

## Courts Matter! A Comparison of Dispute Settlement under GATT and the WTO

Zangl, Bernhard

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**BERNHARD ZANGL**

**COURTS MATTER!**

A COMPARISON OF DISPUTE SETTLEMENT  
UNDER GATT AND THE WTO

**InIIS-Arbeitspapier Nr. 34  
2006**

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**InIIS-Arbeitspapier Nr. 34/06**

Institut für Interkulturelle und Internationale Studien  
(InIIS)  
Universität Bremen  
Postfach 33 04 40  
28334 Bremen

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## Abstract

Analysing disputes between the US and the EU under GATT and the WTO respectively, the paper demonstrates that the judicialization (or legalization) of international dispute settlement procedures can contribute to states' compliance with these dispute settlement mechanisms. The paper compares four sets of pairwise similar disputes with US had with the EU: the so-called Domestic International Sales Corporations (DISC) case (which arose under GATT) and the Foreign Sales Corporations case (which was settled through WTO procedures), the Steel case (GATT) and the Patents case (WTO), the two Hormones cases under GATT and the WTO respectively, and the Citrus case (GATT) and the Bananas case (WTO). In each of the four comparisons the US acted more in accordance with the judicial WTO dispute settlement procedures than with the diplomatic GATT procedures. We can therefore say that contrary to realist assumptions, the judicialization of dispute settlement procedures can contribute to their effectiveness. However, contrary to idealist assumptions the effectiveness of international dispute settlement procedures does not automatically follow from their judicialization. Yet, as assumed by institutionalists, judicialized dispute settlement procedures are better than diplomatic dispute settlement mechanisms in sustaining states' compliance with these procedures precisely *because* of their normative and strategic effects.

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## Introduction<sup>1</sup>

The rule of law is one of the crucial dimensions of modern statehood. Yet, until recently even OECD states were only *internally* bound by domestic law, while *externally* state sovereignty implied that they were not equally bound by international law. While internally the judiciary provides the institutional safeguard that urges state actors to comply with domestic legal obligations, until recently there was no parallel international judiciary to ensure that state actors complied with their external legal obligations. There are indications today, however, that due to the emergence of issue area-specific international judiciaries the domestic rule of law is increasingly complemented by an international rule of law.<sup>2</sup>

In fact, judicialized procedures designed to adjudicate whether state actors comply with their international commitments are on the rise.<sup>3</sup> Recently, an International Criminal Court was created to pass sentence on war crimes. The authority of the European Court of Justice as well as the European Court of Human Rights was strengthened. An International Tribunal for the Law of Sea has been established. Many international environmental regimes, such as the ozone regime and the climate regime, now dispose of quasi-judicial non-compliance procedures. And last but not least, with the creation of the World Trade Organization (WTO) the diplomatic dispute settlement procedures of the General Agreement on Tariffs and Trade (GATT) have been replaced by a judicial dispute settlement system.<sup>4</sup>

The rise of judicial dispute settlement procedures might be seen as one indication of an emerging international rule of law. At least, traditional *idealists* always claimed that the judicialization of international dispute settlement procedures would lead almost automatically to an international rule of law. In contrast to diplomatic dispute settlement mechanisms, they argued, judicialized dispute settlement procedures would ensure both compliance with international law and comparable treatment of comparable breaches of international law.<sup>5</sup> Others, however, argued that international dispute settlement procedures would not ensure an international rule of law. For these so-called *realists*, it was not a matter of the judicialization of dispute settlement procedures whether states comply with international law and whether comparable breaches of international law are given comparable treatment. They maintained that irrespective of judicial or diplomatic dispute settlement procedures powerful states can and will always act as they please, while less powerful states have to suffer what they must.<sup>6</sup>

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<sup>1</sup> This paper draws heavily on research done in the project 'Judicialization of International Dispute Settlement' which is part of the Bremen Research Centre 'Transformations of the State' (TranState) funded by the German Research Foundation (DFG). Therefore my first thanks go to Achim Helmedach, Aletta Mondré, and Gerald Neubauer who are part of the project's research team. I would also like to thank Karen Alter, Ken Abbott, Klaus Dingwerth, Monika Heupel, Jürgen Neyer and Jonas Tallberg for their most helpful comments on an earlier version of this paper. Thanks go also to the participants of the 2004 Luncheon Seminar of the Robert Schuman Centre at the European University Institute in Florence/Italy as well as the participants of the 2004 Luncheon Seminar of the Center for European Studies at Harvard University in Cambridge/USA.

<sup>2</sup> For a discussion on the international rule of law see Watts 2000, Watts 1993, Tamanaha 2004, Brownlie 1998.

<sup>3</sup> Romano 1999.

<sup>4</sup> Keohane, Moravcsik and Slaughter 2000, Zangl and Zürn 2004a,b.

<sup>5</sup> Clark and Sohn 1966.

<sup>6</sup> Morgenthau 1948.

Today, however, the debate between idealists and realists has lost ground; *institutionalists* now set the tone.<sup>7</sup> Idealist positions were clearly undermined by the fact that the International Court of Justice (ICJ), with its judicialized dispute settlement procedure, has hardly transformed international dispute settlement practices. Since the ICJ has rarely been invoked and its rulings often ignored, it could hardly be said to have institutionalized an international rule of law. But realist assumptions were also weakened by the fact that the European Court of Justice (ECJ), marked by a heavily judicialized procedure of dispute settlement, has transformed European dispute settlement practice. The ECJ has regularly been invoked and its rulings usually followed, thereby establishing an international rule of law in Europe.<sup>8</sup> For institutionalists, however, it remains an *empirical* question whether – and if so where and when – the judicialization of international dispute settlement *procedures* leads to a corresponding *practice* of judicialized dispute settlement.<sup>9</sup> Hence, from an institutionalist point of view, the judicialization of the practice of international dispute settlement is neither considered impossible nor is it seen as an automatism of the judicialization of dispute settlement procedures. Most institutionalists, be they of a more rationalist or of a more constructivist orientation, would nevertheless subscribe to the hypothesis that, *ceteris paribus* – at least under today's circumstances in the OECD world –, the judicialization of dispute settlement procedures sustains the judicialization of international dispute settlement practice.<sup>10</sup>

Assuming that the judicialization of dispute settlement is one important aspect for the emergence of an international rule of law, I aim to evaluate this institutionalist hypothesis and trace the processes due to which judicial dispute settlement procedures have a more pronounced impact on states' dispute settlement behaviour than diplomatic dispute settlement proceedings. To do so, I will compare US dispute settlement behaviour in the context of the judicial WTO dispute settlement procedures with its behaviour in similar disputes under the diplomatic dispute settlement system of GATT. In a first step I elaborate on the institutionalist hypothesis by indicating why judicial dispute settlement procedures might be better equipped to control states' dispute settlement than diplomatic dispute settlement mechanisms. In a second step I briefly describe the judicialization of GATT/WTO dispute settlement procedures that has been taken place over the past two decades. In a third step I then conduct the above mentioned comparison of US dispute settlement behaviour under the GATT and WTO respectively. The comparison reveals that the US was more willing to act according to the agreed WTO procedures than it was prepared to comply with GATT proceedings. Against the background of alternative explanations, the paper

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<sup>7</sup> For an overview of institutionalism in International Relations see among others Hasenclever, Mayer and Rittberger 1997, Rittberger, Hasenclever and Mayer 2000, Keohane 1989.

<sup>8</sup> Alter 2001.

<sup>9</sup> In this paper I distinguish the terms "judicialization" and "judicialized": Judicialization is used to describe processes of institutional change through which a given dispute settlement procedure becomes more judicialized. Judicialized, by contrast, describes the state of an institution that has reached a certain threshold.

<sup>10</sup> See for instance Stone Sweet 1996, Stone Sweet 2000, Yarbrough and Yarbrough 1997, Helfer and Slaughter 1998, Weiler 1999, McCall Smith 2000, Keohane, Moravcsik and Slaughter 2000, Alter 2001, Alter 2006, Zürn and Joerges 2005, Zangl and Zürn 2004a,b, Zürn and Joerges 2005, Zürn 2005. For an empirical critique of the institutionalist hypothesis see Posner and Yoo 2005. For a criticism of the critique see Helfer and Slaughter 2005.

concludes with an overall evaluation of the hypothesis and some general remarks on the emergence of an international rule of law.

## 1. The Institutional Hypothesis

The hypothesis that the judicialization of international dispute settlement *procedures* supports corresponding *practices* of judicialized dispute settlement rests on the institutionalist assumption that, the effects of international institutions depend – among other things – on their institutional design. Accordingly, in terms of design, institutions with a judicial DSP such as the European human rights regime which tries through the European Court of Human Rights to ensure an impartial treatment of alleged breaches of international law can be distinguished from institutions with diplomatic DSPs such as the UN Human Rights Council which cannot be seen as institutional attempts to ensure the comparable treatment of comparable breaches of international law. The judicialization of a given DSP, hence, entails that it moves in terms of its design on a gradual scale from the pole of a purely diplomatic DSP towards the pole of a judicial DSP. In this view, judicialization can be assessed on the basis of four criteria international DSPs might meet to varying degrees:<sup>11</sup>

(1) *Political Independence*: The political independence of international DSP is a criterion of the utmost importance for an impartial treatment of breaches of international law.<sup>12</sup> Concentrating on the composition of the relevant dispute settlement bodies four grades of independence can be distinguished: Bodies such as the old GATT working parties in which representatives of the disputing states themselves are deciding on the dispute at hand are the least independent. Somewhat more independent are bodies such as the UN security council in which states that are (usually) not subject to the dispute deliver a decision. They are, however, less independent than bodies such as some ILO committees composed of experts acting in their individual capacities. However, only a standing body of judges such as the International Court of Justice can be considered truly independent.

(2) *Legal Mandate*: Irrespective of its independence the mandate of an international DSP has to be regarded as an important criterion of an impartial treatment of breaches of international law. Considering whether the mandate is rather political or rather legal four grades can be distinguished: If, as in the case of the UN Security Council for instance, the decision ensuing from the DSP is allowed to be based on mainly political considerations rather than legal reasoning the mandate can hardly be seen as legal. Decisions of a somewhat more judicialized DSP draw on legal arguments while their rulings are not legally binding. Here one can further distinguish between those based on legally binding procedures such as the ICJ when giving advisory opinions and those where the procedures themselves have no legally binding force, which is the case under CITES. But only procedures that feature binding rules of due process and are authorized to take legally binding decisions can be considered to

<sup>11</sup> For a set of criteria to describe processes of judicialization see Yarbrough and Yarbrough 1997, Helfer and Slaughter 1998, Helmedach et al. 2006, McCall Smith 2000, Keohane, Moravcsik and Slaughter 2000, Zangl 2001, Zangl and Zürn 2004a, b.

<sup>12</sup> Keohane et al. 2000: 459-462, Helfer, Slaughter 1997: 353-355



have a fully judicialized mandate, as for instance is the case with the European Court of Human Rights.

