

The tension between political and legal interests in trade disputes: the case of the TEP Steering Group

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Beiträge zum Transnationalen Wirtschaftsrecht

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The Tension between
Political and Legal Interests
in Trade Disputes:
The Case of the TEP Steering Group

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**The Tension between Political and Legal Interests
in Trade Disputes:
The Case of the TEP Steering Group**

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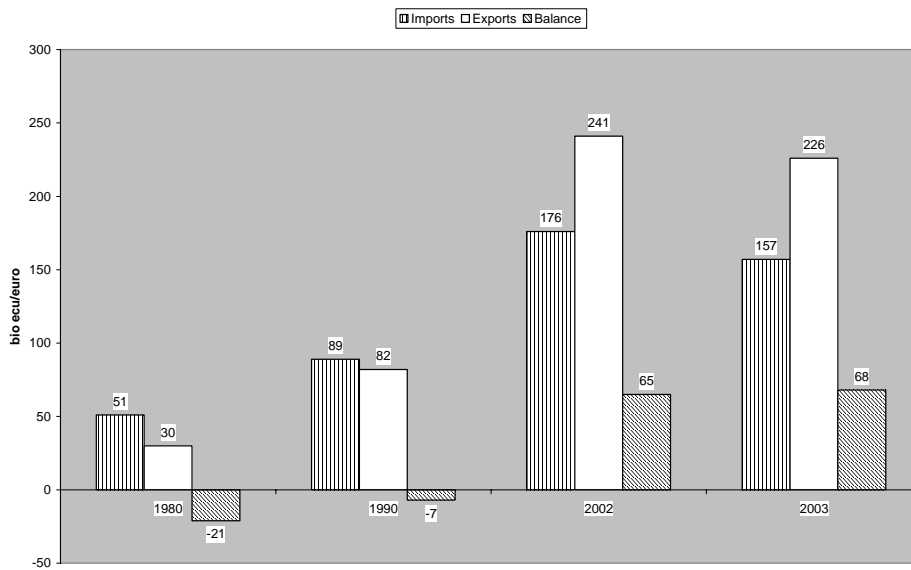
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A. The bilateral trade relationship

The EU and the US are each other's most important trading partners with the largest bilateral trade and investment relationship in the world. In the area of trade, the US is the largest trading partner for the EU, while the EU is the second largest trading partner for the US after Canada and before Mexico. In 2003, around 26% of total EU exports went to the US (226 billion dollars), while 17% of total EU imports came from the US (157 billion dollars).

EU merchandise trade with the US



Source: <http://trade-info.cec.eu.int/doclib/html/113465.htm>

The bilateral investment relationship is even more significant: the EU and the US are by far the most important source and destination for foreign direct investment (FDI) for each other. Between 1998 and 2001 the share of EU FDI outflows to the US accounted for more than 52% of total EU investment, while more than 61% of all EU FDI inflows originated in the US. In 2003, the EU investment position in the US amounted to 856 billion dollars, while total US FDI in the EU accounted for 845 billion dollars. Another important link of the transatlantic economy are foreign affiliate sales which amounted to 2.8 trillion dollars in 2001, more than five times the total bilateral trade.¹

Given this large and interdependent transatlantic economic relationship it is quite natural that trade tensions and disputes arise. However, they account for only 1-2% of total trade and investment between the EU and the US. Even though only a small amount is affected, some of the conflicts led to a severe strain on the transatlantic relationship.

¹ European Commission on Bilateral Trade Relations with the USA of September 2004, available on the Internet: <http://europa.eu.int/comm/trade/issues/bilateral/countries/usa/index_en.htm> (visited on 12. May 2004); *Hamilton/Quinlan*, *Partners in Prosperity*, 21, 31, 93.

B. Transatlantic trade conflicts

There is a wide range of trade conflicts between the EU and the US which affect diverse areas such as agriculture, aircraft industry, services, steel, tax systems and standards. *Gary Hufbauer* of the Institute for International Economics and *Frederic Neumann* of the Johns Hopkins School for Advanced International Studies divided these conflicts into three categories: they distinguished between market access, industrial policy, and ideological cases.² Although these categories overlap sometimes, they serve as a useful distinction for the following analysis.

