SWP Comments

Stiftung
Wissenschaft und
Politik

German Institute
for International and
Security Affairs

Conflict Management in Transatlantic Trade Relations

Not Every Dispute Should Be Subject to the WTO

Stormy Mildner / Oliver Ziegler

In early May this year, one of the longest transatlantic trade rows – the dispute over the European Union's import ban on hormone-treated beef from the United States – was temporarily settled. Given the multitude of trade disputes that could possibly escalate this year – the Airbus-Boeing conflict, the controversy over genetically modified corn, and the "Buy American" clause – it is worth thoroughly reflecting on the different dispute-settlement fora. The three available institutions – the World Trade Organization (WTO), the Transatlantic Economic Council (TEC), as well as several institutionalised bilateral dialogues on the political and working levels – are not equally suited to address different types of trade conflicts.

The twenty-year-old dispute over the European import ban of hormone-treated beef came to a surprising conclusion in early May 2009. By signing a Memorandum of Understanding, the European Union agreed to increase its duty-free imports of non-hormone-treated beef in the coming years, while the United States agreed to refrain from imposing further retaliatory duties on EU products ranging from French Roquefort cheese to Italian mineral water. These duties were due to be imposed by mid-May. In addition, both sides will refrain from taking any further action on the hormone-treated beef case over the next eighteen months.

While the dispute is not permanently settled, the trading partners were able to contain it by way of diplomatic negotiations. Further escalation, due to the implementation of so-called carousel sanctions by the United States, was prevented.

Building on the successful resolution of the beef dispute, in mid-July US Trade Representative Ron Kirk and EU Trade Commissioner Catherine Ashton agreed that four major trade issues should be resolved in a similar way in upcoming negotiations: US rice exports to the European Union; a disagreement over US online gambling laws; the so-called Irish music dispute, which relates to music licensing; and trade implications of chemical regulations in the European Union as well as in the United States.

Dr. Stormy Mildner is researcher at SWP's The Americas division
Oliver Ziegler is PhD Fellow at SWP's The Americas division

High Conflict Potential

Currently, there are thirteen active WTO cases pending. Seven complaints are directed against the United States, such as the continued existence and application of certain anti-dumping practices, while six are concerned with practices in the European Union, for example import restrictions on chlorine-washed poultry. Beyond these issues, there are several latent conflicts lingering, for example the disputes on American subsidisation of biofuels or US online gambling laws. These trade conflicts can be divided into three categories: ideological disputes, market-access disputes, and industry-specific (strategic) disputes. Not only does a conflict's origin fundamentally determine whether or not it can be successfully settled, it also determines the appropriate body in which it should be discussed.

Ideological conflicts

Different risk perceptions form the basis of numerous trade disputes. Since the terrorist attacks of September 11, 2001, the United States has increasingly focussed on national security, thereby taking a variety of precautionary actions. The 2007 legislation on Container Security, for example, lays down that 100 per cent of US-bound containers must be fully scanned at port of shipment starting, at the latest, from July 1, 2012. The legislation has become a matter of transatlantic contention due to the high costs it imposes on European ports not fitted for such scanning. For its part, Europe has become a much more risk-averse actor in the areas of food safety and the environment. When faced with uncertainties about the potential risks of products, European regulators are much more willing to take precautionary measures than their American counterparts. Yet, a lack of trust in the trade partner's intentions increases the conflict potential, particularly where standards are concerned: the European Union points to consumer safety when, for example, defending its import ban on chlorine-treated poultry; the United States views this as a hidden agenda to protect Europe's agricultural sector.

Because these kinds of trade dispute are often based on societies' underlying risk perceptions, they tend to escalate quite easily and are difficult to deal with. The current dispute concerning genetically modified corn falls into this category. Referring to possible health risks, the European Union has imposed strict rules on approval and marketing. Since 1998, Mon 810 has been the sole type of genetically modified corn approved for commercial cultivation in the European Union, with the individual Member States having the last word on that matter. In May 2003, the United States filed a WTO complaint. Although the Appellate Body ruled against the European Union in autumn 2006, implementation of the panel decision has been slow. When several EU Member States, among them Germany, recently prohibited the cultivation and sale of the corn, the conflict escalated. Through the European import ban, the United States loses access to a large and important market. Moreover, the United States fears that other countries might follow the European example and implement strict rules and prohibitions on genetically modified corn.

Market-access conflicts

Classic conflicts in transatlantic trade relations can be ascribed to market-access and protectionism concerns that are based on the motivation to shield domestic businesses from foreign competition. As can be currently observed, in times of economic crises trade partners increasingly make use of anti-dumping measures as well as protective duties in order to secure domestic production and jobs. In general, conflicts arising from these measures can be kept under control thanks to the strict rules of the WTO. Individual conflicts deeply rooted in domestic politics of the defendant country may, however, prove difficult to tackle by means of the WTO dispute-settlement procedure.

A current transatlantic dispute in this area has been sparked by the Buy American clause, which is included in the US economic stimulus bill of spring 2009 (American Recovery and Reinvestment Act of 2009). The clause seeks to ensure that only US iron, steel, and manufactured goods are used in projects funded by the bill. Although the clause requires US compliance with international trade-policy obligations, such as the plurilateral WTO Agreement on Government Procurement (GPA), the European Union regards it as problematic. This is mainly due to the GPA's limited scope: US mass transit and highway projects are exempt from the WTO agreement. Moreover, the United States could avoid accusations of breaking its WTO obligations by passing the stimulus funds to the states, many of which are immune from trade obligations. Only thirty-seven states have agreed to the GPA. Accordingly, there are exceptions for the acquisition of mass transit vehicles in New York, for paper, ships, and fuel in Washington, and for beef in South Dakota. These loopholes bear the risk that American goods might be preferred to foreign/European ones.