(3) *Authority to decide*: The authority of the relevant DSP to make decisions is another, important criterion for a comparable treatment of comparable breaches of international law.<sup>13</sup> Considering the disputing parties ability to block the proceedings of an international DSP four grades are to be distinguished: As in the old GATT, the DSP's authority to decide remains very restricted when the states involved in a dispute can block both the initiation of the procedures as well as the adoption of decisions made within these procedures. The decision making authority of a DSP also remains quite restricted when disputing states can block either the initiation of the relevant procedure or their rulings as is, for instance, the case with the International Court of Justice. Where, as in ILO, the decisions of DSPs can only be blocked by a collective of states, rather than by the states involved in a dispute, the authority to decide can be described as quasi-compulsory. True compulsory decision making authority, however, requires that rulings such as those of the European Court of Human Rights may not be blocked either by individual states or by a collective of states.

(4) *Sanctions*: The authority to decide on sanctions in cases where states do not comply with rulings made within international DSP can be regarded as another relevant criterion for the comparable treatment of comparable breaches of international law.<sup>14</sup> Four grades are to be distinguished: The authority to sanction does not exist if the DSP does not regulate sanctions at all, as in the case of the ILO, for example. Their authority to sanction is, however, also quite limited when complaining states that are willing to employ sanctions against non compliant defendant states need, as in the old GATT system, the authorization of the respective DSP, but such authorization can be blocked by the affected state. If, as in the WTO, such an option to block the authorization of sanctions does not exist, the authority to sanctions is substantively stronger. However, a fully developed authority to sanction requires the DSP's rights to mandate sanctions, as is the case with the UN Security Council.

Given that the four criteria allow assessing – on the basis of their respective grades – the judicialization of any international DSP, it should be able to evaluate the institutionalist hypothesis. The hypothesis rests on the institutionalist assumption that, depending on their institutional design, international institutions – and by implication their dispute settlement procedures – can have multiple effects.<sup>15</sup> Despite the fact that institutionalists of a more rational<sup>16</sup> and a more constructivist<sup>17</sup> orientation focus on different effects, they agree that institutions in general and their dispute settlement procedures more specifically can have normative and strategic effects which can operate either enabling or constraining. Accordingly, four major effects of international institutions can be distinguished that might, in principle, be supported by the judicialization of their dispute settlement procedures:

<sup>13</sup> Morgenthau 1948, McCall 2000: 139-140

<sup>14</sup> Morgenthau 1948, Zangl/Zürn 2004

<sup>15</sup> For the impact the design of international institutions might have on their effectiveness see among others Haas, Keohane and Levy (eds.) 1993, Mitchell 1994, Chayes and Chayes 1995, Underdal 1998, Victor, Raustiala and Skolnikoff 1998, Wettestad 1999, Young 1999, Brown Weiss and Jacobson 1998, Miles, Underdal and Carlin 2001, Koremenos, Lipson and Snidal 2001, Tallberg 2002.

<sup>16</sup> See, for instance, Helmedach et al. 2006, Keohane 1984, 1989, Zangl and Zürn 2004: 25-26, Zürn 1992, Martin 1992 and Scharpf 1997.

<sup>17</sup> See among others Wendt 1992, Wendt 1999, Hurrell 1993, Katzenstein 1996, Risse 2000, Finnemore 1996, Klotz 1995, Müller 1994, Checkel 2001.

Table 1: Effects of International Institutions

	Constraining Effect	Enabling Effect
<b>Normative Effect</b>	States are constrained by their own normative <i>commitment</i> to the institution	Institutions can help states to undermine the <i>reputation</i> of non-compliant states through shaming
<b>Strategic Effect</b>	States are constrained by their own interest in the institution's <i>credibility</i>	Institutions can help states to increase the costs of other states' non-compliance by authorizing <i>sanctions</i>

- International institutions and their dispute settlement procedures can have an effect because states feel *normatively compelled* to respect them. Thus, international dispute settlement procedures can rely on a normative compliance pull of their own.<sup>18</sup> They might be internalized by states to the degree that following them becomes an aim in itself. Hence, disregarding or manipulating them is not even taken into consideration; following the procedures is then taken for granted.<sup>19</sup>
- International institutions and their dispute settlement procedures might be effective because disregarding them can, through shaming, undermine a state's *reputation* as a reliable member of the international community. A bad reputation may not only inhibit any future cooperation with that state within the same institution<sup>20</sup>; it may even undermine its recognition as an equal member of the international community. Hence, states are prepared to follow international dispute settlement procedures to prevent losing their status as an equal member of the international community.<sup>21</sup>
- International institutions and their dispute settlement procedures might have an impact because states are interested in their *credibility*. Especially when states consider the institution to be serving their interests they may be willing to follow its dispute settlement procedures. They will understand that disregarding these procedures can undermine the institution's credibility. This in turn, might lead to the breakdown of the dispute settlement procedures that support an institution in whose effectiveness they are interested. Hence, states follow agreed dispute settlement procedures because they shy away from the consequences of disregarding behaviour for the institution as such.<sup>22</sup>
- The influence of international institutions and their dispute settlement procedures may also stem from their authority to *impose sanctions* against those states found to be violating their international commitments.<sup>23</sup> By authorizing sanctions international institutions and their dispute settlement procedures might coordinate the sanctions of affected states, thereby making them more effective.<sup>24</sup> Moreover, authorized sanctions might be more effective because, as opposed to non-authorized sanctions, states that incur these sanctions can

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<sup>18</sup> Franck 1990.

<sup>19</sup> Koh 1997.

<sup>20</sup> Keohane 1984.

<sup>21</sup> Hurrell 1993, Chayes and Chayes 1995.

<sup>22</sup> Zürn 2005, Cronin 2001.

<sup>23</sup> Underdal 1998.

<sup>24</sup> Downs, Rocke and Barsboom 1996, Keohane 1984, Axelrod and Keohane 1986.

hardly justify any retaliation against sanctioning states. Hence, they cannot deter others from applying sanctions against their non-compliant behaviour.<sup>25</sup>

Building on these effects, the institutionalist hypothesis claims that judicialized DSPs are better in sustaining states' compliance with these DSPs than diplomatic DSPs precisely *because* they are better at activating their normative and strategic, their constraining and enabling effects. But why should, according to institutionalist thinking, judicial DSPs be better in activating these effects than diplomatic DSPs? Institutionalists of a more constructivist orientation and institutionalists of a more rationalist orientation may point at two reasons:

(1) Institutionalists of a more constructivist orientation may argue that judicial DSPs may be perceived as being *more legitimate* than diplomatic DSPs, because they institutionalize the principle of an impartial treatment of alleged breaches of international law to a larger degree. This can, according to constructivist institutionalism support the normative effects international DSP may have: on the one hand the perceived legitimacy of DSPs may support the feeling of states and societies to be normatively committed to respect these procedures, because disregarding them cannot be justified by pointing at a lack of their legitimacy; and on the other hand the perceived legitimacy of DSPs may also drive the feeling of states and societies that any breach of the respective procedures will undermine their reputation as law abiding members of the international community, because it provokes more normative insurrection than disregarding a DSP that is considered to be less legitimate.

(2) Institutionalist of a rationalist orientation can argue that judicial DSPs are generally perceived to be *more reliable* than diplomatic DSPs, because they are better equipped to treat breaches of international law in an effective way. This can, according to rational institutionalism support the strategic effects international DSP may have: on the one hand the perceived reliability of international DSPs may support the feeling of states and societies that following these procedures is in their own interest in order to preserve the DSP's credibility; on the other hand the perceived reliability of international DSPs may drive the feeling that threats of binding convictions and of authorized sanctions are credible. This can enhance the incentive to follow the procedures to deal with alleged breaches of international law by other states while at the same time enhancing incentives to comply with these procedures when accused by others to violate international law.

To evaluate the institutionalist hypothesis that due to these reasons judicial DSPs are better able to activate the normative and strategic effects of international institutions than diplomatic DSPs, four types of behaviour states may apply in their attempts to settle disputes are to be distinguished. Each type of behaviour can be displayed in each of the four phases any dispute might pass through, i.e. the complaints, adjudication, implementation, and the enforcement phase: (1) States may strictly *follow* the relevant procedures and show willingness to settle disputes as envisaged by the relevant dispute settlement procedure. (2) States may *avoid* the application of the relevant dispute settlement procedures and seek a negotiated settlement, but without violating the provisions of the procedures. (3) States may choose to use the relevant dispute settlement procedures but at the same time seek to

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<sup>25</sup> Zangl 2006.

*manipulate* their operation by questionable means. (4) States may also choose to *disregard* the relevant DSP by violating agreed dispute settlement provisions.

The institutionalist hypothesis is supported if it can be demonstrated that due to the reasons given above the judicialization of international DSPs dispute settlement behaviour disregarding or manipulating the procedures becomes less and less diffused while following the procedures to settle disputes is becoming more common.<sup>26</sup>

## 2. The Judicialization of Dispute Settlement Procedures under GATT/ WTO

To evaluate the institutionalist hypothesis, and the four effects it builds on, I have chosen the GATT/WTO dispute settlement system, because it has undergone a remarkable process of judicialization over the past two decades, thus allowing a comparison of states' actual dispute settlement behaviour under the judicialized WTO dispute settlement system and the diplomatic dispute settlement mechanism of GATT within the same issue area thereby facilitating to control for potentially confounding variables.<sup>27</sup>

In terms of *political independence*, the process of judicialization of the GATT/WTO dispute settlement procedures is quite manifest.<sup>28</sup> The political independence of dispute settlement procedures under GATT was rather restricted.<sup>29</sup> During the 1980s and early 1990s so-called panels made up of three or five panelists were assigned the task of deciding in so-called reports whether states had violated their GATT obligations. Although the panelists acted in their individual capacities, the fact that the disputing states had to agree on the panelists on a case-by-case basis militated against their independence, as did the fact that they mostly chose state representatives rather than independent legal experts.<sup>30</sup> During the 1990s, however, after the WTO was established, the political independence of the dispute settlement procedure was consolidated. While the composition of the panels did not change, a remarkably independent Appellate Body was established to revise panel reports in appeal cases, and thereby diffused its independence across the entire dispute settlement system. Unlike the panels, the Appellate Body is composed of independent legal experts, i.e. judges, acting in their individual capacities. Moreover, rather than being selected by the disputing states, the seven judges of the Appellate Body are now elected to deal with all disputes that arise during their four-year term.<sup>31</sup>

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<sup>26</sup> Helmedach et al. 2006, Zangl 2006.

<sup>27</sup> The effects of the judicialization of GATT/WTO dispute settlement procedures have become the subject of intensive debate. See, for instance, Busch and Reinhardt 2002, Busch and Reinhardt 2003a, Busch and Reinhardt 2003b, Busch, Raciborski and Reinhardt 2005, Iida 2004, Zangl 2001, Zangl 2006, Zürn 2005.

