The European Union and the Multilateral Trade Regime

Reciprocal Influences

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CHAPTER 18

The European Union and the Multilateral Trade Regime

Reciprocal Influences

Pieter Jan Kuijper and Geraldo Vidigal

1 Introduction

The European Union (EU) and the World Trade Organization (WTO) are often described as “rules-based” organisations. In both organisations, the adjudicators established to oversee implementation of the core treaties – the WTO Appellate Body and the Court of Justice of the European Union (ECJ) – have played a significant role in establishing the principle that commonly agreed rules and principles constitute an integral legal framework rather than a mere juxtaposition of bilateral relations between parties.1 From the viewpoint of the EU’s institutions, the EU’s Membership in the WTO means that, while they remain chiefly submitted to the political and legal imperatives of the European Union, they must also take into account external constraints established by the WTO Agreements.

The internal imperatives of the European Union, governed by the rules and procedures of its founding treaties and subject to adjudication by the ECJ, include the unification of the internal market and the defence at its external borders.2 By directing the economic policies of EU Member States and controlling access to the world’s largest market, EU regulations and practices inevitably affect economic agents in third countries. Given the extent of its legal and economic influence, it is not far-fetched to describe the EU as a regulatory superpower.3

Externally, the EU is constrained by its engagements towards its economic partners. While “regional” trade agreements (RTAs) are acquiring growing

1 See e.g. AB, EC – Large Civil Aircraft, DS316, para. 845; AB, Peru – Agricultural Products, DS457, para. 5.106; Case 6/64 Flaminio Costa v E.N.E.L., [1964] ECR 585, 593.
2 See Treaty on the European Union, preamble, Recitals 8–9, 11.
importance, adjudication of trade disputes has taken place overwhelmingly at the WTO. The WTO Dispute Settlement Understanding provides WTO Members with the ability to seek authoritative rulings from panels and the Appellate Body on the WTO-consistency of other Members’ measures, and then employ political pressure and trade retaliation to induce compliance with these rulings.

This chapter examines the reactions by the EU’s different organs to adverse decisions adopted at the WTO level. It begins by describing the rejection by the Court of Justice of direct effect of WTO law and panel and Appellate Body reports on EU law. It then examines different types of responses by the EU to WTO rulings that required it to change its policies. We divide responses into three types. First are the cases in which, in response to adverse rulings, the EU established an internal mechanism to ensure not only case-specific compliance but also the dynamic adaptation of its policies to decisions made at the WTO level. Second are two cases in which the EU has complied with decisions of panels and the Appellate Body, significantly changing its own policies to adapt to the WTO’s rulings. Third are two cases in which the EU has responded to rulings by the WTO with attempts to change the global regulatory regime. While in one high-profile case (hormone-treated beef), this involved contradicting the findings of WTO adjudicators, in another case (agricultural subsidies) the EU’s compliance with adverse rulings led it to mobilise other countries to concur in accepting its own way of complying with global agreements.

2 WTO Law and the EU Legal Order

2.1 WTO Law and the EU Legal Order

It is briefly recalled here that the ECJ has rejected the direct effect of GATT provisions almost from the start of the EEC common commercial policy (CCP) in 1970, even when it recognised the succession of the EEC in the rights and obligations of the Member States that were Contracting Parties to the GATT. There is little doubt that a certain fear of contamination must have played a role in this judgment, so close was the resemblance between key provisions of

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4 See G. Vidigal, ‘Why Is There So Little Litigation under Free Trade Agreements? Retaliation and Adjudication in International Dispute Settlement’, JIEL 20 (2017), p. 927 (noting that RTA adjudication occurs essentially only where RTAs give individuals and private entities standing before the adjudicator).

both treaties. The ECJ’s view on this matter did not change when the GATT was succeeded by the WTO, of which the EC was one of the founding Members. Direct effect of WTO provisions, which would set aside EU secondary law, remained beyond the pale for the Court. A clearer interpretation of the relevant provisions of the different WTO Agreements could not change this rejection of direct effect. On the other hand, the ECJ maintained its traditionally monist position where it concerned the relation between international law and Union law also in respect of the WTO Agreements. This implied that the Court was willing to interpret and apply Union law so that it would be in conformity with the WTO Agreements. Such interpretation can be quite stringent in some cases and come close to direct effect in practice. In itself this approach followed by the ECJ is in line with Article XVI:4 of the WTO Agreement, which reads: “Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements”. This provision leaves room both for monist and dualist Members of the WTO to fulfill their WTO obligations, each in their own way.

On the other hand, the ECJ has been extremely reluctant to be seen to have taken into account, in its interpretation of WTO rules, the interpretations of WTO law by panel and Appellate Body reports. This has been most evident in the attitude of the ECJ to the report of the Appellate Body (AB) in *EC – Bed Linen*, which condemned the so-called zeroing practice of the Commission for calculating the dumping margin for imports of bed linen from India into the EU. In the end, the ECJ followed the example of the AB without ever referring
in any way to the AB’s report adopted by the DSB condemning this practice.\textsuperscript{13} In this respect, there has been lately a considerable divergence in judicial style, if perhaps not substance, between the Court of Justice and the General Court, with the latter having developed familiarity with the WTO case law in the field of anti-dumping (AD) and countervailing duties (CVD) and not shying away from referring to this case law in support of its own positions.\textsuperscript{14}

The ECJ’s view that WTO law requires political implementation may have contributed to the EU’s developing legislative tools that are supposed to work seamlessly with the WTO legal instruments. Some of these instruments allow EU executive organs to access the WTO dispute settlement system or directly exercise certain rights that the EU may have under the WTO rules, including as a consequence of an adopted Panel or Appellate Body report. However, international influence also played a role in the creation of these instruments.

