
EC Compliance with WTO Law: The Interplay of Law and Politics

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Abstract

This article analyses the interplay of international law and domestic politics in producing compliance with GATT/WTO law. It seeks to assess whether the strengthening of GATT dispute settlement under the WTO has led to greater compliance on the part of the European Community. In doing so, it focuses on cases of trade-restrictive regulatory process standards. From an in-depth analysis of two cases in which the EC adopted such standards, the article concludes that the change from GATT to WTO has indeed led to a greater awareness of international trade law considerations within the EC. Nevertheless, compliance with GATT/WTO law is not unconditional. Rather, the case studies point to two factors that are particularly important in understanding compliance. First, resorting to the WTO is most effective as a threat before the trade-restrictive standards are implemented; once these standards are implemented, it becomes progressively more difficult to have them withdrawn. Second, the role of European trade officials is crucial in producing compliance; although the role of trade officials within the EC has become stronger since the creation of the WTO, their influence on a decision to comply depends crucially on their capacity to exclude other interests from the decision-making process.

1 Compliance with GATT/WTO Law

A Introduction

With the creation of the World Trade Organization (WTO) in 1995, dispute settlement in the field of international trade law was greatly strengthened. Among the various changes to the dispute settlement system, the establishment of a dispute settlement panel and the adoption of a panel report can no longer be blocked by one of the parties to a dispute, as was the case under the GATT. Also, parties to a dispute can now appeal

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a panel ruling with an Appellate Body (AB) on points of law, creating a two-tiered dispute settlement system.

Substantively, the applicable law is similar under WTO and GATT, and the provisions of GATT 1947 were retained as GATT 1994. In several areas, additional agreements were concluded to broaden the scope of international trade law, for example to trade in services under the GATS. In other areas, agreements aimed to specify the general GATT rules for specific areas, such as for food safety standards in the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement), and for technical standards in the revised Technical Barriers to Trade Agreement (TBT Agreement).

All in all, the change from GATT to WTO was intended to strengthen existing GATT principles rather than to change those principles themselves. This strengthening was expected to improve compliance of WTO Members with WTO law and to reduce the use of unilateral trade measures.

At first sight, the WTO's success at achieving this aim seems mixed. On the one hand, the number of disputes has exploded since the creation of the WTO, possibly reflecting greater confidence in the new system among WTO Members.¹ On the other hand, important WTO Members have failed to comply with high-profile WTO rulings, such as the European Community (EC) in the beef hormones and bananas cases. This raises three important questions:

- Does WTO law have an impact on the behaviour of states?
- Under what conditions will there be compliance with WTO law?
- Has the change from GATT to WTO made a difference in this respect?

B Compliance and Compliance Constituencies

Compliance is the outcome of (political) processes between and within states. In the end, the behaviour of a state in the international arena is the outcome of a domestic political process, even if international commitments and developments exert an influence on this domestic process. An important part of the contemporary literature on compliance therefore focuses on processes within states for explaining compliance or the lack thereof. A crucial determinant in this approach is the existence of a so-called 'compliance constituency' of domestic political actors who support compliance with some international norm or legal regime.²

This does not mean that international institutions are irrelevant in ensuring compliance. On the contrary, international institutions may structure the political processes that lead to compliance in such a way that compliance becomes more (or

¹ Hudec offers an alternative explanation. He argues that the rise in the number of disputes under the WTO can be almost fully explained by the broader scope of the WTO Agreements as compared to the GATT, both in terms of areas covered by agreements (such as trade in services) and of the stronger obligations imposed on developing countries. See Hudec, 'The New WTO Dispute Settlement Procedure: An Overview of the First Three Years', 8 *Minnesota Journal of Global Trade* (1999) 17.

² Kahler, 'Conclusion: The Causes and Consequences of Legalization', 54 *International Organization* (2000) 675.

less) likely. Some international institutions do so by offering private parties access to dispute settlement procedures and by allowing domestic courts to apply international norms directly. The best example of such an institution is the EC, which is often regarded as a relatively effective international legal regime.³

Even if these legal routes are not available to private parties, as is the case under WTO law, international institutions may empower certain domestic political actors and thereby strengthen their political position. Compliance is encouraged to the extent that the position of domestic political actors that favour compliance (the compliance constituency) is strengthened *vis-à-vis* political actors that favour non-compliance.⁴ A strengthening of a dispute settlement system may contribute to this by making it more difficult for a Member State to avoid a legal ruling, thereby making issues of WTO law more salient within countries that impose restrictions on trade.

With regard to WTO law, the questions then are whether and under which conditions WTO law influences domestic political processes in the WTO Member States, and whether the change from GATT to WTO has made a difference in that respect.

C Studying Compliance

It is tempting to study compliance in terms of compliance with WTO rulings. This, however, is only one side of the coin: WTO law can also have effects without a formal ruling or even without a case being brought before a WTO panel in the first place. This is so because resorting to formal WTO dispute settlement procedures can be used as a threat. In addition, states may anticipate adverse legal rulings or threats from other countries and ensure compliance before a dispute arises.

These mechanisms are also important in assessing compliance with WTO law. In fact, compliance with WTO law will arguably be more pronounced in cases where no formal ruling is issued than in cases that lead to such a ruling. As Busch and Reinhardt have argued in their study of early settlements in GATT/WTO law: 'cases in which the regime's bluff has been called (i.e., those in which judgements are issued), are likely to be those in which the regime's normative power holds little sway over the defendant'.⁵ As a result, compliance with GATT/WTO law may well be less likely in cases that involve a formal ruling than in cases that do not.

³ See Helfer and Slaughter, 'Toward a Theory of Effective Supranational Adjudication', 107 *Yale Law Journal* (1997), at 277 and 337; Keohane, Moravcsik and Slaughter, 'Legalized Dispute Resolution: Interstate and Transnational', 54 *International Organization* (2000) 457; Trachtman, 'Bananas, Direct Effect and Compliance', 10 *EJIL* (1999) 659.

⁴ Cf. Keohane, Moravcsik and Slaughter, *supra* note 3, at 476; see also Cortell and Davis, 'How Do International Institutions Matter? The Domestic Impact of International Rules and Norms', 40 *International Studies Quarterly* (1996) 451; Goldstein and Martin, 'Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note', 54 *International Organization* (2000), at 608–609 and 631; and Börzel, 'Why There Is no "Southern Problem": On Environmental Leaders and Laggards in the European Union', 7 *Journal of European Public Policy* (2000) 148.