<sup>28</sup> For criteria to distinguish different degrees of political independence of dispute settlement procedures see Helmedach et al. 2006, Keohane, Moravcsik and Slaughter 2000, Helfer and Slaughter 1998: 353-355, Zangl and Zürn 2004a: 25-26.

<sup>29</sup> Jackson 2004, Petersmann 1997.

<sup>30</sup> Jackson 2004.

<sup>31</sup> Petersmann 1997: 177-198, Stone Sweet 1997.

The GATT/WTO dispute settlement procedures' judicialization is also characterized by an increasingly *legal mandate*.<sup>32</sup> Through the early 1980s the task of GATT panels was mainly to stipulate in their panel reports solutions the disputing parties could agree on. Hence, panel reports were the result of political negotiations and mediation rather than of legal reasoning. This was only changed with the WTO dispute settlement procedures. Under the WTO procedures panels are forced to base their reports on legal reasoning, because reports that rather followed political considerations run the risk of being modified by the Appellate Body which had the task of reviewing panel reports in appeal cases.

The GATT/WTO dispute settlement procedures' judicialization is also indicated by their increasing *authority to decide*.<sup>33</sup> Through the early 1980s, the establishment of a panel to adjudicate in a dispute required a consensual GATT Council decision.<sup>34</sup> It was thus even possible for the defendant state to block the establishment of a panel. This changed in the late 1980s, however, when complainants were given the right to have their allegations heard by a panel.<sup>35</sup> Yet, the adoption of panel reports still required the consensus of the GATT Council. Hence, defendants could still block any decision made against them.<sup>36</sup> This changed in the mid-1990s when the WTO came into existence. The newly established Dispute Settlement Body (DSB), which was given the dispute settlement tasks of the old GATT Council, almost automatically approves the establishment of panels as required, as well as panel and Appellate Body reports. It may block panel reports and Appellate Body rulings only by consensus. Thus, since defendants can no longer block the procedure, the DSB can now exercise compulsory jurisdiction.<sup>37</sup>

Another aspect of the judicialization of the GATT/WTO dispute settlement system is their growing *authority to sanction*.<sup>38</sup> Under GATT, decisions to authorize sanctions required the consensus of the GATT Council. They could therefore even be blocked by defendants whose non-compliance was criticized by an adopted panel report.<sup>39</sup> Under the WTO dispute settlement procedures, by contrast, decisions to authorize aggrieved states to employ sanctions can be made without the consent of the defendant state. If a defendant does not comply with a WTO ruling – and is not prepared to offer adequate compensation – the complainant can request the Dispute Settlement Body to authorize sanctions. This authorization is then automatically granted, unless the DSB unanimously decides otherwise. The defendant can no longer block the sanctions, and merely has the right to invoke the original dispute settlement panel to decide on the amount of sanctions.

In sum, the degree of judicialization of the dispute settlement procedures under the GATT/WTO trade regime has been remarkably enhanced.

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<sup>32</sup> Hudec 1998, Jackson 2004, Waincymer 2002:75

<sup>33</sup> For a discussion of criteria to distinguish different degrees of "compulsory jurisdiction" of dispute settlement procedures see Helmedach et al. 2006, McCall Smith 2000: 139-140, Zangl and Zürn 2004a: 27.

<sup>34</sup> Hudec 1993.

<sup>35</sup> Petersmann 1997: 66-91.

<sup>36</sup> Jackson 2004, Hudec 1993.

<sup>37</sup> Jackson 1997: 107-137, Stone Sweet 1997, Petersmann 1997: 177-198.

<sup>38</sup> For criteria to differentiate between different degrees of authority to sanction different dispute settlement procedures might have, see for instance Helmedach et al. 2006, Morgenthau 1948, Yarbrough and Yarbrough 1997, Zangl and Zürn 2004a: 28-32.

<sup>39</sup> Jackson 2004.

### 3. The Judicialization of US Dispute Settlement Behaviour under GATT/ WTO

To evaluate the institutionalist hypothesis I will investigate US dispute settlement behaviour in pairwise similar disputes it had with the EU/EC under the GATT and WTO dispute settlement systems respectively. I will compare US behaviour in the so-called DISC and FSC case, the Patent and Steel case, the first and the second Hormones case, and finally the Citrus and Bananas case. The reasons for this particular choice are as follows. First, the focus on the US was chosen because if the judicialization of GATT/WTO dispute settlement procedures can impact the behaviour of the most powerful state one can assume that it will have similar effects on the behaviour of less powerful states too (hard case design). Second, the focus on disputes with the EU was chosen to rule out the possibility that differences in US behaviour under the WTO and GATT dispute settlement systems are due to differences pertaining to the party with which it had the dispute (similar case design). Third, pairwise similar disputes were selected to keep the matter of dispute constant. This helps to rule out the possibility that differences in behaviour were caused by differences in the matter of the disputes (most similar case design). Fourth, I selected not only disputes in which the EU complained under GATT/WTO law about US non-compliance, but also disputes in which the US itself complained about EU non-compliance with GATT/WTO law. This was imperative in order to get an adequate picture of US dispute settlement behaviour, because both as complainant and as defendant it may chose to comply with the law or to take the law into its own hands.

#### 3.1 Comparing the DISC and the FSC Cases

For the purposes of most similar case design the so-called DISC and FSC cases can be considered ideal for evaluating the institutionalist hypothesis. While settled under the GATT and WTO dispute settlement procedures respectively, they were most similar because both cases concerned EU/EC allegations that the US government provided US companies with export subsidies through tax preferences for so-called Domestic International Sales Corporations (DISCs) and Foreign Sales Corporations (FSC) respectively.

##### *The DISC Case*

The DISC case between the US and the EU (then the EC) first emerged in 1971, when the US administration announced preferential tax treatment for DISCs.<sup>40</sup> DISCs were subsidiaries of American companies that, on paper, managed the export business for their parent company.<sup>41</sup> The US claimed that preferential treatment for DISCs was compatible with GATT, because it was meant to offset the competitive disadvantage American export companies suffered due to the fundamental differences between the American tax system's principle of global taxation, and the principle of territorial taxation of most European tax systems.<sup>42</sup> The EU, however, complained that the preferential tax treatment for DISCs

<sup>40</sup> Parent 1989: 93-101, Hufbauer 2002: 1-3.

<sup>41</sup> Parent 1989: 39-44.

<sup>42</sup> Hudec 1993: 59-62.

constituted an export subsidy that was illegal under GATT because it provided export-specific tax exemptions.<sup>43</sup>

From early on in the *complaints phase* the US tried to *avoid* the GATT dispute settlement procedures being invoked by the EU.<sup>44</sup> The Nixon administration considered the GATT regulations too unspecific for any decision to be made under GATT. The US saw the dispute as a political, rather than a legal issue and it was therefore only prepared to seek a negotiated settlement. To force the EU to accept negotiations the US announced that if it insisted on dispute settlement under GATT, it would initiate GATT proceedings against the tax laws of various EU countries.<sup>45</sup> Indeed, when the EU requested consultations under GATT, the US, in a retaliatory move, demanded consultations over the tax regulations of France, Belgium and the Netherlands.<sup>46</sup>

As the consultations failed, the DISC case, in May 1973, entered the *adjudication phase*.<sup>47</sup> Now strictly *following* the dispute settlement procedures, both the EU and the US requested GATT panels and abstained from blocking their establishment.<sup>48</sup> Therefore, by July 1973 the GATT Council was able to agree on four panels to deal with the American and the three European tax systems. Due to procedural conflicts between the US and the EU, however, the actual establishment of the panels was deferred until February 1976, but after their establishment they were able to work without being bothered by the either dispute party.<sup>49</sup> In their reports of November 1976 the panels not only criticized the DISC scheme as incompatible with US commitments under GATT, but also various tax provisions of the three EU states (GATT L/4422).

To *avoid* the report becoming binding the US announced in December 1976 that it would block the panel report criticizing its DISC scheme unless the EU was prepared to accept the panel reports criticizing their tax systems. (New York Times 06.11.1976, The Economist 20.11.1976). However, almost all GATT states were in favour of rejecting the panel report criticizing the EU while at the same time supporting the adoption of the panel report criticizing the US. While the former was considered to be legally wrong, the latter was held to be legally correct. Nevertheless, in the face of an overwhelming majority of GATT Council members the Carter administration blocked the adoption of the panel report for more than five years.<sup>50</sup>

Only in December 1981, after realizing that the blockage of the report had damaged its reputation and in this way impeded its struggle against subsidies under GATT, the US was finally prepared to *follow* the agreed dispute settlement procedures (Wall Street Journal 10.12.1981). The Reagan administration had to acknowledge that when confronted with their complaints about subsidies, the accused states could always justify their defiance by pointing at the US blockage of the panel report in the DISC case. To overcome the humiliation of being so discredited, the Reagan administration finally accepted the Council's adoption of the

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<sup>43</sup> Jackson 1978: 766, Parent 1989: 53-53.

<sup>44</sup> Hudec 1993: 66-68, Jackson 1978: 761.

<sup>45</sup> Hudec 1993: 68.

<sup>46</sup> New York Times 27.02.1973.

<sup>47</sup> New York Times 30.05.1973.

<sup>48</sup> Parent 1989: 51-52.

<sup>49</sup> Parent 1989: 762-763, Hudec 1993: 69-71.

<sup>50</sup> Hudec 1993: 82-88.

four aforementioned reports on the understanding that the European tax systems – but not the American tax system – would be rehabilitated as compatible with the GATT (Parent 1989: 122-123, Hudec 1993: 92).

After the adoption of the panel reports the dispute moved on to the *implementation phase*. In December 1981, the Reagan administration openly refused to comply with the panel report that criticized the US (New York Times 22.07.1982). *Manipulating* the understanding among almost all GATT members, the US claimed that the aforementioned GATT Council resolution not only rehabilitated the European but also the American tax system.<sup>51</sup> In response to this attempt to justify US non-compliance, almost all GATT members supported council resolutions that shamed the US for its open defiance of an adopted panel report (Financial Times 11.05.1982). Moreover, this defiance proved to damage the US reputation anew, and considerably impeded the Reagan administration's struggle against GATT-defiant subsidies of other states.<sup>52</sup> In July 1982 it therefore announced that it was now willing to *follow* the panel report.<sup>53</sup> In 1983, after extensive deliberations between the Reagan administration and Congress, the US finally abandoned the DISC scheme, and substituted it with preferential tax status for so-called Foreign Sales Corporations, or FSCs. Since FSCs, in contrast to DISCs, had to be located abroad – in tax havens like the Virgin Islands – in order to enjoy the said preferential tax treatment, they were considered to be compatible with GATT obligations.<sup>54</sup> For the time being, the decade-long DISC dispute came to an end.<sup>55</sup>

### *The FSC Case*

Although it accepted the US preferential tax treatment of FSCs for more than a decade, the EU then complained in 1997 that it was not compatible with WTO law.<sup>56</sup> The FSC scheme was considered illegal under WTO law because it grants for exports certain exemptions from otherwise due tax payments.<sup>57</sup> The EU especially criticized that the exemptions were granted only for the export of commodities produced in the US, and not for all commodities of the respective company regardless of where they were produced.<sup>58</sup> The US, however, defended the FSC scheme on the grounds that it was merely rebalancing the advantages European companies reaped from the European tax systems, which were based on the principle of territorial rather than global taxation.<sup>59</sup>

Throughout the *complaints phase* the US tried to *avoid* the invocation of the WTO dispute settlement procedure by the EU. Admittedly, it accepted its duty to consultations. In fact, in

<sup>51</sup> Hudec 1993: 92-94, Parent 1989: 123.

