The Incidental Fortress: The Single European Market and World Trade*

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Abstract

The European Union’s role in international trade contains two significant contradictions: first, although its trade policy, with some notable exceptions, is generally fairly liberal, it has been the respondent in a number of high-profile trade disputes; second, although a champion of multilateralism, the EU has had problems complying with World Trade Organization (WTO) judgments. I argue that these contradictions in the EU’s trading persona are due to the internal dynamics of European policy-making, which create ‘regulatory peaks’ where the member governments’ rules diverge, and render the resulting rules difficult to alter.

Introduction

The European Union is a pivotal player in world trade. It is the world’s largest exporter and second largest importer and it has been an influential player in repeated multilateral trade rounds. Its political role in international trade, however, contains two significant contradictions. First, although its trade policy – with the notable exceptions of agriculture, clothing and textiles, and anti-

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dumping – is generally fairly liberal, it has been the respondent in a number of high-profile trade disputes. Second, although a vocal and persistent champion of multilateralism, the EU has had some problems complying with World Trade Organization (WTO) judgments. Neither of these contradictions is unique to the EU. The EU’s nature as an international organization, however, arguably makes them particularly pronounced.

Although there may be more than a whiff of straightforward hypocrisy behind these contradictions, there is more to it than that. I argue that these contradictions are due to the EU being Janus-faced, but in a different way. I contend that the contradictions in the EU’s trading persona are due to a disconnection between its internal policy-making and external obligations. Consequently, although the external impact of the single European market (SEM) programme has generally been liberalizing, it is not always so. In some cases the SEM has produced strict common regulatory standards that impede access for imports. Consequently, there are ‘regulatory peaks’, just as there are tariff ‘peaks’.

I argue that, to the extent that the SEM has a protectionist impact, this is a largely incidental consequence of the internal dynamics of European policy-making. Further, I argue that regulatory peaks are likely to occur under particular circumstances and, therefore, are in some ways predictable. In addition, the circumstances that contribute to the occurrence of the peaks in the first place mean that they are very difficult to alter, contributing to the problems the EU has complying with WTO judgments.

This article connects two distinct features of the SEM: its internal dynamics and its external impact. Each of these features has been the separate focus of quite extensive analysis, with fairly consistent findings within each literature. There is not much of a dialogue between these two literatures, however.1 By integrating the literatures, this article sheds light on where regulatory barriers are likely to occur. By incorporating the emerging literature on trade disputes, it makes the case for expecting any trade disputes stemming from such barriers to be particularly difficult for the EU to resolve.

I. Barriers to the Single Market

The EU is not generally regarded as a free trader. The EU’s common agricultural policy (CAP) functions through a system of price supports, which requires that agricultural imports be subject to very high tariffs to prevent them undercut-

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1 Among the handful of pieces that address the interaction between the internal dynamics of the SEM and its external impact are: Brewin (1997) on the impact of specific measures on specific third countries; Egan (2001, pp. 251–8) on standards; Hanson (1998) on quantitative restrictions; Meunier (2000) on agriculture, government procurement and air transport; Woolcock (1993) on technical barriers to trade (before the creation of the WTO); and Young (2002) on foreign direct investment and air transport.
ting EU prices. There are also particularly high tariffs (‘tariff peaks’) on some manufactured goods – particularly footwear, leather, textiles and clothing – reflecting the tendency of the EU to aggregate the sectoral protectionism of the member governments (Winters, 2001). Further, the EU is an extensive user of trade defence instruments that can be imposed on specific foreign producers following complaints by domestic producers of ‘unfair’ competition (Allen and Smith, 2001).

Nonetheless, the EU has a fairly open trading regime. From the outset the EU’s external trade policy has been shaped by the multilateral trading system. In the 1950s the German government’s insistence that the creation of the customs union be compatible with General Agreement on Tariffs and Trade (the precursor to the WTO) obligations meant that common external tariffs were not set at the level of the most protectionist Member State (Lindberg, 1963; Moravcsik, 1998). As the result of subsequent rounds of multilateral negotiations, the EU’s average most favoured-nation (MFN) tariff on industrial products is only 4.2 per cent, and 20 per cent of tariff lines enter duty free (WTO, 2000, pp. 7–8).2

As tariffs have fallen and quantitative restrictions have been eliminated, regulatory barriers to trade have become more prominent (OECD, 2000; PIU, 2000; World Bank, 2000). The EU’s regulations and standards now represent the most significant barriers to market access for industrial goods (USTR, 2001, p. 108; WTO, 2000, p. 8).

Studies of the external impact of the SEM, however, are almost unanimous in the view it has generally benefitted third-country firms (Commission, 1998b; Pohl and Sorsa, 1992; WTO, 1995).3 In addition to the impact of regulatory barriers, these assessments include consideration of the impact of the single market on trade creation and trade diversion4 and on its impact on residual national quantitative restrictions, which are beyond the concern here. When the SEM’s regulatory impact is isolated, these assessments find the overall effect to have been positive, but acknowledge that in some cases regulatory barriers to imports might increase.

