Support for international trade law:
The US and the EU compared

Jappe Eckhardt* and Manfred Elsig**

In this article we compare United States and European Union support for bilateral and multilateral international trade law. We assess the support for international law of both trading blocs by focusing on the following four dimensions: leadership, consent, compliance and internalization. Although we find strong support for international trade law from both the US and the EU in general, we also witness some variation, most notably in relation to the design of preferential trade agreements (PTAs) and compliance with World Trade Organization (WTO) law. Turning to explaining these (moderate) differences, we argue that outcomes in US trade policy can best be explained by a domestic political factor, namely the direct influence of interest groups. Although the involvement of societal interests also goes a long way in explaining EU behavior, it does not tell the entire story. We posit that, in EU trade policy, institutions are a particular conditioning factor that needs to be stressed. Moreover, we suggest that foreign policy considerations in managing trade relations have characterized EU’s support for international trade law.

1. Introduction

Scholars and policy-makers tend to portray the United States’ (US) support for international law as weak at best, whereas the European Union (EU) is usually seen as the guiding light for other nations when it comes to its role as supporter of a strong international legal order. This conventional view is, however, often based on anecdotal evidence rather than sound empirical research. We lack knowledge as to whether the US is indeed less committed to international law than the EU. To address this gap, Mark Pollack has developed an analytical framework, which enables scholars to compare and explain EU...
and US support for international law across time and issue area. In this article, we use his framework and focus on one of these issue areas: international trade law.

We look at both multilateral and bilateral trade law. Until 1995, the General Agreement on Tariffs and Trade (GATT) was the principal instrument regulating multilateral trade relations. The GATT facilitated a slow but steady reduction in trade barriers and an expansion of world trade. It also played a crucial role in creating a rules-based system of multilateral trade. Yet, the GATT only included rules on trade in goods and contained many qualifications, exemptions and escape clauses, which allowed member countries to impose protectionist measures without violating GATT rules. With the establishment of the World Trade Organization (WTO) in 1995, the role of law in multilateral trade relations was greatly expanded, as the negotiated WTO agreements included new obligations in areas beyond trade in goods (e.g., trade in services and intellectual property rights) as well as enhanced provisions to restrict the usage of some of the most important GATT loopholes. Beyond new provisions increasing the depth and scope of international obligations, the WTO also put into place a more legalized system for settling trade disputes with the aim of increasing countries’ willingness to comply with WTO law.

International trade law consists not only of multilateral trade agreements, but also of bilateral preferential trade agreements (PTAs), which are a growing source of law. A PTA is based on an intergovernmental treaty including two or more countries, in which the parties to the treaty grant each other preferential market access for goods, services, capital, or labor. The treaties are preferential in the sense that, for example, goods originating from a PTA partner are subject to lower trade barriers than goods imported from non-PTA members. The exact coverage of products and issue areas within PTAs varies from case to case. Beyond market-access issues, these treaties increasingly prescribe state behavior in behind-the-border regulation.

We assess the US’s and the EU’s support for bilateral and multilateral trade law by focusing on the concepts of leadership, consent, compliance and internalization. We show that both trading blocks are strong supporters of international trade law. We do, however,
also find some interesting variation. First, we witness differences in how they design the content of PTAs. The agreements the US signs with its trading partners tend to be deeper, while the EU agreements are more comprehensive and wider in scope. Second, they differ when it comes to their compliance record with WTO law. Although both the EU and the US are confronted with many WTO disputes, the US is targeted slightly more than the EU and, more importantly, both trading blocs tend to engage in systematically different kinds of violations of WTO law. We argue that while a model on business group lobbying is a good predictor for the observed outcome in the case of the US, the EU explanation needs to supplemented with institutional and foreign policy considerations.

In the remainder of this article we will, in Section 2, address the question of what support means in respect to international trade law and assess how far we can observe variation between the US and the EU in this regard. Then, in Section 3, we turn to explaining the observed differences and similarities. We finish with a summary (Section 4) of our findings and a discussion on how the current talks between the EU and the US on a Transatlantic Trade and Investment Partnership (TTIP) might affect future support of international trade law.

2. What does support mean in respect to international trade law?

In order to capture the support for international trade law of the EU and the US, we focus on four dimensions: leadership, consent, compliance and internalization.

2.1. Leadership

We follow the framework article by Pollack, which defines leadership as “the willingness of a state to take an active role in the creation of new law, either through the negotiation of new international treaties or through active promotion of new norms of customary international law.”

This leads us to question what needs to be observed in order to demonstrate leadership in international trade law? According to the so-called hegemonic stability theory (HST), leadership is often associated with the role played by hegemonic actors. HST posits that if there is a dominating power, the international economic system is most likely to be open and stable, while in the absence of a hegemon instability and protectionism are expected to flourish. Due to the free-rider problem, there is a need for a single leader, which is able to provide the public good of international stability and economic openness. Many of the claims made by HST have been criticized over the years. Building on the idea of hegemonic powers providing

5 Pollack, supra note 1.
6 Id.
7 Charles P. Kindleberger, The World in Depression, 1929–1939 (1973); Charles P. Kindleberger, Dominance and Leadership in the International Economy: Exploitation, Public Goods, and Free Rides, INT’L STUD. Q. 242 (1981).
8 Stephen D. Krasner, State Power and the Structure of International Trade, 28(3) WORLD POL. 317 (1976).
9 Isabelle Grunberg, Exploring the “Myth” of Hegemonic Stability, 44(4) INT’L ORG. 431 (1990); Duncan Snidal, The Limits of Hegemonic Stability Theory, 39(4) INT’L ORG. 579 (1985). Others refute the claim that hegemons always favor an international system based on free trade all together. See, e.g., Helen V. Milner, The Political Economy of International Trade, 2(1) ANN. REV. POL. SC. 91 (1999).
leadership by creating the global trade infrastructure, we focus on how leadership could be interpreted in both multilateralism and in the newer generation of PTAs.

Following World War II, the US was the prime designer of the multilateral trading system characterized by a set of rules that restrict arbitrary forms of discrimination and assist in gradually opening markets. It also allowed its own behavior to be restricted to a certain degree. The US led the way in the sense that it made substantial, and often asymmetrical, tariff commitments during the initial GATT negotiations in the 1940s, as well as during negotiation rounds in the decades that followed. In addition, the US played a leadership role by taking steps to keep the GATT moving forward. US efforts to launch the Kennedy Round (1964–1967) were particularly important in this regard, as this Round resulted in a 35–40 percent average cut in tariffs on industrial goods. A final illustration of US leadership during the first decades of the GATT is the role it played in extending the membership (most notably, Japanese membership in the 1950s) and pushing for the implementation of non-discrimination principles.