⁵ Busch and Reinhardt, 'Bargaining in the Shadow of the Law: Early Settlements in GATT/WTO Disputes', 24 *Fordham International Law Journal* (2000) 159.

As a consequence, this article starts from the other side. Rather than examining cases that have come before the WTO, it examines two EC regulatory measures that restricted trade in order to see whether GATT/WTO law had an impact on their adoption or implementation:

- The European leghold trap Regulation, which banned the imports of furs and fur products from countries that had not banned leghold traps and did not adhere to internationally agreed humane trapping standards;⁶
- The European ban on meat from animals treated with growth hormones (the beef hormone case).⁷

The selection of these two cases involves a number of choices. First, they are limited to cases where the EC adopted a trade-restrictive measure that (potentially) affected the US and Canada. Cases in the transatlantic relationship are important because this relationship is crucial for the functioning of the WTO and its dispute settlement system. The EC-US ‘tandem’, in particular, has been a driving force behind the creation of the WTO in the first place and, given the sheer size of their combined trade with each other and other countries, trade disputes in the EC-US relationship tend to have important effects on the entire WTO system.

Second, the cases are limited to measures involving process and production standards. There are two reasons for this limitation. To begin with, regulatory standards, which include process and production standards, have become much more relevant as barriers to trade now that tariffs have gradually been reduced. This is particularly true in the field of industrial products, but with the gradual liberalization of agricultural trade, regulatory standards have also gained significance in that field. In fact, most substantive modifications made during the creation of the WTO were aimed at dealing with regulatory standards in international trade.

Moreover, the imposition of process standards on other countries through the use of trade restrictions is a good example of the kind of unilateral measures that WTO law seeks to circumscribe. This does not mean that this type of trade restriction is always forbidden, but discriminating between ‘legitimate’ and ‘illegitimate’ measures is a central aim of the WTO Agreements. Because of the importance of process standards in the international trade regime, an analysis of compliance with GATT/WTO law in these cases is therefore likely to yield particularly relevant insights about compliance with GATT/WTO law more generally.

The leghold trap and beef hormone cases are particularly interesting for a number of reasons. First, both are cases of EC measures that did not conform to GATT/WTO law, and are thus particularly relevant to the compliance question. Second, one case led to a formal WTO dispute and ruling, while the other did not, allowing for a useful contrast. And third, both measures were implemented under the GATT regime, but were largely played out under the WTO regime, allowing for a comparison between

⁶ Council Regulation 3254/91 of 4 November 1991, OJ 1991 L 308/1.

⁷ Council Directive 88/146 of 7 March 1988, OJ 1988 L 70/16; later Council Directive 96/22 of 29 April 1996, OJ 1996 L 125/3.

the two regimes. Both cases show links to other EC measures, which is relevant for understanding the impact of WTO law. These related cases will briefly be discussed at the end of the two case studies.

At the same time, since the analysis relates to only two case studies, it is difficult to reach firm conclusions about compliance with WTO law in general. Nevertheless, detailed scrutiny of these cases offers interesting insights that merit further exploration.

D Methods Used in the Case Studies

The cases have been studied by means of a combination of methods. First, official documents and decisions have been analysed to reconstruct the formal decision-making processes in these cases. Second, existing case analyses and studies provide valuable insights into the background to and informal processes during these decision-making processes. Finally, I have conducted interviews with 39 officials and interest group representatives in the EC, the US and Canada, who were involved in the processes, in order to gain a better understanding of their roles and motivations.⁸

2 The Leghold Trap Regulation

A The Issue of Leghold Traps

Leghold traps are the subject of intense controversy between animal welfare activists and trappers. This type of trap grasps an animal's limb or body until the trapper comes to release the animal and kills it. Animal welfare activists claim that leghold traps are particularly cruel devices, because they may cause grave injuries and stress for the animal.⁹ Trappers, on the other hand, see leghold traps as valuable tools for wildlife management. They argue that the image of steel-jawed leghold traps is outdated and that modern versions cause much less injury.¹⁰

B The European Leghold Trap Regulation

In the late 1980s, European and North American animal welfare activists started a lobby to have leghold traps banned in the European Community and to ban the imports of furs from countries where they were still allowed. Their cause was picked up by several Members of European Parliament, who pushed for EC-wide measures.¹¹

In 1991, these efforts resulted in a Regulation that did two things. First, it banned the use of leghold traps in the EC itself. Second, it foresaw an import ban on 13 species of fur and fur products from countries that had not banned the use of leghold traps

⁸ For details, see S. Princen, *EU Regulation and Transatlantic Trade* (2002), at 29–32 and 371–374.

⁹ See e.g. Vingerling, 'Leghold Traps: The Animal's Point of View', in A. Nollkaemper (ed.), *Trapped by Furs? The Legality of the European Community's Fur Import Ban in EC and International Law* (1997) 7.

¹⁰ See e.g. Fur Institute of Canada, *Answers* (unpublished booklet, on file with author), at 18–20.

¹¹ EP Declaration of 16 September 1988, OJ 1988 C 262/221; EP Resolution of 17 February 1989, OJ 1989 C 69/198.

themselves and did not adhere to ‘internationally agreed humane trapping standards’. The ban was to enter into effect on 1 January 1995, with the possibility of a one-year postponement.¹²

C *Impact on the US and Canada*

Twelve of the 13 species that were to be covered by the European import ban were mainly caught in North America.¹³ In both the US and Canada, the use of leghold traps was still widespread. Neither country had federal regulatory standards for traps or trapping. Regulation at the level of states and provinces differed widely, but only a few jurisdictions had banned the use of leghold traps altogether.¹⁴

Although it had no binding federal standards, Canada had had considerable experience with nationwide voluntary trapping standards.¹⁵ In the US, there were no such standards when the European Regulation was adopted, but in 1996, in response to rising activism against leghold traps in several states, a process was started to formulate nationwide, voluntary ‘Best Management Practices’ for traps and trapping.¹⁶

For the Canadian and US fur industry, Europe was the most important export market. European countries were not only important as buyers of fur products, but also as fashion centres and centres for the processing of raw furs. All in all, more than 50 per cent of North American furs went to Europe at some point in the production process.¹⁷ As a result, an EC import ban would have a significant effect on the US and Canadian fur industries.

D *The ISO Process*

In 1987, on the initiative of the Canadian Government, the International Organization for Standardization (ISO) started to work on humane trapping standards. In the early 1990s considerable progress had been made on many important issues. After the European Regulation was adopted, the ISO process therefore became the obvious

¹² See *supra* note 6.

