CHAPTER FOUR

EU IDENTITY FROM THE PERSPECTIVE OF THE WTO –
THE SPILLOVER EFFECTS OF THE UNION’S INTERNAL MARKET
IN THE INTERNATIONAL TRADING ARENA

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1. INTRODUCTION

The European Union’s identity from the perspective of the World Trade Organization is influenced by a complex interaction of many factors. This identity has institutional and substantive aspects.

The institutional aspects of the Union’s international identity as seen by the WTO (discussed below in part 2) relate to the fact that both the EU and all of its Member States are WTO members. A historical overview clarifies how this institutional arrangement came into being. It explains that the Union’s identity in international trade gradually evolved as a consequence of the fact that, with each Treaty amendment, the Member States conferred upon the EU (i.e. each of its predecessor organizations) more competences in this field.

More substantive aspects of the EU’s identity in the WTO (discussed in part 3) are connected to the external effects of the internal market. The EU is a WTO-legal regional trading block, but despite being legal, only some of its measures contribute to external trade, while others create obstacles to it. The WTO’s view of the EU thus also depends on whether the latter internally takes into account these external effects and the compliance of its measures with WTO rules. There is a cross-correlation between how the WTO perceives the Union and how the EU takes WTO law into account.1 Two case studies (one in the field of animal welfare, another on the environmental effects of air transport) mean to shed light on whether the EU institutions take WTO law into account, and whether their approach has been changing. The final substantive aspect of the EU’s

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identity in the WTO derives from its actions in the dispute settlement process. As we shall observe, particularly relevant here are cases where the EU is the respondent, as it then has to justify to the world its internal measures, i.e. its internal choices and identity.

2. Institutional aspects of the Union’s identity in the WTO

2.1 Institutional Arrangements and the Setting-up of the GATT

It is well known that the first steps in setting up the global trading system predate European integration. For in 1947, when the General Agreement on Tariffs and Trade (GATT) was established, neither the EU nor its predecessor organizations existed. The original parties to the GATT were only the states themselves. All six countries which later initiated the European integration process (Belgium, France, Germany, Italy, the Netherlands and Luxemburg) were also original parties to the GATT.

2.2 Institutional Arrangements and the Setting-up of the WTO

Since the establishment of the GATT in 1947, until the time the Uruguay Round was negotiated in the 1980s and 1990s, the political and economic situation in Western Europe changed dramatically. The European Community had become a powerful supra-national organization, with its own legal personality and competences in the external sphere. The European Court of Justice was thus asked to give an opinion on who should become a WTO member and a party to the agreements under the WTO umbrella – the EC, the European Coal and Steel Community (ECSC), the European Atomic Energy Community (EURATOM), and/or the Member States.

In its Opinion 1/94, the ECJ gave an interpretation of what was then Article 113 TEC (Article 133 TEC post-Amsterdam; currently Article 207 TFEU). This was an interpretation of the division of competences in external trade which was relevant for WTO membership.2 The Court held that in the field of Common Commercial Policy, Article 113 TEC gave the Community exclusive competence for concluding all multilateral agreements on trade in goods.3 This covered not only the GATT, but also, among

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3 Ibid., par. 22–34.
others, the agreements on Technical Barriers to Trade (TBT) and the Application of Sanitary and Phytosanitary Measures (SPS).

Concerning competence to enter into international agreements on trade in services, the Court considered that it was necessary to differentiate between the four modes of provision of services envisaged by the General Agreement on Trade in Services (GATS). The relevant criterion for distinguishing between the modes was whether or not a mode entailed the movement of persons. On the one hand, concerning the provision of services which do not include the movement of persons (“cross-border supply”), the ECJ held that the Community enjoyed competence on the basis of Article 113 TEC. On the other hand, as regards the provision of services where there is movement of persons (“consumption abroad”, “commercial presence”, “presence of natural persons”), these were not covered by Article 113 TEC. However, the Community did have competence to regulate the latter three modes of services provision internally as regards movement of Member States’ nationals and the treatment of third country nationals. If the EU had exercised this internal competence, it would also have acquired implied exclusive external competence on those matters. The ECJ held that had the EC “included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries or expressly conferred on its institutions powers to negotiate with non-member countries[,] it (...) [would have acquired] exclusive external competence in the spheres covered by those acts”; however, the EC had not exercised its internal competence in all service sectors, so there was no implied exclusive external competence in those fields. The Court confirmed that “an internal power to harmonize which has not been exercised in a specific field cannot confer exclusive external competence in that field on the Community.”

The special regime of transport services is also worth mentioning here. These services were not covered by Article 113 TEC. This provision was the legal basis solely for the adoption of certain embargoes on the suspension of transport services. These embargoes related primarily to the export and import of products, but “they could not have been effective if it had not been decided at the same time to suspend transport services.”

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4 Ibid., par. 44–47.
5 Ibid., par. 90–97.
6 Ibid., par. 88.
7 Ibid., par. 48–53.
8 Ibid., par. 51.
services were primarily covered by the ‘Transport’ Title of the Treaty. That field, just like the field of non-transport services, was not fully regulated internally, so there was no exclusive external power of the Community. For all these reasons, the Court concluded that the EC and the Member States shared competence for concluding the GATS.9

As regards TRIPs, the ECJ distinguished between two aspects of that agreement. On the one hand, the Court held that the section of TRIPs which related to border measures aimed at enforcement of intellectual property rights fell within the CCP, and could be regulated by an international agreement on the basis of Article 113 TEC. On the other hand, other areas of TRIPs were not sufficiently connected to the movement of goods to be regulated by an international agreement on the basis of Article 113 TEC.10 Furthermore, other internal competences in the field of intellectual property did exist (ex Articles 100, 100a, 235 TEC). Again, however, these powers had not been fully exercised, so that they did not create an exclusive external power for concluding the TRIPs agreement. Consequently, this meant that the EC and its Member States were jointly competent to conclude it.11