2 Due to the EU’s extensive system of preferences, all but a handful of countries’ products actually face tariffs lower than the MFN tariff.
3 Hughes Hallett (1994) offers a negative, but largely speculative account. His concerns focus on trade diversion, investment diversion, the adoption of voluntary export restraints and the use of standards for protection.
4 Trade creation and trade diversion are two effects that occur as the result of preferential trading arrangements, including regional integration. Trade creation occurs when the removal of trade restrictions causes consumption to shift from more expensive producers to cheaper foreign producers. Trade diversion occurs when the removal of trade barriers causes consumption to shift from more efficient foreign producers who still face barriers to less efficient foreign producers that do not.
II. Identifying Regulatory Peaks

These assessments, however, are rather vague about where such regulatory peaks might occur, providing a few illustrative cases rather than a more systematic mapping (see, e.g., Pohl and Sorsa, 1992; WTO, 1995). Even the WTO’s Trade Policy Reviews list only major regulatory developments without explicitly commenting on their impact on trade (see, e.g., WTO, 2002). There are, however, other ways of identifying regulatory peaks, although each has its shortcomings. By combining them, I hope to mitigate these shortcomings and create a fairly comprehensive picture.

The most systematic indicator of trade barriers are the formal complaints brought against the EU under the WTO’s dispute settlement procedure. This information is readily available and is, within limits, comprehensive. Those limits, however, mean that the information is subject to a significant selection bias as a large number of disputes never make it as far as a formal complaint (Busch and Reinhardt, 2002).

Although gathering information on disputes that are not the subject of formal dispute resolution is normally problematic, the United States Trade Representative (USTR) publishes an annual report of trade barriers around the world. These reports are based on complaints by US firms and not all issues are equally important, but they do provide a reasonably comprehensive overview of measures that impede access to the EU market. The obvious problem with using the USTR’s reports is that they report only US concerns. This is not, therefore, a comprehensive catalogue of the EU’s rules that impede trade. The US is, however, the EU’s largest trading partner, accounting for roughly 20 per cent of all EU merchandise imports (WTO, 2002). In addition, as most SEM product rules affect manufactures, and particularly sophisticated manufactures, they are more likely to affect imports from developed countries, of which the US is reasonably representative, than those of developing countries. Nonetheless, where possible, the data from the US are supplemented with other reports of trade barriers stemming from EU rules.

One of the striking features of the pattern of WTO disputes in which the EU is the respondent is how few of them involve regulatory issues. Of the 47 complaints brought against the EU between January 1995 and the end of 2003, only 12 involved regulatory barriers to trade. Further, one-third of those concerned the rules of one Member State (France in all four cases), and so

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5 Noland (1997) uses the USTR’s Trade Barrier Report in an analogous way as an indicator of which trade barriers attract the USTR’s attention.

6 UNCTAD (2002, pp. 60–2) identifies barriers to agricultural products, voluntary export restraints and trade defence instruments as the main impediments to developing country market access, although there are some notable exceptions, such as the EU’s limits on aflatoxin in nuts.

7 Three separate cases (brought by Canada, Chile and Peru) concerned the trade description of scallops. The fourth case was a complaint by Canada about France’s ban on asbestos.
cannot be laid at the door of the EU as such. In addition, two further complaints concerned the EU’s ban on hormone-treated beef and three concerned the EU’s rules on genetically modified food. Thus only five SEM regulations have been the subject of formal WTO complaints (see Table 1). A sixth EU rule, concerning noise emissions from jet aircraft, was the subject of a formal dispute with the US, but was addressed within the International Civil Aviation Organization (ICAO), rather than the WTO. It is also worth noting the EU’s banana trade regime, which has been the focus of three formal complaints,\(^8\) arose out of the need to create a common import regime for bananas as the SEM came into effect. A focus on formal disputes, therefore, confirms the impression that the SEM has been largely liberalizing, although it has generated some very prominent regulatory peaks.

The picture is distinctly more bumpy, however, if the disputes that have not (yet at any rate) led to formal complaints to the WTO are considered. Table 2 reports the US government’s main objections about EU regulatory trade barriers affecting goods. It does not include measures that are either not regulatory in nature (e.g. the presence of public monopolies) or do not directly impede trade (e.g. the inadequate protection of intellectual property rights). As the focus is on the SEM, individual EU Member State measures are also excluded. The US concerns are also cross-referenced with those regulatory barriers identified in a Canadian Parliament (2001) report. What leaps out of Table 2 is that, for regulatory issues, formal complaints represent only the tip of the iceberg.