It was not until the 1980s that the European Community (later the EU) was ready to provide joint leadership in the multilateral arena. By the second half of the Uruguay Round negotiations, the EU and US had combined forces to create a global organization (the WTO), to agree on a set of instruments to foster additional market access (goods, services, protection of intellectual property rights), to allow for the restriction of some flexibility loopholes (e.g., non-tariff barriers and trade remedies), and to push for the reform of diplomatic enforcement tools (new dispute settlement). Both had to make concessions for this partnership to work.11

In the current trade-negotiation round of the WTO, the Doha Round, we witness a clear failure to exert leadership by either of the transatlantic partners. There were only a few attempts at presenting joint proposals (e.g., in the run-up to the Cancun Ministerial Conference in 2003). There are external and internal reasons for the absence of leadership in the sense of providing a public good. The external reasons are the result of a shift in balance of trade power with the rise of emerging markets, the accession of China to the WTO, and the evolving institutional inertia in the WTO.12 This makes US–EU leadership more contested. Yet, internal reasons seem to offer equally important causal explanations. First, the waning support by exporting industries to open up new markets through the WTO stands out. As WTO negotiations have

---

10 Todd Allee, *The Role of the United States: A Multilevel Explanation for Decreased Support Over Time*, in *The Oxford Handbook on the World Trade Organization* 235 (M. Daunton et al. eds., 2012); G. John Ikenberry, *After Victory: Institutions, Strategic Restraint, and the Rebuilding of Order after Major Wars* (2001); Douglas A. Irwin et al., *The Genesis of the GATT* (2008); John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations*, 133 (1997).

11 Richard H. Steinberg, *Great power management of the world trading system: a transatlantic strategy for liberal multilateralism*, 29(2) *Law & Pol’y Int’l Bus*. 205 (1997); Manfred Elsig & Jappe Eckhardt, *The Creation of the Multilateral Trade Court: Design and Experiential Learning*, 14(S1) *World Trade Rev.*, S1 3 (2015).

12 Although, as a reaction to criticism in the late 1990s the organization has become more transparent and inclusive, the institutional setting with the need for consensus and the continuing reliance on single trade rounds make change difficult. Amrita Narlikar, *Adapting to New Power Balances: Institutional Reform in the WTO*, in *Governancing the World Trade Organization: Past, Present and Beyond Doha* 111 (Thomas Cottier & Manfred Elsig eds., 2011).
reached stalemate in recent years, firms have been actively lobbying for governments to explore other venues to pursue their interests.\textsuperscript{11} Second, the increase in voices calling for selective crisis-era protectionism, both in the US and the EU, have hampered initiatives for across-the-board liberalization.\textsuperscript{14} In a recent Global Trade Alert (GTA) report, Simon Evenett shows how indeed protectionism has been on the rise since the global financial crisis hit in 2007–2008.\textsuperscript{15}

If we turn our focus to leadership in new regionalism, the question arises how to define the concept of public good provision in this particular setting. As most PTAs are by definition “preferential” \textit{vis-à-vis} other trading partners, they may inflict costs on parties that are not members of the PTA. This is why there has been a long-standing debate as to the extent to which PTAs are trade creating or trade diverting.\textsuperscript{16} Today, most large-N studies on the effects of PTAs suggest that more trade flows are created than diverted,\textsuperscript{17} notwithstanding warnings from some trade economists about potential negative effects.\textsuperscript{18} A related fault line has been the relationship between bilateralism and multilateralism. To what degree are PTAs building blocks and to what degree are they stumbling blocks for multilateralism? The jury is still out on this question. On an optimistic note, one can see PTAs as a forum to elaborate new regulatory solutions. In addition, there are some areas that can only be satisfactorily addressed at the global level (e.g., disciplines on subsidies, trade remedies, competition law), which eventually will provide incentives for WTO Members to resume talks.\textsuperscript{19} Following this reasoning, we do not expect that the US and EU signing of PTAs directly undermines leadership in multilateral trade regulation, but see this approach mostly as complementary and dialectic in international trade regulation.

Focusing on EU and US experience with negotiating bilateral trade deals, however, we observe an important difference between the two. The EU has been using PTAs as a privileged platform for some time now (see \textbf{Figure 1}). In the 1970s, the EU had already discovered PTAs as a tool for managing its economic relations with member states’ former colonies, which resulted in an increasing number of new trade pacts. Another active time for bilateralism was the early 1990s when the EU was organizing trade relations with prospective new members from Central and Eastern Europe. During this time, the EU was also keen to consolidate the single European Market through trade agreements with European Free Trade Association (EFTA) states as well as venturing into new forms of partnerships with the “neighborhood” by signing agreements with Mediterranean countries. After a phase of reflection and pause at the end of the

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{11} Christina L. Davis, \textit{Overlapping Institutions in Trade Policy}, 7(1) \textit{PERSPECTIVES ON POL.}, 25 (2009).
\item\textsuperscript{12} Allee, supra note 10; Manfred Elsig, \textit{The EU in the Doha Negotiations: A Conflicted Sponsor?}, \textit{in LEADERSHIP AND CHANGE IN THE Doha NEGOTIATIONS} 23 (Amrita Narlikar & Brendan Vickers eds., 2009).
\item\textsuperscript{13} Simon Evenett, \textit{The Global Trade Disorder: The 16th GTA Report} 1 (2014).
\item\textsuperscript{14} Jacob Viner, \textit{The Customs Union Issue} (1950).
\item\textsuperscript{15} Scott L. Baier & Jeffrey H. Bergstrand, \textit{Do Free Trade Agreements Actually Increase Members’ International Trade?}, 71(1) \textit{J. INT’L ECON.}, 71 (2007); Dür et al., supra note 4.
\item\textsuperscript{16} Jagdish Bhagwati, \textit{Territories in the Trading System: How Preferential Agreements Undermine Free Trade} (2008).
\item\textsuperscript{17} Richard E. Baldwin, \textit{Multilateralising Regionalism: Spaghetti Bowls as Building Blocks on the Path to Global Free Trade}, 29(11) \textit{WORLD ECON.} 1451 (2006).
\end{itemize}
\end{footnotesize}
1990s, under Trade Commissioner Pascal Lamy, the EU discovered again the bilateral venue about ten years ago and has negotiated a substantial number of new agreements across the globe since then.\(^{20}\)

The US experience with PTAs is more recent (see Figure 1). While the US engaged in some security-motivated agreements (e.g., in 1985 with Israel) and focused on regional consolidation through the US–Canada trade agreement and later the North American Free Trade Agreement (NAFTA) in 1988 and 1993, respectively, the US only turned towards embracing the bilateral forum of opening markets in 2003. This decision was driven by the realization that its objectives could not be met through the multilateral arena and by concerns of competitiveness \textit{vis-à-vis} its main competitors. A particularly notable development in this regard is the participation of the US in the negotiations on a Trans-Pacific Partnership (TPP) Agreement. When confronted with several competing models for Asia-Pacific economic integration that excluded it entirely, the US decided to become actively involved in the TPP negotiations. The TPP presents the US with an opportunity not only to participate, but also to take a leadership role in an Asia-Pacific PTA. The US has persuaded the other negotiating partners in TPP to use standard US templates as a basis for the negotiations.\(^{21}\) Also noteworthy is the launch of negotiations with the EU on a Transatlantic Trade and Investment Partnership (TTIP) in 2013. This development was influenced by a lack of progress in the WTO’s Doha Round negotiations and a need to regain overall leadership in creating new rules for the global trading system.