Thus the so-called Trade Barriers Regulation, which was part of the Uruguay Round implementation package, was supposed to be the European response to Section 301 of the US Trade Act 1974. It created a procedure by which representatives of economic sectors or individual companies could launch a complaint to the Commission so that it would investigate allegedly unfair or illegal trade legislation of a third State.\textsuperscript{15} Normally these complaints were related to trade legislation or practices that were allegedly contrary to WTO provisions. Originally this instrument attracted a fairly steady stream of complaints, but, after some ten years of its existence, this slowed to a trickle and now seems to have petered out altogether.\textsuperscript{16} Of late, most complaints from economic sectors or individual enterprises are channeled to the Commission informally, either through the authorities of a Member State or directly.\textsuperscript{17}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{13} Case C-351/04, \textit{Ikea Wholesale v Commissioners of Customs and Excise}, EU:C:2007:547, para. 50–57.
\item \textsuperscript{14} See in respect of the WTO Appellate Body on Bed-Linen from India, the Judgment of the General Court in Case T-274/02, \textit{Ritek et al. v Council}, EU:C:2006:332, where at para. 97 ff. the Court refers extensively to the Bed-Linen report of the AB in order to argue that it differs fundamentally from the Ritek case. Another example of the General Court referring to WTO cases is Case T-67/14, \textit{Viraj Profiles Ltd. v Council and Commission}, EU:2017:481, para. 98–99.
\item \textsuperscript{15} Council Reg. 3286/94 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community’s rights under international trade rules, in particular those established under the auspices of the World Trade Organization (OJ 1994, L 349/71–78).
\item \textsuperscript{16} For a brief perusal of the complaints brought under the Trade Barriers Regulation, see P. J. Kuijper et al. (eds.), \textit{The Law of EU External Relations, Cases, Materials and Commentary on the EU as an International Legal Actor, 2nd ed.} (OUP, 2015), p. 442–443.
\item \textsuperscript{17} This is based on personal knowledge of one of the authors and is linked to the felt need of enterprises not to make themselves known to the country complained of for fear of
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Whereas the Trade Barriers Regulation is about authorising the Commission to manage a procedure that may lead to the EU starting a WTO dispute settlement case, the 2014 Enforcement Instrument\(^{18}\) authorises the Commission to implement the suspension of concessions and other obligations pursuant to a decision to this effect by the WTO DSB, after a third State has failed to carry out a report of a panel or of the Appellate Body favourable to the EU.\(^{19}\) A similar authorisation enables the Commission to take so-called rebalancing measures in case it is not compensated by a third State that has taken safeguard measures (Article 8 of the Safeguards Agreement) or modified concessions under Article xxviii of GATT.\(^{20}\) In short, this instrument is about the Commission enforcing the EU’s rights. It is interesting to note that the first major use of the Enforcement Instrument has been the taking of “rebalancing” measures against the US in response to the latter’s tariff increases on steel and aluminum, allegedly taken for national security reasons.\(^{21}\) Two successive Commission Implementing Regulations based on the Enforcement Instrument implicitly characterised these US measures as safeguard measures for which the US had not offered the required compensation.\(^{22}\)

Much earlier, it had been found necessary that the Commission should be put in the position to implement Panel and Appellate Body reports requiring changes or amendments to EU Acts, notably in the field of anti-dumping and countervailing duties. After the EU lost the important EC – Bed Linen case,\(^{23}\) it became obvious that the Union should be capable of implementing adverse panel and Appellate Body reports at relatively short notice in order to be able

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\(^{18}\) Regulation No. 654/2014 concerning the exercise of the Union’s rights for the application and enforcement of international trade rules (OJ 2014, L 189/50–58).

\(^{19}\) Art. 3(a) of Reg. 654/2014.

\(^{20}\) Art. 3(c) and (d) of Reg. 654/2014.

\(^{21}\) Taken on the basis of Section 232 of the Trade Expansion Act 1962. The EU has attacked these measures in the WTO: DS/548. This case has been joined to a number of other such cases brought by other WTO Members and is presently before the panel, which has let it be known that its final report can only be expected by the autumn of 2020, see doc. WT/DS548/16.

\(^{22}\) Commission Implementing Regulation (EU) 2018/724 on certain commercial policy measures concerning certain products originating in the United States of America (OJ 2018 L 122/14) and Commission Implementing Regulation (EU) 2018/886, with the same title (OJ 2018 L 158/5). The US, after consultations, has initiated a dispute settlement procedure against the EU, DS559. The panel was composed on 28 January 2019 and the panel has stated that its final report can only be expected by the second half of 2020.

\(^{23}\) See n. 12.
to respect the time limits of Articles 21 and 22 DSU. Soon thereafter, in 2001, the Council adopted a Regulation that authorised the Commission to take “appropriate measures” to implement reports of the WTO, which was codified in a new Regulation in 2015 (the so-called “implementing regulation”).

Appropriate measures” may include measures which go beyond mere repeal or amendment of the condemned EU act or practice and seek more broadly to ensure the conformity of the EU legislation or practice in the field of anti-dumping and anti-subsidy to WTO rules.

In respect of the actual application of the “implementing regulation” the following can be said, based on a terminological search in the EUR-Lex data base. Since 2001, there have been broadly six instances of the initiation of procedures for review or amendment of specific anti-dumping measures based principally on the “implementing regulation” as such. And there have also been six instances of the “implementing regulation” being an accessory basis for an interim or expiry review of anti-dumping measures or of a renewed complaint of European producers of such measures that had been the subject of Panel or Appellate Body reports.

It is not always easy to be sure of the result of the initiation of these procedures under the “implementing regulation” as a principal or accessory basis, since some of the procedures initiated under this regulation as principal basis in the end were superseded and/or formally adopted as the result of an interim review of the anti-dumping duties concerned. This meant that the delegation to the Commission laid down in the “implementing regulation” was no longer applicable, as the final anti-dumping measures after an interim review had to be imposed by the Council, which could decide not to follow the Commission. In theory this should have changed after 1 December 2009, when the new implementing powers of the Lisbon Treaty should have found application in anti-dumping, which made the decision-making procedures under the “implementing regulation” and under the Basic Anti-Dumping Regulation follow the general procedure for the exercise of Union legislative powers.

Regulation (EU) 2015/476 (Parliament and Council) on the measures that the Union may take following a report adopted by the WTO Dispute Settlement Body concerning Anti-Dumping and Anti-Subsidy matters (OJ 2015 L 83/6–10).

25 See Art. 1(b) of Reg. 2015/476.

26 These were published as Notices in the OJ C series under the heading “Procedures relating to the implementation of the Common Commercial Policy”.