¹³ Apart from the US and Canada, the Regulation affected the Russian Federation, which later also joined talks between the US, Canada and the EC.

¹⁴ For an overview of trapping standards in the late 1980s, see the contributions on various regions in the US and Canada in M. Novak *et al.* (eds), *Wild Furbearer Management and Conservation in North America* (1987); for the US, see also Liss, ‘Trapping and Poisoning’, in Animal Welfare Institute, *Animals and their Legal Rights* (1990) 157.

¹⁵ Novak, ‘Traps and Trap Research’, in Novak *et al.* *supra* note 14, at 957 and 962–964.

¹⁶ International Association of Fish and Wildlife Agencies, *Improving Animal Welfare in U.S. Trapping Programs: Process Recommendations and Summaries of Existing Data* (unpublished report 1997, on file with author).

¹⁷ Shieff and Baker, ‘Marketing and International Fur Markets’, in Novak *et al.*, *supra* note 14, at 862–877; see also Hamilton *et al.*, ‘The European Union’s Wild Fur Regulation: A Battle of Politics, Cultures, Animal Rights, International Trade and North America’s Wildlife Policy’, *Transactions of the 63rd North American Wildlife and Natural Resources Conference* (1998) 573.

way for the US and Canada to avoid an import ban; explicit reference to the ISO process was even made in recital 6 of the European Regulation.¹⁸

At the same time, however, the new significance of the ISO process attracted participation from opponents of the fur trade and of those groups and countries that feared the ISO standards would be too lax. The influx of new participants disrupted the emerging consensus in the technical committee working on the standards, particularly when a majority voted to delete the word 'humane' from the standard's title.¹⁹ In response, the European Commission indicated that the standard would no longer qualify under the leghold trap Regulation, and in September 1995 efforts to reach an agreement were abandoned altogether.²⁰

E *The GATT/WTO Compatibility of an Import Ban*

When the European regulation was adopted, no cases of trade measures that were meant to protect animals in other countries had been brought before the GATT. This changed in the first half of the 1990s, with the widely publicized *Tuna-Dolphin* cases. These involved a US measure that banned the import of tuna from countries that had not taken measures to reduce the number of accidental dolphin kills during tuna catches.

In two separate rulings, GATT panels decided that the US measure was not allowed under GATT law.²¹ The precise reasoning differed between the two panels, but they both argued that a state could not ban the imports of products from another country exclusively based on the way these products had been produced.

Although the two panel reports were never officially adopted by the GATT General Council, they were significant for the European leghold trap Regulation in a number of ways. First, the line of argument developed in the *Tuna-Dolphin* cases made it clear that a European import ban under the leghold trap Regulation was likely to fail before the GATT. Like the US measure to protect foreign dolphins, the European Regulation sought to ban fur imports exclusively based on the way the animals had been caught in the US and Canada.

Second, the *Tuna-Dolphin* reports were published exactly between the adoption of the leghold trap Regulation and the foreseen implementation date of the import ban. They therefore raised awareness of the international trade law aspects of this type of import ban, both in North America and in the EC.

Third, the leghold trap Regulation pitted some of the same states against each other, but in reverse roles. In the *Tuna-Dolphin* cases, the EC had argued against the US ban,

¹⁸ See *supra* note 6.

¹⁹ Animal Welfare Institute, 'Pro-Steel Jaw Leghold Trap "Experts" Meet behind Closed Doors to Produce a Final Draft of "Humane" Trap Standards', 42 *AWI Quarterly* (1993), at 12–13; Animal Welfare Institute, 'Friends of Furbearers: Delegations that Voted for Removal of the Word "Humane" from the Title of the Trap Standards', 43 *AWI Quarterly* (1994) 11; National Trappers Association, *Annual Report* (unpublished 2000, on file with author) 12.

²⁰ National Trappers Association, *supra* note 19, at 15.

²¹ *United States — Restrictions on Imports of Tuna*, 16 August 1991, 30 *I* (1991) 1594; *United States — Restrictions on Imports of Tuna*, June 1994, 33 *International Legal Materials* (1994) 839.

claiming that this type of unilateral measure to protect animals in other countries was not allowed. Under the leghold trap Regulation, the situation was different: now it was the US that complained about the European measure, while the EC defended its use of an import ban to protect animals in other countries.

The issue of the GATT/WTO compatibility of process standards meant to protect values in other jurisdictions resurfaced in the later *Shrimp-Turtle* case under the WTO.²² This case concerned a US import ban on shrimp from countries that had not adopted sufficient measures to avoid the accidental killing of sea turtles during shrimp catches. The *Shrimp-Turtle* AB Report seems to offer more room for using this type of process standard. Yet, even under the *Shrimp-Turtle* case law, the leghold trap Regulation would probably have failed GATT/WTO scrutiny. To begin with, the *Shrimp-Turtle* AB Report required a ‘sufficient nexus’ between the value to be protected and the territory of the state imposing the import ban.²³ Although the AB Report did not specify what exactly constituted a ‘sufficient nexus’, it would have been difficult to establish one between fur-bearing animals in North America and the territory of the EC. Moreover, the leghold trap Regulation required the US and Canada (or any other country under its scope) to ban leghold traps altogether or to adopt a set of international humane trapping standards, if available. This amounted to requiring the adoption of ‘essentially the same’ policy, which had been deemed GATT/WTO-inconsistent in the *Shrimp-Turtle* case.²⁴ Finally, the leghold trap Regulation provided for a blanket ban on all furs from countries that did not comply with the Regulation’s regulatory requirements, without distinguishing between states or provinces, let alone individual fur producers.²⁵

F *The Creation of the WTO*

When the ISO process to formulate international humane trapping standards failed, a European import ban became ever more likely. Since banning leghold traps was not politically feasible in either the US or Canada, the two countries started to look for other ways to prevent an import ban. In 1994, the Canadian Government requested consultations with the EC under the GATT, the first step toward a formal complaint. The US Government lobbied the European Commission to amend the Regulation in

²² *United States — Import Prohibitions of certain Shrimp and Shrimp Products*, Report of the Panel WT/DS58/R of 15 May 1998; Report of the Appellate Body WT/DS58/AB/R of 12 October 1998 (hereinafter AB Report).

²³ AB Report, *supra* note 22, at para. 6.133.

²⁴ *Ibid.*, at para. 6.163.