\(^{20}\) Manfred Elsig, \textit{The EU’s Choice of Regulatory Venues for Trade Negotiations: A Tale of Agency Power?}, 45(4) J. COMMON MKT STUD. 927 (2007).

\(^{21}\) Meredith Kolsky Lewis, \textit{Trans-Pacific Partnership: New Paradigm of Wolf in Sheep’s Clothing}, 34(1) B.C. INT’L & COMP. L. REV. 27 (2011).
2.2. Consent and compliance: the core elements of support

We now turn to what we believe are the core dimensions for studying support for international law: consent and compliance. We suggest that the two dimensions interact in important ways; therefore we discuss them in combination. In international trade law, consent is usually explicitly obtained through the act of ratification of treaties. Consent is signaled in two sequential ways, usually the signing of an agreement by the executive of a government followed by ratification (often with parliamentary involvement). While in the US the key institution in consenting to international trade law is the US Congress, in the EU it was for a long time the EU Council (and national ratification bodies). Today, the EU institutional setup has become more complex, given that the Lisbon Treaties have delegated co-decision power for the ratification of trade agreements to the European Parliament.

While consent, or what political scientists call “commitment,” is important for being legally bound to international trade law, it is, in our view, not a sufficient indicator of “support” for international trade law. A long-running debate in the international relations (IR) literature suggests that we can only capture the true level of commitment if we can empirically show how compliance with international law restricts domestic behavior or leads to change in domestic policies (a constraining effect). Put differently, if ratification of international agreements resembles cheap talk (as implementation costs are close to zero), then consent is not a valid proxy for the overall commitment or support. In other words, the focus on leadership by studying how active the US and EU have been in pushing for international law needs to be complemented by studying their actual commitments through consent and compliance. Bearing this conceptual distinction in mind, we focus below again on multilateralism and preferentialism to discuss potential differences between the US and EU approaches.

Our focus on multilateralism draws mainly from an analysis of the Uruguay Round negotiations’ outcomes. In creating the WTO (and its many provisions) in 1995 we assume that both the US and the EU were the principal designers of the overall substance and level of the obligations. However, given that middle powers like Japan, Canada, and Australia and several key emerging countries (e.g., India and Brazil) needed to agree to the final outcomes, both the US and the EU made a number of concessions. On the EU side, these were mainly characterized by reducing the support to the agricultural sector; in the US case, concessions were mainly made in the textiles and apparel sectors. Both WTO members also accepted to abstain from aggressive unilateralism (in particular the US) and refrain from arbitrarily applying domestic law in fields such as technical regulation or sanitary and phytosanitary measures. However, given their competitive positions in goods and services trade (and their interest in protecting intellectual property rights), many agreements clearly reflected US and EU interests. Finally, the EU–US partnership was pivotal in creating a more legalized dispute settlement system with the potential to increase

22 George W. Downs et al., Is the Good News about Compliance Good News about Cooperation? , 50(3) Int’l Org. 379 (1996).

23 Jeffery J. Schott, Uruguay Round: An Assessment (1994); Terence P. Stewart, The GATT Uruguay Round (1993).
overall implementation of Uruguay Round obligations. At least in the Uruguay Round, therefore, the EU and the US were both willing to consent to far-reaching substantive commitments in order to secure agreement on an overall multilateral package. This substantive commitment, in turn, raises the related question of compliance with the agreement.

Measuring state compliance with international law is notoriously difficult, and assessing US and EU compliance with international trade agreements is no exception. Below, we discuss the participation in WTO dispute settlement, which provides (partial) information on first-order and second-order compliance. First-order compliance is about compliance with the treaty obligations. Second-order compliance is about compliance with the rulings made in dispute settlement proceedings. We posit that actual behavior in WTO dispute settlement allows us to discuss both types of compliance. However, we focus on first-order compliance due to lack of more precise data on actual compliance with WTO rulings. We are particularly interested in cases where the US or the EU are on the defendant side. This is the best proxy available with two qualifications. First, as cases are costly, parties will bring complaints only if they anticipate that the odds of winning are high. This also suggests that being a defendant means that it is highly likely that a WTO member is non-compliant with existing WTO law (lack of first-order compliance). Second, bringing a case against the US and EU is also risky for the complainant as doing so could sour relations with them; therefore the number of potential cases is almost certainly much higher than reported here.

We discuss some evidence drawn from a dataset on WTO dispute settlement which disaggregates cases to the level of claims. The number of claims suggests some noteworthy differences between US and EU behavior in implementing WTO obligations. In relation to other WTO Members, the US and the EU are key targets of complaints. The US and the EU have been on the defendant side in respectively 33 percent and 17 percent of all cases (at the panel stage) of WTO dispute settlement since 1995. Looking at the development over time (see Figure 2), it becomes clear that since 1998, the US has been relatively more often on the defendant side than the EU. This suggests that the US

24 Elsig & Eckhardt, supra note 11.
25 Jan von Stein, The Engines of Compliance, in Interdisciplinary Perspectives on International Law and International Relations: The State of the Art 477 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013).
26 For a critical discussion, see Lisa Martin, Against Compliance, in Interdisciplinary Perspectives on International Law, supra note 25, 591.
27 There is, at present, lack of data on how the US and the EU comply with panel or Appellate Body (AB) rulings (second-order compliance). As to panel rulings, compliance could be inferred from AB cases, but for compliance with AB rulings we lack systematic information.
28 Manfred Elsig & Philipp Stucki, Low-income Developing Countries and WTO Litigation: Why Wake up the Sleeping Dog?, 19(2) Rev. Int’l Pol. Econ. 292 (2012).
29 Henrik Horn, Louise Johannesson, & Petros Mavroidis, The WTO Dispute Settlement System 1995–2010: Some Descriptive Statistics, 45(6) J. World Trade 45 (2011). A legal claim as defined in the WTO case law on art. 6.2 of the Dispute Settlement Understanding (Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994)) comprises a factual matter and the legal provision that it allegedly violates.
has been on average more WTO-non-compliant than the EU. If we focus on the number of claims per case that are brought, we see that there are no significant differences between the US and the EU. In fifteen years of WTO disputes, the US has been confronted with 1505 claims (i.e., eighteen claims per case) and the EU with 710 claims (i.e., seventeen claims per case) at the panel stage. As expected, the panels supported a great majority of the claims brought against the US and the EU; yet in respect to the US, this figure is substantially higher: the US lost 78 percent of all claims, while the EU lost 64 percent of the total number of claims against it. In other words, not only does the US face more disputes, on average the US is also ruled more WTO non-compliant.