27 See, for example, European Commission, Notice regarding the termination of the process concerning implementation of the Panel report adopted by the WTO Dispute Settlement Body concerning the anti-dumping measure applicable on imports of farmed salmon originating in Norway (2008/C 298/04), (OJ 2008, C 298/7–8).
of implementing powers by the Commission, pursuant to Article 291 TFEU.\textsuperscript{28} In reality the Basic Anti-Dumping Regulation was only adapted to the general rules on implementing powers of the Lisbon Treaty in the framework of a broader reform of the Basic Anti-Dumping Regulation adopted by the Council and the Parliament in mid-2016.\textsuperscript{29} This now makes implementation of panel and Appellate Body reports in the field of anti-dumping much easier across the board.

Shortly before the adaptation of the Basic Anti-Dumping Regulation to the general scheme of implementing powers, an \textit{ad hoc} modification of certain provisions on non-market economy countries of this regulation was adopted by the Council and the Parliament in order to adapt EU anti-dumping law\textsuperscript{30} to the Appellate Body report in \textit{China – Fasteners}.\textsuperscript{31}

In a similar vein as the “implementing regulation” in the field of anti-dumping and anti-subsidy procedures, the present general regulation on the common organisation of the different agricultural markets contains a number of different provisions authorising the Commission, following the general procedures for delegated powers and for implementing powers, to adapt import duties and tariff quotas on agricultural products to the Union’s international obligations, including any obligations under the WTO.\textsuperscript{32} This considerably simplifies EU implementation to changes in WTO rules and to panel and Appellate Body reports. In Section 4.2 below we will return to a specific regulation which played an important role in the solution of the problems confronted by the Union after the DSB report in \textit{EC – Sugar}.\textsuperscript{33}


\textsuperscript{31} AB, \textit{EU – Anti-dumping duties on certain iron and steel fasteners from China}, DS397.

\textsuperscript{32} Reg. (EU) 1308/2013 establishing a common organisation of the markets in agricultural products, in particular Rec. 146, Art. 183 ff. on import duties and Art. 184 ff. on tariff quotas.

\textsuperscript{33} Art. 44(b) of Council Regulation No. 38/2006 on the common organisation of the markets in the sugar sector (OJ 2006, L 58/1). This provision authorised the Commission, together with the management committee for the sugar sector, “to ensure compliance … with [the EU’s] international obligations” with regard to so-called C sugar, which had been found contrary to WTO rules by the panel and the Appellate Body in DS265 and DS266, \textit{EC – Export Subsidies on Sugar}. 
2.2 EU Law before Panels and the Appellate Body

On the side of the WTO, the panels and the Appellate Body, when they have to pronounce on the conformity of EU law with the WTO Agreements, have taken the position that they should treat EU law as “fact”, in other words to treat it as any international court would treat national law. That means that a panel or the AB should treat the question of what a certain national legal provision means on the basis of the arguments of the claimant and the defendant Member relating to their legality under WTO law. The view of the national law that a panel or the AB forms on this basis is said to be a factual assessment, while presumably the question of its conformity with the WTO agreements is a legal judgment. This argument was encountered by the EC early on in the existence of the WTO in the EC – Bananas dispute. The EC argued to no avail that only itself (in particular the Court of Justice) could give an authoritative interpretation of the Lomé Convention and its successors, as it was an agreement concluded by the Community. In reality there is always an aspect of interpretative skill involved in construing a provision of national law even if it is formally a question of fact. Qualifying it nevertheless as a factual judgment serves the formal purpose of clarifying that what the WTO DS organs say about provisions of Union law has no legal value inside the EU legal system, but only within the “WTO sphere” with a view to judging whether such EU legislation is in conformity with WTO law. It is important to note that the ECJ itself has applied similar reasoning in the Kadi I case to explain to the UN side that its views about the EU implementation of Security Council sanctions in the EU had no legal value in UN law.

On the “legislative side” of the WTO, recommendations and decisions of WTO Committees in the field of AD and CVD and of the SPS and TBT Committees have a legal status that is not always clear from the text of the WTO Agreements. Although the Appellate Body has sought to endow such instruments with a legal status on the basis of their text and multilateral character, the lack of clear legal rules in the WTO Agreement on the matter renders panels wary of making any clear finding on the matter. From earlier research, it

34 On national law as fact before international courts, see Oppenheim’s International Law, 9th edition by Jennings and Watts, p. 83 and S. Bhuiyan, National Law in WTO Law, Cambridge 2007, p. 41–42.
38 See, e.g., Panel, US – Poultry (China), DS392, para. 7.131–7.139 (on the Decision on the Implementation of Article 4 of the SPS Agreement); Panel Report, Australia – Plain...
would seem that the Commission’s services have been following such texts as a matter of administrative practice, in particular in AD and CVD cases. The EU has never adapted its regulatory texts to such WTO instruments.

3 Achieving Compliance

3.1 EC – Bananas

EC – Bananas was one of the longest-lasting disputes in the WTO history, having involved five complainants, including two that went all the way to requesting trade retaliations (the US and Ecuador). The period 1996–1999 saw the dispute go through all the regular steps of WTO litigation: original reports of the panel and Appellate Body, arbitration of a reasonable period of time for compliance, compliance reports by the panel and Appellate Body and arbitration of an amount of retaliation, which the US started applying in 2001. This first stage of the dispute was followed in 2001 by a mutually agreed solution, within which the EU committed to replace its complex regime for bananas with a tariff-only regime by the end of 2006, and a waiver granted for the EU to amend its banana regime, subject to an ad hoc arbitration procedure. In 2005, proposals made by the EU for new tariffs and quotas were twice submitted to an arbitrator, who found that they did not eliminate the WTO-inconsistency. New EU regulations were subsequently adopted, in 2005 and 2007, and condemned by a new compliance panel and by the Appellate Body in 2008. New agreements were reached in 2009, followed by

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40 A fairly comprehensive report can be found here: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds27_e.htm.


42 Ministerial Conference, Decision of 14 November 2001 (WT/MIN(01)/15).

43 Award of the Arbitrator, The EC–ACP Partnership Agreement, 1 August 2005 (WT/L/616); Award of the Arbitrator, The EC–ACP Partnership Agreement, 27 October 2005 (WT/L/625).

the “Geneva Agreement on Trade in Bananas” in 2010\(^{45}\) and, finally, a definitive mutually agreed solution in 2012.\(^{46}\)

Despite the protracted negotiations and various adjudication stages, the outcome of EC – Bananas conformed fully with WTO orthodoxy: the mutually agreed solution involved the EU, after a number of agreed intermediate steps, replacing its complex mechanism which the Appellate Body found to be discriminatory with a tariff-only barrier.