²⁵ Cf. *ibid.*, at para. 6.165. Howse and Regan have challenged the conventional arguments about the GATT/WTO incompatibility of trade-restrictive process and production standards; see Howse and Regan, ‘The Product/Process Distinction — An Illusory Basis for Disciplining “Unilateralism” in Trade Policy’, 11 *EJIL* (2000) 249. Although their argument offers an interesting contribution to the debate on process standards in GATT/WTO law, the interpretation offered here probably reflects the state of GATT/WTO law in the second half of the 1990s (cf. John Jackson’s comment in Jackson, ‘Comments on the Shrimp/Turtle and the Product/Process Distinction’, 11 *EJIL* (2000) 303). Moreover, it is doubtful whether the EC’s country-based ban in the leghold trap Regulation even fulfils their own criteria (cf. Howse and Regan, at 269 *et seq.*).

order to avoid an import ban, but the proposed amendments were blocked by the European Parliament.²⁶

The US and Canadian Governments focused their lobbying efforts on DG I (Trade), which until then had not been involved in this issue. The US and Canadian position was strengthened by the imminent creation of the World Trade Organization, which was to come into being on 1 January 1995. Under the WTO, the EC would no longer be able unilaterally to block the establishment of a dispute resolution panel or the adoption of a panel report.

The US and Canadian Governments used the argument of GATT/WTO incompatibility to put pressure on the European Commission to find a solution. To DG I, the prospect of a WTO panel was very unattractive, since the EC was likely to lose the case. Moreover, the European Commission itself had consistently argued against the use of unilateral trade measures to protect the environment, both in the *Tuna-Dolphin* cases and in the Uruguay Round of negotiations.²⁷ This commitment would be restated in a 1996 Communication on Trade and Environment, which read that ‘the most effective way of dealing with international environmental problems is through international and multilateral agreements, not by unilateral trade measures’.²⁸ The leghold trap Regulation could pose a rather inconvenient precedent in this respect, and DG I therefore had a clear interest in avoiding an open trade dispute and a formal WTO case.

At the same time, the US and Canadian Governments did not have an interest in a formal WTO dispute either. To begin with, a formal complaint could only be filed after the EC had implemented an import ban. Then, it could take years for the dispute resolution procedure to be concluded, and in that time the damage to the North American fur industry might already have been done. Furthermore, resorting to the WTO would expose the US and Canadian Governments as ‘animal-unfriendly’. Given the public outcry after the *Tuna-Dolphin* cases, particularly in the US, both governments had an interest in avoiding being pushed into that position.

G *The Agreements on Humane Trapping Standards*

In order to avoid both an import ban and an open trade dispute, the US and Canadian Governments proposed to negotiate a separate agreement on humane trapping standards with the EC. This agreement would cover not just leghold traps, but all types of traps for a larger number of species in both North America and Europe, and would then qualify as an exemption under the Regulation. From an EC perspective, the agreement would be negotiated under Article 228 (now Article 300) EC Treaty, requiring a qualified majority vote in the Council of Ministers and consultation of the European Parliament. The agreements would then be recognized by the Commission

²⁶ See Princen, *supra* note 8, at 113–116.

²⁷ See D. Vogel, *Trading Up. Consumer and Environmental Regulation in a Global Economy* (1995), at 113–114; and Winham, ‘The World Trade Organization: Institution-Building in the Multilateral Trading System’, 21 *The World Economy* (1998) 364.

²⁸ Communication from the Commission to the Council and the European Parliament on Trade and Environment of 28 February 1996, COM (96) 54, at 22.

as ‘international humane trapping standards’ under the leghold trap Regulation. This procedure effectively ruled out any decisive role for the European Parliament, which had been one of the main supporters of a stringent application of the import ban.

In spring 1995, the US, Canada and the EC started talks on an agreement, building on the work that had been done in the ISO. They were later joined by the Russian Federation, the other country that would be affected by an import ban. In these talks, DG I succeeded in gradually replacing DG XI (Environment), the initial sponsor of the Regulation within the European Commission, as the main participant on the European side. This also reduced access opportunities for animal welfare groups, who had mainly worked together with DG XI and the European Parliament. Implementation of the import ban was postponed several times during the negotiations, even though the Regulation itself only foresaw a one-year postponement.²⁹

In December 1996, the EC and Canada (and Russia) initialled an agreement that contained binding standards for a wide range of traps. The US was not willing to accept a binding agreement, but talks continued to reach a non-binding agreement with the EC that contained the same substantive standards as the EC-Canadian-Russian agreement.

The agreements were generally condemned by animal welfare activists, who argued that they were too lax, and their concerns were voiced by the European Parliament.³⁰ In the end, however, adoption of the agreement only depended on the approval of the Council of Environmental Ministers, which had also adopted the leghold trap Regulation itself.

In the Environmental Council, the UK, Germany, Belgium and Austria formed a blocking minority against adoption of the agreement between the EC, Canada and Russia, even after an additional declaration by the Canadian Government that it would prohibit the use of leghold traps for a number of species.³¹ As it became clear that the agreement would not be accepted by the Environmental Council, the Dutch Presidency of the EC decided to shift decision-making to the General Affairs Council in July 1997, thereby completing the shift from the environmental to the trade policy arena within the EC. The General Affairs Council approved the agreement on 22 July of that year.³²

The EC-US agreement went directly to the General Affairs Council. Since this agreement was non-binding, it was not self-evident that it could count on the same majority as the EC-Canadian agreement.³³ The position of Germany was particularly pivotal in this respect. In December 1997, just days before the vote in the General

²⁹ See Princen, *supra* note 8, at 115 *et seq.*

³⁰ EP Resolution of 21 February 1997, OJ 1997 C 85/173; EP Resolution of 18 December 1997, OJ 1998 C 14/177; and EP Resolution of 16 June 1998, OJ 1998 C 210/31.

³¹ See *1978th Council — Environment*, Press Release, 9 December 1996, PRES/96/360; and *2017th Council — Environment*, Press Release, 19 June 1997, PRES/97/204.

³² *2024th Council — General Affairs*, Press Release, 22 July 1997, PRES/97/246. The formal adoption took place on 26 January 1998; see Council Decision 98/142, OJ 1998 L 42/40.

³³ See the statement of the General Affairs Council in *2047th Council — General Affairs*, Press Release, 24 November 1997, PRES/97/356.

Affairs Council, the US Trade Representative sent a letter to the German Minister of Foreign Affairs indicating the US Government's commitment to developing voluntary trapping standards and warning of a trade dispute should the agreement be rejected by the EC.³⁴ In the end, Germany supported the agreement, and it was approved on 12 December 1997.³⁵

H *GATT/WTO Law in the Leghold Trap Case*

Judged exclusively from the outcome of the case, GATT/WTO law does not seem to have led to compliance on the part of the EC: the leghold trap Regulation was not withdrawn, and after the agreements with the US and Canada were concluded, the import ban was formally imposed.³⁶ At the same time, closer scrutiny of developments in this case makes it clear that GATT/WTO law played an important role in the background.

