

A Conflict of Institutions?
The EU and GATT/WTO Dispute Adjudication

Christina L. Davis

Department of Politics
Princeton University

March 12, 2007

Abstract

This paper argues that EU institutions reduce the effectiveness of the mechanisms that enforce international trade law. Legal strategies that narrow the policy agenda fail to circumvent veto actors, while competing claims of European integration and the diffusion of accountability across members reduce the pressure for compliance with WTO rulings. The paper analyzes EU compliance in GATT/WTO adjudication and discusses in detail the beef hormone dispute, which represents the most longstanding case of noncompliance with WTO rules.

1 Introduction

Why has the EU been obstructionist in GATT/WTO adjudication? This question holds wider relevance for understanding the conditions under which states will comply with international law and how the EU policy process influences its trade policy. The central hypothesis of this paper proposes that EU institutions and values interfere with the operation of reputation effects and normative pressure that are the mechanisms for enforcement in the trade dispute system.

International institutions promote cooperation most effectively when they compensate for a problem of domestic institutions. The GATT/WTO dispute settlement process brands specific policy violations, which increases reputational and normative concerns to counter opposition by domestic interests. This pressure for compliance, however, is weakened in the context of EU institutions. EU-level politics diffuses accountability among member states, and thereby reduces concern for reputational harm from violation rulings. At the same time, the goal of European integration provides a competing source of normative legitimacy with the goal of free trade. The narrow issue scope of adjudication fails to counter deadlock within the EU institutional process with many veto players.

The poor fit between compliance mechanisms and EU institutions is especially evident for agricultural policy. This sector has central importance for EU integration - agricultural policies represent the most far-reaching common policy and spending for agriculture still composes nearly half of total EU expenditures. Strong vested interests supported by broad social legitimacy, segmented policy-making with multiple veto actors, and inter-locked policies hinder reform efforts. An international negotiation structure that broadens the policy process with the creation of issue linkages counters these obstacles by changing the EU-level aggregation of interests and policy-making venue. In contrast, the narrow focus of adjudication fails to change the domestic institutional context and aggregation of interests. Yet because agriculture represents the sector with the largest

number of GATT/WTO dispute cases, it is also a central issue area for trade adjudication. Thus the story of European noncompliance in GATT/WTO revolves around its inability to change agricultural policies to comply with trade rulings. But the answer is not simply the strength of the farm lobby, because Europe has reformed agricultural policies successfully in other negotiation contexts. The difficulty encountered during international adjudication of agricultural policy with the EU represents more than a conflict of interest - it represents a conflict of institutions in terms of basic rules, norms, and procedures.

In the next section, I present evidence of the puzzle which motivates this paper - the record of EU resistance within GATT/WTO dispute settlement. In section 2, I discuss the mechanisms through which the WTO promotes liberalization and why they have encountered obstacles in the EU policy process. Section 3 examines the beef hormone dispute as a case where the strongest measures available for enforcement of international law have failed to change a policy of modest economic interest. The case highlights the contrast between EU refusal to change its hormone ban under pressure from legal rulings and its acceptance of the Sanitary and Phytosanitary Agreement in the Uruguay Round negotiations. Section 4 offers concluding remarks.

2 The Troubled History of Europe in GATT/WTO Adjudication

The EU ranks among the least cooperative trading entities across the record of legal adjudication of trade disputes. The EU is notorious for delaying tactics, and on several occasions blocked formation of a panel or adoption of a panel report when this was possible under the more lenient rules of the 1947 GATT system.¹ Since becoming a full participant in GATT legal affairs in 1960, the EC established a pattern of non-cooperation. Over the period from 1960 to 1994 under the rules of the

¹Hudec (1993, p. 48) refers to the 1976 case, *United States v. European Community: Programme of Minimum Import Prices, Licenses, Etc. for Certain Processed Fruits and Vegetables*, as a “textbook lesson in the many ways a GATT lawsuit could be obstructed.”

1947 GATT dispute settlement proceedings, the EC only offered a concession for 44 percent (25 of 57 disputes) when it was a defendant, in contrast to non-EC members, which offered a concession for 71 percent of defendant cases. This record is worse than both Japan and the United States, which offered concessions in respectively 88 percent (21 of 24 disputes) and 76 percent (40 of 53 disputes) of their cases as a defendant.² In the high profile dispute with the United States over the EC oilseeds subsidy program, modest concessions by the EC were achieved only after two GATT rulings, U.S. threat of sanctions, and the wider context of the Uruguay Round (Hudec, 1993, p.560). The uncooperative position of Europe is also evident in the findings by Bayard and Elliott (1994), who examine U.S. Section 301 negotiations. They conclude that GATT procedures do not add substantial leverage. However, they note that this is largely due to including the EC, which lowers GATT success from an average of 71 percent of cases to 54 percent of cases (Bayard and Elliott, 1994, p.90).

Recalcitrance in adjudication has continued under the new rules of the WTO. Following the establishment of the WTO in 1995 with strengthened dispute procedures, the EU has faced sanctions rather than comply with rulings against its ban on hormone-treated beef and its import regime for bananas. The EU only changed its banana import regime after multiple rulings and implementation of sanctions, and currently faces new legal challenges against its implementation.³ The ban on hormone-treated beef remains in place, despite WTO-authorized sanctions by the US and Canada against European goods since 1999. These cases and others contribute to the observation that the median time to settlement for the EU as a defendant in WTO adjudication is 46 months, which is

²A concession partially or fully remedies the alleged violation. I thank Marc Busch for sharing his data on GATT disputes, which includes all complaints filed, whether they ended in consultation or continued to a panel. See Busch (2000) for full description of data.