At the same time, this dispute, which lasted for almost 17 years, was no doubt the case that fed the ECJ’s conviction that negotiations and attempts at appropriate implementation could and would continue in certain cases even after all the steps of the WTO dispute settlement system had been gone through, even twice, with two ad hoc arbitrations in the middle. This justified the ECJ’s concern about the negative effects on the EU separation of powers of granting direct effect even to the most straightforward provisions of the GATT. Granting such direct effect would effectively put the Court in the position of the negotiator of the mutually agreed solution, the Commission, and/or of the Council, as the authority which needed to approve such a solution or otherwise adapt the EU legislation on bananas.\(^{47}\) It should be noted that the EU and world market for bananas changed considerably over the course of the dispute. Hence, the interests of both the EU and the different groups of banana-producing countries had shifted. Moreover, the EU and the ACP countries also needed time in order to perform a complete overhaul of the Association between them (and not just of the system of buying guaranteed quantities of bananas) and its conversion from a system of unilateral trade liberalisation in favour of the ACP countries to mutual liberalisation between the EU and the ACP countries.\(^{48}\)

In the light of the foregoing, it is not exaggerated to say that the bananas case has had an enormous influence on the EU’s development and trade policy, in particular in its relations with Africa and the Caribbean.\(^{49}\)

\(^{45}\) Geneva Agreement on Trade in Bananas (OJ 2010, L 141/3).
\(^{46}\) Notification of a Mutually Agreed Solution, EC – Bananas III, 12 November 2012 (WT/DS27/98).
\(^{47}\) Case C-377/02, Léon Van Parijs v BIRB (n. 8).
\(^{48}\) This was mainly done by concluding a large number of regional trade and cooperation agreements between the EU and regional groups of countries parties to the Cotonou Agreement, see for instance the first of these agreements, between the EU and Caricom (OJ 2008, L 289/1/3).
3.2 *EC – Biotech*

In *EC – Biotech*\(^{50}\) in which the EU’s procedure for authorising the cultivation and marketing of genetically modified organisms (GMOS) was challenged by the US, Canada and Argentina, the outcome was difficult for the Union. The dispute challenged the decision-making rules of the EU in two ways. First, the question arose to what extent it was acceptable, in a centralised procedure for the admission of certain agricultural products and for the cultivation of such products, to give a certain leeway to the Member States to take their own decisions based on their specific circumstances (so-called safeguards) and what such specific circumstances could be restricted to. Secondly, the condemnation of the Members States’ safeguards also immediately affected the new EU Regulation concerning the Member States’ mechanisms for control of the Commission’s exercise of its newly acquired implementing powers under the Treaty of Lisbon (under Article 292 TFEU).

The complainants (US, Canada and Argentina) had framed their attack on the EU regulation of GMO products so as to avoid a frontal attack on the approval of GMO products as such. Instead, they attacked the EU method for approval as being insufficiently based on science and leaving room for prevarication. The result was that the EU was condemned for having operated a *de facto* moratorium on approval of GMO products; having caused undue delays in 23 cases of approval of specific products; and, in 6 cases, for Member States’ implementation of national safeguards without an appropriate risk assessment. The WTO Dispute Settlement Body duly adopted the relevant conclusions and recommendations in late 2006. The US then sought authorisation from the WTO Dispute Settlement Body to suspend concessions and other obligations, after the reasonable period of time for implementation by the EU had run out after an agreed prolongation. Since the EU objected to the level of retaliation requested by the US, the dispute was submitted to an arbitrator pursuant to Article 22(6) of the DSU. In February 2008, the US and the EU agreed to suspend the arbitration subject to a promise that the EU would apply its implementation mechanism for admission of GMO products on its market in an effective manner.\(^{51}\)

This agreement with the US was not in the form of a Mutually Agreed Solution (which the EU later adopted with regard to Canada and Argentina).\(^{52}\) It was an informal arrangement, so-called “Agreed Procedures”, which did not terminate

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\(^{50}\) *DS291, DS292 and DS293.*

\(^{51}\) *Art. 22.6 Arbitration, EC – Biotech, Communication from the Arbitrator, 19 February 2008 (WT/DS291/42).*

\(^{52}\) *See WTO Doc. WT/DS292/40 (EU-Canada) and WT/DS293/41 (EU-Argentina).*
the dispute. Hence, the US retains to this day the right to re-activate the arbitration on the level of the suspension of concessions and other obligations and the EU remains subject to the obligation to report on the implementation of the AB report to the DSU.\footnote{See WTO Doc. WT/DS291/38, Understanding between the EC and the US regarding procedures under Art. 21 and 22 of the DSU.}

In spite of the differences in form, the substance of the two mutually agreed solutions and the understanding with the US was broadly the same. The EU promised to make its procedures “really work” and to apply them in conformity with the relevant WTO agreements, notably the Sanitary and Phytosanitary (SPS) Agreement. A dialogue was to be instituted between the EU and the three complaining WTO Members on these matters. This dialogue on the functioning of the EU’s approval procedures was to be held twice a year between the relevant government/Commission departments on a number of themes mentioned in the understanding.\footnote{See the documents mentioned in n. 52.}

In order to make the approval procedure for GMO cultivation and GMO food and feed speedier and (thus) more compatible with WTO requirements, the Commission had to confront two problems. First, the frequency with which Member States applied so-called safeguards, which seemed to be incompatible with the Commission’s science-based approach in its proposals for approvals. Second, the unwillingness of Member State representatives to take any position at all during the implementation procedure with regard to individual approvals of GMO products (e.g. to be used for cultivation or as a part of another food or feed product), too often made any position of the implementing committee impossible, leaving the Commission to bear the burden of a positive or negative decision.\footnote{Normally the Commission’s proposals are based on a risk assessment of EFSA, the European Food Safety Authority.}

The first problem was solved by organising the Member States’ power to take national or even regional measures in respect of cultivation of GMOs and the marketing of GMO food and feed, only after these products have been