By using GATT/WTO incompatibility as an argument, the US and Canada were able to draw DG I into the process, and to force a negotiated solution, even though the Regulation did not foresee such an outcome. In the end, this led to an outcome that was acceptable to the US and Canadian Governments, as well as to DG I, and avoided an open trade dispute.

Evaluation of this outcome will depend on the perspective of the evaluator. The European Parliament and animal welfare activists have condemned the agreements as being too lax. Those who care about the binding commitments that WTO Members have made will argue that the EC violated its commitments by not withdrawing the leghold trap Regulation. In terms of our understanding of compliance with GATT/WTO law, however, this case shows how GATT/WTO law can play an important role in the background of negotiations, and how the 'shadow of WTO law' has had an impact on the way WTO Members deal with trade restrictive measures.

I *Further Effects: The EC Cosmetics Directive*

WTO law and the leghold trap issue have also impacted the EC's behaviour in a related case, concerning the EC's cosmetics Directive. The Sixth Amendment to this Directive, adopted in 1993, foresaw a ban on cosmetics tested on animals, which was set to come into force in the late 1990s.³⁷ This ban would also affect imported cosmetics that had been tested in third countries. In terms of WTO compatibility, the cosmetics Directive suffered from the same flaws as the leghold trap Regulation, and was therefore also likely to violate WTO law. In the second half of the 1990s, because of the

³⁴ Letter from USTR Charlene Barshefsky to the German Minister of Foreign Affairs Klaus Kinkel, dated 10 December 1997 (on file with author).

³⁵ *Special Council Meeting — General Affairs*, Press Release, 12 December 1997, PRES/97/393. The formal adoption took place on 13 July 1998; Council Decision 98/487, OJ 1998 L 219/24.

³⁶ By adopting lists of exempted countries: see Council Decision 97/602 of 22 July 1997, OJ 1997 L 242/64; and Council Decision 98/188 of 2 March 1998, OJ 1998 L 70/28.

³⁷ Council Directive 93/35 of 14 June 1993, OJ 1993 L 151/32.

apparent WTO incompatibility, DG I (Trade) started to put pressure on DG Enterprise, the main sponsor of the Directive, to remove the trade restrictions from the Directive.³⁸

In 2000, the European Commission tabled an amendment to that effect.³⁹ After the European Parliament opposed substituting a testing ban for a general marketing ban, agreement was reached in a conciliation procedure in December 2002.⁴⁰ The testing and marketing ban was postponed until 2009, and for some tests until 2013, with further postponement possible through new legislative acts. Thus, the European Commission was not able to remove the import ban completely. At the same time, however, the decision to postpone the marketing ban also buys precious time. If the new WTO negotiating round reinforces the GATT/WTO incompatibility of this type of measure, the process of revising the directive may well start all over again.

3 The Beef Hormone Case

A The Issue of Growth Hormones and the European Ban

Growth hormones are used to speed up the fattening process in animals. In this way, they will grow faster and need less feed to reach their full weight. In addition, their meat will be leaner. At the same time, concerns have been raised about the carcinogenic effects of these hormones. In the early 1980s, the use of growth hormones caused a public outcry in Italy, when children were reported to have grown oversized genitals and to suffer from other disorders in their sexual development as a result of eating hormone-treated meat.⁴¹

In response to these concerns, the EC decided in 1981 to ban the use of a number of growth hormones.⁴² A ban on five additional growth hormones was postponed until further studies had been completed. Although the scientific working group that studied these hormones found that they did not pose specific health risks, public pressure led the EC to adopt a complete ban on growth hormones in 1985.⁴³

In the Council of Ministers, the UK was the staunchest opponent of a ban. The UK Government challenged the ban on formal grounds before the European Court of Justice. Although the Court ruled in 1988 that the 1985 Directive was indeed void on

³⁸ See Princen, *supra* note 8, at 144.

³⁹ European Commission, *Proposal for a Directive of the European Parliament and of the Council Amending for the Seventh Time Council Directive 76/768/EEC on the Approximation of the Laws of the Member States Relating to Cosmetics Products*, COM (2000) 189 final, 5 April 2000.

⁴⁰ *Directive of the European Parliament and of the Council Amending Council Directive 76/768/EEC on the Approximation of the Laws of the Member States Relating to Cosmetic Products*, Joint Text Approved by the Conciliation Committee, Document C5–0557/2002, 8 January 2003.

⁴¹ Princen, *supra* note 8, at 147–149.

⁴² Council Directive 81/602 of 31 July 1981, OJ 1981 L 222/32.

⁴³ For the findings of the scientific working group, see Lamming *et al.*, 'Scientific Report on Anabolic Agents in Animal Production', 121 *The Veterinary Record* (1987), at 389–392; for the ban, see Council Directive 85/649 of 31 December 1985, OJ 1985 L 38/228.

procedural grounds, it was readopted soon afterwards.⁴⁴ Since then, the UK has remained the only consistent opponent of a complete ban among the EC Member States.

Apart from a ban on the use of growth hormones within the EC, the Directive also banned the imports of meat from countries that continued to allow the use of growth hormones. The ban had to be framed in terms of the 'use of growth hormones' rather than hormone levels in meat, because it covered both natural and synthetic growth hormones. Synthetic growth hormones can be detected in an animal's meat, but when natural growth hormones are inserted into an animal, it is impossible to distinguish the added hormones from the natural hormones produced by the animal itself. If administered correctly, the residues of added growth hormones in meat will usually fall within the natural variation in these natural hormone levels.

B Impact on the US and Canada

The import ban mainly affected beef imports from the US and Canada. In both countries, the five growth hormones that the EC had banned in 1988 were widely used, mainly in cattle.⁴⁵ Exports to the EC were relatively limited, because of the EC's restrictive import regime for beef. The two countries shared a quota for prime beef imports. In addition, the US exported beef offal, which was not subject to a quota.⁴⁶

Yet, the European measure was part of a larger debate on trade in agricultural products, in which the US and Canada pushed for the liberalization of agricultural trade. Their efforts were mainly aimed at the EC, whose Common Agricultural Policy had resulted in strong restrictions on agricultural imports. Agricultural trade liberalization was one of the main issues in the ongoing negotiations of the GATT Uruguay Round. As a result, US and Canadian farmers and officials saw the European hormone ban as yet another way for the EC to protect its beef market against cheaper imports.⁴⁷

C Developments in the late 1980s

The import ban was initially set to enter into force on 1 January 1988, but this was later postponed to 1 January 1989. In 1987, the US filed a complaint under the GATT's TBT Agreement, but the establishment of a panel was blocked by the EC. As the import ban took effect, the US imposed retaliatory duties against EC products. An

⁴⁴ For the ECJ ruling, see Case 68/86, *United Kingdom of Great Britain and Northern Ireland v. Council of the European Communities*, [1988] ECR 855; for the readopted ban, see Council Directive 88/146 of 7 March 1988, OJ 1988 L 70/16.