<sup>52</sup> Financial Times 28.07.1982. Secretary of Finance Donald T. Regan declared: "A general consensus has developed among GATT member countries that the DISC is inconsistent with the GATT and that the US should bring its tax practices into compliance with these rules. The administration believes that the US should respect the GATT consensus and attempt to comply with it" (Washington Post 09.12.1982).

<sup>53</sup> New York Times 28.07.1982.

<sup>54</sup> Hufbauer 2002.

<sup>55</sup> Parent 1989: 124-125.

<sup>56</sup> Langbein 2000: 547, Hufbauer 2002.

<sup>57</sup> WT/DS108/1, WT/DS108/2.

<sup>58</sup> Murphy 2000: 531-533.

<sup>59</sup> WT/DS108/5.



1997 and 1998 EU and US delegations met three times for consultations.<sup>60</sup> To prevent the EU from requesting a panel, however, the Clinton administration threatened to retaliate with similar demands for panels to deal with the allegedly deviant tax systems of some EU states. The US wanted to solve the dispute by negotiation with the EU rather than under the WTO dispute settlement system.<sup>61</sup>

Nevertheless, the EU insisted on a WTO panel.<sup>62</sup> The FSC case moved on to the *adjudication phase*, in which the US strictly *followed* the designated procedures.<sup>63</sup> The US and the EU agreed on the composition of a panel, which was then established in November 1998. The panel report of October 1999 stated that the preferential tax treatment for FSCs provided export subsidies that were illegal under WTO law.<sup>64</sup> The US appealed, but the Appellate Body upheld the main conclusion of the panel and requested the US in its report of February 2000 to bring its tax laws in conformity with WTO law.<sup>65</sup>

The US nevertheless continued to *follow* the WTO dispute settlement procedures in the *implementation phase*. Though critical of the report, the US declared that it would revise the FSC scheme accordingly.<sup>66</sup> In fact, obviously feeling normatively committed to WTO procedures, the Clinton administration did not even consider defying the WTO reports, and accepted without hesitation that the FSC scheme must be repealed. It explained, however, that it had the intention of adjusting US tax law to its WTO obligations in a way that the tax burden would not increase for companies that had hitherto enjoyed the advantages of the FSC scheme.<sup>67</sup> Underlining the (normative) commitment of the US to the WTO procedures, Deputy Secretary of Finance Stuart Eizenstaat explained:<sup>68</sup>

“In general it is the intention of the US to implement the recommendations and rulings of the WTO in a manner that respects our WTO obligations while protecting the interests of US companies and workers”.

In fact, in November 2000, under pressure from the Clinton administration,<sup>69</sup> US Congress replaced the FSC scheme with a so-called Extraterritorial Income (ETI) scheme, which provided preferential tax rates for both export and non-export earnings from the foreign activities of US companies.<sup>70</sup> However, the EU objected that the ETI scheme failed to adequately implement the WTO decision,<sup>71</sup> but the US, having repealed its FSC scheme in good faith, maintained that the ETI regime complied with its WTO obligations.<sup>72</sup> To deal with the dispute the WTO panel and the Appellate Body convened again, and concluded in their

<sup>60</sup> Journal of Commerce 08.04.1998.

<sup>61</sup> Journal of Commerce 08.01.1999, 05.08.1999.

<sup>62</sup> WT/DS108/2.

<sup>63</sup> Brumbaugh 2002: 3, Langbein 2000: 548.

<sup>64</sup> WT/DS108/R.

<sup>65</sup> WT/DS108/AB/R.

<sup>66</sup> Financial Times 25.02.2000.

<sup>67</sup> Washington Post 25.02.2000, New York Times 03.05.2000.

<sup>68</sup> quoted in Murphy 2000: 533.

<sup>69</sup> Deputy Finance Secretary Stuart Eizenstaat underlined: “We cannot emphasize strongly enough how critical it is that Congress (acts) as expeditiously as possible” (Financial Times 02.10.2000).

<sup>70</sup> Charnovitz 2002: 619, Hufbauer 2002: 6, Brumbaugh 2002: 4-5.

<sup>71</sup> Financial Times 02.09.2000.

<sup>72</sup> Murphy 2000: 533-534, Brumbaugh 2002: 3.

reports of August 2001, and January 2002 that the ETI scheme violated WTO law.<sup>73</sup> The US was obliged to revise its tax legislation again.<sup>74</sup>

As the US could hardly change its ETI legislation immediately, the dispute entered the *enforcement phase*. As compensation for the damage it suffered from the illegal ETI scheme, the EU requested that the WTO approve sanctions of approximately 4 billion US Dollars.<sup>75</sup> Nevertheless, the US continued to *follow* the WTO dispute settlement provisions. Partly due to its normative commitment towards WTO dispute settlement provisions, but also due to the credible threat of authorized sanctions, the Bush administration consented to ask Congress again to revise the US tax legislation.<sup>76</sup> Speaking out in favour of a repeal of the ETI scheme, the administration emphasized that the US should not undermine the credibility of WTO, which generally served American long-term interests, for the sake of short-term objectives.<sup>77</sup> Under the pressure of gradually increasing EU sanctions, the Bush administration vigorously tried to push a WTO-compliant solution through Congress.<sup>78</sup> This was only deferred over and over again because Congress could not agree on how best to repeal the ETI scheme.<sup>79</sup> Eventually, in October 2004, Congress finally adopted a repealed ETI scheme, thus bringing the US back into compliance with its WTO obligations and bringing the dispute with the EU to an end.<sup>80</sup>

#### *Comparing the DISC and FSC Cases*

Overall, the comparison of US dispute settlement behaviour in the DISC and FSC cases backs the institutionalist hypothesis. While switching back and forth between avoiding, following and manipulating the diplomatic GATT dispute settlement procedures in the DISC case, the US proved to be prepared, after initial attempts to avoid the invocation of the WTO had failed, to strictly follow the judicialized WTO dispute settlement system. Moreover, as the DISC case shows, the GATT procedures only took effect because the US had learned that blocking and disregarding the panel report undermined its reputation, thereby impeding its attempts to negotiate for stricter GATT rules on subsidies. In the FSC case, by comparison, the WTO procedures also had an impact because, firstly, both the Clinton and the Bush administration felt normatively committed to comply with WTO dispute settlement provisions, and secondly they were concerned about the credibility of the WTO dispute settlement system. Moreover, the threat of sanctions authorized by the WTO obviously contributed to its compliance with WTO rulings.

What is more, not only US behaviour differed in both cases, but EU behaviour too, so that the way in which the two superpowers of international trade handled the disputes differed

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<sup>73</sup> WT/DS108/ RW; WT/DS108/AB/RW.

<sup>74</sup> Brumbaugh 2002.

<sup>75</sup> WT/DS108/ARB.

<sup>76</sup> Financial Times 26.01.2002. In the face of the WTO's approval of sanctions USTR Robert Zoellick declared: "I believe today's findings will ultimately be rendered moot by US compliance with the WTO's recommendations and rulings in this dispute" (Washington Post 31.08.2002).

<sup>77</sup> USTR Robert Zoellick underlined: "The United States respects its WTO obligations, which serve America's interests, and we intend to continue to seek to cooperate with the EU in order to manage and resolve this dispute" (Washington Post 15.01.2002).

<sup>78</sup> Financial Times 03.10.2003.

<sup>79</sup> Washington Post 31.08.2002, 06.07.2003.

<sup>80</sup> Financial Times 05.10.2004, 16.12.2004.

considerably. While the DISC case was mainly dealt with outside of the GATT procedures, the FSC case was mainly handled within the WTO dispute settlement system.

### 3.2 Comparing the Patents and the Steel Cases

To the extent that in both the Patents and the Steel case the EU accused the US of illegal retaliation against allegedly unfair trading practices of their GATT/WTO partners, these cases lend themselves well to a pairwise comparison in the context of a most similar case design for judging the institutionalist hypothesis.

#### *The Patents Case*

The Patents case emerged in 1986 as a result of US provisions that allowed American companies suffering from patent infringements on products of non-American origin to invoke not only ordinary courts, as was permissible with products of American origin, but also a so-called International Trade Commission (ITC), which was accountable to the US administration.<sup>81</sup> The EU complained that the ITC procedure was illegal under GATT because it discriminated against non-American companies that were accused of violating American patents.<sup>82</sup> The US, however, held that the ITC procedures differed from ordinary court procedures, but did not discriminate against non-American companies which allegedly violated American patents.<sup>83</sup>

Faced with the accusations of the EU the US, during the *complaints phase*, strictly followed GATT dispute settlement provisions. The US accepted the EU's request for formal consultations. In fact, the Reagan administration was in favour of consultations because it thought that these would further the GATT Uruguay Round negotiations over the protection of intellectual property rights which it so strongly supported. The US hoped that by offering to repeal the ITC procedures during the negotiations it might get something in return from the EU. The EU, however, insisted that the US adjust its ITC procedures not as a result of ongoing GATT negotiations, but as a precondition for successful negotiations over intellectual property rights.<sup>84</sup>

As there was obviously no common ground on which the two sides could meet the dispute entered the *adjudication phase*, and in March 1987 the EU requested a GATT panel to decide on the legality of the ITC procedure.<sup>85</sup> Strictly following GATT dispute settlement provisions, the US accepted the request and refrained at this point from obstructing it in the GATT Council.<sup>86</sup> In line with the EU's criticism, the panel, which was then established in October 1987, concluded that the US provisions unduly discriminated between violations of US patents by products of American and non-American origin.<sup>87</sup> Its report requested:

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<sup>81</sup> Hudec 1993: 220, Dinan 1991.

<sup>82</sup> L/6439, 36S/ 345.

<sup>83</sup> Duvall 1990, Abbott 1990.

<sup>84</sup> Journal of Commerce 20.02.1987.

<sup>85</sup> L/6439, 36S/ 345.

<sup>86</sup> Hudec 1993: 547.

<sup>87</sup> Duvall 1990.