³Under a settlement reached in 2001, the EU was to phase in a tariff-only import regime by January 1, 2006. On November 16, 2006, Ecuador formally requested a WTO Article 21.5 panel to review EU compliance with this agreement.

much greater than either the 26 month duration of disputes expected from a strict observance of WTO time limits or the overall median for members of 34 months.⁴

Agriculture has been a focal point for WTO disputes filed against the EU with 27 of the 46 disputes filed against the EU by the end of 2006 related to agriculture.⁵ Of the nine cases in which the EU has appealed a ruling against an EU policy, five have addressed agricultural policies. While many countries protect their farmers, it is not true that all countries are more uncooperative on agricultural policy within dispute adjudication. Hudec (1993, p.331) finds in a comprehensive analysis of GATT disputes that “complaints against restrictions on agricultural trade do not, on the whole, produce worse results than complaints against other types of trade restrictions.” Thirty-five percent (113 of 319) of WTO complaints filed between 1995 to July 2004 were about agriculture. Only seven WTO cases have led to authorization of retaliatory measures for noncompliance, and of these seven the only two on agriculture measures are the beef hormones and banana cases involving the EU.

Skeptics of theories about international institutions would cite the uncooperative behavior by the EU as evidence that states only follow the rules when it is in their interest to do so and no important domestic groups resist cooperation (Mearsheimer 94/95; Strange 1982). Special treatment of the highly sensitive agricultural sector supports the notion that domestic politics conditions when states are willing to cooperate within an international institution (Downs and Rocke, 1995). The power of domestic interests may be magnified in the EU policy context. Young (2004) argues that European decision-making rules make the EU even more prone to have regulatory peaks protecting sensitive areas that conflict with trade rules because EU level policies tend to be set at levels that reflect the preferences of the most risk averse member. Codification of such rules

⁴The figures are from Davey (2005), who calculates the time frames for country medians in terms of elapsed time from complaint to settlement as of December 2004.

⁵I follow convention to count multiple complaints filed on one issue as a single dispute.

makes them harder to change.

However, it is not the case that Europe simply refuses to change its agricultural policies or accept international regulations. The Uruguay Round trade negotiation led the EU to undertake the most comprehensive reforms since the establishment of the Common Agricultural Policy (CAP). Although European resistance to agricultural liberalization has been an obstacle in current Doha Round negotiations, its agriculture group negotiation proposal to eliminate export subsidies and cut domestic subsidies by thirty percent nonetheless shows some prospect for concessions in this area. Even in the area of standards for food and plant safety, the EU accepted the introduction of science-based rationale for standards in the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). This pattern indicates that cooperation varies according to the negotiation context as well as the domestic politics of the issue area.

3 Complementarity and Conflict Between Institutions

International institutions shape state behavior through creating an incentive structure that promotes cooperation, but at the same time, domestic institutions influence how states respond to those incentives. International cooperation depends on a complementary fit between the international institution and domestic political institutions. This is especially true for the EU, where it is not the domestic political process of a single government, but rather a supranational institution that forms the internal process. Theories about two-level games have highlighted the importance of interaction between domestic and international politics (e.g. Putnam, 1988; Milner and Rosendorff, 1997), and research on trade negotiations shows that bargaining leverage is stronger when foreign pressure augments the influence of internal actors with common interests (e.g. Odell, 2000; Schoppa, 1993). While these studies focus on bilateral negotiations, the same logic applies to institutions - the multilateral dispute settlement process depends upon domestic institutions that create concern

for reputation and rule compliance and capacity to change policies found in violation.

The literature on international institutions has examined how international institutions correct for market imperfections, which result from lack of certainty and enforcement of contracts in an anarchic world system (Keohane, 1984). The role of international institutions operates not only at the international level, but also at the domestic level. Often it is imperfections in political markets through rent-seeking behavior of interest groups that leads to uncooperative policies such as trade protection. The key question then is whether foreign pressure through an international institution offers unique tools to change the internal balance in favor of liberalization. Issue linkage is one way that an international institution reduces domestic obstacles to liberalization by expanding the scope of interests and policy jurisdiction (Mayer, 1992; Davis, 2004). International institutions also influence negotiation outcomes through monitoring compliance. Those who value future trade opportunities will support policies to maintain a good reputation. Punishment mechanisms through authorized retaliation provide even more tangible reasons for targeted industries to lobby for a change of the offending policy. International legitimacy also helps to create social and normative pressure for compliance (Kratochwil, 1989; Reus-smit, 2003). By defining appropriate behavior, a legal ruling clarifies the substantive actions demanded by international obligation and enhances the “compliance pull” of rules (Franck, 1990).

WTO Mechanisms to Promote Liberalization

The WTO trade system has two distinct kinds of trade negotiations: trade rounds and dispute settlement proceedings. Although falling under the rubric of one international institution and serving the same goal to promote liberalization, these two kinds of negotiations interact with the domestic political context by different mechanisms. Trade rounds apply issue linkage strategies to promote trade-liberalizing agreements with a comprehensive scope. Dispute settlement proceedings

apply legal framing strategies to enforce existing liberalization commitments and focus on a single policy (Davis, 2003). While trade rounds broaden the agenda in a bargaining process, dispute panels narrow the agenda for an adjudication process.

Dispute settlement proceedings are an example of high legalization (Abbott et al., 2000). The dispute process begins with a formal complaint followed by a consultation stage and an adjudication phase that issues a ruling on whether the particular policy violates commitments under WTO rules. The process may lead to authorization of sanctions. Multilateral dispute settlement procedures promote trade liberalization by disseminating information about violations and aggregating enforcement power (Maggi, 1999). Concern for trade reputation and potential retaliation motivate states to liberalize policies when threatened with a negative ruling (Reinhardt, 2001). In addition to economic interests lies the respect for law. Jackson (1998, p.170) contends that the real influence of the dispute settlement procedures arises because the third party ruling based on legal principles holds credibility that countries cannot ignore. Together, trade interests and normative value of the rules system create a sense of 'international obligation' that motivates countries to follow WTO rulings (Kovenock and Thursby, 1992). Within governments, trade ministries and foreign ministries engaged in the day to day conduct of international affairs will be sensitive to the impact of one case on future reputation and the strength of the trade system, and these officials will be the most likely to favor compliance with legal rulings. On the other hand, domestic agencies may be indifferent to the effects of internal policies on external relations and be less concerned by rulings. To the extent that these interests and norms are valued by domestic society, the legitimacy conferred by a legal ruling will persuade the domestic audience that liberalization is necessary.