The fact that the Community had exclusive competence for international agreements on goods, while competence for international agreements on services and intellectual property was shared did not mean that both the EC and the Member States were supposed to negotiate and conclude agreements and be in charge of their fulfillment. If the Member States and the EC were engaged in constant discussion over their division of competence, “[t]he Community’s unity of action vis-à-vis the rest of the world [would] (...) be undermined and its negotiating power greatly weakened”.12 The ECJ thus held that as regards agreements for which “it is apparent that the subject-matter (...) falls in part within the competence of the Community and in part within that of the Member States, it is essential to ensure close cooperation”. According to the ECJ, this “obligation to cooperate flows from the requirement of unity in international representation of the Community”, and it thus applies “both in the process of negotiation and conclusion and in the fulfillment of the commitments entered into”.13 The duty of cooperation also has special importance in

9 Ibid., par. 77–98.
10 Ibid., par. 55–71.
11 Ibid., par. 99–105.
12 Ibid., par. 106.
13 Ibid., par. 108.
WTO dispute settlement, especially in connection to the remedy of retaliation; this remedy would be less efficient for the EC if it could retaliate only in the field of goods, but not in the field of services or intellectual property.\textsuperscript{14}

It is due to Opinion 1/94 that both the Community and the Member States became original members of the WTO in 1995.\textsuperscript{15} However, the WTO Agreement explicitly states that the EC represents all of its Member States and has “a number of votes equal to the number of (…) [its] Member States”.\textsuperscript{16} This means that, within the Community internally, Member States might have had different opinions on trade issues, but externally the EC had a unified position and could place all its votes in favor of that position. This gave the EC, and later the EU, significant power in the WTO. The unified position of the EC/EU in the WTO is particularly visible in the dispute settlement process. The EC/EU could act as claimant even when only one or some of its Member States had an interest in challenging a third country’s measure. Similarly, the EC/EU could find itself in the position of a respondent not only when a challenged measure was adopted by its institutions, but also when it was adopted by a single Member State (e.g. in EC – Asbestos).\textsuperscript{17}

2.3 Institutional Arrangements after the Treaty of Lisbon

Since the establishment of the WTO, the competences of the Community gradually increased with successive Treaty amendments (e.g. for concluding agreements on all modes of service supply and commercial aspects of intellectual property). The EC became exclusively competent in more fields of external trade, but there are still areas of WTO law over which Member States still retain some competence (e.g. transport services).\textsuperscript{18}

\textsuperscript{14} Ibid., par. 109.
\textsuperscript{15} Art. XI of the Agreement Establishing the World Trade Organization (hereinafter referred to as the WTO Agreement).
\textsuperscript{16} Art. IX:1 WTO Agreement.
The latest amendments embodied in the Treaty of Lisbon have given the Union legal personality, so that the role of the EC within the WTO has now been taken up by the EU. Thus far, this has not caused any substantive change. Article 3(1)(e) TFEU now explicitly mentions the CCP as one of the Union’s exclusive competences (as was already established by the ECJ in Opinion 1/75).\(^\text{19}\) The new Article 207 TFEU (replacing Article 133 TEC post-Amsterdam, ex Article 113 TEC) provides a legal basis for

the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.

The Treaty of Lisbon also increased the role of the European Parliament in the CCP. For “measures defining the framework for implementing” the CCP, the ordinary legislative procedure applies, which gives the EP the power to co-decide issues with the Council (previously called the co-decision procedure). For negotiating and concluding international agreements, Article 218 TFEU calls for the consent of, or consultations with, the European Parliament, depending on the type of agreement which is being concluded. While in the EU, the increased powers of the European Parliament are generally perceived as a positive development leading to more democratic decision-making, it remains to be seen whether the same will be true in the CCP. Below, it will be shown that the European Parliament is frequently indifferent to the external effects of EU measures which are the core of the CCP. It is still not clear whether or how this new role in the CCP will sensitize the European Parliament to external trade issues.

3. **Substantive aspects of the Union’s identity in the WTO**

3.1 **External Trade Effects of the Internal Market**

The Union’s identity in the global arena as perceived by other international actors depends on what the Union does internally. Consequently, in the field of international trade, the EU’s identity is affected by the Union’s internal market rules.

3.1.1 The EU as a WTO-Legal Regional Block

From the perspective of the WTO, the EU internal market constitutes a regional trading block (RTB). RTBs are deviations from the most favored nation principle (MFN). They typically cause trade diversion in the sense that the globally most efficient producer is discriminated against in relation to the less efficient producer from within the RTB. However, RTBs are explicitly permitted by the GATT and the GATS. Article XXIV GATT allows WTO members to form two types of RTBs: customs union and free trade areas, as well as interim agreements necessary for the formation of the two mentioned types of RTBs. Similarly, Article V GATS allows WTO members to enter into an agreement that would liberalize trade in services between them to a greater extent than under the WTO regime. The idea behind allowing RTBs can be understood from the Understanding on Article XXIV GATT, which is a part of GATT 1994. Its preamble recognizes that RTBs have contributed to the “expansion of world trade”.

The EU has similarly argued that it contributes not only to its own internal trade, but also to world trade. The Union’s official documents frequently emphasize its commitment to world trade, especially through the WTO. For example, the EU’s 2011 report issued in connection to the trade policy review states that multilateral trade and the WTO “are the focus for the EU trade policy, as the EU believes that a system of global rules is the best way to ensure that trade between countries remains open and that prosperity can be widely shared”. Similarly, at the WTO Ministerial Conference in 2011, the EU Commissioner for trade, Mr. De Gucht, reiterated the Union’s commitment to multilateral world trade. He stated that protectionism remains a threat to the world economy and that WTO members need to do more. In his view, the biggest challenge is to unblock the Doha Round, and progress in Doha negotiations in the opening up of markets is crucial for maintaining the centrality of the multilateral trading system. He claimed that some progress had been made, but that more needed to be done in connection to trade facilitation and non-tariff barriers, and that it was important to focus on areas which are of interest to both developing and developed countries. Commissioner De Gucht also

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21 Ibid., Recital 3 of the Preamble.
stressed that the WTO must continue to oversee regional trade agreements, so that they are constructed in a way to support and not undermine the multilateral system.\footnote{Plenary Session of the WTO Ministerial Conference, December 2011, available as a webcast at \url{http://gaia.world-televison.com/wto/2011/min11_webcast_e.htm#eec}.} One could conclude from this that he believes that the EU is a type of RTB that supports the multilateral system, but that there are RTBs which do the opposite.