Some interesting differences can be observed as well when we look at the specific issue areas or provisions where claims have been brought.

The US is predominantly a defendant in cases concerning trade remedies. In fact, 90 percent of all claims brought against the US between 1995 and 2010 concerned anti-dumping, safeguards, and anti-subsidy measures. The US is involved in about 64 percent of all trade remedy-related claims dealt with at the panel stage of WTO dispute settlement, indicating that the US is highly WTO-non-compliant in this very sensitive issue area. The EU also accounts for a substantial number of trade remedy cases and claims, yet the figures for the EU are substantially lower than for the US. Of all claims in which the EU was on the defendant side, 30 percent are related to trade remedies and, as a result, the EU is involved (as a defendant) in 10 percent of the total number of trade remedy claims. One could hence argue that the EU is more in compliance with WTO law when it comes to the usage of trade remedies. The EU is, however, the prime target for alleged

---

**Figure 2.** Number of WTO dispute settlement cases (panel stage) brought against the EU and the US (1995–2010).

*Source:* Henrik Horn, Louise Johannesson, & Petros Mavroidis, *The WTO Dispute Settlement System 1995–2010: Some Descriptive Statistics*, 45(6) J. WORLD TRADE 45, 1107 (2011).
non-compliance of domestic regulations that discriminate against foreign goods, with other WTO provisions such as GATT article III cases (on like products), technical barriers to trade (TBT) and, most prominently, sanitary and phytosanitary measures (SPS). In fact, the EU accounts for 84 percent of all SPS claims that are brought. Our discussion of the data, therefore, suggests that the differences between US and EU compliance with international trade law are not primarily at the aggregate level of number of violations. Instead, we find that the US and the EU tend to engage in systematically different kinds of violations, a finding that we explore further below.

The other empirical landscape in which to study consent and compliance relates to PTAs. Similarly to WTO law, ratification is an important domestic prerogative of Congress in the US and of member states and the European Parliament in the EU. As there have so far been few legal cases to enable us to study compliance (exceptions include NAFTA panels), there are no available proxies for measuring compliance through an analysis of disputes. In addition, as PTAs are agreements where the US or the EU by definition represents the more powerful actor within a dyad, it is likely that these PTAs are less constraining than multilateral obligations for the EU and the US. PTAs are more fine-tuned to meet the necessities of the PTA partners (e.g., some areas can be excluded). Generally, to gauge the true commitments (ex ante) we need to focus on the degree of obligation that is best captured by the concepts of depth and scope. We ask to what degree do PTAs offer more market access (depth) and how far are trade-related sectors included (scope)? We draw on the work by Horn et al. and Dür et al. compare a selection of twenty-eight EU and US agreements which illustrate subtle differences. They focus on so-called WTOPlus obligations, which can serve as a measure of depth. Their data suggests that both the US and the EU create additional obligations (beyond the existing WTO level). It is fair to assume that these obligations reflect their industry interests. As Figure 3 shows, the US agreements are slightly deeper than the EU ones.

In relation to the number of trade-related obligations (that are not regulated in the WTO—i.e., WTOExtra), we see a different picture (Figure 3). The EU agreements are much wider in scope than US agreements, suggesting that they are more comprehensive, covering areas such as cultural cooperation, education and training, energy, human rights, industrial cooperation, political dialogue, regional cooperation, research and technology, and social matters. Scope, however, also negatively correlates with overall enforceability. Many of the WTOExtra obligations are less enforceable. In sum, US PTAs are deeper on average and EU PTAs have a wider scope.

31 Note that one case (i.e., European Communities—Measures Affecting the Approval and Marketing of Biotech Products, DS291) involving three countries (US, Canada, and Argentina) counts for more than half of all the 264 SPS claims brought against the EU in the 1995–2010 period.
32 This proxy could also be discussed under the concept of leadership in so far as new areas with potentially important spillover effects are addressed in PTAs. We thank one reviewer for making this point.
33 Henrik Horn, Petros C. Mavroidis, and André Sapir, Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements, 33(11) World Econ. 1565 (2010).
34 Andreas Dür et al., supra note 4.
35 In comparison to multilateral obligations, depth and scope of PTA commitments, however, are of interest to the US and the EU in the first place. Therefore, in terms of leadership, consent to and compliance with PTA obligations are more selective as it benefits mainly those parties involved.
The work of Dür et al. suggests a similar pattern for US and EU agreements and compares their relative depth using a large set of 590 PTAs. They rely on a number of measures of depth, such as a simple additive index on commitments related to trade in goods, services, investment, public procurement, etc., as well a measure arrived at through factor analysis (based on market-opening concessions). They show that both US and EU agreements are deep compared to the average PTA; however, US agreements are on average deeper than EU agreements (Figure 4).

2.3. Internalization

The final element we focus on is “internalization.” An in-depth study of the various mechanisms of legal internalization, the incorporation of international law “through executive action, legislative action, judicial interpretation, or some combination of the three,” goes beyond the scope of this article. As the US and the EU have generated an enormous quantity of regulations and other instruments intended to implement their international trade law obligations, it is very difficult to meaningfully compare measures of internalization between the US and EU. The Uruguay Round Agreements alone consist of more than 20,000 pages of treaty text. In addition, WTO dispute settlement panels and the Appellate Body have to date generated more than 50,000 pages of jurisprudence. There have been no systematic studies to quantify the number of obligations and the percentage of those obligations that have been domesticated.

Although, many of the EU PTAs with central and eastern European states post-1990 led later to accession and the deepest form of trade integration. In this sense, these agreements served as stepping stones for deeper agreements. We thank the reviewer for highlighting this.

Harold H. Koh, How is International Human Rights Law Enforced?, 74(4) Ind. L.J. 1399 (1998).

Jeffrey L. Dunoff, Less Than Zero: The Effects of Giving Domestic Effect to WTO Law, 6(1) Loy. U. Chi. Int’l L. Rev. 279 (2008).
When one also wishes to address all the obligations that result from PTAs, which are also part of international trade law, the story becomes even more complex.\(^\text{39}\)

However, scholars have looked at certain aspects of the internalization of international trade law in quite some detail. One key point that this literature has put forward is that if one wants to get an idea of the domestic impact of WTO rules (or international trade rules more broadly), one should make a distinction between the direct and indirect effect of international law.\(^\text{40}\)

By direct effect of international law we mean that, “the application of a norm is not dependent on the legislative implementation and applies per se in domestic law.”\(^\text{41}\) Most authors seem to agree that there is no direct effect of international trade law in the US and the EU. In the case of the US, direct effect of WTO law is actually denied explicitly through statutory legislation. In the Uruguay Round Agreements Act of 1994,\(^\text{42}\) it is clearly stated that (a) US domestic law will prevail in the case of a conflict with its WTO

\(^{39}\) We do not engage with internalization effects through NAFTA which certainly exist.