The legal nature of dispute settlement creates a narrow agenda focused on the single policy complaint. This is necessary in order to make a judgment on the legal status of the policy. The focus on a single policy problem also is important for the informational role of dispute settlement

because it helps place the spotlight on one policy. The domestic costs of protection policies are often hidden from public view, such as indirect price support policies or complicated export restitution payments, and the ruling brings attention to the issue. The external costs in terms of reputation are also made more visible as the policy ruling becomes an agenda item at WTO meetings and a news headline. Finally, the narrow focus on a single policy makes it easier for the international institution and trade partners to adjust incentives so that they are sufficient to outweigh the interests that support the given trade barrier. Especially in the case of the WTO authorization of retaliation measures, the WTO arbitration panel calculates a specific amount that is deemed equivalent to the trade loss suffered as a result of the trade barrier.

EU Institutions as an Obstacle for GATT/WTO Dispute Settlement

The narrow focus necessary for the legal evaluation of a dispute works against its eventual success in the EU policy process. Linking together multiple policy areas would render a case unmanageable in a legalistic framework. However, this also means that on the domestic agenda the issue is addressed as a single policy. Typically a dispute settlement recommendation will call for a policy change such as ending an import ban or eliminating a subsidy for a specific commodity. Given the EU policy context where a broad policy package is often necessary to reach consensus among members, the narrow focus of the legal approach becomes a liability.

In addition, the threat of retaliation has less impact in the context of EU decision-making. WTO arbitration limits the amount to the estimated trade harm suffered as a result of the policy measure ruled in violation. This already represents a modest penalty, and frequent reform proposals call for higher levels of retaliation such as retroactive damages. The penalty carries even less power to bring compliance in the EU because the weight of sanctions is spread across several governments, while any single government could threaten to veto the policy change required for compliance.

During the dispute over the EU banana import regime, the United States tried to address this incentive problem through “carousel retaliation” that rotated sanctions across EU products and members. The EU, however, challenged the legality of the practice and the United States never fully implemented its use.

European integration complicates the question of legitimacy and international obligation. Preferential trade arrangements and the CAP are central pillars in European integration. Yet these same policies create tension with the world trade rules. On trade issues related to these topics, European member nations must choose whether to give preference to European rules over international trade rules. Meunier and Alter (2006) discuss how nested institutions allow for overlapping commitments that create competing obligations. They use the dispute over the EU banana import regime as an example where problems related to nested institutions (the Lome Convention, EU, and WTO) made it more difficult to resolve a dispute over relatively minor trade interests. While EU treaty law recognizes the primacy of international law and the fact that GATT law is binding on EU institutions, the ECJ has ruled that the Community did not have to take into consideration GATT rules when evaluating the legality of a regulation (Petersmann, 2000, p.277). According to Hudec (1988, p.43), the vulnerability of important EU policies to criticism on the basis of international law and the uncertainty regarding the status of GATT law within the EU account for its resistance to legal settlement of trade disputes.

Fundamentally, the competing obligations within the EU represent different priorities over the goals for integration and the goals for freer trade. The tradeoff is associated with large economic and normative stakes. The importance of European integration provides a counterweight to the importance of global free trade. Intra-EU trade represents almost two-thirds of individual members’ total trade.⁶ At the same time, the EU represents the largest trade entity in the world market.

⁶In 2003, the share of intra-region exports for the EU-15 was 61.9 percent of total exports and the share of intra-region imports for the EU-15 was 61.7 percent of total imports. World Trade Organization Secretariat. “International

When excluding the intra-EU trade, in 2003 the EU had an 14.7 percent share of world merchandise exports, greater than the 9.6 percent share of the United States and 6.3 percent share held by Japan.⁷ Clearly the EU has strong economic interests in both the internal and external markets.

The Problem with Agriculture

European agricultural policy represents a case where there is poor fit between the mechanisms of enforcement for international law and European level policy institutions. As noted in section 2, many of Europe's trade disputes in GATT/WTO adjudication arise over agriculture related topics. In part, this reflects the large number of trade barriers protecting European agriculture. Europe is not alone, however, in protecting its agricultural sector and having a strong farm lobby. The fact that one of the most difficult agriculture related trade disputes revolved around bananas, where Europe has no producer group, suggests that there is more than the influence of farmers behind European noncompliance in GATT/WTO adjudication. This section will discuss how agriculture epitomizes the institutional obstacles of EU decision-making that can prevent reform of trade barriers after a WTO ruling.

Efforts to open EU agricultural markets encounter stiff resistance. As part of creating a European Common Market, strong national interests in protection of the farm sector were accommodated by the establishment of a system of agricultural protection that log-rolled preferences for high production levels and high prices. Spending for agriculture as a share of total Community expenditures ranged from the high of 87 percent in 1970 to 45.5 percent in the 2006 budget. A broad consensus favors using an interventionist farm policy to maintain the family farm as the foundation of European agriculture (Daugbjerg, 1999, p.417). The status of CAP as a pillar for

Trade Statistics, 2004." (Geneva: WTO, 2004) at <http://www.wto.org>. After enlargement, in 2005 intra-region exports had grown to 73.2 percent of total exports.

⁷Ibid. By 2005, the EU-25 share of world merchandise exports had grown to 39.4 percent.

integration gives greater legitimacy to its policies beyond economic interests. Supporters can argue from a moral high ground that criticism of CAP represents an attack on the entire integration project (Keeler, 1996, p.136).