However, what is relevant for the present paper is not whether the EU thinks that it contributes to world trade, but whether this is really so, and whether other WTO members and the WTO itself might perceive this to be the case. The issue is complex because internal market measures can both facilitate and impede external trade.

3.1.2 Internal Market Rules Facilitating External Trade

Some studies support the claim that the EU internal market facilitates world trade by arguing that "[t]he liberalization of external trade has been at least as strong as the intra-EU liberalizing effects".\footnote{Chris Allen, Michael Gasiorek and Alasdair Smith, ‘Trade Creation and Trade Diversification’, The Single Market Review Series, Subseries IV – Impact on Trade and Investment, summary available at \url{http://ec.europa.eu/internal_market/economic-reports/docs/studies/stud12_en.pdf}; Peter Hoeller, Nathalie Girouard and Alessandra Colecchia, The European Union’s Trade Policies and Their Economic Effects: Economics Department Working Papers No. 194’, OECD, 1998; Ari Kokko, Thomas Mathä and Patrik Gustavsson Tingvall, ‘Regional Integration and Trade Diversion in Europe’, (2007) 26 Integration and Trade, p. 205.} This would be because some mechanisms originally designed to facilitate internal trade also contribute to external trade, e.g. mutual recognition and partial/minimum harmonization.

First, the principle of mutual recognition in its original form, as set up by the ECJ in Cassis de Dijon, provides that any product lawfully produced and marketed in one Member State must be allowed on the market of another Member State, unless the latter has a justified reason for denying access to its market.\footnote{ECJ, Case 120/78, Rewe-Zentral AG v Bundesmonopolverwaltungen für Branntwein, [1979] ECR 649 (hereinafter referred to as Cassis de Dijon).} The principle has been extended to other areas beyond trade in goods. For international trading partners, this means that their products and services can be marketed within the EU more easily. Once a product or service from a third country satisfies the conditions for being placed on the market in one Member State, it will have to be granted access to the market of another Member State, unless there is a justified reason for denying such access.
Second, partial harmonization, especially *minimum harmonization*, contributes to the Union’s external trade. Partial harmonization primarily occurs through the ‘new approach’ directives which partially harmonize an area, but leave Member States some regulatory choice. Minimum harmonization sets certain standards, but allows countries to adopt stricter ones. In such a case, it is typically also necessary for the relevant directive to guarantee the free movement of goods that comply with it. This means that each Member State can impose stricter standards on its domestically produced goods, but not on imports from another Member State. This regulatory choice left to states translates into more choice for importers from third countries. These importers can first import their goods into an EU country which for them has the most convenient rules, and then, if the relevant directive guarantees the free movement of products which comply with it (as directives usually do), their goods will be in free circulation within the entire Union.

3.1.3 Internal Market and Obstacles to External Trade

In contrast to the described mechanisms, the EU internal market can equally present an impediment to international trade. Such impediments can be grouped into three main types.

First, ‘Fortress Europe’ has many *deliberate mechanisms which limit its external trade* by protecting domestic production and stimulating intra-EU trade. For example, such mechanisms are primarily external customs levied on goods from third countries. It is well known that only internal customs within the Union are prohibited, but that the EU has a common customs tariff towards third countries. WTO law does not prohibit customs, but merely requires the observation of the MFN principle and the gradual lowering of tariffs in subsequent negotiation rounds. Still, despite being WTO-legal, customs certainly cause some trade diversion and inhibit the globally optimal allocation of resources. Furthermore, the EU still has a lot of subsidies in various sectors, such as agriculture and fisheries. These are sectors which the EU has traditionally been reluctant to liberalize, although the Doha Round requires some progress. However, apart from these mechanisms where the EU intentionally decides to limit its external trade, there are also areas where this can happen without necessarily being planned.

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Thus, the second type of obstacle to external trade arises when the EU internal process of decision-making itself creates a trade barrier. This was the situation in the EC – Biotech\textsuperscript{27} case on the placing on the EU market of genetically modified organisms (GMOs). The dispute largely arose as a consequence of the fact that EU Member States have different attitudes towards GMOs. Their disagreement led to several types of trade barriers to the movement of goods which existed at both national and EU levels, and which were all challenged within the WTO. Firstly, since the relevant EC directives and regulations in force allowed Member States to prohibit or restrict trade in biotech products which had already been approved for EU-wide marketing in accordance with relevant Community law, individual Member States used this opportunity to create many obstacles. Secondly, the EC itself stopped approving biotech products pending the adoption of its new regulatory regime, so during this period there was a \textit{de facto} moratorium on approvals. It is interesting that even after the Panel’s decision in EC – Biotech, which found the EC to be in breach of its WTO obligations, most EU Member States still did not intend to change their policies, despite the Commission’s proposals supported by certain other Member States.\textsuperscript{28} It is also interesting that the Council was frequently so split on the issue of biotech products that it could not reach a qualified majority either for approving or for rejecting a product.\textsuperscript{29} This shows how the EC’s ‘federal’ nature and its dynamics of decision-making create obstacles to trade.

As the third type of obstacles to external trade, one should note that it is not only the legislative process, but also the legislative outcome that can cause obstacles to trade. Harmonization can bring about rules which are more trade restrictive than the average of member states’ rules which they replace. And not only can EU rules be stricter than the average of


the Member States' rules, but they can be as strict as the strictest rule of a single one of them (often referred to as the ‘regulatory peak’). There are many examples of restrictive EU measures. For example, the Union's very restrictive rules on tobacco labeling constitute significant obstacles to all types of tobacco trade. However, the clearest examples of situations where EU rules are stricter than the average of Member States' rules, and as strict as the strictest rule of a Member State, are total bans, e.g. the ban of oral tobacco (snus) and the ban of seal products. In the case of oral tobacco, prior to EU legislation, only three Member States banned this product and it was permitted in all the other countries. However, the Union legislature considered this different regime to present an obstacle to the internal movement of goods so it used its internal market competence to ban snus entirely. The ECJ upheld this use of an internal market competence in Swedish Match. Similarly, prior to EU legislation, only two Member States (Belgium and The Netherlands) banned seal products and twenty-five Members permitted the marketing of these products. However, the EU again used its internal market competence to ban seal products throughout the Union. Cases on the validity and