\(^{40}\) John J. Barcelo, *Paradox of Excluding WTO Direct and Indirect Effect in US Law*, 21(1) *TUL. EUR. & CIV. L. F.* 147 (2006); Thomas Cottier, *The Role of Domestic Courts in the Implementation of WTO Law: The Political Economy of Separation of Powers and Checks and Balances in International Trade Regulation*, in *The Oxford Handbook on the World Trade Organization*, supra note 10, 607.

\(^{41}\) Thomas Cottier, Matthias Oesch & Thomas M. Fischer, *International Trade Regulation: Law and Policy in the WTO, the European Union and Switzerland: Cases, Materials and Comments* (2005).

\(^{42}\) See the Uruguay Round Agreements Act, 19 U.S.C. § 3501 (1994), and the Act, Statement of Administrative Action, H.R. Rep. No. 103–316 (1994), *quoted in* Dunoff, supra note 38, at 283.
obligations; (b) adverse dispute settlement body reports do not automatically change domestic law or practices; and (c) private parties cannot use WTO dispute reports in domestic litigation to challenge actions by the US government.\textsuperscript{41} What is more, by reserving the power to bring the US into compliance with international trade law to Congress rather than the executive, US law makes it even harder for the US to internalize WTO and other international trade rules. After all, it would be easier for the executive to act on its own than to get legislation through the two legislative chambers.\textsuperscript{44} Despite the fact that direct effect of WTO law is explicitly denied in the US, private parties have over the years attempted to rely upon WTO law, especially dispute settlement body reports, in domestic courts. However, courts have made clear time and again that “private parties are completely barred from seeking to give direct effect to WTO provisions in court proceedings, whether the challenge is to Federal or state law.”\textsuperscript{45}

The EU also denies direct effect of WTO rules. In 1994, the Council, following a European Commission proposal, stated in the preamble to its decision on the conclusion of the Uruguay Round Agreements, that WTO rules are not susceptible to being invoked in EU (community or member state) courts. It was argued that, as the US and other major EU trading partners had already indicated they would explicitly deny direct effect, the EU had no other choice than to also rule out the option of the invocability of WTO rules in EU courts. However, the ultimate decision on whether WTO rules and provisions can be invoked was left to the European Court of Justice (ECJ).\textsuperscript{46} The position of the ECJ became clear during the first case in which the ECJ was to assess the legal effect of WTO law: Portugal v. Council.\textsuperscript{47} In this case, the ECJ did what it had always done during the GATT years and denied direct effect of WTO law.\textsuperscript{48} More specifically, “[the ECJ] denied that the WTO Dispute Settlement Understanding itself obliges the European Community to implement rulings by making them directly enforceable . . . [and] it denied the possibility of doing so autonomously.”\textsuperscript{49} In the years since this first judgment of WTO law, the ECJ has determined in a series of cases that WTO obligations do not have direct effect in the EU legal system.

Although WTO law has no direct effect in US and EU law, it may be given indirect effect. The literature does not provide a clear definition of indirect effect of international

\textsuperscript{41} Dunoff, supra note 38; Barcelo, supra note 40.
\textsuperscript{44} We thank Jeffrey Dunoff for pointing this out to us.
\textsuperscript{45} Barcelo, supra note 40, at 150.
\textsuperscript{46} Peter Van den Bossche, The European Community and the Uruguay Round Agreements, in Implementing the Uruguay Round 23 (John H. Jackson & Alan O. Sykes eds., 1997).
\textsuperscript{47} C-149/96, Portugal v. Council, 1999 E.C.R. I-8395. Portugal contested the legality of agreements regarding market access for textile products concluded between the EU and India and Pakistan. The Portuguese government “requested that the Decisions of the Council on the conclusion of these agreements be declared null and void because of their alleged incompatibility with the WTO Agreement on Textiles and Clothing one of the multilateral agreements achieved as a result of the Uruguay Round.” See Stefan Griller, Judicial Enforceability of WTO Law in the European Union. Annotation to Case C-149/96, Portugal v. Council, 3(3) J. Int’l Econ. L. 447, 441 (2000).
\textsuperscript{48} Griller, supra note 47; Piet Eeckhout, Judicial Enforcement of WTO Law in the European Union—Some Further Reflections, 5(1) J. Int’l Econ. L. 91 (2002).
\textsuperscript{49} Griller, supra note 47.
law in domestic court proceedings. Hix distinguishes between three types: (i) a substantive indirect effect, covering “cases where domestic courts interpret a domestic act in the light of an international agreement”; (ii) a procedural indirect effect, covering “cases where courts stay domestic proceedings or remand a case for further consideration because of international law considerations”; and (iii) factual indirect effect, “covering cases where domestic courts, in the application of domestic law, refer to international agreements as a factual element or as part of the general normative framework.”

Some studies of individual cases show that at times, both in the US and in the EU, courts have given a form of indirect effect to WTO rules and provisions. One example, in the US context, which is mentioned as a potential case of indirect internalization of WTO law, is the US practice of zeroing. Zeroing is a controversial US methodology to calculate anti-dumping duties, which has been challenged by several countries at the WTO. After multiple WTO disputes, domestic court proceedings and fierce political bickering between many institutional actors (in particular Congress and the executive), the US has, over time, agreed to comply with the main elements of WTO law by opting toward removing zeroing. The most interesting element in this case, in light of the potential indirect effect of international law, is that US courts, in a series of zeroing related cases, permitted private parties (mainly foreign exporters and importers hurt by the practice of zeroing), to rely upon international trade law. “These tribunals have used WTO law, in particular WTO dispute reports, to reject agency interpretations of U.S. statutes, and to find in favor of private parties challenging agency actions.”

In the EU too, we can find examples in which WTO law has had an indirect effect. The WTO disputes between the EU and several of its trading partners over the EU’s tariffs, quotas and subsidies on bananas are a case in point. The regulation, which was adopted at the beginning of the 1990s, led to a series of WTO complaints against the EU. The complainants (the US and Latin American countries) argued that the EU’s regulation violated numerous provisions of international trade law (e.g., the most-favored-nation (MFN) clause and WTO provisions on trade-related investment measures and trade in services). The WTO panels (and Appellate Body reports) ruled against the EU in most of these cases and every time this led to heated political debate and court proceedings within the EU on whether or not to change the regulation. Although these political and judicial battles never led to immediate and radical changes, a series of “mini reforms” over a long period of time made sure that the EU

50 JAN-PETER HIX, INDIRECT EFFECT OF INTERNATIONAL AGREEMENTS: CONSISTENT INTERPRETATION AND OTHER FORMS OF JUDICIAL ACCOMMODATION OF WTO LAW BY THE EU COURTS AND THE US COURTS 7 (2013).