In the policy-making process agricultural interests benefit from “biased enfranchisement” within EU institutions (Keeler, 1996). The Directorate General for Agriculture is among the most powerful directorates as a result of both its control over large budgetary resources and a complex web of policies that few outside actors comprehend (Tracy, 1997, p.84). Agricultural interests are also favored in the Council of Ministers. For agriculture-related issues, the General Affairs Council tends to wait for the opinion of the Agriculture Council, which brings together national agriculture ministers and assumes a strong pro-farmer perspective (Moyer, 1993, p.102). In practice, unanimity voting guides most Agriculture Council decisions. Often the need for consensus leads to “marathon sessions” and elaborate packages with special measures before agreement could be reached (Tracy, 1997, p.85). Without such efforts to create a balance of benefits and sacrifices, one member will block the entire proposal. When EU preferences are close to the status quo as in agricultural policy, these unanimity voting norms strengthen the European bargaining position as it resists calls for liberalization from trade partners (Meunier, 2005).

In the area of food policy standards, one sees a tendency for the most risk averse state preferences to “trade up” as the EU establishes a strict standard at the EU level (Young, 2004; Princen, 2004). Young (2004) explains that in this area where integration is pursued through common authorization by a detailed set of rules rather than mutual recognition, codification increases the chance of trade disputes.

European agricultural policy has long held an uneasy legal status within international trade law, neither clearly against the rules nor fully accepted. In the first frontal attack against a central CAP policy, in 1961, Uruguay filed a complaint to GATT claiming that a wide range of CAP policies

violated the GATT rules. The panel concluded that the contracting parties had not sufficiently settled the legality of CAP policies in the terms of the GATT and refused to give a ruling on the legality of the variable levies (Hudec, 1993, p.445-447). The outcome neither exonerated the CAP policies as compatible with GATT, nor found them to be in violation. Thereafter, EC negotiators had to wage a defensive battle to uphold CAP policies against ongoing legal challenges.

The interlocking nature of the CAP policies meant that a negative panel ruling held wider implications beyond any single issue. A ruling on one policy could unravel the core operation of the CAP. For example, a GATT case against export subsidies for the raw material component of pasta products threatened to destroy the export markets of food processors, which depended on the export restitution payments to compensate for the high prices they paid to buy European agricultural products (Hudec, 1988, p.33). Even marginal adjustments threatened to upset the precarious balance of common prices and exacerbate the problem of surplus production. For example, a zero tariff binding for oilseeds in an early GATT round (the Dillon Round, 1960-61), led to imported soymeal cake becoming a feed substitute that displaced more expensive EC grains in the internal market (Iceland, 1994, p.211). The CAP stood at risk of unraveling from the development of such holes within the complex network of protection. Any single case had to be viewed in terms of its wider effect on the entire agricultural sector, which often magnified the threat of accepting the precedent set by a ruling. In one case against subsidies to growers and processors of canned fruit, the EC blocked the panel report, but settled the dispute with concessions to the United States on condition that the United States agree to withdraw the panel report (Hudec, 1993, p.498). Sometimes, even when accepting a ruling and changing the specified policy, the EC registered a reservation noting legal objections to the content of the ruling.⁸

In sum, both the EU policy process and interests account for its difficulty to liberalize agricul-

⁸See for example, "United States v. European Community: Restrictions on Imports of Apples," in Hudec (1993, p.564).

tural policies within dispute settlement proceedings. Legal framing applies normative pressure and material incentives for leverage. However, for the EU there is a tradeoff between the importance of CAP, a pillar of integration, and the trade rules. Since the policy process in the EU for agricultural decision-making is biased to favor CAP, liberalization is only possible if the negotiation lifts the issue outside of the normal policy setting. Package negotiations in trade rounds create such an opportunity because issue linkages force a broader policy agenda and increase the influence of trade officials and mobilization by export interests (Davis, 2003). The narrow focus of the legalistic approach, however, fails to broaden the EU policy process.

4 Legalism Encounters Institutional Barriers: The Beef Dispute

By looking closely at one of the most prominent cases of noncompliance in the WTO, this section investigates why legal framing within the dispute settlement process fails to persuade the EU to change its policies. The dispute between the United States and EU over hormone-treated beef represents one of the few cases in the WTO with longstanding non-compliance and ongoing sanctions. It is useful to test the argument presented in this paper because it allows comparison of the European policy context when similar issues were raised in adjudication versus trade round.

Background on the Ban Against Growth Hormones

The initial decision to ban hormone-treated beef reflected the need to address consumer concerns, domestic surplus, and to accept a common regulatory standard across EU members. Farmers in Europe, the United States, and elsewhere used hormones to promote growth so that animals would reach market weight faster and consume less feed. For Europe, health fears connected to hormone-treated meat began in 1980 with horror stories about abnormal sexual development in humans who ate the meat. European consumer groups seized upon hormone-treated meat as a

public health threat and urged the ban of all hormones. Farmers were eager to reassure consumers about beef safety, so long as a complete ban maintained a level playing field so that neither farmers within Europe nor those overseas could gain a competitive advantage by means of growth-promoting hormones.⁹ By 1985, West Germany, Belgium, and Italy banned hormone use with national legislation, and pressure was growing for a European level ban.¹⁰ Faced with a severe beef surplus problem, Agriculture Commissioner Frans Andriessen readily supported a European level ban as a way to reduce domestic production and imports.¹¹ The combination of consumer and producer interests formed a powerful “baptist-bootlegger” coalition in support of the ban; in the subsequent trade debates Europeans emphasized the consumer concerns for food safety while Americans and Canadians pointed to the protectionism of beef farmers (Princen, 2004).

In an unusual move, the European Parliament took the initiative to pass a resolution for a Community-wide ban on all hormones. While the European Parliament has no authority over trade policy, the hormone policy related to consumer health and regulation of the Common Market where the Parliament has a larger voice in the institutional process.¹² Final decision authority, however, rested with the Council. In December 1985, the Agriculture Council adopted the directive to ban the use of hormones within EC livestock farming and the import of meat produced with such hormones. The directive emphasized the need to harmonize policies in order to uphold equal trade

⁹*The Financial Times*, 26 November 1985.