⁴⁵ For an overview of authorizations in the US, see Preston, 'Hormone Containing Growth Promoting Implants in Farmed Livestock', 38 *Advanced Drug Delivery Reviews* (1999) 124. During the WTO cases on the European import ban, the US and Canada claimed that about 70 per cent (the US) and 75 per cent (Canada) of their beef was hormone-treated.

⁴⁶ Vogel estimates that less than 1 per cent of the US and Canadian beef production was exported to the EC; see Vogel, *supra* note 27, at 167–169.

⁴⁷ Princen, *supra* note 8, at 153–155.

EC request to establish a GATT dispute resolution panel on the US retaliation was turned down by the US. Negotiations between trade officials from both sides did not lead to a solution. In the end, the two parties only reached an 'Interim Agreement' on the imports of certified non-treated beef from the US under a so-called 'Hormone Free Cattle' (HFC) programme. Yet, exports under this programme have remained limited.⁴⁸

D The Creation of the WTO and the SPS Agreement

This stalemate continued until 1995, when the WTO came into existence. Part of the WTO Agreements was an Agreement on Sanitary and Phytosanitary measures (SPS Agreement), which specified conditions for the use of trade-restrictive food safety standards. The SPS Agreement required such standards to be based on scientific risk assessments. Moreover, domestic standards were presumed to conform to WTO law if they were based on international standards as formulated in the Codex Alimentarius Commission (hereinafter Codex), a subsidiary body of the UN's Food and Agriculture Organization and the World Health Organization.⁴⁹

Debates on residue limits for growth hormones in meat had been ongoing in Codex since the mid-1980s. The formulation of residue limits was based on the idea that hormones pose no health risks as long as their residue level in meat stays under a certain limit. In June 1995, the US and Canada forced a vote on residue limits for five growth hormones, which were adopted by a narrow majority.⁵⁰ This paved the way for a WTO case, since the EC's blanket ban on growth hormones clearly went beyond Codex's residue limits.

E The Cases before the WTO

In 1996, both the US and Canada requested the establishment of a WTO panel. Earlier that year, the EC had adopted a new Directive amending the 1988 Directive and consolidating earlier Directives,⁵¹ and this new Directive now became the subject of the dispute before the WTO panel. Formally, the US and Canadian complaints were two separate disputes, but the composition of the two panels was identical, as were most of the conclusions in the panel reports.⁵²

The panel reports concluded that the European import ban violated the SPS

⁴⁸ See Meng, 'The Hormone Conflict between the EEC and the United States within the Context of GATT', 11 *Michigan Journal of International Law* (1990), at 824–825; and McNiel, 'The First Case under the WTO's Sanitary and Phytosanitary Agreement: The European Union's Hormone Ban', 39 *Virginia Journal of International Law* (1998), at 109–111.

⁴⁹ See *Agreement on the Application of Sanitary and Phytosanitary Measures*, Part of Annex 1A to the Agreement Establishing the World Trade Organization, Adopted on 15 April 1994.

⁵⁰ See *Report of the Twenty-First Session of the Joint FAO/WHO Codex Alimentarius Commission*, Rome, 3–8 July 1995, ALINORM 95/37, paras 43–46.

⁵¹ Council Directive 96/22 of 29 April 1996, OJ 1996 L 125/3.

⁵² For the report on the US complaints, see WT/DS26/R/USA of 18 August 1997; for the report on the Canadian complaint, see WT/DS48/R/CAN of 18 August 1997. I will only refer to the report on the US complaint (hereinafter 'Panel Report'), since the substantive conclusions in both reports are almost identical.

Agreement in three ways. First, the ban was not based on the Codex standards that had been adopted the year before, which effectively shifted the burden of proof to the EC.⁵³ Second, the ban was not based on a risk assessment, since the EC could not show convincing scientific evidence for the health risks of the growth hormones.⁵⁴ And third, the hormone ban went beyond the level of protection offered by European regulatory standards for other substances in food, which resulted in 'arbitrary or unjustifiable distinctions in the levels of sanitary protection'.⁵⁵

In the appeal before the WTO's Appellate Body, the first and last conclusion of the panel were reversed. The AB maintained, however, that the European ban was not based on a scientific risk assessment. As a consequence, the ban violated WTO law.⁵⁶

F Non-compliance and Retaliation

Although the AB Report clearly condemned the European ban, the EC took no steps to reverse it. The European Commission announced that it would conduct further risk assessments in order to fill the gap in the scientific underpinnings of the ban. The US and Canada, however, demanded that the EC withdraw the import ban. In a further arbitration case, the WTO concluded that the EC should bring its measures into compliance within 15 months after the adoption of the AB report, noting that 'withdrawal is the preferred means of implementation'.⁵⁷

Within the EC, however, support for the hormone ban had only grown stronger. Concerns about food safety had gained a new impetus with a series of food scandals in Europe in the second half of the 1990s, the BSE crisis being the most widely publicized. These scandals had led to a strengthening rather than a weakening of support for the ban among consumer groups and elected officials alike. In addition, European farmers, represented by COPA/COGECA, argued that it would not be fair to allow imports of non-treated beef while prohibiting the use of growth hormones in Europe.⁵⁸

Under these conditions, reversing the hormone or even the import ban was politically not feasible. The European Commission and US officials engaged in talks about compensation, mainly in the form of an expansion of the Hormone Free Cattle programme, but these attempts eventually failed.⁵⁹ The US and Canada gained WTO authorization to retaliate in July 1999, and they imposed retaliatory duties

⁵³ Panel Report, *supra* note 52 at para. 8.75 ff.

⁵⁴ *Ibid.*, at paras 8.136–8.137.