I. Market Access Conflicts

Market access cases comprise traditional “on the border” trade conflicts regarding tariffs and quotas, antidumping and countervailing duties, safeguard restrictions, etc. Examples for transatlantic disputes about market access are the EU banana regime which established preferential treatment for banana producers from ACP (African, Caribbean, and Pacific) countries, thereby discriminating against producers from Central American countries, US restrictions on steel imports, or the US Byrd Amendment which pays the collected antidumping and countervailing duties to the injured US companies.

II. Industrial Policy Conflicts

Disputes in the industrial policy category deal with non-tariff barriers to trade, such as regulatory issues, preferential treatment of domestic industries, competition policy, subsidies and support measures. During the previous GATT-Rounds tariffs were reduced drastically so that after the Uruguay-Round industrial tariffs in the US amounted to 3.1% and in the EU to 2.9%. Consequently, non-tariff barriers to trade became increasingly important, e.g. transatlantic industrial policy conflicts concerning European shipbuilding subsidies or EU export subsidies under the Common Agricultural Policy (CAP). Also the high-profile conflict about Foreign Sales Corporations (FSC), which provided partial tax breaks for foreign export sales subsidiaries, falls into this category. The EU regarded these FSC provisions as an illegal export subsidy for US multinational companies and challenged them successfully at the WTO in 1999. As a successor, the US enacted the “Extraterritorial Income Exclusion Act” (ETI) in 2000, which was again ruled to be incompatible with WTO rules. In the end, the WTO authorized the EU to impose sanctions of up to 4 billion dollars against US exports – the highest amount ever permitted by the WTO. As the US did not change the contested law, the EU started to impose retaliatory tariffs on 5% of the amount starting in March 2004, which was supposed to rise every month by 1%. Finally, in October 2004 the conflict was partially resolved when both houses of Congress passed a bill which repealed the export tax breaks of the FSC/ETI system and reformed US

² *Hufbauer/Neumann*, SAIS Working Paper Series WP/01/02 (2002), 6 ff.

corporate tax law. As a consequence, the EU lifted the sanctions but decided nevertheless to check the WTO compliance of the new legislation.³

Another industrial policy conflict which has the potential to severely strain the transatlantic relationship at the moment is the conflict about European Airbus subsidies. This dispute has languished for several years, but in October 2004, during the presidential election campaign, President *Bush* requested consultations with the EU in the WTO on the massive “unfair” government support to Airbus. In response, the EU requested WTO consultations with the US on subsidies granted to Boeing. With the reciprocal complaint at the WTO, the US-EU aviation trade dispute threatened to escalate. Particularly due to the economic and political importance of the aviation industry, the Airbus-Boeing conflict poses the danger of seriously straining the WTO and burdening transatlantic relations. Recognizing this, the EU and US agreed in January 2005 to begin three months of negotiations on eliminating all types of aircraft subsidies. In return, both parties agreed not to request a WTO panel. However, the talks were suspended in March over the terms of the negotiating agreement so that the outcome of the conflict remains unclear.

III. Ideology Conflicts

The last category of trade conflicts between the EU and the US involves “ideological” disputes where also non-trade concerns are involved. These cases deal with domestic regulations which were enacted to pursue legitimate national goals such as public health, consumer protection, environmental protection, data privacy or food safety regulations. In the US, food safety standards are largely regulated on a federal level by agencies such as the Food and Drug Administration (FDA). In response to the 1990s BSE and food and mouth disease crises, the EU established a Food Safety Authority and demanded the establishment of the “precautionary principle”. This has subsequently led to conflicts with the US, as food safety regulations can also act as non-tariff barriers to trade. Transatlantic conflicts in this area deal with issues such as the approval and labeling of genetically modified organisms (GMO), or restrictions on US poultry meat imports because of the use of chlorine.