32 Swedish Match, supra n. 31, par. 37.
33 Swedish Match, supra n. 31.
legality of EU measures on seal products are currently pending before the ECJ and WTO Panel, respectively.\footnote{Currently pending EU cases are: Case C-583/11 P, Inuit Tapiriit Kanatami and Others v Parliament and Council, [2012] OJ C 58/3; Case T-526/10, Inuit Tapiriit Kanatami and Others v Commission, action brought on 9 November 2010 [2011] OJ C 13/34. Currently pending WTO disputes are: European Communities – Measures Prohibiting the Importation and Marketing of Seal Products (Complainant: Canada), DS400 2 November 2009; European Communities – Measures Prohibiting the Importation and Marketing of Seal Products (Complainant: Norway), DS401 5 November 2009.}

There are several possible reasons why the EU rules are stricter than the average of Member States’ rules. Primarily, the Treaty requires EU institutions to ensure high levels of health, safety, environmental protection and consumer protection when adopting common rules.\footnote{Art. 114(3) TFEU (ex 95(3) TEC); Art. 168 TFEU (ex 152 TEC); Art. 169 TFEU (ex 153 TEC); Art 191 TFEU (ex 174 TEC).} Article 114 TFEU, a frequently used legal basis for measures aiming at the establishment and functioning of the internal market, provides in its paragraph 3 that the measures proposed on this basis “will take as a base a high level of protection” of “health, safety, environmental protection and consumer protection”, “taking account in particular of any new development based on scientific facts”. There are also special horizontal clauses throughout the Treaty which mandate that a high level of certain values is achieved through EU legislation, and which then lead to strict and trade restrictive rules. In addition, very restrictive common rules can be a consequence of the fact that a state with more stringent rules frequently has a better bargaining position than a state with lower standards. For, “[s]o long as there is no agreement, its industry is protected from foreign competition [which does not meet equally high standards], while [the industry] (…) of its trading partners [is] hurt by being denied access to the market”.\footnote{Young, supra n. 30, p. 401 and p. 410.}

However, the strength of a bargaining position depends on the given voting rules and on whether products from the State with more stringent rules will be competitive in other states, bearing in mind that the cost incurred in complying with the high standards will be reflected in the price. Finally, and most importantly, the ECJ has been generous towards EU legislative institutions in delineating the boundaries of their competences. In the field of the internal market in particular, the Court has allowed the legislature to adopt measures which were only remotely (if at all) connected to the establishment and functioning of the internal market, but were at the same time intended to achieve another legitimate aim.
for which the EU would not have the necessary regulatory competence. These are, for example, the mentioned rules on tobacco labeling\(^39\) and on oral tobacco.\(^40\)

All these types of obstacles to trade, regardless of whether or not they are internally legal and legitimate, have a negative effect on trade with third countries which do not have such high standards in protecting certain non-trade aims. Third countries which are WTO members then use the WTO dispute settlement mechanism to challenge EU rules in order to try to eliminate these obstacles.

### 3.2 Taking WTO Law into Account in the EU’s Internal Legislative or Judicial Process

The Union’s identity in the WTO is in cross-correlation with how the EU treats WTO law and the external trade effects of its rules on other WTO members. If the EU did not take WTO law or the external trade effects of its measures into account, it would be perceived to be acting unilaterally instead of multilaterally. This does not mean to say that the Union should always try to satisfy the interests of its trading partners or that it should fear WTO challenges. The EU can, in pressing matters, even deliberately use its market power to promote certain non-trade interests outside its territory by blocking the access of goods and services to its market that do not meet its standards.\(^41\) However, unilateral action can always lead to disputes as well as to unilateral action of other WTO members. EU institutions should be aware of these possible consequences, since an informed decision-maker is in a better position to reconcile the interests of its internal trade, external trade and the protection of values (both from the perspective of domestic rationality and global efficiency).\(^42\)

There are numerous ways in which the EU could gain information about the external effects of its measure, particularly about other WTO

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\(^{39}\) *British American Tobacco*, supra n. 31.  
\(^{40}\) *Swedish Match*, supra n. 31.  
\(^{42}\) Taking account of foreign views on domestic measures is important in achieving domestic rationality. For more on whether foreign interests should be taken into account in domestic decision-making, with a view to achieving global efficiency which cannot be achieved by mere domestic rationality, or whether domestically rational measures are globally efficient, see Donald H. Regan, ‘What Are Trade Agreements For? – Two Conflicting Stories Told by Economists, with a Lesson for Lawyers’, (2006) 9 Journal of International Economic Law, p. 951.
members' attitudes, even before the adoption of a measure. One way of doing this is through the Union's own process of preparing legislation when its legislature can consult various interest groups, the general public, etc. It is important to include at this stage all relevant actors, including other countries. The jurisprudence of the Appellate Body even suggests that a lack of consultation in the pre-legislation stage with certain WTO members on a non-discriminatory basis may in itself represent a violation of WTO obligations. Another way of gaining information about other WTO members' positions is through institutionalized procedures in the WTO. For example, this kind of information exchange about the effects of the measure happens in the SPS committee. When a WTO member plans to adopt an SPS measure, other WTO members can express their views and concerns within the SPS committee. As Scott pointed out, “[t]he raising of such concerns [has on certain instances] operated to sensitize Members as to the external impact of their regulatory proposal (…) and consequently led Members to adjust their demands”. All this contributes to EU legislation being drafted in a WTO-consistent manner.

There is indeed a significant number of examples where EU decision-makers have analyzed a proposed or an existing measure to check its WTO compliance, in order to avoid litigation with another WTO member. Quite recently, for example, some steps were taken for the adoption of an EU ban on food products derived from cloned animals' offspring, but this ban was never proposed. It seems that the Commission and the Council had concerns about its WTO compatibility, although there were even disagreements between the EU institutions (which leaked out).


The question now arises whether the tendency of taking external effects and WTO law into account is on the rise or decline. This chapter does not attempt to offer a complete analysis of all the EU measures affecting trade, checking whether WTO compliance was taken into account in the legislative or judicial process. However, below, we will engage in case studies in two fields – animal welfare and the environmental effects of air transport. These build upon studies conducted by de Búrca and Scott in 2000. These scholars used two examples, one from each of these fields, to demonstrate the effects of the WTO on the Union’s legislative and judicial decision-making (respectively). The current chapter builds on these two examples, and contrasts each of them with a newer example in the same substantive field and at the same stage of decision-making (legislative or judicial).