51 The practice works as follows. The US compares the foreign domestic price of a product with the US import price. If the sum of the foreign domestic price minus the US import price is less than zero, the US sets this negative difference at zero automatically. By excluding negative amounts, “this method increases, often substantially, the exporter’s margin of dumping and thus the amount of anti-dumping duty that the exporter has to pay.” See European Commission, What is Zeroing?: Press Release MEMO/12/73 (Feb. 6, 2012), http://europa.eu/rapid/press-release_MEMO-12-73_en.htm.

52 Dunoff, supra note 38, at 296–297.

53 Karen J. Alter & Sophie Meunier, Nested and Overlapping Regimes in the Transatlantic Banana Trade Dispute, 13(3) J. EUR. PUB. POL’Y 362 (2006).
changed its regulation on trade in bananas step by step until, eventually, it was in compliance with WTO law. De Búrca and Scott describe several other instances in which one could argue that there have been indirect forms of impact of WTO law on EU law and decision-making. What these cases show is that the way in which the EU considers itself bound to observe the provisions of WTO law are, as de Búrca and Scott note, “much more complex and subtle than the debates on direct effect and justifiability can capture.”

3. Explaining variation in support of international trade law

In the section above we have compared EU and US support for international trade law, by looking at four dimensions of support: leadership, consent, compliance, and internalization. We have highlighted that there are strong commonalities between the EU and the US in terms of leadership and internalization, but we also observed some (subtle) variation in behavior when it comes to consent and compliance. Two of these differences are particularly noteworthy. First, we observed variation in EU and US participation (as defendants) in WTO dispute settlement. That is, we found that the US is targeted more than the EU and, even more interesting, there are clear differences in the specific issue areas where claims have been brought against both trading blocs. A second empirical landscape in which we studied consent and compliance, and found notable variation, relates to PTAs. We noticed that US agreements tend to be deeper, whereas the PTAs the EU signs with its trading partners are more comprehensive and wider in scope. In this section we attempt to offer an explanation for these observed (differences in) outcomes. Given that we do not see much variation in leadership and internalization, we abstain from discussing explanatory variables in this respect.

In his typology on causal factors, Pollack maps an international and a domestic level of analysis, as well as legal/constitutional and political factors, to come to a “four-part typology of potential determinants of a state’s support for international law: international-political, international-legal, domestic-political, and domestic-legal.” We argue that domestic-political variables are best suited to analyze variation in EU and US support for international trade law. We base ourselves on the two prominent distinct types of “domestic political” explanations for policy outcomes one can find in the trade policy literature: societal (or pluralist) and state centered explanations.

Societal explanations focus on the crucial role played by domestic economic interest groups. Policy-makers, who want to enter or remain in office, need the support of interest groups, which in turn makes them sensitive to the demands of these groups. It is argued that trade policy outcomes are, in particular, influenced by corporate interests

---

54 Gráinne de Búrca & Joanne Scott, *The Impact of the WTO on EU Decision-making. In The EU and the WTO: Legal and Constitutional Issues* 1 (Gráinne de Búrca & Joanne Scott eds., 2001).
55 *Id.*, at 29–30.
56 Pollack, *supra* note 1.
who either benefit or lose from international trade. Traditionally, it is argued that the losers of increased trade are imports-competing producers, who are expected to support trade barriers. On the other side of the spectrum we find export-oriented sectors; the winners of increased trade. This latter group defends anti-protectionist interests, as they gain from lower foreign trade barriers. In recent years, the theoretical and empirical literature has turned to the firm level and to another group of anti-protectionist economic interests—import-dependent firms. Import-dependent firms “can be defined as those which rely on income created by imported goods or on the import of intermediate products for their production process and, as such, they prefer policies that create stability for their supply chain and/or that reduce (domestic) trade barriers.” The increasing importance of import-dependent firms is closely related to the globalization of production and the establishment of global value chains in which this kind of firm plays a pivotal role.

State-centered explanations stress that trade policy dynamics can be explained mainly by (changes in) the institutional set-up of trade-policy making and preferences of policy-makers, rather than interest group pressure. A particularly noteworthy state-centered explanation is the so-called collusive delegation argument. The main assumption behind this argument is that protectionist interests—typically, import-competing producers—make themselves heard much easier in the political arena than those benefiting from freer trade. Given this protectionist bias, decision-makers may hope to be able to shield the policy-making process from pro-protectionist firms and lobby groups in case they are concerned with the negative welfare consequences of trade restrictive measures. By delegating trade policy authority to the executive branch (the US President) or another decision-making body/level (the European Commission), decision-makers may hope to be able to shield the policy-making process from pro-protectionist interest group pressure. Trade-policy makers can then use their authority to advocate the lowering of trade barriers in international negotiations—a policy which is in the interest of the public at large, as it maximizes a country’s welfare, but goes against the protectionist interests and demands of certain sectoral interest groups.

57 Consumers and NGOs are generally seen as societal interests of second-order importance. See Andreas Dür & Dirk De Bièvre, Inclusion Without Influence? NGOs in European Trade Policy, 27(1) J. pub. pol. 79 (2007).
58 Michael J. Gilligan, Empowering Exporters: Reciprocity, Delegation, and Collective Action in American Trade Policy (1997); Gene M. Grossman & Elhanan Helpman, Electoral Competition and Special Interest Politics, 63(2) REV. ECON. STUD. 265 (1996); Helen V. Milner, Resisting Protectionism: Global Industries and the Politics of International Trade (1988); Thomas Oatley, International Political Economy: Interests and Institutions in the Global Economy (2010).
59 I. M. (Mac) Distelr & John S. Orell, Anti-Protection: Changing Forces in United States Trade Politics, (1987); Jappe Eckhardt, EU Unilateral Trade Policy-Making: What Role for Import-Dependent Firms?, 51(6) J. COMMON Mkt Stud 989 (2013); Jappe Eckhardt, Business Lobbying and Trade Governance; The Case of EU-China Relations (2015); Giovanni Maggi & Andrés Rodríguez-Clare, Import Penetration and the Politics of Trade Protection, 51(2) J. INT’L ECON. 287 (2000);
60 Eckhardt, EU Unilateral Trade Policy-Making, supra note 59, at 990.
61 Eckhardt, Business Lobbying and Trade Governance, supra note 59.
62 Sophie Meunier & Kalypso Nicolaïdis, Who Speaks for Europe? The Delegation of Trade Authority in the EU, 37(3) J. COMMON Mkt Stud 477 (1999).
When relying on these two explanations to assess (differences in) EU and US support for international trade law, we consider a pluralist explanation to account best for US behavior. That is, we argue that US approaches towards international trade regulation (in respect to consent and compliance) and change over time are a result of competing domestic economic interest groups’ struggle for influence. In terms of preferentialism, the US approach is very much driven by market access interests pushed by exporting firms and more recently supported by import-dependent firms. It has been argued, for instance, that exporters have an incentive to lobby in favor of PTAs, in particular when in need of larger-than-national markets, as this enables them to take advantage of economies of scale or to develop production-sharing networks. Chase shows how this logic played out during the creation of NAFTA.63 Beyond NAFTA, however, the US did not pay much attention to PTAs for long, as US exporters were satisfied with market opening through the multilateral arena. However, as multilateral trade negotiations have reached an impasse in recent years, US industry has been pushing for the exploration of other venues. Companies “have shifted their lobbying efforts away from the multilateral round to instead focus on bilateral agreements that can be negotiated more quickly and shaped to address key issues of importance to business.”64 As a result, we observe that US agreements are focused on new market opportunities for its industries that go beyond WTO concessions (WTOPlus). Research has also shown that exporting firms directly affect the depth of trade agreements (both multilaterally as well as bilaterally), whereas import-competing firms will focus their lobby efforts on flexibilities in relation to trade liberalization. One other important policy instrument, through which import-competing firms demand protection, is the use of trade remedies.65