Table 1: Trade Disputes Involving Single Market Regulatory Measures as of the End of 2003

<table>
<thead>
<tr>
<th>Measure</th>
<th>Complainant</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hushkits</td>
<td>US</td>
<td>Negotiated solution in ICAO</td>
</tr>
<tr>
<td>Hormone-treated beef</td>
<td>US</td>
<td>Sanctions imposed</td>
</tr>
<tr>
<td></td>
<td>Canada</td>
<td>Technical policy change</td>
</tr>
<tr>
<td>Trade description of sardines</td>
<td>Peru</td>
<td>WTO ruling against EU</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Compliance underway</td>
</tr>
<tr>
<td>Wine-making practices</td>
<td>Argentina</td>
<td>WTO consultations underway</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Complaint filed 12.9.02</td>
</tr>
<tr>
<td>Approval of GM products</td>
<td>US</td>
<td>WTO panel established</td>
</tr>
<tr>
<td></td>
<td>Canada</td>
<td>Complaints filed 21.5.03</td>
</tr>
<tr>
<td></td>
<td>Argentina</td>
<td></td>
</tr>
<tr>
<td>Ban on imports of conifer wood</td>
<td>Canada</td>
<td>Consultations pending since</td>
</tr>
<tr>
<td></td>
<td></td>
<td>24.6.98</td>
</tr>
</tbody>
</table>

\(^8\) A fourth complaint, the first filed, was withdrawn and subsequently replaced.
This discussion, therefore, both reveals that the SEM has created some regulatory peaks and confirms the impression that many disputes never become formal complaints.10

### III. Explaining the Location of Regulatory Peaks

The EU’s regulatory barriers cluster in particular areas. This differentiated external impact of the SEM is heavily influenced by the EU’s multi-track approach to market integration. Different modes of market integration are deployed to tackle different types of regulatory barriers within the EU. These different modes have different implications for imports from outside the EU. The argument is supported by analyses of a few illustrative measures selected from the sub-set of EU rules that were identified as barriers to imports in the previous section.

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9 Argentina initiated a complaint in September 2002.
10 Why governments do not always decide to initiate formal trade disputes is beyond the scope of this article. For a discussion of some of the considerations, see Young (2003).
Modes of Market Integration

The EU has used four approaches to removing regulatory barriers to trade among its Member States (see Table 3). The most innovative is the mutual recognition principle (MRP). The successful application of the MRP is as liberalizing for third-country products as it is for EU products as it provides access to the entire EU market on the basis of meeting one Member State’s rules. The MRP assumes that, although Member States’ rules might differ in substance, they should be considered to be equivalent in effect. There are no regulatory peaks where mutual recognition applies.

Even among the EU’s relatively homogenous Member States, however, many national regulations cannot always be assumed to be equivalent in effect. This is because there are a number of legitimate reasons why national regulations diverge (Hancher and Moran, 1989; Previdi, 1997). One increasingly important reason for differences in the stringency of national regulations is different attitudes towards the management of risk – an issue with respect to both the hormone-treated beef and genetically modified (GM) food complaints (Isaac et al., 2000; Vogel, 2001). As a consequence, the EU has frequently engaged in ‘positive integration’ – agreeing common rules – in order to achieve market integration.11 When common rules are agreed, there is the potential that they will impede imports.

The so-called ‘new approach’ is the mode of ‘positive integration’ that is least likely to impede imports. Under ‘new approach’ directives, the European institutions agree only common ‘essential requirements’, which establish only

Table 3: Modes of Market Integration in the EU

<table>
<thead>
<tr>
<th>Mode</th>
<th>Description</th>
<th>Estimated Share of Intra-EU Trade Accounted for by Affected Products (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mutual recognition principle</td>
<td>Different national standards assumed to be equivalent in effect</td>
<td>30</td>
</tr>
<tr>
<td>‘New approach’</td>
<td>Common objectives with reference to voluntary standards</td>
<td>20</td>
</tr>
<tr>
<td>Approximation</td>
<td>Common detailed rules</td>
<td>30</td>
</tr>
<tr>
<td>Common authorization</td>
<td>Common approval of individual products required</td>
<td>Pharmaceuticals, GM crops and food</td>
</tr>
</tbody>
</table>

Source: Adapted from Holmes and Young (2001) and Commission (2002).
Notes: Percentages do not add to 100 because not all products are subject to product-specific regulation.

11 Tinbergen (1954, p. 122) considers ‘positive integration’ the adoption of common rules. Pinder (1968, p. 90) stresses that the purpose of the measure should also be to maximize welfare, not just to remove discrimination. My usage clearly fits with that of Tinbergen and, I would argue, with that of Pinder.
regulatory objectives, not the means of achieving them. Developing detailed specifications to meet these requirements is delegated to the European standards bodies. The standards developed by these bodies, although bringing advantages, are not mandatory; any product that meets a standard that is certified as meeting essential requirements can circulate freely within the EU. Thus ‘new approach’ directives are also fairly benign to imports.