3.2.1 Case Study – Animal Welfare

The EU does not have competence to regulate on the basis of animal welfare. However, if the EU regulates an area on the basis of another competence, it has to take into account animal welfare protection. Most frequently, measures adopted in the field of the internal market are the ones used to achieve a high level of protection of other interests, including animal welfare. The high level of protection of non-trade interests turns these internal market measures into **de facto obstacles to the importation of goods from outside the EU that do not meet the Union’s high standards**.

Two pieces of legislation will be analyzed to assess whether the EU takes into account WTO compliance when adopting marketing bans which seek to achieve a high level of animal welfare. These are the Cosmetics Directive as the older example (discussed by de Búrca and Scott), and the Seal Products Regulation as the newer example. Both of these

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49 Art. 13 TFEU and Art. 114(3) TFEU.
51 De Búrca and Scott, supra n. 48, pp. 6–12.
measures were adopted on the basis of internal market competence, but have significant (and in the latter case dominant) external trade effects.

The older example, the Cosmetics Directive, was originally adopted in 1976 and regulated the composition, labeling and packaging of cosmetic products. Since then, the Directive has been amended several times, it was recently recast by the Cosmetics Regulation which comes into force in 2013. One of the important amendments was adopted in 1993. This amendment added to the list of prohibited cosmetic products “ingredients or combinations of ingredients tested on animals”. The entry into force of this provision was originally set for 1 January 1998, but it was postponed several times. In 2000, de Búrca and Scott’s case study on the amendments of the Cosmetics Directive identified that one of the reasons for the Union legislature to postpone the entry into force of the marketing ban of products derived from animal testing was the desire of the EU regulator to make the measure WTO compliant. This was not the official reason mentioned in the Directive’s amendments, but it was expressed in the Commission’s answers to the European Parliament. The Commission stated the following:

it is the Commission’s view that it cannot unilaterally impose the Community’s welfare-based production standards on third countries. For example, WTO rules do not permit the Community to prohibit imports of cosmetic products on the sole ground that they have been tested on animals, even if the Community imposes such an animal-testing ban for marketing of Community products. Rather than proceeding to an import ban of such products, the Community should focus on the creation of multilateral standards.

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52 The original Cosmetics Directive was adopted on the basis of then Art. 100 TEC (now Art. 115 TFEU). At the time of the adoption of the original Cosmetics Directive, the Article which is now Art. 114 TFEU (Art. 95 TEC post-Amsterdam, ex Art. 100a TEC pre-Amsterdam) did not yet exist, but the Directive’s amendment on animal testing discussed below was adopted precisely on that legal basis. The Seal Products Regulation was also adopted on the basis of Art. 114 TFEU.


55 The provision then became Art. 4(1)(i) Cosmetics Directive.

56 De Búrca and Scott, supra n. 48, pp. 6–12.

57 E-0949/98, ‘Written Question to the Commission "Impact on animal protection of the GATT/WTO" by Mark Watts’ (PSE), 30 March 1998; and 'Answer to Written Question E-0949/98 given by Sir Leon Brittan on behalf of the Commission’, 7 May 1998. See on this De Búrca and Scott, supra n. 48, p. 8.
for animal welfare. The Community should first try to convince its trading partners to modify their policies in the direction it thinks appropriate. Consumers in Europe should, moreover, be in a position to make an informed choice about the animal welfare aspects of the products they buy, for example through labelling schemes. Given that animal welfare is becoming increasingly relevant in terms of international trade, this issue may in the future be raised in the WTO context. The possibility of amending WTO rules to address welfare concerns more generally will be addressed in the context of the determination of the Community’s negotiating objectives for the next stage of the WTO negotiations.58

As de Búrca and Scott explained at the time,59 this was a very cautious move of the EU legislature. It was certainly not clear at that time (nor is it now) that a trade ban on products not complying with animal welfare standards would be contrary to WTO rules. There was, and is, plenty of room to argue that such a measure is in accordance with WTO law. This is why it is unclear whether WTO compliance was indeed a reason for postponing the entry into force of the provision, or whether there was another interest involved. De Búrca and Scott mentioned at the time (in subtle terms) that this might be comparable to the Member State action known as ‘blame it on Brussels’, where Member States “point to the constraints of EC membership to justify an unpopular measure adopted at home”, but that in this case it was the EU itself which was hiding behind the alleged constraints of WTO membership.60 However, what is relevant for the present purposes is that WTO compliance formed part of the political debate and it was taken into account in the legislative process.

The newer example, the Seal Products Regulation, tells a somewhat different story. In 2007, two years before the EU rules on this matter were adopted, Belgium and the Netherlands adopted legislation banning trade in seal products. This led to a Europe-wide discussion on seal hunting, reflecting on whether an EU ban was needed.61 Canada reacted promptly to the Belgian and Dutch measures, and the same year requested

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58 Answer to E-0949/98, supra n. 57.
59 De Búrca and Scott, supra n. 48, pp. 9–12.
60 Ibid., pp. 11–12.
consultations with the EC, which constituted the first step in a WTO challenge. At the time, one might have reasonably assumed that the WTO challenge would make the EU legislature reluctant to adopt Union legislation on the matter. However, this assumption would soon be proven wrong. In 2009, Regulation 1007/2009 was adopted banning the placing of seal products on the market (with narrow exceptions for indigenous communities, marine management and importation for personal use).

This total ban is currently being challenged within the EU by interested individuals on the grounds that it breaches the principles of conferred competences, subsidiarity, proportionality and fundamental rights. The ban is also challenged at the WTO by Canada and Norway, given that it raises concerns about possible protectionism and other types of irrationalities, permissible justifications, necessity, etc. European parliamentarians did not ask much about WTO compliance before the adoption of the Regulation.