In terms of multilateralism, we see some differences in relation to implementing trade agreements (first-order compliance). The data above suggests that, particularly in the US, import-competing industries are more successful in capturing the regulators66 and, as a result, the US is more likely to accept domestic policies that are WTO-inconsistent. As discussed above, the national application of trade remedy instruments (anti-dumping, countervailing duties and safeguards), demanded by domestic industries, stands out in this regard. Empirical evidence suggest that the key federal agencies that administrate US trade remedy law, the Department of Commerce (DOC) and the International Trade Commission (ITC),67 are under close watch from US Congress (and organized interests). That is, research on the ITC and DOC shows that—although

63 Kerry A. Chase, Economic Interests and Regional Trading Arrangements: The Case of NAFTA, 57(1) Int’l Org. 137 (2013).
64 Davis, supra note 13, at 25.
65 Ronald D. Fischer, Endogenous Probability of Protection and Firm Behavior, 31(1) J. Int’l Econ. 149 (1992); Andreas Dür, Leonardo Baccini & Manfred Elsig, The Politics of Trade Agreement Design: Revisiting the Depth-Flexibility Nexus, Int’l Stud. Q. (forthcoming 2015).
66 George J. Stigler, The Theory of Economic Regulation, 2(1) Bell. J. Econ. & Mgmt Sci. 3 (1971).
67 In US trade remedy cases, the DOC carries out a (two-step) investigation to determine whether the foreign exporters in question sold their products on the US market below “normal” value, while the ITC determines whether these imports cause material injury to the US industry and whether or not these injuries are the result of the allegedly dumped/subsidized imports.
Congress has delegated decision making to these two agencies and clearly defined specific criteria that are to impact their decisions—Congress maintains strong influence over final trade remedy decisions, which in turn makes it vulnerable to political pressure from organized interests. Put differently, notwithstanding examples of indirect internalization over a longer time period (e.g., zeroing practices), US trade negotiators will risk legal defeat at the international level, as it is more important for them to show that they are defending the national interests and are therefore ready to escalate disputes through all the different steps of WTO litigation. More recently, however, with the growing economic importance of importers and retailers and their increasing political involvement in trade policy, we see that policy-makers at times also give in to the anti-protectionist demands of import-dependent firms. One example is the heavy criticism from US importers on the US practice of zeroing, which seems to have played a role in pushing the US Government to reconsider its zeroing policy and bring it in further compliance with WTO law. Another example of the impact of import-dependent firms has found to have played an important role in the recent decision by the US to open PTA negotiations with some of its Asian trading partners.

If we turn to the EU, interest group pressure can also serve as a baseline explanation for the behavior we observe. Research shows that in the EU context, mobilization (and influence) of economic interests plays an important role in the formation of PTAs. Andreas Dür shows, for instance, how PTAs between the EU and Mexico and Chile, where driven by political pressure from exporters, who were afraid that, as a result of trade diversion, their exports to these countries would be affected by trade agreements the US was negotiating with both Latin American countries. In similar vein, import-dependent firms have found to have played an important role in the recent decision by the EU to open PTA negotiations with some of its Asian trading partners. We also see the influence of interest groups on trade remedy decisions. Import-competing firms, for instance, successfully blocked a recent attempt by the European Commission to reform its Trade Defense Instruments (TDI) policy, while also in individual TDI cases we witness the influence of both import-competitors and import-dependent firms.

68 Jeffrey M. Drope & Wendy L. Hansen, *Purchasing Protection? The Effect of Political Spending on U.S. Trade Policy*, 57(1) J. POL. RES. Q. 27 (2004); Wendy L. Hansen & Thomas J. Prusa, *The Economics and Politics of Trade Policy: An Empirical Analysis of ITC Decision Making*, 5(2) REV. INT’L ECON. 230 (1997); Douglas A. Schuler, *Corporate Political Strategy and Foreign Competition: The Case of the Steel Industry*, 39(3) ACAD. MGMT J. 720 (1996).

69 Christina L. Davis, *Why Adjudicate? Enforcing Trade Rules in the WTO* (2012).

70 We thank the anonymous reviewer for pointing our attention to this case.

71 Steve Charnovitz & Bernard Hoekman, *US Special Safeguard on Imports of Tires from China: Imposing Pain for Little Gain*, CEPR Discussion Papers No. 9217 (2012).

72 Andreas Dür, *EU Trade Policy as Protection for Exporters: the Agreements with Mexico and Chile*, 45(4) J. COMMON MARKET STUD. 833 (2007).

73 Jappe Eckhardt & Arlo Poletti, *The Politics of Global Value Chains: Import-dependent Firms and EU-Asia Trade Agreements*, J. EUR. PUB. POL’Y (forthcoming 2015).

74 Dirk De Bièvre & Jappe Eckhardt, *Interest Groups and EU Anti-Dumping Policy*, 18(3) J. EUR. PUB. POL’Y 339 (2011).

75 Eckhardt, *EU Unilateral Trade Policy-Making*, supra note 59; ECKHARDT, BUSINESS LOBBYING AND TRADE GOVERNANCE, supra note 59.
However, interest group influence and changing lobby constellations tell only part of the story. Building on societal interests, we need to draw on two additional factors to explain EU’s support for international trade law. First, we posit that the institutional set-up of the EU buffers decision-makers against direct influence by lobby groups more than is the case in the US. Given the European Commission is instrumental in running trade policy and the directly elected members of the European Parliament (for many years) have lacked influence over EU trade policy, this has allowed the EU institutions to be less vulnerable to direct outside lobbying and offered the European Commission opportunities to influence the direction of trade policy. At the same time, increasing access point possibilities through the European Parliament have not yet been used in ways that affect overall EU commitment to WTO law. Second, given that trade policy has been one of the most important instruments of the EU’s common foreign policy, it has been used far beyond meeting the interests of economic actors, but also as a strategic tool to manage its relations with neighboring countries in light of enlargement and post-colonial ties. In this sense trade policy has also been an important part of EU foreign policy.