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\textsuperscript{53} See WTO Doc. WT/DS291/137/Add. 128 ’Status Report of the European Union’ (7 December 2018). The re-activation of the arbitration occurs in the event that the DSB finds that measures taken in compliance with the panel report by the EU are non-existent or inconsistent with a covered agreement (para. 6 of the Agreed Procedures mentioned in n. 53).
\footnote{See Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, \textit{Reviewing the decision-making process on genetically modified organisms (GMOs)}, COM(2015) 176 final, para. 2.2.}
\end{flushright}
authorised at the level of the Union. Thus, such national measures cannot affect the procedural and substantive conditions of the EU authorisations of GMOs and GMO food and feed. Moreover, the Member States can only base their national measures on elements other than those that are taken into account at the Union level, and the Union authorisation will in principle remain valid for the Union as a whole.\footnote{See Art. 1(2) of Directive 2015/412 amending Directive 2001/18/EC as regards the possibility for the Member States to restrict or prohibit the cultivation of genetically modified organisms (GMOs) in their territory (OJ 2015, L 68/1) and Art. 1 of the Commission Proposal amending Reg. 1829/2003 as regards the possibility for the Member States to restrict or prohibit the cultivation of genetically modified food and feed in their territory, COM/2015/177 final (not yet enacted). See also Miranda Geelhoed, ‘Divided in Diversity: Reforming The EU’s GMO Regime’, Cambridge Yearbook of European Legal Studies, 18, 23–44 (2016).}

In order to deal with the second problem, the Commission felt constrained to propose a modification of the standard decision making procedure that had been adopted after the entry into force of the Lisbon Treaty and laid down in the new Regulation on the exercise of the Commission’s implementing powers.\footnote{Reg. 182/2011 laying down the rules and general principles concerning mechanisms for control by the Member States of the Commission’s exercise of implementing powers.} The Commission’s proposal aimed to reduce the risk that there would be no opinion of the implementing committee because of abstentions by the Member State representatives on the Committee. Hence, the Commission wanted to ensure that the Member States that are absent or do not vote are not counted in the calculation of the qualified majority and that a simple majority of the Member States constitutes a quorum. Moreover, the procedure in the appeal committee should be strengthened, the votes of the Member States should be made public and a referral to the Council should be made possible.\footnote{See COM(2017)85, p. 7–9. This proposal has not yet been adopted.} It can be argued that this proposal was actually an abdication by the Commission of its normal task in such situations and may not even lead to an improvement in the EU’s implementation record. The case is unique insofar as it has led the European Commission to propose modification of important generally applicable decision-making procedures in the EU, inspired by considerations principally related to one kind of implementing decisions, namely those relating to GMOs.

Everything considered, it is reasonable to conclude that the EU in part has adapted, and is still adapting, its authorisation procedures in a way that guarantees that decisions concerning GMOs at the Union level are taken on the basis of a conformity assessment that will be based on science, while not affecting the Member States’ right to exercise their residual competence to ban...
GMOs for reasons other than those addressed in the EU measure. The Member States may thus be constrained to face up to any complaint from WTO Members about such decisions concerning GMOs without being able to rely on any support from EU institutions, most notably the unrivalled WTO litigation experience of the Commission.

3.3 EC – Seals
The EC – Seals disputes only came about because the EU authorities, principally the Commission, took a flight forward, when Belgium and the Netherlands decided to introduce a ban on seal products from Canada and Norway on their own. In the end, an EU-wide ban on the marketing of seal products and products made from seals was instituted. In invoking the public morals exception of the GATT (Art. XX(a) GATT), the EU argued that the methods used for killing seals ran contrary to the concerns of EU citizens with animal welfare, which made the ban necessary to protect public morals. The WTO panel and the Appellate Body upheld that view. However, the EU’s exception allowed the sale of products derived from seal hunted by Inuit communities, permitting cruel hunting, without clear criteria, and more easily accessible to Greenlandic Inuit communities than to Canadian ones. These elements of the seal regime were found to be discriminatory treatment that could not be justified by the “the objective of addressing EU public moral concerns regarding seal welfare.”

In order to address these shortcomings, the EU enacted in 2015 a new Regulation and a new Implementing Regulation. Regulation 2015/1850 required hunting conducted by Inuit communities to be conducted “in a manner which has due regard to animal welfare, taking into consideration the way of life of the community and the subsistence purpose of the hunt.”

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61 DS400 and DS401.
64 Ibid, para. 5.200.
65 Ibid, para. 5.338.
Regulation 2015/1850 established clear criteria for the EU recognition of independent bodies able to certify compliance by Inuit communities with the hunting requirements set out in the regulation.\textsuperscript{67}

The EU declared before the DSB that, with these regulations, it had achieved compliance with the recommendations and rulings in the \textit{EC – Seals} Reports.\textsuperscript{68}

This declaration was met with a mixed reaction. Canada, which had signed a Joint Statement with the EU on access to the EU market for Inuit products, and had had a Canadian Inuit entity added to the EU’s list of recognised bodies for the purposes of Inuit hunting, was pleased with the EU’s path towards compliance.\textsuperscript{69} On the other hand, Norway stated that the new EU regime had not had “any effect regarding seal products exported from Norway”.\textsuperscript{70} Despite this declaration, Norway did not request a compliance panel, suggesting that it accepted that the EU’s measures, despite restricting rather than facilitating trade, addressed the problematic discrimination found by the Appellate Body in the original regulation.\textsuperscript{71}

3.4 Conclusion

The \textit{EC – Bananas}, \textit{EC – Biotech} and \textit{EC – Seals} disputes involved complex regulatory measures adopted by the EU. In all three cases, the EU implemented the DSB recommendations and rulings in the end. In the latter two cases, it also maintained certain essential features of its legislation, which were also considered of exemplary value for subsequent cases in which domestic regulation, adopted for non-economic reasons, affected international trade.

4 Influencing the Global Regime – Enforcing Rules, Developing Rules, and Breaking Rules

This section analyses cases in which the EU went beyond compliance, and employed its legal and political machinery, as well as its economic weight, to shape the global regulatory legal order. In the three cases examined, this


\textsuperscript{68} Minutes of DSB Meeting of 28 October 2015 (WT/DSB/M/369), para. 1.45.