¹⁰*The Financial Times*, 31 October 1985.

¹¹CAP price supports guaranteed that the European Community would buy at intervention prices all meat that could not be sold for a better price in the depressed market. This left the EC budget to pay cold storage costs and export subsidies - the beef sector in 1986 received 16 percent of all EC expenditure for agriculture and over half of expenditure for intervention purchasing. (European Commission Directorate General for Agriculture. “Situation and Outlook: Beef,” *CAP 2000 Working Document*, Brussels: April 1997.)

¹²The Council Directive on hormones (no. 85/649, 31 December 1985, OJ L 382/228, 31 December 1985.), was based on Article 43, which gave the Parliament a formal consultative role.

conditions within the Common Market.¹³ Later the European Court of Justice ruled in support of the ban with a decision stating that the policy was necessary to prevent different health and veterinary rules in member states from forming barriers that distort trade.¹⁴ Scientific assessment of risk did not inform the decision. Indeed, Agriculture Commissioner Frans Andriessen dismissed the conclusions of a Commission-appointed scientific study that showed no evidence of health risk, saying that “Scientific advice is important, but it is not decisive. In public opinion, this is a very delicate issue that has to be dealt with in political terms.”¹⁵

The United States issued early warnings that any restriction in the absence of scientific evidence would violate GATT rules and that retaliation would be likely.¹⁶ U.S. officials viewed the policy as a test case for new EC product standards under the plan for creation of the European Union in 1992 (Hudec, 1993, p.545). Commission officials defended the ban as a non-discriminatory policy which applied equally to European and foreign producers. They rejected the U.S. position that the scientific standard should apply or that the measure fell under GATT regulations (Roberts, 1998, p.6). Where a dispute panel could have resolved these questions, in a bizarre legal battle that made a farce of GATT dispute settlement, the two sides blocked establishment of a panel and the legal interpretation remained uncertain.¹⁷

¹³Council Directive (EEC) no. 85/649, 31 December 1985, on prohibiting the use in livestock farming of certain substances having a hormonal action, OJ L 382/228, 31 December 1985.

¹⁴*The Financial Times*, 14 November 1990.

¹⁵*The New York Times*, 1 January 1989.

¹⁶*The Financial Times*, 31 October 1985, 1 November 1985.

¹⁷In 1987, the United States called for establishment of a technical experts group under Article 14.9 of the Standards Code of the GATT Tokyo Round Agreements to evaluate whether there was any scientific justification for the hormone ban. The EC objected to establishment of the technical panel on the grounds that accepting the applicability of the Standards Code and experts panel would prejudge the relevance of scientific evidence (Hudec, 1993, p.545). The United States in turn refused to accept the EC suggestion for a legal panel and broke off the dispute settlement procedures. The GATT 1947 rules gave the EC the right to block dispute proceedings and consequently no panel was established.

Beginning in 1989, the EC implemented its ban on hormone-treated beef, in effect excluding U.S. beef from the European market. EC officials declared that consumer health concerns motivated the ban while the U.S. officials insisted that there was no scientific evidence of a health risk and the ban represented a trade barrier motivated by the desire to reduce beef imports. Given long experience with safe use of hormones and the perception that the European ban reflected protectionist motives, there was no movement in the United States to adapt its own practices to meet the European standard (Princen, 2004). In what was soon labeled the 'beef war', the United States launched unilateral sanctions against the EC worth \$100 million dollars, a figure that represented the value of the market loss for U.S. beef exports as a consequence of the EC hormone directive. The trade conflict had reached a cease-fire that would persist for the next six years while ongoing talks in the Uruguay Round became the focus of concerns regarding agriculture.

Negotiating Science-based Standards

The Uruguay Round agreement included ambitious new regulations for policies to protect human, plant, or animal health. The Agreement on the Application of Sanitary and Phytosanitary (SPS) Measures encourages harmonization on the basis of international standards. Governments that choose to set a higher standard for protection of health and environment must show that the measures are based on scientific assessment of risks. Many participants saw the beef hormone dispute as a driving factor behind the U.S. initiative to design this agreement (Devereaux, Lawrence and Watkins, 2006, p. 58). This makes it puzzling that the EU accepted the terms of the SPS Agreement that would later be used against it on the hormone case.

One factor may be that the international standard for hormone use remained unsettled when the SPS agreement was negotiated. The *Codex Alimentarius* Commission, the body which sets international food standards, in 1991 rejected a standard for safe use of growth hormones in meat

production by a surprising upset for the United States. This changed in 1995 when Codex members voted to adopt a standard for the safe use of growth hormones in beef production. Thus one could conclude the EU was outmaneuvered by the US successful strategy to “change the game” (Devereaux, Lawrence and Watkins, 2006, p. 84). Yet the close vote on the hormones issue in 1991 should have made EU officials wary about future reversal.

EU acceptance of the SPS agreement was possible because the negotiations were embedded within the Uruguay Round. The broad package of issues created pressures on the EU to make compromises and prevented actors such as the Agriculture Council or European Parliament from holding a veto role on a single issue (Davis, 2003, p. 329). Indeed, the European Parliament showed little interest in the SPS negotiation. Parliamentary resolutions on the Uruguay Round barely mention the SPS agreement.¹⁸ The key decisions on Uruguay Round negotiations were made in the General Council rather than the Agriculture Council. The European Parliament vote was limited to an up or down decision approving the entire set of agreements. Nevertheless, despite the relative ease with which the EU agreed to the new SPS rules, it was later unwilling to accept the implications of this agreement for the beef hormone dispute.