“the United States to bring its procedures applied in patent infringement cases bearing on imported products into conformity with its obligations under the General Agreement”.<sup>88</sup>

In an effort to *avoid* the report becoming binding, the US blocked its adoption at eight consecutive GATT Council meetings.<sup>89</sup> Like the Reagan administration, the new Bush administration hoped that the ITC procedure could be used as a bargaining tool in the intellectual property rights negotiations of the GATT Uruguay Round.<sup>90</sup> Deputy US Trade Representative Rufus Xerxa underlined that only with an effective international procedure in place was the US prepared to renounce its ITC procedures and accept the panel report.<sup>91</sup> However, blocking the report turned out to be self-defeating.<sup>92</sup> Later, even USTR Clara Hills had to admit that the obstruction of the panel report and consequent loss of reputation for the US had become a liability rather than a bargaining tool, as intended, for the GATT Uruguay Round negotiations on intellectual property rights.<sup>93</sup> Indeed, the EU was not alone in shaming the US and declaring that US compliance with the panel report was a necessary precondition for successful GATT negotiations on intellectual property rights.<sup>94</sup> Finally, in November 1989, to save these negotiations the US conceded to accept the panel report.<sup>95</sup> Former USTR F. Holmer explained why his successors were now willing to *follow* GATT procedures: “They never were going to be successful in the Uruguay Round, particularly in the intellectual property negotiations, if they continued to block that panel report. It was having a very negative impact on the negotiations”.<sup>96</sup>

Yet, during the *implementation phase* the US began to openly *disregard* the GATT dispute settlement system.<sup>97</sup> The Bush administration declared that any US statute changes would have to wait until the GATT Uruguay Round was successfully concluded.<sup>98</sup> The US even continued to ignore the panel report in the light of further delays in the conclusion of the Uruguay Round beyond 1990, and in the meantime even refused to apply existing ITC provisions in line with GATT provisions.<sup>99</sup> This time, attempts to shame the US and to undermine its reputation as a reliable GATT partner failed. Only five years later, with the conclusion of the Uruguay Round, was the US finally prepared to adjust its ITC procedures to meet its obligations under GATT. The patents case finally came to an end.

### *The Steel Case*

The origins of the Steel case went back to steel tariffs introduced by the US in March 2002 in response to a sudden surge of steel imports due to the Asian Crisis in 1997 and 1998, which

<sup>88</sup> L/6439, 36S/ 345.

<sup>89</sup> Hudec 1993: 221, 548.

<sup>90</sup> Financial Times 12.10.1989, Journal of Commerce 08.11.1989.

<sup>91</sup> Journal of Commerce 06.11.1989.

<sup>92</sup> Hudec 1993: 221.

<sup>93</sup> Members of the US delegation for the GATT negotiations on intellectual property rights objected: “How do we go on the offensive when we won’t own up on the panel reports? Do we want to use the GATT as a sword or as a shield? If we use it as a shield, we gum up the whole works” (Journal of Commerce 16.10.1989).

<sup>94</sup> The Economist 20.05.1989, Financial Times 08.11.1989.

<sup>95</sup> Journal of Commerce 08.11.1989, 09.11.1989.

<sup>96</sup> New York Times 13.11.1989.

<sup>97</sup> Hudec 1993: 548, Dinan 1991.

<sup>98</sup> Journal of Commerce 08.11.1989, The Economist 21.04.1990, Financial Times 08.11.1989.

<sup>99</sup> Journal of Commerce 27.06.1990, 13.03.1991.

affected – and continued to affect – the American Steel industry.<sup>100</sup> The US considered these tariffs to be WTO-compatible, because, according to the Bush administration, they were to provide temporary relief from international competition, so that the steel industry could undergo a restructuring program.<sup>101</sup> The EU, however, criticized the steel tariffs as an open violation of WTO law,<sup>102</sup> and underlined that steel imports into the US increased after the Asian Crisis in 1997 and 1998 only and have declined ever since.<sup>103</sup> Therefore, the EU argued, the steel tariffs could not be justified under WTO law.<sup>104</sup>

The *complaints phase* began in March 2002, immediately after the increase of the tariffs had been declared, when the EU invoked the WTO dispute settlement procedure.<sup>105</sup> Although it was determined to implement the intended tariffs, the US *followed* the WTO dispute settlement provisions and accepted the EU request for consultations, which were held in April 2002.<sup>106</sup>

As the consultations failed, the dispute entered the *adjudication phase* during which the US continued to *follow* the WTO dispute settlement procedures,<sup>107</sup> neither disregarding nor trying to manipulate them. While granting exemptions from the steel tariffs for a variety of specific steel products, the Bush administration continued to argue in favour the tariffs. Yet the panel, which was requested by the EU, in its report of July 2003, as well as the Appellate Body, which was invoked by the US, in its report of November 2003, agreed that the American steel tariffs were illegal under WTO law. Both reports criticized that among other things, the US had failed to demonstrate a causal link between rising steel imports and the crisis of the American steel industry, and both reports demanded that the US repeal its illegal steel tariffs.<sup>108</sup>

Although it criticized the reports, the Bush administration announced that the US was willing to *follow* the WTO reports, and to withdraw its steel tariffs, and the *implementation phase* began.<sup>109</sup> While, admittedly, it neither mentioned the WTO reports nor the sanctions threatened by the EU, but pointed instead at the successful restructuring of the American steel industry,<sup>110</sup> it was nevertheless obvious that the administration complied because it feared authorized sanctions. It was hardly by chance that it announced its decision, in December 2003, less than a week before the EU was able to apply sanctions of about 2.2 billion US dollars. Within both the administration and Congress the prospect of sanctions authorized by the WTO weakened those who had argued in favour of steel tariffs, while

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<sup>100</sup> Financial Times 06.03.2002, The Economist 09.03.2002.

<sup>101</sup> WT/DS258/R.

<sup>102</sup> WT/DS248/1.

<sup>103</sup> New York Times 06.03.2002.

<sup>104</sup> WT/DS248/12.

<sup>105</sup> WT/DS248/12.

<sup>106</sup> WT/DS248/11.

<sup>107</sup> WT/DS248/12.

<sup>108</sup> WT/DS248/R, WT/DS248/AB/R

<sup>109</sup> New York Times 06.12.2003.

<sup>110</sup> The President explained: "I took action to give the industry a chance to adjust to the surge in foreign imports and to give relief to the workers and communities that depend on steel for their jobs and livelihoods. These safeguard measures have now achieved their purpose, and as result of changed economic circumstances it is time to lift them" (Washington Post 05.12.2003, New York Times 05.12.2003).

strengthening those who had always been against them.<sup>111</sup> For example, Senator Lamar Alexander from Tennessee declared, in face of the sanctions:

“Because of the WTO ruling continuing the tariff will destroy thousands more of our textile and agricultural jobs. President Bush’s honest effort to save steel jobs is now backfiring and hurting American workers”.<sup>112</sup>

In addition, concerns about US reputation and about the WTO’s credibility had also won the administration as well as Congress over in favour of complying with the WTO reports.<sup>113</sup>

Senator Charles E. Grassley, for instance, maintained:

“Although I may not agree with every decision at the WTO, it’s important that we comply when decisions go against us. Complying with our WTO obligations is an important sign of American leadership”.<sup>114</sup>

### *Comparing the Patent and Steel Cases*

Overall, the comparison of US dispute settlement behaviour in the Patents and the Steel case supports the institutionalist hypothesis. While in the Steel case it strictly followed the judicial WTO procedures, in the Patent case its strategy fluctuated between following, avoiding and disregarding the diplomatic GATT dispute settlement mechanism. Moreover, as the Patent case confirms, the GATT procedures only had an impact on the US when its deviant behaviour discredited its reputation to such a degree that it jeopardized its efforts to negotiate over intellectual property rights protection within the GATT Uruguay Round negotiations. The Steel case shows us that the WTO procedures also had an impact because the Bush administration as well as Congress feared authorized sanctions and they held concerns about the US reputation and the credibility of the WTO.

In addition, not only the US but also the EU acted differently in the Patent and the Steel case. The way in which the two disputants dealt with these cases thus differed considerably. While the Patent case, after a good start, was then mainly dealt with and finally solved outside of GATT dispute settlement procedures, the Steel case was settled entirely within the WTO dispute settlement system. Both parties to the dispute evidently likened GATT panel reports to political bargaining chips, while they accepted that the WTO reports have to be treated as binding rulings.

### **3.3 Comparing the Hormones Cases**

The so-called Hormones cases under GATT and WTO are singularly appropriate for investigating the institutionalist hypothesis within a most similar case design. The cases are similar because in both of them the US objected to the EU ban on beef treated with certain growth hormones. Moreover, in both cases the US had considerable incentives to take the

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<sup>111</sup> Washington Post 05.12.2003, The Economist 06.12.2003.

<sup>112</sup> New York Times 12.11.2003.

<sup>113</sup> New York Times 11.11.2003, Financial Times 05.12.2003. An adviser of President George W. Bush explained the US decision: “Defiance had real costs. (...). It was going to cost us credibility around the world” (New York Times 05.12.2003).

<sup>114</sup> Washington Post 11.11.2003.

law into its own hands, because the EU refused to lift its ban although it defied GATT/WTO regulations.

### *The First Hormones Case*

When the Hormones case was sparked off in 1985 the EU claimed that its ban was justified because the growth hormones in question were suspected of enhancing the risk of cancer. The US, however, criticized the ban as illegal under GATT because there was no evidence, they claimed, that meat produced with the said hormones increased the risk of cancer.<sup>115</sup> The US complained that the ban was an arbitrary measure to protect European beef producers from American meat production.<sup>116</sup>

From early on in the *complaints phase* the US *disregarded* the GATT dispute settlement mechanism.<sup>117</sup> Then in March 1987 the US requested consultations with the EU under the GATT agreement on Technical Barriers to Trade.<sup>118</sup> Even before consultations took place, however, and without any GATT authorization, the US threatened to employ sanctions if the EU went ahead with its ban.<sup>119</sup> In fact, under heavy pressure from Congress the Reagan administration even prepared a list of EU products the US was willing to sanction.<sup>120</sup>

At all events the GATT consultations failed, and in June 1987 the Hormones case entered the *adjudication phase*. The US now requested a dispute settlement panel to be established under the TBT agreement rather than GATT, because the former provided panels of independent experts, while the latter appointed panels of state representatives.<sup>121</sup> The EU was not prepared to accept a panel of experts, however; from the European point of view the TBT agreement was not applicable to the Hormones case.<sup>122</sup> Yet, the EU did offer to accept a GATT panel to decide on the applicability of the TBT agreement.<sup>123</sup> Although this was explicitly provided under the TBT agreement, the US rejected the GATT panel and insisted instead on an expert panel under the TBT agreement.<sup>124</sup> In September 1987, in open *disregard* of GATT dispute settlement procedures, the Reagan administration thus began preparing concrete sanctions.<sup>125</sup>

The Hormones dispute now moved on to the *implementation phase*. Finally, in December 1987, in *disregard* of the GATT dispute settlement system, the Reagan administration decided to employ sanctions.<sup>126</sup> It prepared a list of products against which sanctions were to be employed if and when the EU ban went into force.<sup>127</sup> As attempts to come to an amicable

<sup>115</sup> New York Times 28.12.1988.

<sup>116</sup> Decker 2002: 150.

<sup>117</sup> Hudec 1993: 545; Meng 1990: 824.

<sup>118</sup> TBT/Spec/18.

<sup>119</sup> Financial Times 31.12.1985, Financial Times 23.11.1987.