Regulatory peaks are most likely to occur where products are subject to detailed common rules (Commission, 1998b; Woolcock, 1991). This is not to say that regulatory approximation within the EU does not bring benefits to third-country firms by eliminating the need to comply with multiple national requirements and by increasing transparency. However, although it is possible that the common rules may be less restrictive than the national ones they replace, the tendency is, as explained below, for them to be stricter.

Within the category of harmonized product regulations, rules that govern how products are produced present particular problems for third-country firms. So-called ‘process’ regulations do not generally present barriers to trade; however, they can present a problem when the production process is considered to have altered the product. This seems to be a particular problem with respect to food safety. The WTO disputes over hormone-treated beef, GM food and wine-making standards all fit into this category, as do the simmering dispute concerning anti-microbial treatments in poultry production, and the shelved dispute about rBST milk and the resolved dispute over the third-country meat directive.

The fourth mode of market integration employed in the EU is common authorization, which applies to individual products, not just to product categories. Forms of common authorization currently apply to pharmaceuticals and GM crops. Although such close regulation may be very trade restrictive, having a single authorization rather than multiple national authorizations should (in theory) be liberalizing. This has been the case with pharmaceuticals, where a centralized authorization procedure is based on a technical assessment by the European Medicines Evaluation Agency (EMEA). The approval procedure for GM crops involves more players, has more veto points, and is more politicized (Young, 2001). As a result approvals have been frozen since 1998, which creates problems for imports of crops and foods from countries with more approved GM varieties.

12 The European Committee for Standardisation (CEN), the European Committee for Electrotechnical Standardisation (CENELEC) and the European Telecommunications Standards Institute (ETSI) (see «http://www.NewApproach.org»).
The Dynamics of ‘Positive Integration’ and Pressures for Approximation

When the EU adopts common rules, the dynamics of market integration press for regulatory approximation at a strict level. The energy for approximation comes from the negative impact that divergent national rules have on trade within the EU. Stringent product standards provide benefits to domestic firms by protecting them from other European competitors whose products do not meet those standards. Those competitors may decide that it is simply worth complying with the rule in order to gain access to the market. Alternatively, they might try to have the rule overturned under EU law.

Under EU law, however, member governments have the right, albeit within limits, to enforce strict national rules despite the mutual recognition principle. As noted above, the MRP applies only when the assumption of equivalence holds. Further, Article 30 (ex-36) of the Treaty of the European Community permits restrictions on trade for a number of public policy reasons, including the protection of human health and safety. It is possible, therefore, that a government’s more stringent regulation will be upheld. As a consequence, there are incentives for its trading partners to negotiate a common rule in order to eliminate the disruptive impact on trade of different rules (Vogel, 1995; Young and Wallace, 2000).

When common rules are negotiated, the government with legitimate, more stringent standards is in a strong bargaining position. So long as there is no agreement, its industry is protected from foreign competition, while those of its trading partners are hurt by being denied access to its market. Consequently, the costs of no-agreement fall more heavily on its trading partners. The government with least to gain from an agreement has a strong incentive to hold out for a good deal, while those that have most to gain have stronger incentives to compromise. In such circumstances, a negotiated outcome will be closer to the preferred position of the government with the stricter regulation (lower cost of no agreement) (Fisher and Ury, 1982; Garrett and Tsebelis, 1996; Moravcsik, 1993; Putnam, 1988). Because there has generally been a blocking minority in favour of stricter standards, this has created a political dynamic within the single market that favours the adoption of stricter common standards (Peterson, 1997; Sbragia, 1993; Scharpf, 1996; Vogel, 1995; Young and Wallace, 2000), a process known as ‘trading-up’ (Vogel, 1995). The dynamic is particularly powerful when it intersects with an ‘advocacy alliance’ of member governments, civic interest groups and the European Commission and/or the European Parliament (Young and Wallace, 2000, pp. 21–4).

As a sweetener to get the government with the most stringent regulation to accept a common rule not quite as strict as its own, secondary legislation may incorporate escape clauses that permit member governments to adopt more stringent national rules under specified circumstances. Such provisions
provide scope for the dynamics of ‘trading up’ to continue to press for even stricter standards even after common rules have been adopted.

Some Illustrative Examples

Two high-profile examples serve to illustrate these dynamics. The EU’s ban on hormone-treated beef clearly illustrates the process of trading up and the influential role of an advocacy alliance. The informal moratorium on GM crop approvals and the subsequent revision of the directive on the intentional release of genetically modified organisms illustrate how escape clauses can provide opportunities for ratcheting up agreed rules.