The WTO Dispute Against the EU Beef Hormone Ban

In 1995, the European Parliament and Agriculture Commissioner again rejected scientific evidence as the criterion for evaluating the beef hormone policy. The European Parliament adopted a resolution calling on the Commission and Council to make it clear that the hormone ban would be maintained under the new WTO rules.¹⁹ In November, the EU sponsored a Scientific Conference

¹⁸Text of European Parliament Resolution of 17 March 1994 on the outcome of the Uruguay Round of GATT multilateral trade negotiations (Resolution on GATT multilateral trade negotiations, A3-0149/94) in Angelidis (1994, p.64-70).

¹⁹European Commission. Memo/95/153. Brussels, 21 November 1995.

on Growth Promotion in Meat Production that was intended to guide the upcoming decisions. However, even after scientists at the conference confirmed that when properly used hormones did not pose a human health threat, the Commission re-affirmed the hormone ban and said it would defend the policy against any U.S. challenges within the WTO.²⁰ On 18 January 1996, the European Parliament voted unanimously in favor of a resolution that the EU should work “steadfastly to oppose the import of hormone-treated meat in the EU.”²¹ Four days later, the Agriculture Council discussed the studies from the conference and re-stated its commitment to uphold the ban.

In January of 1996, the United States filed a WTO complaint to initiate dispute settlement proceedings (joined by Australia, New Zealand, Chile and Argentina, with Canada filing its own parallel complaint). After hearing legal arguments from both sides and evidence from 5 scientists, the three panelists issued their report on August 18, 1997.²² The ruling, which was upheld by an Appellate Body report, found that the ban was inconsistent with the SPS agreement because the EU had not performed any kind of risk assessment showing scientific justification for the ban.²³ It recommended that the EU change its ban to bring it into conformity with obligations under the SPS agreement. The ruling was adopted by the Dispute Settlement Body of the WTO February 13, 1998 and the EU announced that it “intended to fulfill its obligations under the WTO.”²⁴

²⁰ *The Financial Times*, 13 January 1996.

²¹ *The Journal of Commerce*, 19 January 1996.

²² WTO, Report of the Panel on “EC Measures Concerning Meat and Meat Products (Hormones)”, WT/DS26/R/USA, 18 August 1997.

²³ WTO, Report of the Panel on “EC Measures Concerning Meat and Meat Products (Hormones)”, WT/DS26/R/USA, 18 August 1997; “EC Measures Concerning Meat and Meat Products (Hormones) Report of the Appellate Body,” (16 January 1998) WT/DS48/AB/R). The appellate body report cited Article 5.1 and Article 2.2 of the SPS agreement in its finding that the EC measures were at present inconsistent with the SPS agreement, but it allowed that future scientific evidence could justify regulating hormone-treated imports. See Stewart (1998).

²⁴ Commission of the European Communities, “Communication From the Commission to the Council and the European Parliament: WTO Decisions Regarding the EC Hormones Ban.” COM(1999) 81 final. 10 February 1999.

All of the major EU policy actors affirmed the principle that the EU should comply with WTO rules. When informing the WTO that the EU could not lift the ban by the deadline, the Commission spokesman said, “We want to comply with our WTO obligations. We believe the best way forward on this is a dialogue with the Americans about compensation.”²⁵ The European Parliament passed a resolution on 4 May 1999 that called for the Commission to maintain the ban on hormone-treated meat, but also said that any acceptable solution must provide both the “highest possible level of food security for European consumers,” and represent “fulfillment by the EU of its international obligations under the WTO.”²⁶ Officials of the Council of Ministers commented that not even the most radical minister would say in Council discussions that the EU should not follow WTO rules.²⁷ Yet when EU negotiators were unable to persuade either the United States or Canada to accept a compensation package with the indefinite continuation of the ban, they chose to remain in violation rather than change the policy.²⁸

When the May 13th deadline expired, WTO arbitrators authorized the United States to implement sanctions against goods up to the value of \$116.8 million.²⁹ U.S. officials designed the sanctions list in order to mobilize lobbying against the WTO-illegal policy. The heaviest share of sanctions fell on Germany and France (twenty-four percent of targeted value on each) which were seen as the key actors supporting the ban, while the UK was exempted. Yet there was surprisingly little response from European businesses to counter the ban. The main business group UNICE did not publicly advocate any position, and while the targeted industries complained to Commission

²⁵ *The Journal of Commerce*, 14 May 1999.

²⁶ European Parliament. “Resolution on the Transatlantic Economic Partnership and EU/United States - trade disputes, especially hormones, bananas, and hushkits.” Brussels, 4 May 1999. <http://www.europa.eu.int/comm/trade/miti/dispute/hormones/0605hormb.htm>

²⁷ Official of Secretariat to the Council of Ministers. Interview by author. Brussels, 7 July 2000.

²⁸ *The Financial Times*, 27 May 1999.

²⁹ WTO, “Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU: Decision by the Arbitrators.” [WT/DS26/ARB] 12 July 1999.

officials, they fought against the linkage of their interest with the hormone ban rather than the policy itself.³⁰ Meanwhile, consumer groups and farmers continued to lobby in support of the ban.³¹

In a final effort to resolve the dispute without changing the import ban, the EU has continued its legal defense of the policy in the WTO. After passing legislation in 2003 that changed the EU ban for five of the growth hormones to a “provisional ban” subject to further scientific study, the EU notified the WTO that it was now in compliance with the WTO ruling. New research showing evidence of harm from one hormone is cited to justify retention of a permanent ban for the 6th type of hormone. Article 5.7 of the SPS agreement allows for provisional measures when there is insufficient scientific evidence so long as members are engaged in sincere effort to explore risks through science-based assessment. The EU initiated a WTO dispute against the United States and Canada for their refusal to lift their retaliation measures.³² The legal battle continues as the United States and Canada counter the EU legal arguments and challenge the scientific studies as inadequate.