<sup>120</sup> New York Times 27.11.1987.

<sup>121</sup> Hudec 1993: 545; Meng 1990: 824.

<sup>122</sup> Financial Times 21.12.1988.

<sup>123</sup> New York Times 01.01.1989.

<sup>124</sup> Financial Times 23.09.1987, 14.10.1987.

<sup>125</sup> Hudec 1993: 225-226; Decker 2002: 150.

<sup>126</sup> Hudec 1993: 225-226; Meng 1990: 824-825.

<sup>127</sup> Decker 2002: 150. The Reagan administration underlined: "We're prepared with a retaliatory package if (...) U.S. beef imports into the E.C. are being interrupted" (New York Times 25.12.1987).

solution repeated failed, the dispute threatened to escalate.<sup>128</sup> The EU announced that it was prepared to retaliate against US sanctions, to which the Reagan administration threatened with counter-retaliation.<sup>129</sup>

The Hormones case entered the *enforcement phase* when the EU ban went into force in January 1989. Still *disregarding* GATT provisions the US immediately responded with unauthorized sanctions.<sup>130</sup> Moreover, the US blocked the EU request for a GATT panel to deal with American sanctions.<sup>131</sup> The US claimed that non-authorized sanctions were justified because of the inadequate dispute settlement procedures under GATT, which in their view gave the EU the opportunity to arbitrarily block its request for a panel.<sup>132</sup> In actual fact, the US had never requested a GATT panel.<sup>133</sup> In any case, US sanctions that defied the regulations of the GATT were not conducive to an amicable solution of the dispute.<sup>134</sup> The US and the EU merely managed to agree on partial solutions which led to a gradual reduction of US sanctions.<sup>135</sup>

### *The Second Hormones Case*

In 1995, with the new dispute settlement procedures in place, the US again started to complain about the EU ban on hormones-treated beef. This time, however, from early on in the *complaints phase*, the US was prepared to strictly *follow* the WTO dispute settlement procedure. In contrast to the earlier Hormones case under GATT, the US refrained from threats of imposing non-authorized sanctions. Instead, it announced that it would invoke the WTO dispute settlement procedures if the EU did not give up its illegal ban immediately. In fact, in January 1996, after attempts to come to an amicable solution with the EU again failed, the US requested consultations under the WTO.<sup>136</sup>

After the failure of WTO consultations the dispute entered the *adjudication phase*.<sup>137</sup> In April 1996 the US, still *following* the dispute settlement procedures to the letter, requested the establishment of a WTO panel.<sup>138</sup> The Clinton administration even withdrew the sanctions the US had been employing since the first Hormones dispute.<sup>139</sup> The administration underlined that it was seeking to get sanctions authorized by the WTO in order to force the EU to give up its ban which it claimed infringed WTO law. USTR Charlene Barshefsky even declared that she considered authorized sanctions as the *only* effective means of asserting US rights in the face of EU non-compliance.<sup>140</sup> To ensure that the EU could not turn the tables she even decided that the US would give up on its previous sanctions. She explained:

<sup>128</sup> Decker 2002: 150.

<sup>129</sup> Financial Times 21.11.1988, Washington Post 13.12.1988.

<sup>130</sup> Hudec 1993: 225-226; USTR 2002: 13.

<sup>131</sup> Financial Times 09.02.1989.

<sup>132</sup> USTR Clayton Yeutter claimed: "We have tried repeatedly to bring this issue to a scientific disputes settlement, under the GATT, in order to have it resolved. Our European counterparts have consistently blocked our efforts" (Financial Times 28.12.1988).

<sup>133</sup> Hudec 1993: 574, 249; Meng 1990: 833-835.

<sup>134</sup> Financial Times 10.08.1989.

<sup>135</sup> Hudec 1993: 229.

<sup>136</sup> WT/DS26/1.

<sup>137</sup> Ahearn 2002: 27.

<sup>138</sup> WT/DS26/6.

<sup>139</sup> New York Times 06.07.1996, Journal of Commerce 16.07.1996.

<sup>140</sup> Financial Times 04.02.1999.



“As the United States now had effective multilateral procedures to address the matter of the EC’s restrictions on imports of U.S. meat (...) the USTR (...) determined that it was in the interest of the United States to terminate (...) the increased duties”.<sup>141</sup>

In their reports of August 1997 and February 1998 the panel as well as the Appellate Body agreed that the ban was illegal, because the EU had failed to provide scientific evidence that beef treated with the hormones in question posed any risk for consumers.<sup>142</sup> And USTR Charlene Barshefsky claimed victory:

“This is a sign that the WTO dispute settlement system can handle complex and difficult disputes where a WTO member attempts to justify trade barriers by thinly disguising them as health measures”.<sup>143</sup>

The Hormones dispute now entered the *implementation phase*. Disagreement arose again over the period for the implementation of the WTO reports. The US insisted that the EU end its ban immediately.<sup>144</sup> The EU however, argued that the WTO reports had not criticized the ban itself, but merely the lack of scientific evidence. The EU demanded the right to uphold its ban for 15 months while seeking scientific evidence to justify the ban.<sup>145</sup> In fact, a panel, invoked by the US, gave the EU 15 months until May 1999 to come into compliance with the WTO reports.<sup>146</sup> Unlike the first Hormones case under GATT, the US continued to *follow* the WTO procedures despite this decision. It did not resort to unilateral sanctions the very moment that WTO procedures did not bring forth the desired results. The fact that the administration as well as Congress did not even consider unilateral sanctions might even be seen as an indication of their normative commitment towards the WTO procedures.<sup>147</sup>

As the EU decided in May 1999 that it would uphold its ban on hormones-treated beef, the dispute with the US entered the *enforcement phase*. The EU argued that scientific evidence was in preparation which indicated that the said hormones posed a risk for human consumption.<sup>148</sup> The US, however, accusing the EU of undermining the credibility of the WTO system, was no longer willing to wait for the EU to produce sound scientific evidence.<sup>149</sup> May 1999, in accordance with the dispute settlement provisions, the Clinton administration requested the WTO to authorize sanctions.<sup>150</sup> This was, however, deferred when the EU requested a further WTO panel to decide on the amount of sanctions.<sup>151</sup> Again, the US assented, and when the decision was made was even prepared to reduce sanctions, as required, from 220 to 116 million US dollars.<sup>152</sup> The US was anxious to ensure that the EU

<sup>141</sup> USTR 2002: 13.

<sup>142</sup> WT/DS26/R/USA; WT/DS26/AB/R.

<sup>143</sup> Financial Times 19.08.1997.

<sup>144</sup> New York Times 14.03.1998, Financial Times 13.02.1998.

<sup>145</sup> Financial Times 13.02.1998, New York Times 14.03.1998.

<sup>146</sup> WT/DS26/15.

<sup>147</sup> Wall Street Journal 23.03.1999.

<sup>148</sup> Financial Times 04.05.1999, 05.05.1999, 20.05.1999.

<sup>149</sup> Financial Times 15.05.1999, New York Times 23.03.1999.

<sup>150</sup> WT/DS26/19. The US administration nevertheless emphasized that employing sanctions was not its preferred option: “We would still prefer to resolve this long-standing trade dispute in a way that provides access for US meat in the European market” (Financial Times 15.5.1999).

<sup>151</sup> WT/DS26/20.

<sup>152</sup> Decker 2002: 152. The US representative at the WTO Rita Hayes declared: “The final list of sanctions will not be drawn up until we have WTO authorization” (New York Times 04.06.1999).

could not turn the tables and shame it for violating WTO procedures.<sup>153</sup> Moreover, the US urged the EU to comply with the reports to preserve the WTO's credibility.<sup>154</sup> The EU, however, merely accepted the sanctions employed by the US without retaliation, but until today has neither lifted the ban nor provided scientific evidence for its justification.<sup>155</sup>

### *Comparing the Hormones Cases*

The comparison of US behaviour in the two Hormones cases under GATT and WTO bears out the institutionalist hypothesis. While constantly disregarding the diplomatic GATT dispute settlement procedures during the first case, the US was willing to follow the judicial WTO dispute settlement provisions to the letter in the second case. As the first Hormones case reveals, the GATT dispute settlement proceedings had hardly any effect on US behaviour. The very moment that the procedure did not deliver the desired results, because the EU refused the required TBT panel, the US decided to take the law into its own hands. In the second Hormones case, by contrast, the US was prepared to strictly follow the WTO procedures although it also did not bring forth the desired results. In particular, the dispute settlement proceedings did not authorize the amount of sanctions requested by the US, and (therefore) failed to ensure EU compliance with the panel report requiring the EU to lift its ban. The US was obviously prepared to follow the WTO procedure because it perceived it to allow effective shaming of the EU and to get sanctions authorized. At the same time it followed the procedures to rule out that the EU could shame the US for disregarding its WTO obligations and to ask the WTO itself for authorized sanctions. In addition, normative commitments towards the WTO seemed to have had an impact on US behaviour too.

Moreover, in the Hormones cases not only the US, but also the EU acted more in accordance with the dispute settlement procedures under the WTO than under GATT. Certainly, in both cases the EU upheld its ban on hormone-treated beef in defiance of the respective rulings. Remarkably, however, in the second Hormones case the EU accepted the sanctions the US was authorized to employ without any threat of retaliation. Therefore the way in which the two superpowers of international trade dealt with the dispute changed considerably. While in the first case, under GATT, their behaviour threatened to lead to a spiral of unauthorized sanctions, retaliation and counter-retaliation, the second case could be kept within the frame of the WTO dispute settlement system.

### **3.4 Comparing the Citrus and Bananas Cases**

In terms of case similarity the so-called Citrus case under GATT and the Bananas case under the WTO fulfil the criteria for evaluating the institutionalist hypothesis, because both are similar inasmuch as the US complained that the EU's preferential treatment of agricultural products from former European colonies discriminated against products from the US.

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<sup>153</sup> Financial Times 17.05.1999, 27.07.1999.

<sup>154</sup> For example, USTR Charlene Barshefsky said: "I would urge the EU to reconsider its damaging actions and to demonstrate a real commitment to a rules-based multilateral trading system" (Financial Times 13.07.1999).

<sup>155</sup> New York Times 25.05.2000.

### *The Citrus Case*

Since the 1960s, the EU (then the EC) held trade agreements with states around the Mediterranean rim giving them preferential access to European markets for a variety of products.<sup>156</sup> In 1976, the US, although in principle accepting the preferential treatment of developing countries, criticized specifically the agreements for Citrus products. The US claimed that these agreements were illegal under GATT because they unduly discriminated against American Citrus products. The EU, which saw the US allegations as an attempt to undermine its trade agreements with Mediterranean countries, argued that the preferences for Citrus from these countries were compatible with GATT, which explicitly allows preferential treatment for developing countries.