\textsuperscript{69} \textit{Ibid}, para. 1.46.

\textsuperscript{70} \textit{Ibid}, para. 1.47.

attempt to influence the regime took different forms. In the case of zeroing, the EU sought to “level the playing field” by enforcing the interpretation adopted by the Appellate Body against the other Member using it (the US). In the case of agricultural subsidies, the EU de facto shifted sides in agricultural subsidies negotiations after having adapted its policies to the WTO rulings. Finally, in the case of the ban on hormone-treated beef, the EU’s technical institutions failed to convince the EU political bodies to comply with the reports of the DSB that found the ban to be “not based on science”. Unable to comply with the ruling, the EU first sought to change its legal position before the WTO. When this was ineffective, the EU opted for negotiation with the various claimants arrangements whereby they accepted the EU’s ban in exchange for compensation.

4.1 The Rule Enforcer: Zeroing

This Section examines the case of the EU’s reaction to the AB’s ruling in EC – Bed Linen, brought by India and the first case in which the AB decided that the application of so-called zeroing methodology for calculating of AD duties was contrary to Article 2.4 and 2.4.2 of the WTO Anti-Dumping Agreement (ADA). Zeroing is the technique whereby the so-called positive dumping margins resulting from transactions in which the export price (price at which the good is exported) is above normal value (the price in the country of exportation) are set at zero (absence of dumping), while the transactions in which the export price is below normal value (presence of dumping) are averaged in order to yield the so-called overall dumping margin, which defines the maximum level for anti-dumping duties. Calculated in this way, dumping margins will be higher than when transactions with a positive dumping margin (above zero) had been included in the averaging (instead of being set at zero) and hence the dumping duties imposed will be higher than when the overall average dumping margin had been calculated by also taking into account positive dumping margins. Pursuant to the Appellate Body’s reading of the ADA, this approach is incompatible with Article 9.3 ADA. Briefly summarised, the AB considered that this methodology prevented a “fair comparison” between normal value and export price that has pride of place in Article 2.4 ADA. Moreover, Article 2.4.2 ADA sets out the method for calculating the anti-dumping margins based on “a comparison between a weighted average normal value with a weighted average of prices of all comparable export transactions” and referred back explicitly to Article 2.4’s “fair comparison”. Thus, the Appellate Body supported the panel’s conclusion that zeroing was contrary to Article 9.3 ADA.72

72 AB, EC – Bed Linen, ds141, para. 54–63.
One remarkable aspect of the aftermath of this case was that the EU adapted fairly quickly to the results of the case and enacted the “implementing regulation” as a consequence (see sec. 2.1 above). The US, the other major user of the zeroing technique, however, tried to escape in all possible ways from the consequences of this decision of the AB for its own anti-dumping practices and was supported in that approach by quite a few panel reports, which did not follow the AB’s report in EC – Bed Linen.73

As a reaction to that, the EU began following a determined litigation policy in order to ensure that the US would also be fully subject to the AB’s interpretation of the ADA. Thus the EU and the US would be competing on a level playing field with regard to the WTO’s anti-dumping rules. Initially, the EU intervened systematically in cases brought by other WTO Members against the US’s zeroing practices. This intervention policy culminated in the EU’s intervention in US – Stainless Steel (Mexico), in which the EU strongly supported Mexico, arguing for the unlawfulness of zeroing, and encouraged the AB to make it unambiguous that panels are not only expected, but also obliged, to follow AB findings.74 In response, the Appellate Body ventured to decide the question of the unlawfulness of the zeroing technique definitively75 and also elegantly slammed the resistance of panels that refused to follow its earlier decisions on zeroing by intimating that such decisions in future might be deemed to be contrary to the duty of a panel to make “an objective assessment of the matter before it”, as set out in Article 11 DSU.76

Subsequently, the EU directly attacked the US practices with respect to zeroing in US – Continued Zeroing.77 This case concerned a large number of anti-dumping cases involving EU companies, in particular periodic and sunset reviews in which the US continued to apply zeroing because it was built into the computer programs that the US authorities used for the calculation of dumping margins in such reviews. This occurred despite “zeroing” having

74 AB, US – Stainless Steel (Mexico), DS344, para. 149.
75 Ibid, para. 133-134,139 and 143.
76 Ibid, para. 162.
already been found unlawful in the original imposition of the anti-dumping duties in these cases. The vexed question of zeroing was once again fully litigated, including the interpretation of the special standard of review for anti-dumping cases in Article 17.6(ii) GATT, with the Appellate Body reiterating its earlier interpretations on both issues.78

This case is an example for the the EU having brought its measures in conformity with WTO law in an important trade defence policy case, as required by the DSU, even though its anti-dumping authorities had been of the same opinion as their US counterparts, namely that applying zeroing was an appropriate methodology to calculate dumping margins. Once the EU had adapted to the Appellate Body’s view, it played the role of a “private Attorney-General” in respect of the US, trying to ensure a level playing field for itself and all other WTO Members that had adapted their legal frameworks to implement the Appellate Body’s rejection of “zeroing”.

4.2 The Rule Developer: Agricultural Subsidies

Agricultural subsidies are historically a difficult area in trade negotiations, and one in which the European Union and its Member States traditionally appeared as the ones resisting disciplines. Under the GATT, Australia challenged French subsidies to wheat exports in 1958.79 In the late 1970s and early 1980s, Australia and Brazil unsuccessfully sought agreement from the then European Economic Community on new disciplines on sugar subsidies.80

In the WTO, the big breakthrough on agricultural subsidies came in 2002. On a single day, Brazil requested consultations on agricultural subsidies granted by the United States (US – Cotton) and by the European Union (EC – Sugar). Australia, and later Thailand, joined the EC – Sugar dispute as complainants. In both disputes, the complainants achieved resounding victories. In US – Cotton,

78 **AB, US – Continued Zeroing, DS350, para. 264–303.** An anonymous concurring opinion was added to this part of the report in which the Appellate Body Member recalled that the matter had been litigated in great detail and from many different angles over the years and that every time the AB had considered numerous arguments, always ending with the same conclusion. The author pointed out that this was fully in conformity with the task of the AB, to cut difficult Gordian knots. It was now time to accept what it had decided. The US has not been willing to do this, and the AB’s reports on zeroing and its interpretation of the special standard of review have still played an important role in its finally successful manoeuvres to render non-operational the AB, crippling the WTO dispute settlement system with it.