The European Parliament as an Obstacle to Reform

Involvement by the European Parliament constrained EU decision-making and made this negotiation especially difficult. An official of the Directorate for External Relations of the Commission commented:

This is the first time when the European Parliament flexed its muscles and opposed the

³⁰Official of the Directorate General for External Economic Relations. Interview by author. Brussels, 6 July 1999. Official of EU delegation to Geneva. Interview by author. Geneva, 15 July 1999.

³¹In a 1999 policy memo to the EU Council Presidency, the largest European consumer group appealed that the EU resist WTO pressures and maintain the ban. BEUC (1999)“Consumer Priorities for the Finnish Presidency.” The peak EU farmer organization joined the consumer group to issue a statement supporting the ban (Princen, 2004, p. 137).

³²“Continued Suspension of Obligations in the EC-Hormones Dispute,” (DS320, 321) filed 8 November 2004.

Commission saying that this was a consumer concern and making the Commission toe the line they wanted. It is a warhorse for them.³³

This was a new role for the European Parliament. In the first two decades of European integration, the role of Parliament was limited to informal influence and consultation. Beginning with the Single European Act of 1986, the Parliament gained “conditional agenda setting power” (Garrett and Tsebelis, 1996, p.285), and later under the Treaty of European Union, co-decision rules empowered Parliament with shared legislative authority in certain policy areas: public health, educational and cultural measures, environmental programs, consumer protection, and most internal market legislation. The Parliament remains largely a passive observer of most agricultural trade negotiations, however, since both agricultural policy and trade policy are outside of the domain for co-decision. Indeed, for agricultural policy the Parliament only offers an opinion in a consultation procedure. The Parliament’s position is weakest for trade policy given that the Council is not even obligated to consult with Parliament in this area, although informal arrangements include the Parliament (Bossche, 1997, p.70). Hence, only by emphasizing the public health and consumer protection nature of the hormones dispute could the Parliament intervene actively in the decision-making process - if the ban is treated as a trade issue, then the Parliament would not have co-decision rights.

The beef hormone dispute gave rise to a conflict between the interests of European integration and the interests of upholding the WTO. To defy the Parliament by weakening the ban would have provoked an institutional crisis in the EU. Moreover, ending the Community ban would have left different national regulations in place, which could impede the free movement of goods in the Common Market. In the end, the importance of European integration acted as a counterweight to the value of the trade system. Against the consensus favoring the ban, the narrow focus made it less likely that policy-makers would find a compromise through combining issues. It was impossible to

³³Directorate-General for External Affairs official. Interview by author. Brussels, 26 July 1999.

convince the Agriculture Council or the European Parliament to change the ban against hormones for the sake of trade reputation and international obligation.

The case foreshadows other regulatory battles to come in negotiations with the EU. As WTO negotiations and dispute cases increasingly touch upon *trade and* issues such as health, labor, and environmental standards, they will confront the constraints of parliamentary oversight. The United States in 2006 won a WTO ruling against the EU policies restricting import of GMO products, but Commission proposals to end member state bans in order to comply with the WTO ruling have been rejected by the Council of Ministers. The need for changing legislation with approval from both the Council and European Parliament has been given as an obstacle that will continue to prevent resolution of the dispute.³⁴ Such problems will only increase if the EU adopts further treaty revisions to increase the role of the European Parliament in a full range of EU policies.

5 Conclusion

This study has shown how not only the interests at stake but also the decision-making process and norms account for why Europe has been so uncooperative in legal adjudication of trade disputes. The dispute settlement cases raise stakes related to concern for reputation, retaliation, and commitment to the trade rules as incentives to encourage sacrifices for one case. Trade officials value these interests so that concessions may be possible if they have the lead role in the negotiation. However, the narrow scope of the negotiation makes it harder to overcome deadlock within the EU institutional context. Even retaliation is rendered less effective as the weight of sanctions is spread over several countries, any one of which could exercise veto power. The nature of interlocking policies also increases the stakes against making concessions in legal disputes because small changes have large effects. Thus the interests, norms, and procedures of EU institutions reduce the influence of

³⁴*Inside U.S. Trade*, 22 December 2006.

the institutional mechanisms by which a dispute settlement ruling promotes liberalization.

Ultimately, the combined pressure of adjudication and the stakes of a broad negotiation may be most effective strategy. Daugbjerg and Swinbank (2006, p. 24) argue that the need to appear supportive of the Doha Round negotiations pushed the EU to comply with the recent dispute ruling against the EU sugar regime. Similar pressure may offer the key to breaking the deadlock on the beef hormone dispute. When EU Commissioner Peter Mandelson met recently with members of the European Parliament to discuss trade policy, he emphasized that efforts to solve several bilateral disputes with the United States including the beef hormone dispute would contribute to strengthening the multilateral system and Doha Round.³⁵ Such strategies that combine multiple institutional sources of pressure will be more effective than an isolated legal approach.

³⁵ *Inside U.S. Trade*, 13 October 2006.

References

- Abbott, Kenneth W., Robert Keohane, Andrew Moravcsik, Anne-Marie Slaughter and Duncan Snidal. 2000. "The Concept of Legalization." *International Organization* 54:401–419.
- Angelidis, Angel. 1994. *The Agricultural Negotiations Within the Uruguay Round of GATT*. Working Document No. W-6/Part II. European Parliament Directorate General for Research.
- Bayard, Thomas and Kimberly Ann Elliott. 1994. *Reciprocity and Retaliation in U.S. Trade Policy*. Washington, DC: Institute for International Economics.
- Bossche, Peter Van den. 1997. "The European Community and the Uruguay Round Agreements." In *Implementing the Uruguay Round*, ed. John H. Jackson and Alan O. Sykes. Oxford: Clarendon Press pp. 23–102.
- Busch, Marc. 2000. "Democracy, Consultation, and the Paneling of Disputes Under GATT." *Journal of Conflict Resolution* 44:425–446.
- Daugbjerg, Carsten. 1999. "Reforming the CAP." *Journal of Common Market Studies* 37:407–428.
- Daugbjerg, Carsten and Alan Swinbank. 2006. "Curbing Agricultural Exceptionalism: The EU's Response to External Challenge." Paper presented to the Inaugural Meeting of the International Political Economy Society, Princeton University.
- Davey, William. 2005. "Implementation in WTO Dispute Settlement: An Introduction to the Problems and Possible Solutions." RIETI Discussion Paper Series.
- Davis, Christina. 2003. *Food Fights Over Free Trade: How International Institutions Promote Agricultural Trade Liberalization*. Princeton: Princeton University Press.
- Davis, Christina. 2004. "International Institutions and Issue Linkage: Building Support for Agricultural Trade." *The American Political Science Review* 98:153–169.