Another important ideology conflict regarding food safety which has influenced the relationship for many years is the hormone beef case. In 1989, the EU implemented a ban on US imports of hormone-fed beef which was declared safe by the FDA. The EU justified the ban on the grounds of consumer and health considerations. In 1995 the US took the case to the WTO, which ruled that the ban was not consistent with the WTO Sanitary and Phytosanitary (SPS) Agreement as it lacked scientific evidence. Nevertheless, the EU maintained the ban so that the WTO authorized the US to impose retaliatory tariffs on imports from the EU worth 117 million dollars. In 2003, the EU passed a new ban, presenting scientific evidence that hormone residues were dangerous for human health. Because of the continued use of sanctions by the US, the EU initiated WTO dispute settlement proceedings in No-

³ European Commission on WTO Dispute Settlement, Cases involving the EU: WT/DS108 – Tax treatment for ‘Foreign Sales Corporations’ of September 2003, available on the Internet: <<http://trade-info.cec.eu.int/wtodispute/show.cfm?id=152&code=1>> (visited on 10 June 2004).

vember 2004. The outcome of this case remains unclear as the US remains doubtful of the scientific evidence presented.⁴

C. Different Ways of Dispute Settlement for Transatlantic Conflicts

I. Multilateral dispute settlement

These three categories of trade conflicts between the EU and the US can either be solved in the multilateral dispute settlement system of the WTO, or on a bilateral level. The WTO dispute settlement understanding (DSU) is one of the most comprehensive international treaties in the area of dispute settlement. The former GATT dispute settlement system was remarkably strengthened during the Uruguay-Round and moved from a more diplomatic approach to a more judicial, legally binding system. The DSU still provides for a consultation period; however, if the conflict has not been settled after 30 days, the Panel procedure starts automatically. The most important change is the automatic adoption of Panel and Appellate Body Reports, which can no longer be blocked by the accused party alone. This is a substantial progress compared to the GATT system where the decisions had to be made unanimously. As such, the accused party had de facto a veto power.

Nevertheless, there are fundamental problems regarding this “legalistic” dispute settlement system. First, WTO panels and the Appellate Body have to rely on existing trade rules which are sometimes ambiguous, contradictory and thus open for interpretation. Furthermore, WTO members do not agree on important regulatory subjects regarding for example consumer protection, food safety, and environmental protection.⁵ Thirdly, some of the efforts at the multilateral level have led to “tit for tat” retaliations, which threaten the entire multilateral trading system: in order to strengthen the bargaining position in a current trade conflict, a new conflict against the other party is brought to the WTO. As such, conflicts can easily lead to new conflicts in other areas. Because of these problems, trade conflicts which are referred to the WTO can cause trade wars and damage the transatlantic relationship.⁶ Thus, many observers have emphasized the necessity of a greater reliance on a diplomatic approach on a bilateral level between the EU and the US.

II. Bilateral economic cooperation and dispute settlement

The increasing number of trade disputes in the 1990s, which could not be solved on the multilateral level, and the renewed importance of economic issues in the transatlantic relationship after the end of the Cold War led to the conviction in the US and the EU that bilateral conflict solution should be improved. Therefore, both sides

⁴ *Pollack*, in: Petersmann/Pollack (eds.), *Transatlantic Economic Disputes*, 65 (75 f.); *Ahearn*, CRS Issue Brief for Congress 2003, 8 ff.; European Commission on WTO Dispute Settlement, EU Requests WTO to Confirm that there is no Justification for US/Canada to Continue to Apply Sanctions of November 2004, available on the Internet: <http://europa.eu.int/comm/trade/issues/respectrules/dispute/pr081104_en.htm> (visited 10 June 2004).

⁵ *Barfield*, *Intereconomics* 37 (Nr. 2, 2002), 131 (131 ff.).