The Ban on Hormone-treated Beef. In July 1981 the Council of Ministers, in response to some highly publicized health scares involving hormones used in raising livestock, adopted a directive banning the use of some hormones.13 Unsure about the safety of five others – oestradiol-17-β, progesterone, testosterone, trenbolone and zeranol — the Council permitted the member governments to maintain their national rules pending a review of the directive, following a scientific enquiry, scheduled for mid-1984.14

The member governments had markedly different assessments of the safety of the five hormones (Council, 1988), which resulted in very different practices (Agence Europe, 29–30 September 1989, p. 9; Vogel, 1997). The Italian and Luxembourg governments banned all five hormones, while the British and Irish governments permitted the use of all five. The Danish, French and German governments permitted the use of some. These different practices impeded the free circulation of meat within the EU, and raised concerns about the ‘distortion’ of competition. Thus there were economic and political pressures, as well as a legal deadline, for the adoption of a common rule.

In 1984 the Commission (1984) duly proposed a new directive that would ban the two synthetic hormones – trenbolone and zeranol – but permit the controlled use of the three natural hormones: oestradiol-17-β, progesterone and testosterone. This proposal received a hostile response from consumer groups, the European Parliament, the Economic and Social Committee and most of the member governments (Princen, 2002; WTO, 1997: para II.29). In the face of this formidable advocacy alliance, the Commission (1985) revised its proposal to ban the three natural hormones.

The British and Irish governments continued to favour permitting all five hormones, while the Danish and French governments opposed a blanket ban...

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14 Such a built-in ratchet is a common feature of EU directives reflecting a concession extracted by those member governments that want stricter regulations (Young and Wallace, 2000).
(Vogel, 1997). The ability of member governments to exclude hormone-treated meat from their markets, placed a burden on those who continued to permit the use of hormones. The deck was further stacked against those opposed to the ban by the Commission’s questionable decision to advance the proposal under just Article 43, which enabled the new directive to be adopted by a qualified majority vote. This meant that the opposition of the UK and Denmark and the abstention of Ireland could not prevent the adoption of the directive.

**GM Crop Approvals.** The specifics of the tightening of the EU’s procedures for genetically modified crop approvals are quite different, but the dynamics are similar. The first directive governing the deliberate release of genetically modified organisms was adopted in April 1990. It requires that a manufacturer or importer of a GM crop seek the prior approval of the government of the Member State in which the product is first going to be grown or sold. If that government evaluates the submitted information favourably, the dossier is forwarded to the Commission and to the other member governments for consideration. If none of the other member governments raises an objection, the product may then circulate freely throughout the EU. Only three varieties of GM carnations have been approved by this procedure.

If, as has been much more common (Commission, 1998a), any member government raises an objection, a decision has to be taken through a centralized procedure. The Commission, in the light of scientific advice, makes a proposal to a Regulatory Committee (composed of representatives of the member governments). If the Committee does not give a favourable opinion (by qualified majority), the proposal is forwarded to the Council, which can adopt the Commission’s proposal by qualified majority. It can reject the Commission’s proposal only by a unanimous vote. If the Council does not take a decision within three months, the Commission decides. The Commission, however, in the light of the hostile response to its 1997 authorization of Ciba-Geigy’s Bt maize, has not approved any more GM varieties.

These procedures provide significant scope for any member government to impede the approval of any GM product. In addition, the EU’s rules on biotechnology include safeguard clauses, which permit governments under

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15 The 1981 directive had been based on Article 100 as well, which required unanimous consent. In addition, the 1981 directive had explicitly mentioned that the anticipated revision should take place on the basis of unanimity. The British government, supported by Denmark, successfully challenged the use of qualified majority voting before the European Court of Justice. By the time the directive came back to be considered in March 1988, however, the practice of qualified majority voting had been extended to regulatory policy by the Single European Act. In the end the directive was adopted without substantive changes over the opposition of only the UK.


17 Interview with a Commission official, San Domenico, 4 December 2000.
certain circumstances to exclude from their territories GM products that have been approved for sale in the EU.

Although the approval process was slow, it worked at first. Between October 1991 and October 1998, 18 GM crops were approved for commercial release. In 1998 the member governments stopped taking decisions, even under the centralized procedure. In addition, during 1997–98 the Austrian, French, Greek and Luxembourg governments invoked the ‘safety clause’ of the directive to prohibit the sale of even EU-approved varieties of GM crops.

Frustration at the resulting fragmentation of the single market, and concern about the implications of the EU’s stalled approval process for the competitiveness of the European biotechnology and agriculture industries, gave impetus to the Commission’s reform efforts (Commission, 1998a). The governments of Denmark, France, Greece, Italy and Luxembourg kept up the pressure for reform by declaring that they would not approve any new GM crops until a revised directive was adopted (Council, 1999).

The new directive is stricter than the one it replaces in several respects. It places greater emphasis on precaution and environmental risk assessment. It limits consents to ten years (which may be extended on review). It also requires traceability, monitoring and labelling throughout the production process.