⁵⁵ *Ibid.*, at para. 8.203 *et seq.*

⁵⁶ The AB report is the same for both complaints: *EC Measures Concerning Meat and Meat Products (Hormones)*, Report of the Appellate Body WT/DS26/AB/R & WT/DS48/AB/R of 16 January 1998. The AB's conclusions on the role of international standards can be found in para. 163 *et seq.*; those on distinctions in levels of protection in para. 221 *et seq.* The conclusions on the lack of a scientific basis can be found in para. 178 *et seq.*

⁵⁷ See WT/DS26/15 and WT/DS48/13 of 29 May 1998; quote in para. 39.

⁵⁸ For the broad support base, see the joint declaration of the European consumers' association BEUC and the European farmers' association COPA/COGECA: *European Consumers and Farmers Unanimous on the EU Ban of Hormone Treated Beef*, Joint Statement of BEUC, EUROCOOP, COPA and COGECA, CdP(99)19–1, Press Release, 29 April 1999.

⁵⁹ Princen, *supra* note 8, at 178–182.

amounting to 116.8 million US dollars and 11.3 million Canadian dollars, respectively.⁶⁰ In practice, the retaliatory measures mainly affected Danish pork producers. They pushed for compromise on the issue, but in the end their political clout was not sufficient to have an impact on European decision-making.⁶¹

G *GATT/WTO Law in the Beef Hormone Case*

The beef hormone case presents a clear example of the relative ineffectiveness of GATT/WTO law. Despite a series of clear WTO rulings against the European ban, the EC has not been willing to reconsider its ban, let alone reverse it. As the US and Canada have not been able to find a compromise, this case has ended in a stalemate, with the EC retaining its ban and the US and Canada imposing retaliation.

In this case, the domestic support for the import ban within the EC was simply too strong for the WTO rulings to have a decisive effect. In the trade-off between the political costs of reversing the ban and the political costs of defying WTO law, the latter was clearly the more attractive option for the EC. This is particularly so because support for the hormone ban has been so widespread, including a strong coalition of consumer and farm groups and all Member States, with the exception of the UK.

H *Further Effects: The BST Case*

Still, the hormone case may have had an influence on the related issue of BST, a growth hormone used to increase milk production in cows. This issue came up in the early 1990s, and the case for a ban was very similar to that for growth hormones in meat.⁶² As the EC considered banning the use of BST internally, European farmers called for an import ban on milk from BST-treated cows, using the same logic of 'fair competition' they had advanced in the beef hormone issue.⁶³ However, the EC decided only to ban the use of BST within the EC and not imports of milk from BST-treated cows.⁶⁴ This avoided a trade dispute with the US, where the use of BST was allowed.

4 Conclusions

These two cases present some interesting insights into compliance with GATT/WTO law. In both cases, the European measure violated GATT/WTO law. However, the responses of, on the one hand, the US and Canada and, on the other, the EC, differed

⁶⁰ See United States Trade Representative, *USTR Announces Final Product List in Beef Hormones Dispute*, Press Release 99–60 of 19 July 1999; and Department of Foreign Affairs and International Trade, *Canada Retaliates against the EU*, Press Release No. 174 of 29 July 1999.

⁶¹ Princen, *supra* note 8, at 176.

⁶² Cf. Vogel, *supra* note 27, at 172.

⁶³ See COPA/COGECA, *Position of COPA and COGECA on a Commission Proposal to Prohibit the Use of BST (COM (1999) 544 final)*, Pr(99)94F1/P(99)98F1, 10 December 1999.

⁶⁴ Council Decision 1999/879 of 17 December 1999, OJ 1999 L 331/71.

greatly between the two cases. In the leghold trap case, the US and Canada did not go to the WTO, but the EC position was considerably softened. In the beef hormone case, the US and Canada did go to the WTO and won their cases, but the EC has to date refused to lift its ban.

At first sight, these diverging outcomes give the impression that GATT/WTO law played no important role in these cases: in both instances, the EC's behaviour was not in full compliance with GATT/WTO law, and this was even more so in the case where the US and Canada obtained a clear WTO ruling. At the same time, however, GATT/WTO law did affect the processes and outcomes in these cases, although not in a straightforward manner. In the leghold trap case, the EC's position considerably softened under the threat of a GATT/WTO dispute, leading to a compromise with the US and Canada. In the cosmetics and BST cases, anticipation of GATT/WTO incompatibility of the proposed measures also led to a change in the position of the EC. In the beef hormone case, by contrast, GATT/WTO law does not seem to have had any effect on the EC.

In explaining these outcomes, and the differences between the cases discussed, three conclusions can be drawn:

- the change from GATT to WTO has increased the importance of international trade law arguments in the EC's political process;
- resorting to the WTO is most effective as a threat;
- the role of trade officials, and in particular DG I (Trade), is crucial in determining the EC's compliance with GATT/WTO law.

A The Change from GATT to WTO

The influence of international trade law within the EC seems to have increased with the change from GATT to WTO. This is witnessed most clearly in the leghold trap case. In this case, DG I (Trade) became active in 1994, just before the WTO came into existence. Until 1994, international trade law considerations were conspicuously absent from the political debate about the leghold trap Regulation within the EC, and DG I did not play an important role in the process. Yet, the threat of a panel under the new WTO, which was partly set up to prevent Members from acting unilaterally, seems to have increased the salience of international trade law considerations within the EC.

This conclusion is supported by the development of the European cosmetics Directive. In this case, as in the leghold trap case, the creation of the WTO marked an important change in the European Commission position, since DG I (Trade) became actively involved in this issue in the second half of the 1990s. In 1993, when the Sixth Amendment was adopted, the GATT incompatibility of the Amendment was a much less important issue for DG I.

Of course, the creation of the WTO did not make a difference in the beef hormone case. However, it probably had an indirect effect in the BST case, where the EC adopted regulatory standards that were compatible with GATT/WTO law.

Partly, the decisions in the cosmetics and BST cases may be a reflection of the

previous negative experiences of the European Commission with the leghold trap and beef hormone cases. The Commission may well have wanted to avoid burdening the transatlantic agenda with even more trade disputes. Still, the change from GATT to WTO seems to have contributed to the Commission's awareness of the negative effects of WTO-incompatible regulatory standards, if only because under the WTO it could no longer block a dispute settlement procedure, something it had previously sometimes done under the GATT.

This conclusion does not conform to Busch and Reinhardt's finding that the institutional strengthening of the GATT's dispute settlement procedures had no appreciable effect on the level of compliance. This conclusion is based on a quantitative analysis of all GATT/WTO cases up to 1999, and their analysis is therefore not comparable to the qualitative analysis of a small number of cases carried out in this article. Still, the effects of the change from GATT to WTO in these cases seem to have been the result of a more general shift in the EC's attitude toward GATT/WTO compatibility. As a consequence, their significance goes beyond the cases themselves. Partly, the increased awareness of GATT/WTO law may be peculiar to the EC, which would explain why aggregate numbers do not show an increase in compliance. At the same time, the new WTO dispute settlement procedure seems to have made it less attractive to violate WTO law, at least for the EC.