⁶ *Decker/Mildner*, *DGAP-Analyse* (Nr. 3, 2003), 1 (2 f.).

started several initiatives to strengthen and institutionalize bilateral economic cooperation and conflict resolution outside the formal dispute settlement system of GATT/WTO. As late as June 2001, both sides reaffirmed the importance of bilateral solutions in their statement of the Göteborg summit:

“Consultation, rather than litigation, should be the preferred method of managing our disagreements. We are also determined to work together to explore ways to achieve this objective, including through mediation, and to redouble our efforts to find practical and mutually acceptable solutions to all outstanding trade disputes, in accordance with WTO rules.”⁷

1. *Transatlantic Declaration 1990*

The first transatlantic initiative in this context was the Transatlantic Declaration which was signed in 1990, and which established the biannual summits between the presidents of the US, the European Council and the European Commission. The intention was to establish a new transatlantic structure and new forms of cooperation in order to reaffirm the partnership and the common values and goals.⁸ However, the final declaration was less substantial than initially envisioned: the common activities listed were little more than the activities pursued at the UN, and the agreed economic cooperation was only a continuation of already existing measures. The main improvement was the reevaluation of the transatlantic relationship.

The summits between the EU and the US are still alive until today; however they were reduced to only one annual meeting. The last summit took place on June 20, 2005 in Washington, DC, where the Initiative to Enhance Transatlantic Economic Integration and Growth was signed. The main achievement lies in the adoption of the “2005 Roadmap for US-EU Regulatory Cooperation”, and the establishment of a US-EU high-level Regulatory Cooperation Forum with the aim of improving the transatlantic regulatory dialogue. In addition, the two sides decided to stimulate open and competitive capital markets, to enhance trade, travel and security, and to promote energy efficiency.⁹

2. *New Transatlantic Agenda 1995*

The political and economic cooperation between the EU and the US was further strengthened by the “New Transatlantic Agenda” (NTA) and the comprehensive “EU-US Joint Action Plan”, which were signed by US President *Clinton*, Jacques *Santer*, President of the European Commission, and *Felipe Gonzalez*, Spanish

⁷ Statement of the EU-US Summit in Göteborg of June 2001, available on the Internet: <http://europa.eu.int/comm/external_relations/us/sum06_01/statement.htm> (visited 12 May 2004).

⁸ *Paugam*, IFRI Policy Paper (Nr. 2, 2003), 1 (5).

⁹ The United States and the European Union Initiative to Enhance Transatlantic Economic Integration and Growth of June 2005, available on the Internet: <www.whitehouse.gov/news/releases/2005/06/print/20050620-17.html> (visited 21 June 2005).

President of the European Council at the summit in Madrid in 1995. The idea behind the NTA was to move from a stage of negotiations and consultations to cooperative action. The transatlantic relationship was at a low point in 1994/1995, and both sides were afraid that without an effort to renew the partnership they would grow apart. Tensions had arisen in several areas. Security issues in Bosnia led to foreign policy frictions between the Atlantic partners and Europeans felt alienated by President *Clinton* who had negotiated an agreement with APEC in November 1994 and had proposed a Free Trade Area of the Americas (FTAA) until 2005. Therefore, the Transatlantic Agenda was launched to demonstrate a renewed commitment to the transatlantic partnership.¹⁰

The NTA Action Plan set out four specific policy areas in which joint activities should be improved, ranging from foreign policy issues (promoting peace and stability, democracy and development around the world), global challenges (combating international crime and terrorism, environmental challenges), economic issues (contributing to the expansion of world trade and closer economic relations) to the building of bridges across the Atlantic (bringing together non-governmental actors from both sides of the Atlantic to discuss transatlantic policy questions). The NTA put a special emphasis on the economic partnership: both sides pledged to build a “New Transatlantic Marketplace” by reducing and eliminating trade and investment barriers between them. In particular, non-tariff barriers like regulations, standards and norms, as well as testing and certification requirements were addressed. The EU and the US specifically stressed the importance of mutual recognition agreements (MRAs) for testing and certification, and an improved regulatory cooperation in order to prevent conflicts in this area.¹¹

The NTA also established a more institutionalized governance structure: a so-called “Senior Level Group” and a “NTA Task Force” were established to implement and monitor the transatlantic agenda. In addition, the Transatlantic Business Dialogue (TABD) was created as an integral part of transatlantic cooperation.