IV. The Challenge of Changing Course

The dynamics of market integration not only affect where regulatory peaks are likely to occur, but also influence how hard it is to resolve any ensuing trade disputes. This argument is consistent with an extensive, non-EU literature on trade disputes which stresses the importance of the domestic politics within the respondent country in determining how disputes are resolved (Bayard and Elliott, 1994; Busch and Reinhardt, 2000; Princen, 2002; Schoppa, 1993).

The EU’s Compliance Problem?

The EU appears to have a particular problem complying with WTO rulings, as it is the only WTO member to have had sanctions imposed on it for failure to comply, at least as of September 2003. In both cases – hormone-treated beef and the banana trade regime – the US imposed sanctions. The perception of the EU’s compliance problem, however, may be misleading. Sanctions have been authorized against Brazil, Canada and the US for failing to comply with WTO rulings, but at the time of writing (September 2003) the complainant

18 Two varieties of genetically modified carnation were approved by Member State consent in October 1998.
19 The most recent food/feed crops were approved (by the centralized procedure) in April 1998.
has not imposed them. Thus the perception of the EU’s compliance problem may have more to do with the US government being more willing and/or able than others to impose sanctions.

Another indicator of compliance problems is if there has been a formal WTO procedure to determine if the changes adopted have been sufficient to bring an offending measure into compliance with multilateral rules. In this respect the EU again does not seem to be especially recalcitrant (see Table 4). As of September 2003, the US, for example, had been the subject of three compliance cases, although in one its rule changes were upheld. Canada had also been the respondent in three compliance cases, although two involve the same set of measures. The EU and Australia had each been the respondent in two compliance cases, and Brazil and Mexico the respondent in one each. Significantly, however, the EU has not lifted its ban on hormone-treated beef, rather it has transformed it into a temporary ban while more scientific tests are concluded. This lack of substantive policy change in such a high-profile case contributes to the perception of the EU’s particular problem with compliance.

The perception of the EU’s problem is arguably further heightened by its efforts to preserve the exemption of agriculture from the scrutiny of the dispute-settlement system – the so-called ‘peace clause’ (BRIDGES, 2003; Commission, 2003). This could be characterized as a form of pre-emptive non-compliance, insulating an EU policy that is notoriously resistant to change from challenge under international disciplines.21

The Politics of Compromise and Compliance

With so few cases in general, and particularly few cases involving SEM regulations to consider, it might seem difficult to build a strong case that the EU has a particular compliance problem. Nonetheless, there are several reasons to think that the EU might have particular problems. In order to understand why, it is necessary first to examine the politics of policy-making and compliance more generally.

Most analyses of the politics of trade disputes implicitly or explicitly adopt Putnam’s (1988) metaphor of the ‘two-level game’. Putnam identified two ways in which international pressures might bring about policy change. One is ‘reverberation’ in which international pressures tip the balance of domestic politics in such a way as to make an agreement possible (Putnam, 1988, pp. 455–6). Reverberation can occur as the result of the desire to avoid conflict with an important trading partner or as the result of persuasion – changing minds, moving the undecided or encouraging those in the minority.

The second way in which the interconnection of domestic and international politics might facilitate agreement is through ‘synergistic linkage’ (Putnam,

21 I am grateful to Jim Rollo for suggesting this characterization.
Synergistic linkage does not imply a change in the preferences of domestic actors, but means that the internationalization of an issue makes them willing to compromise on one issue in order to secure another desired goal. Although Putnam’s example is positive – the international actor can give something – the logic should also apply to the imposition of sanctions; taking trade away and promising to restore it in exchange for policy change.

Schoppa (1993) posits two additional ways in which international pressure might bring about domestic policy change. The first is ‘participation expansion’ in which foreign pressure can expand participation in the domestic policy process, at elite level (such as by getting trade ministers involved) or mass level (by heightening popular awareness of the issue) (Schoppa, 1993, p. 372). The second is through ‘alternative specification’ in which the foreign government highlights policy alternatives that might not have been considered or had been dismissed (Schoppa, 1993, p. 373).