How do these explanations account for observed behavior related to EU’s consent and compliance with international trade law? The decisions by the EU to opt for PTAs early on were a reaction to two major challenges that the integrating European states have faced since the 1960s: decolonization and accession to the EU. That is, the European Commission has been actively using preferential trade schemes both to continue and to adjust privileged trade relations with former colonies or to prepare states in the EU’s geographical sphere of influence for membership or other privileged partnership. This not only explains the much larger number of PTAs the EU has signed in comparison to the US, but also the stronger emphasis of the EU on the scope of the PTAs. Scope captures the fact that the EU aims to embed trade relations within a broader set of objectives to manage political and economic relations with these states. Not surprisingly, we observe that the EU has been at the forefront of negotiating comprehensive trade agreements, which include many non-trade issues. EU PTAs serve many objectives other than solely reciprocal tariff concessions. They are seen as a privileged diplomatic tool to broaden and deepen economic ties. Yet far from representing altruistic tools, agreements reflect attempts by the EU to export EU regulation to its economic (and political) partners. Given that the EU itself is an international organization and its institutional form and development is a result of a set of periodically negotiated intergovernmental treaties, EU member states and the Commission are less hesitant than its US counterparts to use international trade law to govern relations.

76 Elsig, supra note 20; Manfred Elsig & Cedric Dupont, European Union Meets South Korea: Bureaucratic Interests, Exporter Discrimination and the Negotiations of Trade Agreements, 50(3) COMMON Mkt Stud. 492 (2012).

77 Mary Farrell, A Triumph of Realism over Idealism? Cooperation Between the European Union and Africa, 27(3) Eur. Integration 263 (2005); Arvind Panagariya, EU Preferential Trade Arrangements and Developing Countries, 25(10) World Econ. 1415 (2002).

78 Sophie Meunier & Kalypso Nicolaïdis, The European Union as a Conflicted Trade Power, 13(6) Eur. Pub. Pol’y 906 (2006).
with other nations. Although EU member states are cautious about importing new trade law, or law that may constrain existing law, by the back door they are generally, given past experience, less skeptical vis-à-vis trade agreements.\(^\text{79}\)

When turning to EU’s consent and compliance in the realm of the WTO, we need to explain in particular why the EU is less likely than the US to be targeted by WTO complaints.\(^\text{80}\) We suggest that also here, besides the role of societal interests, an important institutional feature accounts for this more restricted application of WTO-inconsistent policies. This has to do with the relative autonomy of those who implement the national policies. Drawing from principal–agent theory,\(^\text{81}\) we submit that the EU bureaucracy enjoys more autonomy than its US counterpart in trade-policy making to react to industry demands. Whereas in the US case the agent (ITC and DOC) is severely restricted, the institutional design of EU trade remedy legislation grants more discretion to the European Commission (and the competent services) to impose unilateral action. Now, if agent discretion is an explanatory variable, then the preferences of agents become more important. They affect and condition overall preference aggregation. Most of the EU Directorate General (DG) for Trade Commissioners in recent years have shown willingness to constrain the influence of import-competing groups.\(^\text{82}\) There is ample case study evidence to show how the Commission tries to align and engage in ad hoc coalitions with interest groups having similar preferences.\(^\text{83}\) In relation to the lower number of cases brought against the EU, given the assumption that we should expect equal numbers, we posit that the Commission affects the EU-internal debates by credibly signaling to its constituencies the potential WTO-incompatibility of certain measures.

4. Concluding remarks

In this article we have compared EU and US support for international trade law. We analyzed four dimensions. Regarding leadership, the US played a prominent role in the first three decades after World War II in creating international trade law. Only at the end of the 1980s was the EU able and willing to take up its role as (joint) leader. In recent years, support by both for the multilateral system has waned. The EU’s commitment is largely rhetorical.\(^\text{84}\) When looking at PTAs, the story is different. Here the

\(^{79}\) Manfred Elsig, *The EU’s Common Commercial Policy* (2002).

\(^{80}\) Note that, as mentioned earlier, the EU seems to be less compliant when it comes to sanitary and phytosanitary (SPS) issues (e.g., European Communities—Measures Concerning Meat and Meat Products (Hormones), DS26; European Communities—Measures Affecting the Approval and Marketing of Biotech Products, DS291). EU behavior is significantly influenced by farmer and consumer interests. The latter group cannot be categorized as an “economic interest group.” Both types of constituencies seem to have a relatively strong influence on national governments which in particular translates into second-order non-compliance when it comes to GMOS.

\(^{81}\) Mark Pollack, *Delegation and Discretion in the European Union*, in *Delegation and Agency in International Organizations* 165 (Darren G. Hawkins et al. eds., 2006).

\(^{82}\) Elsig & Dupont, *supra* note 76.

\(^{83}\) Manfred Elsig, *European Union Trade Policy After Enlargement: Larger Crowds, Shifting Priorities and Informal Decision-Making*, 17(6) J. EUR. PUB. POL’Y 781 (2010); Elsig & Dupont, *supra* note 76.

\(^{84}\) Elsig, *supra* note 20.
EU led the way and has been very active ever since the 1970s, while the US turned to preferentialism only in the course of the 1990s. Today, the US and the EU are engaged in concluding a transatlantic trade and investment partnership agreement while they continue to negotiate PTAs to export their domestic rules.

When it comes to consent and compliance we witnessed differences between the EU and the US. In terms of multilateralism, the US seems (relatively) less WTO compliant than the EU (first-order compliance). There are more cases brought against the US, particularly many trade remedy claims. However, the EU is (relatively) less compliant when it comes to rules on non-discrimination against foreign goods. We also compared EU and US approaches (consent) towards PTAs and found that the US PTAs are deeper, whereas EU PTAs are wider in scope. When looking at internalization of international trade law, we find no fundamental differences based on the limited empirical evidence available. Both deny direct effect of WTO provisions, while they do give indirect effect to it in individual cases. As to internalization it also needs to be stressed that international trade law is shaped predominantly by the US and the EU (through WTO law, and templates in PTAs), so there is limited internalization of externally designed obligations to be expected. It is much more a process of externalization.

Turning to how we can explain subtle differences in their attitudes towards trade law, we argued that outcomes in US trade policy can best be explained by looking at interest group pressure. If changes can be observed, then this is related to changes how US industries and firms are involved in global value chains, and therefore firms exporting and firms dependent on imports become more important over time. Although interest groups also play a key role in EU trade policy, they are only part of the story. In the EU case one needs to add institutional features and foreign policy considerations to the equation in order to fully understand its support for international trade law.

How future support for international trade law will evolve will most likely be influenced by the outcomes of the TTIP negotiations. The question is not only whether there will be a successful outcome, but in which areas and to what extent the US and the EU achieve regulatory harmonization or equivalence. Based on experience with earlier landmark agreements (e.g., NAFTA), it is to be expected that TTIP templates will be used in other PTAs and may make their way into multilateral trade law. The outcomes of these trade talks will therefore also redefine the relationship between multilateralism and preferential trade agreements.