During the early *complaints phase* the US *avoided* dealing with the dispute under the GATT dispute settlement procedures. As encouraged by the GATT agreement, it tried to reach a negotiated settlement with the EU, first between 1976 and 1978 outside of GATT, then between 1979 and 1982 in the context of the GATT Tokyo Round. Only in June 1982, after these attempts failed, did it invoke GATT dispute settlement procedures. Now *following* the dispute settlement provisions, the US requested formal consultations.<sup>157</sup> Consultations followed, but the US and the EU were unable to find a solution for the Citrus case.<sup>158</sup>

The dispute thus entered the *adjudication phase*, and the US requested the appointment of a GATT dispute settlement panel.<sup>159</sup> The Reagan administration *followed* GATT dispute settlement provisions although attempts by the EU to block the establishment of a panel delayed the commencement of their work until October 1983.<sup>160</sup> In its report of December 1984 the panel concluded that the preferential treatment of Citrus products from developing countries – while not a violation of GATT obligations – nullified privileges the EU had already granted to the US.<sup>161</sup> Hence the panel neither concurred with the US that the preferential treatment itself was a violation of GATT, nor did it accept the EU argument that the preferential treatment was entirely compatible with the provisions of the GATT. The EU was merely requested to reduce tariffs for two Citrus products, i.e. oranges and lemons.<sup>162</sup> Although the US had not accomplished what it had desired, the administration supported the approval of the panel report.<sup>163</sup> The EU, by contrast, blocked its adoption by the GATT Council.<sup>164</sup>

The dispute proceeded to the *implementation phase*, in the course of which the US administration declared that it now considered the dispute settlement process under GATT to be terminated.<sup>165</sup> Due to the EU's obstruction of the panel report and its refusal to comply with the panel's recommendations, the US claimed the right to employ sanctions without

<sup>156</sup> Hudec 1993: 157-161.

<sup>157</sup> Hudec 1993: 158.

<sup>158</sup> Wall Street Journal 21.04.1982, Financial Times 22.04.1982.

<sup>159</sup> L/5337.

<sup>160</sup> Hudec 1993: 159; USTR 2002: 2.

<sup>161</sup> Hudec 1993: 159; Petersmann 1997: 160-164.

<sup>162</sup> L/5776.

<sup>163</sup> New York Times 18.02.1985.

<sup>164</sup> Hudec 1993: 504.

<sup>165</sup> C/M/190.

GATT approval.<sup>166</sup> *Disregarding* GATT dispute settlement provisions, the US indeed prepared a list of sanctions it was willing to employ.<sup>167</sup> The EU however warned that it would retaliate against non-authorized US sanctions immediately.<sup>168</sup>

Now entering the *enforcement phase*, however, the US continued to *disregard* the GATT dispute settlement provisions. Without obtaining GATT approval it increased tariffs for European pasta by 25-40%.<sup>169</sup> The Reagan administration claimed that this was justified because the GATT dispute settlement system was unreliable.<sup>170</sup> However, these unilateral sanctions aggravated the dispute, because the EU retaliated, again without GATT approval, by increasing tariffs on American citrus and walnuts by 20% and 30% respectively.<sup>171</sup> The European Commission considered its retaliatory sanctions justified because of the US' disrespect for the GATT ban on non-authorized sanctions.<sup>172</sup>

To prevent the dispute from escalating further – both parties were meanwhile threatening to retaliate against the other party's retaliation – the US and the EU tried to reach a *negotiated* settlement. In June 1985 they agreed on a “ceasefire” to temporarily give up their sanctions against European pasta and American citrus and walnuts.<sup>173</sup> But when the ceasefire ended in October 1985, both parties reinstated their sanctions.<sup>174</sup> During the summer of 1986 the dispute seemed to be getting out of control, with both the US and the EU threatening to step up their retaliatory measures.<sup>175</sup> Only the prospect that the Citrus dispute might hamper the GATT Uruguay Round negotiations brought the US and the EU back to the negotiation table.<sup>176</sup> In August 1986, after tough negotiations, they finally agreed that the EU had to reduce its tariffs on citrus, while the US accepted its preferential treatment of Mediterranean countries.<sup>177</sup> After more than ten years the citrus dispute was finally over.<sup>178</sup>

### *The Bananas Case*

The EU Bananas Directive of 1993, which provided preferential access to European markets for bananas from certain developing countries, especially from the Caribbean, gave rise to the Bananas dispute with the US.<sup>179</sup> The US complained that the Bananas regime was not

<sup>166</sup> Financial Times 20.05.1985, 20.06.1985.

<sup>167</sup> USTR 2002: 2.

<sup>168</sup> Financial Times 20.06.1985, Los Angeles Times 20.06.1985.

<sup>169</sup> Washington Post 21.06.1985. US President Reagan declared: “I have determined that the preferential tariffs granted by the European Economic Community (EEC) on imports of lemons and oranges from certain Mediterranean countries deny benefits to the United States arising under the General Agreement on Tariffs and Trade (GATT). (...) I will therefore proclaim an increase in duties on pasta products (...) imported from the EEC” (Public Papers of the President 20.06.1985).

<sup>170</sup> Hudec 1993: 160. US President Reagan explained: “The EEC (...) has been unwilling to accept either the panel's findings or recommendations and has effectively prevented a resolution of this issue in the GATT. (...) The EEC's unwillingness to implement the panel's finding (...) requires us to re-balance the level of concessions” (Public Papers of the President 20.06.1985).

<sup>171</sup> New York Times 28.06.1985, Financial Times 28.06.1985.

<sup>172</sup> New York Times 21.06.1985.

<sup>173</sup> Financial Times 11.07.1985, 13.07.1985.

<sup>174</sup> New York Times 01.11.1985.

<sup>175</sup> Financial Times 06.08.1986.

<sup>176</sup> Wall Street Journal 11.08.1986.

<sup>177</sup> Financial Times 11.08.1986, 12.08.1986, Economist 16.08.1986.

<sup>178</sup> New York Times 11.08.1986.

<sup>179</sup> Hanrahan 2002: 66, Cadot and Webber 2001: 3-6.

compatible with WTO law because it not only provided preferential treatment to developing countries, but also privileged European marketing companies which mainly traded with bananas from the Caribbean, and discriminated against American companies – such as Chiquita and Dole – that marketed bananas from Latin America.<sup>180</sup> The EU argued however that its bananas regime was compatible with WTO law because it was merely designed to privilege bananas from Caribbean countries without giving any advantage to European marketing companies over their American competitors.<sup>181</sup>

Early on in the *complaints phase*, to *avoid* a formal WTO dispute settlement procedure the US tried to persuade the EU to modify its projected bananas regime before it even came into force. But since the bananas regime had been highly contested within the EU, it was unable to agree on a modified regime that would satisfy US interests. In September 1995, in a move to force the EU to give in, the US administration, *following* WTO dispute settlement procedures, requested formal consultations with the EU.<sup>182</sup> As USTR Micky Kantor explained, fear of being put to shame and losing its reputation prevented the US from threatening to apply unauthorized sanctions:

“If we had gone with unilateral sanctions, all we would have done was raise the ire of all the other WTO members, including the member states in the EU who favoured our position”.<sup>183</sup>

Since the US and the EU failed to solve the bananas dispute through consultations, however, the dispute then entered the *adjudication phase*.<sup>184</sup> Consistently *following* WTO procedures, the US asked for a panel to decide on the EU bananas regime.<sup>185</sup> The panel as well as the Appellate Body concluded in their reports of May 1997 and September 1997 respectively that the EU bananas regime was not compatible with WTO law.<sup>186</sup> The reports accepted the preferential treatment of bananas from Caribbean countries, but criticized the fact that the EU import quotas and import licences unduly discriminated against American and in favour of European marketing companies.<sup>187</sup>

In the implementation *phase*, still *following* WTO procedures, the Clinton administration accepted a WTO panel decision allowing the EU not only until August 1998, as demanded by the US, but until January 1999 to adjust its banana regime.<sup>188</sup> The EU declared that it was willing to repeal its bananas regime by then.<sup>189</sup> When, however, in July 1998 it became clear that the EU would only agree on cosmetic changes to its bananas regime, the US began to *manipulate* the WTO procedure. If the EU did not come up with a substantively revised bananas regime, the Clinton administration threatened, the US would request sanctions without involving another WTO panel to decide on the legality of the modified bananas regime.<sup>190</sup> Admittedly, the WTO dispute settlement provisions did not explicitly require the US to invoke another panel to decide on the modified regime; implicitly, though, it was obvious

<sup>180</sup> Tangermann 2003.

<sup>181</sup> Josling 2003: 178-182.

<sup>182</sup> WT/DS16/1, WT/DS27/1.

<sup>183</sup> quoted from Stovall and Hathaway 2003: 155-156.

<sup>184</sup> Josling 2003: 176-177.

<sup>185</sup> WT/DS27/6.

<sup>186</sup> WT/DS27/R/USA, WT/DS27/AB/R.

<sup>187</sup> Josling 2003: 178-182, Hanrahan 2002: 66.

<sup>188</sup> WT/DS27/16, WT/DS27/15.

<sup>189</sup> Josling 2003: 183-185.

<sup>190</sup> Financial Times 24.07.1998.

that it was not for the US to decide whether the modified regime complied with WTO law. It had to invoke another WTO panel to decide on the EU bananas regime before requiring sanctions which the WTO was bound to approve.<sup>191</sup>

In March 1999, now entering the *enforcement phase*, the Clinton administration imposed non-authorized sanctions of 520 m. US dollars against the EU.<sup>192</sup> However, it did not actually collect these sanctions, but merely required importers to post bonds which would cover the sanctions if authorized by the WTO; in this way *manipulating* rather than disregarding the WTO procedures.<sup>193</sup> Through these bonds, the US wanted to reserve the right to collect sanctions retroactively.<sup>194</sup> Its reluctance to openly disregard the dispute settlement provisions can be seen as an indication of its normative commitment to the WTO procedures. At all events, when a WTO panel finally concluded in April 1999 that the modified EU bananas regime still failed to comply with earlier WTO reports, the US reverted to *following* the WTO procedures.<sup>195</sup> Although the panel merely authorized sanctions amounting to 191 m. US dollars, rather than 520 m. US dollars as it had demanded, the US was prepared to reduce its sanctions accordingly.<sup>196</sup> Moreover, the US also complied with a further panel report stipulating that it may not employ sanctions retroactively, and refrained from using the posted bonds.<sup>197</sup> Nevertheless, even with authorized sanctions in place it took another two years before the EU and the US could agree on a WTO-compliant regime for the importation of bananas.

#### *Comparing the Citrus and Bananas Cases*

Overall, the comparison of US behaviour in the Citrus case under GATT and the bananas case under the WTO sustains the institutionalist hypothesis. Admittedly, in both cases, the US was only prepared to follow the agreed GATT/WTO procedures after attempting to avoid a formal dispute settlement procedure. However, later on in Bananas dispute the US abstained from openly disregarding WTO procedures, while it clearly violated GATT provisions in the Citrus case. While in the citrus case the GATT dispute settlement procedures hardly had any effect on US behaviour, the WTO dispute settlement procedures in the bananas case had at least some impact. As in the second Hormones case, the US was willing to go by the WTO procedure in the Bananas case because it perceived it as an effective instrument for shaming the EU and getting sanctions authorized. Moreover, it refrained from openly disregarding procedures, even when they did not deliver the desired results, in order to avoid being put to shame by the EU for disregarding its WTO obligations, and to pre-empt European sanctions authorized by the WTO. In addition, the normative commitment toward the WTO also seems to have played a substantial role.

