated sectors' demands. But in combination with a competitiveness discourse, the instrumentalization of WTO rules have added to regulatory outcomes that are less burdensome.

Finally, what does this paper on the influence of the WTO on regulatory politics within the EU teaches us about EU trade policy (studies) in general? I believe at least two lessons may be drawn. First is that as trade policy is becoming ever more intertwined with internal policies[40] –leading to increasing expansion of the scope of trade policy and its consequent politicization– a holistic perspective on EU trade policy is invaluable. Specific analyses of particular trade dossiers and of the relationship between particular EU actors while bracketing the wider environment remain valuable as such. But they must more often at least be complemented by studies that take into full account the wide variety of actors that have become involved in EU trade policy as well as situate trade policy in the broader realm of EU and international (economic) politics. Second, EU trade policy is a moving target that is constantly implemented not only in the 'shadow of the WTO' as analyzed in this paper but also in the shadow of the past as well as the future. Past domestic and international events, evolutions and decisions as well as expectations about the future inform EU trade policy.

[40] As is also recognized in the latest Commission trade communication (2010) 'Trade Growth and World Affairs: Trade Policy as a Core Component of the EU's 2020 Strategy'. In 2011 the Commission will present its views on how to develop the mutual supportiveness of internal and external market opening, in particular in goods and services regulations (p.16).

A critical historical institutionalist perspective offers a comparative advantage to study EU trade policy in such a complex internal and external environment.

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