Table 4: Compliance Cases as of 5 June 2003

<table>
<thead>
<tr>
<th>Respondent</th>
<th>Complainant</th>
<th>Measure</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>US</td>
<td>South Korea</td>
<td>Anti-dumping duties on DRAMs</td>
<td>Subsequent compliance</td>
</tr>
<tr>
<td>US</td>
<td>Malaysia</td>
<td>Ban on shrimp caught not using turtle-excluder nets</td>
<td>Compliance upheld so long as good faith negotiations persist</td>
</tr>
<tr>
<td>US</td>
<td>EU</td>
<td>Foreign sales corporations</td>
<td>Sanctions authorized</td>
</tr>
<tr>
<td>Canada</td>
<td>New Zealand</td>
<td>Measures affecting the importation of milk and exportation of dairy products</td>
<td>Second compliance authorized, measures still to be inconsistent with multilateral obligations</td>
</tr>
<tr>
<td>Canada</td>
<td>Brazil</td>
<td>Measures affecting export of civilian aircraft</td>
<td>Sanctions authorized</td>
</tr>
<tr>
<td>EU</td>
<td>India</td>
<td>Anti-dumping duties on imports of cotton bed-linen</td>
<td>Measure still inconsistent with multilateral obligations</td>
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<td>EU</td>
<td>Ecuador</td>
<td>Banana trade regime</td>
<td>Sanctions authorized (Ecuador), sanctions imposed (US)</td>
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<td>Australia</td>
<td>US</td>
<td>Automotive leather subsidies</td>
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<td>Australia</td>
<td>Canada</td>
<td>Ban on salmon imports</td>
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<td>Brazil</td>
<td>Canada</td>
<td>Measures affecting export of civilian aircraft</td>
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<td>Mexico</td>
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<td>Anti-dumping duties on high fructose corn syrup</td>
<td>Subsequent compliance</td>
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Several features of the EU, however, may mute these effects. First, the EU’s regulatory process is highly legalistic. As part of the process of approximation, EU regulations are based in law rather than in administrative decisions. The more codified rules are, the harder they are to change in all political systems because more players have to agree change. One of the factors that has complicated US compliance with the WTO judgment concerning foreign sales corporations is that it requires legislative change (Hocking and McGuire, 2002). Where the US has complied with adverse judgments, administrative changes sufficed. The EU, having more regulations based in law than most political systems, is likely to run into compliance problems more often.

The challenge of changing EU legislation is compounded by the EU’s decision rules. Since 1993 changes to EU regulations have required at least a qualified majority of the member governments (that is a super majority) and the support of the European Parliament. Thus for reverberation and/or synergistic linkages to produce a policy change a substantial number of actors (governments and parliamentarians) have to change their positions.

Further, because the EU is an international organization, its rules are the products of compromises among, now, 25 member governments. Consequently, they often embed intra-EU ‘synergistic linkages’. This further raises the threshold for producing policy change because changing one policy may unpick a wider compromise agreement based on a package deal (Avery, 1995; Peterson and Bomberg, 1999). Further, the number of member governments involved in adopting any EU rule means that the policy process tends to be quite open at elite level to both ideas and actors (Peters, 1994; Wessels, 1997; Wallace, 2000; Young and Wallace 2000). This reduces the likelihood that foreign pressure will expand participation or promote policy alternatives that had not been considered.

The EU’s dual character as an international organization and an international actor, therefore, seems to provide a plausible expectation that the EU might have particular problems responding to international pressure to remove its regulatory peaks.

While the preceding discussion applies to any rule that can be changed only through legislation, there is reason to think that regulatory barriers might pose particular problems. This is particularly true if the trade barrier arises from rules that reflect different perceptions of risk (Guzman and Simmons, 2002; Damro and Sbragia, 2003). The reason for this is the problem of compromise. If there is agreement over the level of risk represented by a product, but disagreement over the acceptability of that level of risk, there is no room for compromise. Further, such issues are often highly politically sensitive – witness European attitudes towards hormone-treated beef and GM crops. In such circumstances, any policy change runs the risk of being deeply politically unpopular.
This problem is hardly unique to the EU, but the dynamics of market integration discussed above seem to apply particularly where there are differences over risk management among the Member States. Thus regulatory peaks are most likely to involve this type of issue. Further, the difficulty of compromising on such issues arguably compounds the EU-specific problems with compliance discussed above.

Closer examination of the EU’s responses to the adverse judgments in the hormone-treated beef and banana trade regime complaints provides at least preliminary support for the view that institutional features of the EU are likely to make compliance with WTO judgments particularly challenging. Although the banana trade regime is not a regulatory measure, it is a single market measure that shares many of the same features that are likely to impede compliance in regulatory disputes and so provides a useful illustration of the politics of compliance in the EU.

Hormone-treated Beef: Staying the Course. The WTO’s judgment and the subsequent imposition of sanctions have had no substantive effect on the EU’s ban on the use of growth-promoting hormones in beef. In January 1998 the Dispute Settlement Body (DSB) found that the EU had not adequately justified its ban on the basis of risk assessment. The EU responded by undertaking a series of risk assessment studies. With the expiration of the WTO-adjudicated ‘reasonable’ period for the EU to bring its rule into conformity, the US in July 1999 imposed $117 million in WTO-approved trade sanctions. The EU’s response has been to confirm the ban on one hormone based on a new risk assessment, and adopt temporary bans on the others pending further research.