Following the adoption of the Regulations and their challenges, the Commission was asked some questions concerning WTO compliance, but it merely replied that it would defend the measure. It

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63 Seal Products Regulation, supra n. 35.
65 Two MEPs posed a question on the WTO dispute to the Commission: E-0373/08, ‘Written Question to the Commission “The challenge of seal bans in the WTO” by Jens Holm (GUE/NGL) and Kartika Tamara Liotard (GUE/NGL), 4 February 2008.
66 For a full list of parliamentary questions on seals and WTO compliance in the 7th parliamentary term, see <http://www.europarl.europa.eu/sidesSearch/sipadeMapUrl.do?l=EN&PROG=QP&SORT_ORDER=DA&S_REF_QP=%%&S_RANK=%%&MI_TEXT=seal+and+wto&F_MI_TEXT=seal+and+wto&LEG_ID=7> (08/07/2012); and in particular see E-002592/2011, ‘Question for written answer to the Commission “Measures against the annual commercial seal hunt in Canada” by Bart Staes (Verts/ALE),
is true that, once a measure is challenged, no answer of the Commission recognizing WTO compliance problems is politically feasible.

What one can see from the legislative history of the Cosmetics Directive and the Seal Products Regulation is a stark difference in the attitude of the EU legislature towards WTO compliance. On the one hand, the entry into force of the marketing ban of cosmetic products and ingredients tested on animals was postponed on the ground that the measure might not be WTO compliant. In that case, the EU was excessively cautious as there was and still is plenty of room to defend that measure against any WTO challenges. On the other hand, the EU adopted the seal products ban for which there are more compelling arguments that it might not be WTO compatible.67 Furthermore, at the time the EU seal products ban was being adopted, Canada had already submitted a WTO complaint against the EC, challenging the comparable measures of Belgium and the Netherlands.

This limited comparison of the older and newer example cannot lead to a general conclusion that the EU legislature is becoming more indifferent to WTO compliance, but it does show an interesting shift in attitude. All this affects the image of the EU as seen from the WTO: EU decision-making, which takes less account of WTO law and of the external effects of measures, can be perceived as unilateralism and can lead to disputes and retaliation.

The study also suggests that the attitude towards WTO compliance differs between EU institutions. In both instances, it seems that the Commission was aware of WTO obligations. In the case of the Cosmetics Directive, problems with WTO compliance were explicitly mentioned by the Commission in its answers to the European Parliament. In the case of the Seal Products Regulation, WTO compliance might not have been explicitly mentioned in the public documents – but the Commission’s proposal for the Regulation, which one could argue was easily WTO-compliant, was very different from the finally adopted Regulation. The original Proposal for the Regulation68 shows that the intention of the Commission was not

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67 Perišin, supra n. 64.

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to introduce a ‘total’ ban, but a conditional one. Seal products obtained
through hunting and skinning which observed certain animal welfare
standards and which were properly certified and labeled would have
been permissible in the EU. The conditional ban proposed by the Com-
mission was probably in accordance with WTO rules, and would probably
not have even led to a WTO challenge. However, this originally planned
conditional ban was never adopted, as amendments to the proposal were
added by various committees within the European Parliament.69 In con-
trast to the conditional ban, the total ban (with narrow exceptions for
indigenous communities, marine management and individual imports)
has many weaknesses.70 This would suggest that the Commission is more
aware of, or cares more about, the EU’s WTO obligations than the Par-
liament. This might change given the Parliament’s new role in the CCP
envisaged by the Lisbon Treaty. It remains to be seen whether the Euro-
pean Parliament will become more sensitized to external trade and WTO
law. It is important for the EU to be aware that the actions of all of its
institutions affect whether it is perceived as acting multilaterally, which
is indeed how it wants to portray itself.

3.2.2 Case Study – Air Transport’s Environmental Effects

Transport is an area which has significant effects on both internal and
external trade, and the EU possesses special competences in this field.
Transport also has significant effects on the environment, so EU rules on
transport frequently seek to achieve a high level of environmental protec-
tion as well.

This case study looks at two pieces of legislation in the field of air trans-
port which sought to achieve a high level of environmental protection, but
presented obstacles to the business activities of airlines and thus led to
challenges. These are the Regulation on Civil Subsonic Jet Planes,71 as the

69 For a detailed analysis of the Regulation’s legislative history, see de Ville, supra n. 64.
70 On which, see further Perišin, supra n. 64.
71 Council Regulation (EC) No. 925/1999 of 29 April 1999 on the registration and opera-
tion within the Community of certain types of civil subsonic jet aeroplanes which have
been modified and recertificated as meeting the standards of volume I, Part II, Chapter 3
of Annex 16 to the Convention on International Civil Aviation, third edition (July 1993),
oJ [1999] L 115/1. The Regulation was subsequently superseded by directive 2002/30/EC
of the European Parliament and of the Council of 26 March 2002 on the establishment
of rules and procedures with regard to the introduction of noise-related operating restric-
older example used by de Búrca and Scott, and the Aviation Emissions Directive as the newer example. The study of both the older and the newer piece of legislation focuses not on the legislative histories (as in the previous section on animal welfare), but on the disputes.

The older example of dispute concerns the Regulation on Civil Subsonic Jet Planes, which raised the noise standard for civil subsonic jet planes so that only planes complying with the strict rules of Chapter 3 of the Chicago Convention on International Civil Aviation (CCICA) could register and operate in the EU (where previously compliance with CCICA Chapter 2 was sufficient). The Regulation also imposed an additional technical requirement that re-engined planes needed to have “engines with a by-pass ratio of less than 3” which was challenged by the company Omega Air before UK and Irish courts. In Omega Air’s view, this additional technical requirement going beyond the international standard was disproportionate and was not based on any reasons. The national courts referred the questions to the ECJ concerning the validity of the Regulation, inquiring whether the mentioned provision of the Regulation breached the duty to provide reasons and the principle of proportionality, all in the light of possible rights that individuals might have under the GATT and TBT. By that time, it had already been settled that WTO law does not have a direct effect in the EU. However, the issue arose whether WTO obligations were relevant for determining a breach of the