Industry-specific (strategic) conflicts

The third type of conflict is related to the promotion of industries that are of strategic importance, economically or politically. Temporary subsidies such as tax credits are supposed to facilitate these industries' market access and protect them from foreign competition. Since strategic conflicts often stem from deep-rooted political interests, they tend to be more difficult to solve than market-access conflicts.

The dispute over aviation subsidies falls into this conflict category. The Airbus-Boeing conflict reached a peak in 2004 when both the United States and the European Union filed separate disputes with the WTO. While the Americans argue that EU launch-aid to Airbus clearly violates WTO rules, the European Union views the awarding of public contracts to Boeing – including the acquisition of military planes and federal assistance to R&D in military aviation – as an act of unfair cross-subsidisation. The WTO is likely to deliver a preliminary ruling in the US case against the EU towards the end of August, to be followed about six months later by the decision in the countersuit. Most likely, both parties will be found guilty of violating WTO rules. The case became even more contentious when Germany, France, Great Britain, and Spain discussed possible government loans of up to € 3.5 billion for the new A350 airliner at the Paris Air Show in June. Particularly in light of the current state of the aviation industry – orders are expected to decrease dramatically this year – subsidisation on both sides of the Atlantic has become a contentious issue.

The Way forward

Which bodies should the European Union employ to settle, or at least contain, these three types of conflict?

The WTO as mediator

One way of settling transatlantic trade disputes is by making use of the WTO's Dispute Settlement Body (DSB). While being a powerful tool for enforcing international trade law, its – sometimes long and tedious – legalistic process rarely produces quick results. For trade conflicts in sensitive regulative areas (ideological trade conflicts), such as the debate on genetically modified corn, the legalistic dispute-settlement mechanism is hardly suited to bringing about a stable, long-term resolution – even more so since the WTO rules remain rather unclear on these issues. The weaknesses of this settlement mechanism pertain to other types of conflict as well. With regard to strategic conflicts with a high value in dispute – a prime example of this would be the Airbus-Boeing conflict – bilateral negotiations are far more conducive to long-term resolutions than the existing WTO mechanisms. The European Union would certainly be within its rights to take action against

the Buy American clause under GPA law. Because the agreement does not automatically apply at the state level, such a move, however, seems unpromising. Moreover, by further escalating the situation, the European Union might provoke US retaliation. After all, it can be questioned whether all EU stimulus measures are fully WTO compliant.

The Transatlantic Economic Council as dispute-settlement authority

Given the lack of a bilateral alternative to the WTO's dispute-settlement mechanism, decision-makers might be tempted to negotiate potential WTO disputes under the umbrella of the Transatlantic Economic Council. Since the launch of the TEC in April 2007, considerable progress has been made regarding the harmonisation and mutual recognition of standards and regulations, particularly with respect to the safety of cosmetics, pharmaceuticals, and electrical devices. Under the leadership of European Commission Vice-President Günter Verheugen and Michael Froman, deputy assistant to the US president and deputy national security advisor for international economic affairs, the body operates at a high political level. However, for both functional and personnel reasons, it remains ill-suited to dispute settlement. As last year's poultry dispute – identified as a litmus test for the European Union's willingness to cooperate with the TEC – has demonstrated, engaging in dispute settlement distracts the burgeoning forum from its actual function: the harmonisation and mutual recognition of standards, the reduction of non-tariff barriers, and the prevention of new conflicts by jointly developing product standards in new industries (e.g., nanotechnology).

Even if some Europeans might hope to use the TEC for negotiations on the Buy American clause, it is necessary to dampen their expectations. A dialogue within the prominently staffed body might certainly contribute to trust-building. In the end, however, it is the US Congress that enjoys legislative authority over this emotionally charged topic. And, just like their counterparts in the European Parliament, congressmen are represented in the TEC only indirectly in an advisory function.

Bilateral consultation and agreements

As long as no institutionalised bilateral dispute-settlement procedure exists, such as in the North American Free Trade Agreement (NAFTA) between the United States, Canada, and Mexico, the transatlantic trade partners will be bound to dialogue and consultation in most areas. US Trade Representative Ron Kirk and EU Trade Commissioner Catherine Ashton have successfully made a step in the right direction. It can be assumed that both sides will also reconsider bilateral dialogue after the upcoming WTO rulings on the Airbus-Boeing case. The various dialogues on the political and working levels that were fostered under the New Transatlantic Agenda in 1995 form the institutional framework for such bilateral talks. While regulatory issues should be subject to the TEC, and the WTO should still be seen as a last resort, bilateral consultations can lead to pragmatic resolutions, as has been demonstrated in the hormone-treated beef case.

Ultimately, by choosing the "proper" dispute-settlement body, successful resolution of trade disputes becomes much more likely. Even if disputes cannot be settled immediately, escalation can be prevented and conflicts contained.

© Stiftung Wissenschaft und Politik, 2009
All rights reserved

These Comments reflect solely the authors' views.

SWP
Stiftung Wissenschaft und Politik
German Institute for International and Security Affairs

Ludwigkirchplatz 3–4
10719 Berlin
Telephone +49 30 880 07-0
Fax +49 30 880 07-100
www.swp-berlin.org
swp@swp-berlin.org

ISSN 1861-1761

Translation by Franziska Groß

(English version of SWP-Aktuell 36/09)