B *Using the WTO as a Threat*

Resorting to the WTO seems to be more effective as a threat, before a trade measure is implemented, than after the measure has been implemented. In the leghold trap case, the US Government could use the threat of a WTO case to induce the European Commission to change its position on the import ban. In the beef hormone case, by contrast, the import ban had been in force for more than nine years when it was struck down by the WTO, and the EC stuck to its initial position.

The relative ineffectiveness of WTO cases once a measure is in place is probably the result of four factors that raise the political costs of reversing a regulatory decision. First, trade measures tend to reinforce their support base. In the beef hormone case, importers of US beef, who could potentially have lobbied for a lifting of the import ban, had either gone out of business or shifted to other sources of meat before the WTO rulings. This diluted internal opposition against the import ban. When a ban has not yet been implemented, these groups may still play an active role in the internal political process.

Second, reversing a decision does greater damage to a regulatory body's credibility than not implementing a pending one. As a result, the regulatory body will oppose a reversal more strongly than simply forestalling implementation. Again, in the beef hormone case, it became gradually more difficult for the European Commission to argue for a reversal of the import ban after it had raised concerns over health effects for a long time.

Third, reversing a decision normally requires an explicit decision, whereas forestalling implementation can be achieved in less formal ways. This argument

depends on the institutional context within which measures are adopted. In the EC, reversal of a measure usually requires a qualified majority or even unanimity in the Council of Ministers, and possibly a vote by the European Parliament. The institutional set-up thereby contains a bias toward the status quo. Forestalling a decision, by contrast, often does not require an explicit vote. In the leghold trap and cosmetics cases, the European Commission could independently postpone implementation of the foreseen import bans. In the beef hormone case, this was not an option: rather, a new decision by the Agricultural Council would have been required.

Fourth, regulatory standards that restrict trade involve a trade-off between free trade and non-trade concerns. Withdrawing existing standards arguably makes this trade-off much more salient and explicit than the mere postponement or even withdrawal of standards that are on the books but have not yet been implemented. As a result, political resistance from public interest groups and regulators to withdrawing a regulatory standard is likely to be greater if the standards have already been implemented.

This conclusion ties in with Busch and Reinhardt's finding that early settlements are more likely to lead to the resolution of WTO disputes than actual rulings.⁶⁵ However, as an addition to their argument, there may also be a dynamic aspect to this finding: the opposition to a measure that violates GATT/WTO law may dwindle, while support for it may strengthen as the measure has been in place for a longer time.

C *The Role of Trade Officials*

Trade officials play a crucial role in effecting compliance with GATT/WTO law. In the leghold trap and cosmetics cases, it was DG I (Trade) that pushed for a solution that was compatible with GATT/WTO law, while other DGs and the European Parliament lay greater stress on animal welfare aspects. In the leghold trap case, the US and Canadian Governments even actively sought to draw European trade officials into the process in order to change the EC's position.

A similar dynamic has been observed by Schoppa in his study of US diplomatic pressure on Japan. He found that US pressure was most successful when it involved Japanese foreign affairs officials in policy debates over the issues at stake. These officials had a completely different set of preferences and interests than the older participants in that policy area, leading to a shift of position. Schoppa called this mechanism 'participation expansion'.⁶⁶

Although the leghold trap case presents a good example of successful participation expansion, the involvement of European trade officials made no difference in the beef hormone case. The crucial difference between the two cases was that, in the leghold trap case, trade officials were able to exclude actors that opposed a negotiated solution, such as the European Parliament and animal welfare groups. A combination of

⁶⁵ Busch and Reinhardt, *supra* note 5, at 162–163.

⁶⁶ Schoppa, 'Two-Level Games and Bargaining Outcomes: Why Gaiatsu Succeeds in Japan in Some Cases but not Others', 47 *International Organization* (1993) 353.

constitutional and political factors led to this exclusion: constitutionally, the use of an external agreement under Article 228 (now Article 300) EC Treaty reduced the role of the European Parliament to one of mere consultation; politically, trapping standards and animal welfare policy were rather weakly institutionalized within the Commission, and neither the Member States nor the Commission had a strong tradition in this field.⁶⁷ In the beef hormone case, by contrast, decision-making was firmly entrenched in the agricultural policy community, and supported by agricultural and consumer associations. Moreover, these actors could not be excluded from the decision-making process by moving to another legal instrument. Consequently, DG I (Trade) was not able to dominate the process in the same way it eventually did in the leghold trap case.

This points to the importance of trade officials as the institutional supporters of free trade and the GATT/WTO regime. Participation in the decision-making process by trade officials is therefore an important precondition for compliance with GATT/WTO law. At the same time, participation by trade officials is not a sufficient condition. The outcome also depends on the extent to which they are able to dominate the decision-making process *vis-à-vis* participants with different interests.

D A Final Note on Compliance

This discussion of EC compliance with WTO law can give reason for optimism or pessimism on the part of those who wish to see an improvement in compliance with WTO law. On the one hand, optimists may argue that WTO law seems to have had an impact on the way the EC deals with trade-restrictive process standards. All in all, the creation of the WTO has strengthened the commitment of officials from the European Commission, in particular DG I (Trade), to comply with international trade law. On the other hand, the results in these cases may encourage pessimism among those who would wish compliance to be independent of the political expediencies in WTO Member States, but rather the result of institutional enforcement mechanisms.⁶⁸

It is doubtful whether international agreements can ever hope to achieve this kind of institutionally guaranteed compliance. In the end, compliance will always be the outcome of a political calculus of decision-makers who also take into account other political considerations than WTO law or the possibility of retaliation. At the same time, this does not reduce the compliance question to a matter of (domestic) political expedience; a careful design of international institutions may indeed increase the likelihood of compliance, as it has done in the case of the WTO. It is in the interplay of law and politics that compliance is eventually promoted.

⁶⁷ Cf. Princen, 'Exporting Regulatory Standards: The Cases of Trapping and Data Protection', in M. Knodt and S. Princen (eds), *Understanding the European Union's External Relations* (2003) 154.

⁶⁸ Mavroidis, 'Remedies in the WTO Legal System: Between a Rock and a Hard Place', 11 *EJIL* (2000) 811.