- Devereaux, Charan, Robert Lawrence and Michael Watkins. 2006. *Case Studies in US Trade Negotiation: Volume 2 Resolving Disputes*. Washington, D.C.: Institute for International Economics.
- Downs, George and David M. Rocke. 1995. *Optimal Imperfection? Domestic Uncertainty and Institutions in International Relations*. Princeton: Princeton University Press.
- Franck, Thomas. 1990. *The Power of Legitimacy Among Nations*. Oxford: Oxford University Press.
- Garrett, Geoffrey and George Tsebelis. 1996. "An Institutional Critique of Intergovernmentalism." *International Organization* 50:269–299.
- Hudec, Robert. 1988. "Legal Issues in US-EC Trade Policy: GATT Litigation 1960–1985." In *Issues in U.S.-EC Trade Relations*, ed. Robert Baldwin, Carl Hamilton and Andre Sapir. Chicago: University of Chicago Press pp. 17–58.
- Hudec, Robert. 1993. *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System*. Salem, NH: Butterworth.
- Iceland, Charles. 1994. "European Union: Oilseeds." In *Reciprocity and Retaliation in U.S. Trade Policy*, ed. Thomas Bayard and Kimberly Ann Elliott. Washington, DC: Institute for International Economics pp. 209–232.
- Jackson, John H. 1998. "Designing and Implementing Effective Dispute Settlement Procedures: WTO Dispute Settlement, Appraisal and Prospects." In *The WTO as an International Organization*, ed. Anne O. Krueger. Chicago: University of Chicago Press pp. 161–180.
- Keeler, John. 1996. "Agricultural Power in the European Community." *Comparative Politics* 28:127–149.

- Keohane, Robert. 1984. *After Hegemony: Cooperation and Discord in the World Political Economy*. Princeton: Princeton University Press.
- Kovenock, Dan and Marie Thursby. 1992. "GATT, Dispute Settlement and Cooperation." *Economics and Politics* 4:151–70.
- Kratochwil, Friedrich. 1989. *Rules, Norms, and Decisions*. Cambridge: Cambridge University Press.
- Maggi, Giovanni. 1999. "The Role of Multilateral Institutions in International Trade Cooperation." *The American Economic Review* 89:190–214.
- Mayer, Frederick. 1992. "Managing Domestic Differences in International Negotiations: the Strategic Use of Internal Side-payments." *International Organization* 46:793–818.
- Mearsheimer, John. 1994/5. "The False Promise of International Institutions." *International Security* 19:5–49.
- Meunier, Sophie. 2005. *Trading Voices: The European Union in International Commercial Negotiations*. Princeton, NJ: Princeton University Press.
- Meunier, Sophie and Karen Alter. 2006. "Nested and Overlapping Regimes in the Transatlantic Banana Trade Dispute." *Journal of European Public Policy* 13:362–382.
- Milner, Helen V. and Peter Rosendorff. 1997. "Democratic Politics and International Trade Negotiations: Elections and Divided Government as Constraints on Trade Liberalization." *The Journal of Conflict Resolution* 41:117–146.
- Moyer, H. Wayne. 1993. "The European Community and the GATT Uruguay Round: Preserving the Common Agriculture Policy at All Costs." In *World Agriculture and the GATT*, ed. William P. Avery. Boulder: Lynne Rienner Publishers pp. 95–119.

- Odell, John. 2000. *Negotiating the World Economy*. Ithaca: Cornell University Press.
- Petersmann, Ernst-Ulrich. 2000. "The GATT Dispute Settlement System." In *The European Union and World Trade Law*, ed. Nicholas Emiliou and David O'Keeffe. Oxford: Oxford University Press pp. 253–277.
- Princen, Sebastiaan. 2004. "Trading Up in the Transatlantic Relationship." *Journal of Public Policy* 24:127–144.
- Putnam, Robert. 1988. "Diplomacy and Domestic Politics: the Logic of Two-level Games." *International Organization* 42:427–460.
- Reinhardt, Eric. 2001. "Adjudication without Enforcement in GATT Disputes." *Journal of Conflict Resolution* 45:174–195.
- Reus-smit, Christian. 2003. "Politics and International Legal Obligation." *European Journal of International Relations* 9:591–625.
- Roberts, Donna. 1998. Implementation of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures: The First Two Years. Working Paper No. 98–4. International Agricultural Trade Research Consortium.
- Schoppa, Leonard. 1993. "Two-level Games and Bargaining Outcomes: Why Gaiatsu Succeeds in Japan in Some Cases but not Others." *International Organization* 47:353–386.
- Stewart, Terence P., ed. 1998. *Agricultural Sanitary and Phytosanitary and Standards Reports: The WTO Beef Hormone Dispute*. Geneva: The World Trade Organization.
- Strange, Susan. 1982. "Cave! hic dragones: A Critique of Regime Analysis." *International Organization* 36:479–518.

Tracy, Michael. 1997. *Agricultural Policy in the European Union*. Brussels: Agricultural Policy Studies.

Young, Alasdair. 2004. "The Incidental Fortress: The Single European Market and World Trade." *Journal of Common Market Studies* 42:393–414.