79 **GATT, French Assistance to Exports of Wheat and Wheat Flour, Report by the Panel for Conciliation, 20 November 1958 (L/924).**

80 **GATT, Minutes of Meeting held in the Centre William Rappard on 31 March 1982, 7 May 1982 (C/M/156).**
the Appellate Body concluded that the Agreement on Agriculture (AoA) did not create a comprehensive carve-out from the Subsidies Agreement with respect to agricultural products, but only exempted Members from the general disciplines on subsidies to the extent that the general rules were being specifically substituted by the *lex specialis* of the AoA. In *EC – Sugar*, the Appellate Body found that guaranteed prices for sugar sold in the EU domestic market in fact provided price support for all sugar production. Coupled with a legislation that required non-subsidised sugar to be exported, this support was found to constitute a “payment on the export financed by virtue of governmental action” above the levels permitted by the EU schedule.

The EU’s response to the condemnation was to adopt, a few months before the expiry of the reasonable period of time for compliance, a framework for a comprehensive reform of the sugar sector. Besides removing the requirement that non-subsidised sugar be exported, the 2006 EU regulation allowed dynamic compliance with “the Community’s international obligations”. Although the complainants were not satisfied that the regulation produced the required compliance, the EU’s efforts were sufficient to prevent them from requesting either a compliance panel or authorisation for retaliation.

Over the next decade, the EU reformed its common agricultural policy substantially. This process significantly decreased the weight of the CAP on the EU budget and was driven in large measure by internal pressures resulting from budgetary constraints and the recognition that it would be financially impossible to continue with the old ways of agricultural subsidies when several agricultural states were about to join the EU as new EU Members. The WTO rulings and the prospect of a Doha Round agreement, whereby the EU would have had to reduce subsidies significantly, allowed reformers to reduce the level of trade-distorting subsidies, while being able to “blame it on Geneva”.

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82 *AB, EC – Sugar*, DS265, para. 164, 278.
84 *EC – Sugar*, Understanding between Brazil and the European Communities, 9 June 2006 (*WT/DS266/36*); Understanding between Australia and the European Communities, 9 June 2006 (*WT/DS265/36*); Understanding between Thailand and the European Communities, 9 June 2006 (*WT/DS283/17*).
late 2017, the EU ended its system of quotas for domestic sugar production. Together with the opening of the EU’s sugar market through special arrangements for least developed countries and Economic Partnership Agreements with developing countries, this development was the final step in the EU’s transition towards “market orientation” in the Common Agricultural Policy.\(^\text{87}\)

The shift in the EU’s situation was such that, on the issue of agricultural subsidies, it effectively went from being a defendant to being one of the lead proponents of reforms. In 2015, it submitted, together with Brazil and other agricultural exporters, a proposal to restrict agricultural subsidies.\(^\text{88}\) This proposal eventually developed into a decision issued by the 2015 Ministerial Conference in Nairobi. This Ministerial Decision required developed countries to eliminate immediately their “remaining scheduled export subsidy entitlements”, including with respect to cotton, providing developing countries with a three-year period to do the same.\(^\text{89}\) The decision also limited the granting of export credit, export credit guarantees and insurance programmes for export of agricultural products.\(^\text{90}\) In implementation of this decision, the EU proposed a revised schedule in October 2017, eliminating its entitlements to agricultural export subsidies.\(^\text{91}\) The EU was only the second Member, after Australia, to amend its schedules for this purpose.

The EU’s newfound activism against agricultural subsidies did not end there. In the run-up to the 2017 Ministerial Conference in Buenos Aires, Brazil and the EU again submitted a joint proposal, supported by agricultural exporters, to curb “trade distorting domestic support”.\(^\text{92}\) Although no decision was reached on the matter, this confirmed that the EU – once a large provider of trade-distorting agricultural subsidies – now consistently co-authors proposals to restrict such subsidies, joined by developing, agricultural-exporting countries. The EU therefore not only abided by the WTO ruling requiring it to

\(^\text{87}\) European Commission, ‘EU sugar quota system comes to an end’, Press release, 29 September 2017 (quoting Phil Hogan, Commissioner for Agriculture and Rural Development).

\(^\text{88}\) WTO Committee on Agriculture, Proposal on Export Competition from Brazil, European Union, Argentina, New Zealand, Paraguay, Peru, Uruguay and the Republic of Moldova, 16 November 2015 (job/ag/48/Corr.1).

\(^\text{89}\) WTO, Ministerial Decision of 19 December 2015 (wt/min(15)/45 – wt/l/980), para. 6, 7, 12 (with respect to cotton, developing countries had only one year to comply).

\(^\text{90}\) Ibid, para. 13.

\(^\text{91}\) Committee on Market Access, Rectification and modification of schedules – Schedule clxxv – European Union, 17 October 2017 (g/ma/tar/rs/506).

\(^\text{92}\) WTO Committee on Agriculture, Proposal on Domestic Support, Public Stockholding for Food Security Purposes and Cotton from Brazil, European Union, Colombia, Peru and Uruguay, 17 July 2017 (job/ag/99).
modify its agricultural support policies but also actively engaged in seeking a trade-facilitating modification of the multilateral regime governing the matter.

4.3 The Rule-breaker: Hormone-treated Beef

The dispute regarding the European Union’s ban on hormone-treated beef, started in 1996, was one of longest-lasting ones in the WTO’s history. In 1998, the Appellate Body found in _EC – Hormones_ that the EU had not produced a risk assessment to support its ban. The EU failed to modify its measures within a reasonable period of time, leading the Dispute Settlement Body to authorise trade retaliation by Canada and the United States.

The EU subsequently sought compliance by funding scientific work to justify the ban. This research was considered insufficient by the complainants, which refused to cease retaliation. In response, the EU initiated the _Canada/US – Continued Suspension_ dispute, arguing that its implementation measures had rendered the retaliation WTO-incompatible; it requested an end to those measures.