Thus there has been no reverberation in persuading the Commission, European Parliament or a significant number of member governments that the hormones in question are actually safe, nor has concern for good relations with the US led the EU institutions or member governments to accept policy change (Princen, 2002). Even the imposition of sanctions (a form of synergistic linkage) does not seem to have galvanized support for policy change. The dispute does seem to have widened participation by engaging trade officials and potentially affected exporters (Princen, 2002). Some of those potentially adversely affected have further sought to diffuse the dispute by advocating a shift to labelling (an example of ‘alternative specification’). Neither of these shifts, however, has resonated with the Commission, Parliament or Council.

Bananas: Adjustment without Change? In contrast to beef hormones, the dispute over the EU’s banana trade regime did result in substantive policy change. Nonetheless, the dispute’s resolution took a long time and owed much to the US government (and subsequently Ecuador’s) compromising. Although not a regu-
latory measure, the banana trade regime shares many of the features of single market regulations. In particular, it was a common rule adopted to reconcile the diverse interests of the member governments. That external pressure had only a limited impact in this non-regulatory case, strengthens the expectation that the EU might have particular problems complying with adverse WTO judgments concerning regulatory barriers.

In September 1997 the DSB, while upholding the EU’s right to provide preferential treatment to the former colonies of its Member States (the African, Caribbean and Pacific (ACP) countries), objected to them being individually assigned quotas. It also found the means of allocating licences for importing bananas within the tariff-rate quota to be incompatible with the EU’s WTO obligations.22

In July 1998 the EU adopted a revised regime, but the modifications were relatively minor – reducing slightly the out-of-quota tariff, calling for negotiations on the allocation of quotas and shifting the licensing regime to ‘traditional/newcomer’. Although these changes were clearly linked to external pressure (the DSB’s judgment and the threat of sanctions) in the form of synergistic linkage, they were relatively minor. There is no indication of reverberation. In fact the coalition supporting this minor change was stronger that which had adopted the original measure, reflecting in part new vested interests created by the regime itself.

The changes were sufficiently minor that a WTO compliance panel, in response to a request from Ecuador, found that the new regime was still incompatible with WTO rules. In April 1999 the US and Ecuador imposed WTO-approved retaliatory sanctions.

Two years later, and after a change of US administration and a split in the interests of US banana companies,23 a settlement was reached. The EU undertook to modify the distribution of quotas, adopt an allocation of licences based on historic reference periods and to shift to a tariff-only system from 2006. The US agreed to support a WTO waiver that will permit the continued preferential treatment of ACP producers and to drop its sanctions.24 Crucially, the level of the EU tariff remains to be negotiated. The Commission (2000b, p. 2) has indicated that its intention in negotiating the tariff level is to provide a level of protection as close as possible to that provided by the current system. Thus there are some signs of synergistic linkage and to an extent ‘alternative

22 The DSB also objected to the Banana Framework Agreement, which was a subsequent agreement with Colombia, Costa Rica, Nicaragua and Venezuela which, in exchange for the signatories not pursuing a GATT panel in their favour, granted them specific quotas and authorized them to issue export licences.

23 Although Chiquita was devastated by the EU’s trade regime, Dole, which could qualify as an ACP producer because of its plantations in Africa, thrived under it.

specification’.25 There is not, however, any indication of reverberation. Consequently, the EU’s reforms are more of form than of substance.

Conclusions

The external impact of internal regulations is an increasingly important aspect of the EU’s trade policy. Although the single market programme has generally been liberalizing, it has also produced some ‘regulatory peaks’. Such import-impeding rules cluster where the regulatory differences among the Member States are most pronounced. Substantial differences among member government rules are particularly common with regard to new technologies, where uncertainties about risk are most significant. Where the member governments’ rules diverge, the dynamics of European market integration tend to push for approximation at the level of the most stringent national rule. Thus EU rules tend to reflect the preferences of the most risk averse. Such rules are most trade-restricting when they treat production processes as altering product characteristics. It should come as no surprise, therefore, that many of the trade disputes involving the EU have concerned the use of new technologies in food production, and they are likely to continue to do so.

Just as the EU’s dual nature as an international organization and international actor contributes to the creation of trade barriers, it also gives reason to expect the EU to have particular trouble complying with adverse rulings by the WTO’s Dispute Settlement Body. The high threshold for the adoption of new rules, combined with and compounded by the problem of unravelling the complex compromises embedded in SEM regulations, make changing course particularly difficult even in the face of substantial international pressure.

Enlargement, by increasing the number of actors and diversity of interests involved, is likely both to create additional pressures for regulatory approximation within the EU and make agreeing rule changes more difficult. Enlargement, therefore, is likely both to make the EU’s market more important and intensify its tendencies towards being an ‘incidental fortress’.

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25 The first-come-first-served system of allocating licences was suggested by the panel in Ecuador’s complaint regarding compliance and a version was proposed by the US government. The EU accepted it, however, only after it could not reach agreement with its trading partners on its preferred option of allocating licences based on historical trade (Commission, 2000a).
References