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72 De Búrca and Scott, supra n. 48, pp. 12–16.
74 Art. 2(2) of Regulation 925/1999 defines “recertificated civil subsonic jet aeroplane”, and Art. 3 of Regulation 925/1999 prescribes that such planes cannot be registered in EU Member States.
75 Art. 2(2) of Regulation 925/1999.
76 Joined Cases C-27/00 and C-122/00, The Queen v Secretary of State for the Environment, Transport and the Regions, ex parte Omega Air Ltd and Omega Air Ltd, Aero Engines Ireland Ltd and Omega Aviation Services Ltd v Irish Aviation Authority, [2002] ECR I-2569.
77 Ibid., par. 39–45, 54–61.
78 Ibid., par. 40, 41.
79 Within the WTO, the idea that WTO law should have a direct effect was rejected during the Uruguay round, and this was also held by the Panel in United States – Sections 301–310 of the Trade Act of 1974 WT/DS152/R par. 7.72. Before the Omega Air case, many cases on the effect of WTO law in the EU had already been decided, e.g. Joined Cases 21 to 24/72, International Fruit Company v Produktschap voor Groenten and Fruit, [1972] ECR 1219; Case 70/87, Fediol v Commission, [1989] ECR I 1781; Case C-69/89, Nakajima v Council, [1991] ECR I-2069; Case C-280/93, Germany v Commission, [1994] ECR 4873; Case C-149/96, Portugal v Council, [1999] ECR I-8395.
duty to provide reasons and the principle of proportionality. The ECJ, however, restated that WTO rules cannot be used to assess the legality of EU legislation, except in cases where the challenged piece of legislation is “intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to precise provisions of the WTO agreements”. What is relevant in this case is that WTO compliance was invoked before the ECJ.

A more recent dispute concerning air transport’s environmental effects deals with the Aviation Emissions Directive. This Directive sets up a system according to which airlines are required to purchase allowances for all their emissions on flights into or from the EU (including emissions caused above open seas, another country, or at an airport in another country). Unlike the mentioned Regulation on civil subsonic jet planes, this Directive does not directly regulate planes. However, it does affect the provision of air transport services and indirectly affects the type of planes which companies will use (trying to adjust engines, plane weight, etc., in order to lower their fuel consumption and emissions). The Directive was challenged before the ECJ by a number of US airlines on the grounds of being contrary to customary international law and certain international agreements, but the Court found the Directive to be valid. What is interesting for our purposes is that WTO law is not mentioned anywhere in the case – either by the parties, the AG, or the Court itself. It is true that the GATS explicitly excludes air transport services from its scope, but there might be parts of WTO law which would still be applicable to the case. For example, studies by Bartels and Howse show that there might be parts of the GATT which would apply because the directive limits trade in goods, and that the GATS could apply to the extent that the Directive restricts services other than air transport, e.g. tourism. In

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80 Omega Air, supra n. 76, par. 93–94.
81 Case C-366/10, Air Transport Association of America and Others v Secretary of State for Energy and Climate Change, judgment of 21 December 2011, n.y.r.
82 Opinion of Advocate General Kokott in Case C-366/10, Air Transport Association of America and Others v Secretary of State for Energy and Climate Change, delivered on 6 October 2011. AG Kokott mentions WTO law incidentally when explaining the effects of international law in the EU legal order (par. 70–71, par. 100).
83 GATS Annex on Air Transport Services.
84 Lorand Bartels, The Inclusion of Aviation in the EU ETS: WTO Law Considerations; Trade and Sustainable Energy Series, with a Commentary by Professor Robert Howse', NYU School of Law, Issue Paper No. 6, International Centre for Trade and Sustainable Development, Geneva, 2012. See also Markus Gehring, 'Air Transport Association of America v. Energy Secretary before the European Court of Justice: Clarifying Direct Effect and Guid-
addition, some WTO officials have mentioned that it would be difficult, but not impossible, to bring a successful case before the WTO on this measure. However, this point was not even mentioned in the EU’s judicial procedure.

A conclusion which one might draw from a comparison of these two cases is that once the ECJ ignores any WTO law arguments in previous disputes, it is reasonable behavior of the parties not to invoke such arguments in a later case. However, one wonders whether the ECJ’s indifference to the compliance of measures with WTO rules is prudent. Parties having lost a dispute in the EU could now turn to other available forums. Obtainable information suggests that interested companies are persuading their governments to initiate disputes within the WTO. Regardless of whether it ever comes to a WTO dispute and whether the EU would be successful in that case, the question remains whether the ECJ should in some way take WTO compliance into account so as not to force parties to seek remedy in other forums.

3.3 EU Measures under Challenge in the WTO

The previous sections demonstrated that EU measures can present significant obstacles to external trade. It was also shown that interested parties or third countries are not always able to resolve an issue with the EU prior to the adoption of a measure, nor are interested parties afterwards able to successfully invoke WTO law before the ECJ. These reasons would appear to underlie WTO disputes in which the EU is a respondent.

Out of the 436 WTO disputes registered on the official WTO website, the EU participated in 274 disputes, which equals 63% of the total
number. 87 It has been a respondent in 70 cases, which amounts to 16% of all WTO disputes. 88 This number is high, but it is in relative correlation with the Union's size and economic importance. However, the fact that the EU has frequently been a respondent is important not only in itself, but also because of certain incidental effects.

An important incidental effect is that the EU has frequently advocated regulator-friendly interpretations of WTO rules and has been motivated to employ such litigation strategies, sometimes successfully and sometimes not.

As an illustration, in connection with the GATT, the EC argued for regulator-friendly solutions in EC – Asbestos. In this case, the EC had to defend the French asbestos ban which was challenged by Canada. Canada argued that asbestos products were 'like' products in relation to products containing harmless PCG fibers so that they have to be treated alike. The Panel accepted that these were 'like' products, but it held that treating them differently was justified on grounds of public health. However, despite the fact that the Panel's decision was favorable towards the EC (because France was not required to change its measure), this decision was not regulator friendly enough for the Community. The EC appealed against the Panel's decision by arguing that two products cannot be 'like' in the meaning of Article III GATT if they can be distinguished on the basis of carcinogenicity. The EC claimed that determining 'likeness' exclusively on the basis of commercial factors would present "a serious curtailment of national regulatory autonomy". 89 In its view, non-commercial policy purposes listed as possible justifications in Article XX were not sufficient, due to their (arguably) exhaustive nature. 90 This is why the EC considered that some other legitimate policy purposes needed to be taken into account already in the analysis of national treatment under Article III GATT. 91 In other words, the Community argued that distinguishing between a carcinogenic and a non-carcinogenic product is not even prima facie contrary to the national treatment principle and thus needs no justification. The AB accepted the EC's reasoning. Thus, the AB's interpretation, pushed by

87 Data taken from <http://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm#results> on 24/05/2012.
88 Ibid.
89 EC – Asbestos, AB Report, supra n. 17, par. 34.
90 Ibid.
91 Ibid.
the EC, gave more leeway to national regulators than the Panel's interpretation, against which the EC appealed.