<sup>191</sup> Josling 2003: 186, Cadot and Webber 2001: 30, Hanrahan 2002: 67.

<sup>192</sup> Josling 2003: 187-189, Cadot and Webber 2001: 33.

<sup>193</sup> Washington Post 04.03.1999, Journal of Commerce 05.03.1999. USTR Charlene Barshefsky explained: "The United States has simply preserved its ability to increase duties as of March 3 depending on the outcome of the arbitration decision" (Journal of Commerce 09.03.1999).

<sup>194</sup> Washington Post 09.03.1999.

<sup>195</sup> WT/DS27/RW/EEC.

<sup>196</sup> WT/DS27/ARB.

<sup>197</sup> Hanrahan 2002: 67, Josling 2003: 187-189. USTR Charlene Barshefsky underlined: "We view this as a major victory for the WTO dispute settlement system. This demonstrates that there are time limits that must be respected and if countries don't come into compliance at the end of a reasonable time period, they have to pay the price" (Washington Post 07.04.1999).

Furthermore, not only the US, but also the EU acted more in accordance with the WTO dispute settlement procedures in the Bananas case than in the Citrus case under GATT. Admittedly, the EU manipulated and disregarded both GATT and WTO procedures. But in the Bananas case, in contrast to the Citrus case, it did not dare to retaliate against US sanctions. The fact that US sanctions were authorized forbade the EU to employ any retaliatory measures. Therefore, the way in which the US and the EU were able to handle the dispute differed considerably. While the Citrus case – like the Hormones case under GATT – threatened to escalate into an exchange of sanctions, retaliation and counter-retaliation, the Bananas case – like the Hormones case under the WTO – was largely contained within the WTO dispute settlement system.

#### 4. Conclusion

The institutionalist hypothesis is thus clearly underpinned by the pairwise comparisons described above. In each pair of cases the US acted – no matter whether as complainant or as defendant – more in accordance with the judicial WTO dispute settlement procedures than with the diplomatic GATT procedures. US behaviour in the FSC case was more compliant than in the DISC case, more conforming in the Steel than in the Patents case; more in compliance in the second than in the first Hormones case, and more conforming in the Bananas than in the Citrus case.

*Table 2: US Behaviour in Disputes with the EU*

	<b>Complaints</b>	<b>Adjudication</b>	<b>Implementation</b>	<b>Enforcement</b>
<b>DISC (GATT)</b>	Avoiding	Following Avoiding	Manipulating Following	NA
<b>FSC (WTO)</b>	Avoiding	Following	Following	Following
<b>Patents (GATT)</b>	Following	Following Avoiding	Disregarding Following	NA
<b>Steel (WTO)</b>	Following	Following	Following	NA
<b>Hormones (GATT)</b>	Disregarding	Disregarding	Disregarding	Disregarding
<b>Hormones (WTO)</b>	Following	Following	Following	Following
<b>Citrus (GATT)</b>	Avoiding Following	Following	Disregarding	Disregarding
<b>Bananas (WTO)</b>	Avoiding Following	Following	Following Manipulating	Manipulating Following

The institutionalist hypothesis even fares well in a comparison of all the eight disputes. While the US openly disregarded the relevant procedures – at least temporarily – in all but one of the four GATT cases, it did not do so in a single one out of the four WTO cases. And while in two of the four WTO cases the US strictly followed the procedures throughout the whole dispute, it did not do so once out of the four GATT cases. Remarkably, in each of the four WTO cases the US behaved more compliantly than in any single GATT case. When the cases are ranked according to the degree to which US behaviour conformed to the relevant procedures the first three positions are clearly taken by WTO cases, i.e. the Steel, the second Hormones, and the FSC case. The next two positions are then held by the “worst” (in terms of compliance) WTO and the “best” GATT cases, i.e. the Bananas and the DISC cases. And the last three positions are occupied by GATT cases, namely the Patents, the Citrus and the first Hormones cases.

Moreover, the eight cases also seem to support the institutionalist assumption that the judicialization of procedures activates the effects specified above that international dispute settlement procedures might have. The cases demonstrate that where the GATT dispute settlement procedures were at all effective, this could be attributed to one effect, namely that of shaming and the potential loss of reputation. This was most obvious in the DISC and the Patents case, when the US, after a long history of disregarding, avoiding and manipulating the procedures, started to follow procedures to avoid shaming. The WTO dispute settlement procedure, by contrast, could not only rely on shaming, but also on states’ normative commitments, their concerns about the credibility of the WTO, and on authorized sanctions. In each of the four WTO cases the role of these effects – albeit to varying degrees – could be illustrated.

The institutionalist hypothesis is also strengthened by the fact that not only the US, but also the EU was more compliant under the WTO than under GATT. Certainly, in the WTO cases the EU was less compliant than the US. In the Hormones and in the Bananas case at least, though not in the FSC and the Steel case, the EU openly disregarded the WTO procedures. However, in a comparison between EU behaviour under GATT and under the WTO one can still maintain that it is more compliant under the judicialized WTO procedures than it was under the diplomatic GATT mechanisms. Most importantly, the dispute settlement practices between the EU and the US have certainly changed. As the cases show, the risk of an escalation of unauthorized sanctions, retaliation and counter-retaliation that characterized dispute settlement under GATT, has been substantially mitigated by the WTO procedures.

To be sure, this is not to argue that the judicialization of GATT/WTO dispute settlement procedures offers the best explanation for the judicialization of US dispute settlement behaviour. There may be better explanations for this! This is only to argue that the judicialization of GATT/WTO dispute settlement procedures contributed to the shift in US dispute settlement behaviour. To do so, however, I have to demonstrate that explanations that do not include the judicialization of GATT/WTO dispute settlement procedures fail to come to terms with this shift in US behaviour. Three alternative explanations seem to be of particular relevance: distribution of power, level of interdependence, US presidents’ belief systems.<sup>198</sup>

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<sup>198</sup> Zangl 2006: 246-254



(1) One alternative explanation might be a shift in the power distribution between the US and the EU. Taking the ratio of their respective GDPs as indication for the distribution of power between the US and the EU with respect to trade, however, this explanation does not fare particularly well. While US behaviour in its disputes with the EU was more in compliance with the dispute settlement procedures under WTO than under the old GATT system the distribution of power between the US and the EU has hardly changed. With minor fluctuations the ratio of their GDPs stayed almost constant with the GDP of the EU being around 10 per cent higher than the GDP of the US.

*Gross Domestic Product (in billions of US dollars; fixed exchange rates of 1995)*

	1975	1980	1985	1990	1995	2000
<b>USA</b>	3969	4772	5563	6521	7338	8987
<b>EU</b>	4548	5300	5849	7424	8613	9802
<b>US/EU</b>	0,87	0,90	0,95	0,87	0,85	0,91

*Source: World Bank, World Development Indicators Database*

(2) Another alternative explanation could be the level of interdependence between the US and the EU. Higher levels of economic interdependence might lead to higher levels of compliance with GATT/WTO dispute settlement procedures. In fact, using US foreign trade quotas as indicator, levels of interdependence have, with some fluctuations, increased from around 16 per cent in the mid-1970s to around 25 per cent in the mid-2000s. However, this more or less constant increase does not match the sudden change of US dispute settlement behaviour in the mid-1990s. Moreover, it does not match US levels of compliance under the GATT and WTO dispute settlement systems respectively. Notwithstanding growing levels of interdependence US behaviour in early GATT disputes such as the DISC case was more compliant than in later GATT disputes such as the first Hormones case; and it was more compliant in early WTO disputes such as the second Hormones case than in later WTO disputes such as the Bananas or the FSC cases.

*US Foreign Trade (in billions of US dollars)*

	1975	1980	1985	1990	1995	2000	2005
<b>Export</b>	149	280	302	552	812	1096	1175
<b>Import</b>	151	293	417	630	903	1475	1781
<b>BIP</b>	1825	2789	4220	5803	7397	9817	11735
<b>FT-Quota</b>	16%	20%	17%	20%	23%	26%	25%

*Source: US Census Bureau, Foreign Trade Division*

(3) Fundamental foreign policy beliefs of the respective US presidents could provide another alternative explanation for changes of US dispute settlement behaviour under GATT and WTO. US presidents with belief systems of a multilateralist might be more willing to settle disputes with the EU according to the relevant GATT/WTO dispute settlement procedures than US presidents with belief systems of a unilateralist. Taking Richard Nixon, Gerald Ford, Ronald Reagan and George Bush jun. as unilateralists while assuming that Jimmie Carter, George Bush sen. and Bill Clinton can be considered multilateralists this seems to explain differences in US behaviour under GATT and WTO respectively: 21 dispute years of the selected GATT disputes fall under unilateralist presidents (mainly Reagan) and only 17 dispute years under multilateralist presidents; under the WTO by contrast only 4 dispute years fall under unilateralist presidencies whereas 16 dispute years fall under multilateralist presidencies (mainly Clinton). However, US presidents' belief systems can hardly explain all the differences in US behaviour under GATT and the WTO. Most remarkably, under George Bush jun. presidency the US behaved in the Bananas, Steel and FSC disputes more compliant with WTO procedures than during Jimmie Carter's presidency when the US disregarded GATT procedures in both the Citrus and the DISC cases.

#### *US Presidents' Foreign Policy Beliefs*

<b>1973-1977</b>	<b>1977-1981</b>	<b>1981-1985</b>	<b>1985-1989</b>	<b>1989-1993</b>	<b>1993-1997</b>	<b>1997-2001</b>	<b>2001-2005</b>
Nixon/ Ford	Carter	Reagan	Reagan	Bush sen.	Clinton	Clinton	Bush jun.
Unilateral	Multi-lateral	Unilateral	Unilateral	Multi-lateral	Multi-lateral	Multi-lateral	Unilateral

Overall, as alternative explanations of US/EU dispute settlement behaviour fail, the eight GATT/WTO disputes underpin the hypothesis that the judicialization of international dispute settlement procedures sustains the judicialization of states' dispute settlement behaviour. This, of course, does not prove that the rule of law has already emerged within the WTO. The fact that the US and especially the EU did not always follow WTO procedures to settle their dispute serves as a reminder of this. But one can claim that not only the procedures, but also the corresponding practices of dispute settlement are judicialized to a greater degree today under the WTO than under the old GATT. One can also claim that in the context of the GATT/WTO an international rule of law is gradually emerging. Hence, contrary to realist theory, an international rule of law indeed seems to be possible, at least in the GATT/WTO regime. However, unlike early idealism, we should be cautious in seeing this as indication that international law can be established beyond the GATT/WTO regime.

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