In its 2003 report, the Appellate Body concluded that the mere taking of implementation measures did not preclude continued retaliation against a party found in breach. Instead, “substantive compliance” with the report was required. In order to show substantive compliance, the EU would have to demonstrate either that its new reports had been produced with “the necessary scientific and methodological rigour to be considered reputable science” or that they constituted “evidence from a qualified and respected source” putting into question “the relationship between the pre-existing body of scientific evidence and the conclusions regarding the risks.” Although the Appellate Body reversed the panel’s finding that the EU’s measures were not scientifically grounded, the Appellate Body set up more than a procedural requirement for the hormone ban to be lawful: the EU’s risk assessment would have to be sufficiently rigorous and either demonstrate the existence of a health risk from hormone-treated beef or cast doubt on the pre-existing body of scientific evidence.

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93 For a full and informative overview of the whole dispute up to and including 2016, when the US briefly revived the dispute, see Renée Johnson, _The US-EU Hormones Dispute_, Congressional Research Service, 7 January 2017, 35 pp.

94 _AB, EC – Hormones_, DS26, para. 208.

95 Arbitral Award (Article 22.6), _EC – Hormones_.

96 _AB, Canada/US – Continued Suspension_, DS321, para. 211.

97 _Ibid_, para. 321.

98 _Ibid_, para. 591.

99 _Ibid_, para. 703.
The EU did not seek a new adjudication on the basis of the research it had produced. Instead, it negotiated agreements with the complainants whereby, in exchange for tolerating non-compliance, Canada and the US were granted quotas for exporting “high-quality beef” (i.e. non-hormone-treated beef) to the European Union. In 2009, the US was granted an import quota of 20,000 metric tons of high-quality beef (increased to 45,000 in 2012). In 2011, Canada was granted a quota of 1,500 metric tons, replaced in 2017 with a mutually agreed solution that merely noted that the parties’ “enhanced cooperation and deeper understanding” under the Comprehensive Economic and Trade Agreement (CETA) had resulted in a solution to the dispute. Quotas for “high-quality beef” are available to other large beef exporters, including Argentina, Australia, Brazil, New Zealand and Uruguay.

In the case of hormone-treated beef, therefore, rather than complying with the WTO ruling, the EU has sought to change the international regulatory framework by entering into bilateral agreements with the complainants, and presumably by offering a degree of compensation to non-complaining WTO Members. Thus, the EU chose a course of action that is an anathema internally: allowing Member States to continue with treaty violations, while paying for their (ongoing) sins.

5 Conclusion

The WTO provides a forum where EU policies are regularly challenged by other Members, subjected to scrutiny by non-EU adjudicators, and enforced through retaliatory measures under strict WTO surveillance. This has compelled the various EU organs to make decisions on how to manage the inter-relationship between the EU legal order and WTO rules. This included, on the one hand, the ECJ’s rejection of direct effect of WTO rules within the EU legal order and its minimising of the authority of reports of panels and the Appellate Body. This rejection foreshadowed the separation of the EU’s “new legal

100 EC – Hormones, Joint Communication from the European Communities and the United States, 17 April 2014 (WT/DS26/29).
102 EC – Hormones, Notification of a Mutually Agreed Solution, 3 October 2017 (WT/DS48/27, G/L/91/).
103 This situation differs from the adjudication by the ECJ itself under Association Agreements. See e.g. C-65/16, Istanbul Lojistik, 19 October 2017, EU:C:2017:770.
104 Art. 22(3)-(8) Dispute Settlement Understanding (DSU).
order” from general international law, later expressed in the legal notion of “autonomy of the EU legal order”, as advanced, among others, in the Kadi cases\textsuperscript{105} on the implementation of so-called smart sanctions of the UN Security Council and in Opinion 2/13 on the accession of the EU to the European Convention on Human Rights.\textsuperscript{106} It also imposed on the EU’s political organs the task of determining how and at what pace to comply with WTO rulings, managing the interaction between the EU legal order and the rules governing the EU’s relations with its main trade partners.

Overall, the EU’s political organs have sought to implement faithfully the rulings and recommendations adopted by the DSB. This has proven possible in cases, such as that of bananas and zeroing, in which WTO-inconsistent policies were based essentially on economic interests. In some cases, such as those of zeroing and agricultural subsidies, the EU has gone on to promote the Appellate Body’s view, aiming to “level the playing field” so that the WTO-inconsistent benefits it had denied to its own economic agents would become unavailable also to their foreign competitors.

Changing policies based on politically sensitive “non-trade values”, on the other hand, has proven much more difficult. In the case of Inuit indigenous communities, the EU was able to implement the Appellate Body’s rulings while maintaining the bulk of its measure in place, and even furthering its objective, by further restricting the possibilities for cruel hunting, as well as by opening its market to Canadian Inuit products.\textsuperscript{107} In the cases of rulings condemning its restrictions on GMOs and hormone-treated beef, however, the EU political organs were unable either to provide evidence that these products pose actual health risks or to override deeply held public suspicion that they do. In these cases, the EU has had to compromise, either by offering implementation measures that did not fully address the complainants’ concerns (in EC – Biotech) or by agreeing with complainants to provide compensation through imports of other products (“high-quality beef”) in EC – Hormones.

Overall, the means that the political organs have used to remedy adverse WTO reports have confirmed the ECJ’s view that WTO rulings may not


\textsuperscript{106} Opinion 2/13 \textit{ECHR Accession}, EU:C:2014:2454. The recent Opinion 1/17, EU:C:2019: 341 clarifies that binding international dispute settlement procedures are not at odds with the autonomy of the EU legal order, when they are inter-State mechanisms involving the EU and third States as parties, such as the WTO dispute settlement procedure.

constitute the end of disputes, but merely a starting point for negotiations; this is contrasted with the role of ECJ decisions that have a significantly higher implementation rate. In these negotiations, the EU has generally aimed to address inconsistencies found by the panel and Appellate Body without harming the competitive conditions of its economic agents and without giving up its policies to protect non-trade values, irrespective of whether these values can be “objectively” (read: scientifically) justified.

Conflict therefore is more likely to occur in the latter cases: those in which the political opinions of EU citizens materialise in policies that run counter to WTO requirements of objectivity and non-discrimination. In these cases, the EU’s political and economic weight may allow it to choose between addressing the issues internally, at the risk of lowering the EU’s popularity with its citizens, or seeking to re-shape the global legal environment to level the playing field and project its preferences into the broader international legal order.