Similar examples of regulatory-friendly interpretations and litigation strategies can be found in connection with the other agreements. In \textit{EC – Hormones}, the EC partly succeeded in advocating a regulator-friendly interpretation of the SPS provision requiring national measures departing from an international standard to be based on a risk assessment by persuading the AB not to apply the procedural review.\footnote{European Communities – Measures Concerning Meat and Meat Products (Hormones), Complaint by the United States, Report of the Panel, WT/DS26/R/USA, 18 August 1997; European Communities – Measures Concerning Meat and Meat Products (Hormones), Complaint by Canada, Report of the Panel, WT/DS48/R/CAN, 18 August 1997; European Communities – Measures Concerning Meat and Meat Products (Hormones), Report of the Appellate Body, WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998. See also an analogous case on the EC ban of beef hormones decided by the ECJ, Case C-331/88, The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others, [1990] ECR I-04023.}

In \textit{EC – Sardines}, the EC convinced the AB that, under the TBT, a state which departs from an international standard should not be immediately required to justify its decision.\footnote{European Communities – Trade Description of Sardines, Report of the Panel, WT/DS231/R, 29 May 2002; European Communities – Trade Description of Sardines, Report of the Appellate Body, WT/DS231/AB/R, 26 September 2002.} And in \textit{EC – Biotech}, the EC even took a kind of litigation risk when it argued that one national rule which has two purposes can be subject both to the SPS and the TBT agreement; in this way, somewhat counter-intuitively, it increased the chances of the rule being saved.\footnote{EC – Biotech, Panel Report, supra n. 27.}

The aforementioned cases show how the EU, due to the high standards it has adopted internally, has an interest in developing a regulator-friendly WTO. The Union’s litigation strategy testifies that it is engaged in developing mechanisms for guarding values within the WTO.\footnote{Although the EU is frequently in favour of regulator-friendly interpretations, this is not always the case. For example, in \textit{Tuna/Dolphin II}, the EC argued against considering measures on PPMs as covered by Art III GATT \textit{(United States – Restrictions on Imports of Tuna}, unadopted Report of the Panel, DS29/R, 16 June 1994, par. 3.1, 3.3–3.5, 3.92–3.93, 5.6–5.10); in \textit{United States – Taxes on Automobiles} it argued against the “aim and effects” test \textit{(United States – Taxes on Automobiles}, unadopted Report of the Panel, DS31/R, 11 October 1994, the \textit{CAFE} case) and it blocked the adoption of the Panel report. See Robert E. Hudec, ‘GATT/WTO Constraints on National Regulation: Requiem for an “Aim and Effects” Test’, (1998) 32 \textit{International Lawyer}, pp. 619–649, p. 629.} The EU also frequently intervenes as a third party in disputes between other
WTO members, as it has an interest “to bring to Geneva (...) [its] legal interpretation”.96

4. Conclusion

The EU's international identity, as perceived from the perspective of the WTO, is complex, multifaceted, and not merely a proxy of Member States’ identities. This identity is created through the interaction of different levels of government (EU and Member States) as well as the interaction of the branches of government (legislative, executive and judicial).

One can already observe this complex international trade identity from the institutional perspective, since the EU represents both itself as well as each of its Member States before the WTO. This is relevant not only in rounds of WTO negotiations, or in regular meetings of WTO institutions, but also in dispute settlement where the EU acts as a complainant or as a respondent (or even as a third party) on behalf of itself and all its Members. On the one hand, the Union can raise a complaint against another WTO member even if only one of the EU Member States has an interest in the challenge. Whether the Union will undertake this challenge depends on its internal decision-making process. On the other hand, it is certain that the EU will find itself in the role of the respondent not only when its own measures are challenged, but also in situations where it has no influence over a challenged measure adopted by a single EU Member State. Thus, all the actions and identities of Member States influence how the Union is perceived in the WTO.

When one looks a bit deeper into the substance of EU identity in the WTO, one notices that the Union's international trade identity is under the dominant influence of its internal market activities. Some internal market rules (such as mutual recognition and partial harmonization) stimulate external trade, while others (primarily, strict harmonization) impede external trade.

EU decision-making presupposes taking account of the external effects of EU rules, and of their WTO compliance. This certainly happens within the Commission, as DG Trade can provide input on any measure. Public documents, including inter-institutional communication, also occasionally

refer to WTO law. However, this is not always the case. The two case studies presented here sought to shed some light on whether the approach of decision-makers in the EU towards WTO compliance is changing. While these case studies cannot lead to general conclusions, they both show that decision-makers in the EU (legislative institutions, national courts and the ECJ) took less account of WTO law in the recent examples than in the older ones. Naturally, not taking WTO law into account certainly affects the image of the EU within the WTO, and increases the chances of a WTO dispute.

The EU’s participation in dispute settlement also affects its international identity, especially when it acts as a respondent, as it is then that its internal identity (reflected in its measures) gets questioned. As a respondent, the EU has frequently been in a position to argue for regulator-friendly interpretations of WTO rules, and in several cases, the Panels and the AB accepted some of its reasoning. The EU can thus appear in the WTO as a member that cares about non-trade values and is committed to an international trading regime sensitive to those values. However, in cases where the EU does not manage to persuade the Panel or the AB of its position, its identity is also affected, but in a different way. In these situations, the Union’s view on a matter does not become the WTO’s view. The EU then has to comply with a decision that it does not agree with, otherwise it will be perceived as acting unilaterally. As it does not want to be perceived as acting unilaterally, its official documents always stress its commitment to multilateralism. However, the Union occasionally does act unilaterally when there is another value which it does not want to put in jeopardy. A good example of such unilateral action is the hormones saga, where it lost the case, but did not change its measure, and instead offered alternative concessions to its trading partners. Thus, the EU principally bases its international trade identity on multilateralism, but makes it clear that non-trade values endorsed internally take precedence over external trade relations.