Altogether, the economic pillar of the NTA remained quite vague, as it did not require any specific commitments and did not contain a deadline for implementation. The most important feature of the NTA Marketplace was the commitment to closer regulatory cooperation. With the initiative and support of the TABD an important MRA could be signed in 1997, which covered the area of telecommunications equipment, electromagnetic compatibility, electrical safety, recreational craft, pharmaceuticals, good manufacturing practices, and medical devices.

¹⁰ *Krenzler/Schomaker*, *European Foreign Affairs Review*, (Nr. 1, 1996), 9 (9 ff.); *Frost*, *Policy Brief* (Nr. 6 1998), 1 (1 f.); *Bergsten*, *Competitive Liberalization and Global Free Trade: A vision for the early 21st century*, Institute for International Economics, Working Paper (Nr. 15, 1996), available on the Internet: <<http://www.iie.com/publications/wp/1996/96-15.htm>> (visited 7 July 2004).

¹¹ The New Transatlantic Agenda of December 1995, available on the Internet: <http://europa.eu.int/comm/external_relations/us/new_transatlantic_agenda> (visited 12 May 2004); *Meng*, in: Petersmann/Pollack (eds.), *Transatlantic Economic Disputes*, 507 (517 f.); *Krenzler/Schomaker*, *European Foreign Affairs Review*, (Nr. 1, 1996), 9 (24).

3. *Transatlantic Economic Partnership 1998*

Despite the already existing transatlantic framework, the EU and the US remained unable to solve several trade conflicts which remained high on the agenda, such as the European banana regime, problems regarding food safety (import ban on hormone-fed beef), as well as extraterritorial laws such as the Helms Burton Act and the Iran Libya Sanctions Act of 1996. In response, the Transatlantic Economic Partnership (TEP) was created in May 1998 to further strengthen the economic link and to address trade concerns before they developed into conflicts. Originally, *Sir Leon Britton*, Vice President of the European Commission, had proposed an initiative in 1995 to establish a “New Transatlantic Marketplace Agreement” (NTMA) with the US, which aimed at the abolishment of tariffs on industrial goods, and free trade in services. When the original plan was rejected, a majority of the initiatives were then transformed into the TEP initiative, albeit in a less ambitious way.¹²

At the beginning of November 1998, both sides adopted a work program, the so-called “TEP Action Plan”, which identified areas for common activities through multilateral and bilateral actions. The TEP Action Plan specifically required the EU and the US to undertake bilateral consultations in areas such as regulatory processes in agriculture (e.g. food safety, plant and animal health, biotechnology), intellectual property, procurement and competition – major sources for trade frictions. A special emphasis was put again on regulatory cooperation: as many trade conflicts arise due to different regulatory approaches in the EU and the US, stronger regulatory cooperation was seen as a means to prevent disputes at an early stage. This approach was strongly supported by the TABD, which was interested in repeating the success of the MRA from 1997.

The TEP Statement and Action Plan also provided a framework for dealing with bilateral conflicts through the creation of the “TEP Steering Group”. This group, which replaced earlier sub-cabinet structures between the European Commission and the US Administration, was assigned the task of managing the transatlantic day-to-day trade and investment relations. It was specifically established to:

- monitor the implementation of the agreements reached under TEP;
- identify and review cooperative objectives on an ongoing basis;
- provide a horizontal forum which can receive recommendations made by business, environment, consumer and labour dialogues;
- provide a horizontal forum for bilateral consultation and early warning on any matter of trade and investment relevance, with a view to preventing conflicts and resolving trade frictions.¹³

Additionally, ten TEP specialized working groups were established to assist the TEP Steering Group in most of the issues mentioned in the Action Plan, such as the TEP working group on technical barriers to trade, on food safety, services, or e-commerce. The TEP also created additional civil society dialogues in addition to the

¹² European Commission, *The New Transatlantic Marketplace: Communication of Sir Leon Brittan, Mr. Bangemann and Mr. Monti 1998, 2-3; Pollack*, in: Petersmann/Pollack (eds.), *Transatlantic Economic Disputes*, 65 (85).

¹³ *The Transatlantic Economic Partnership: Action Plan of November 1998*, available on the Internet: <<http://europa.eu.int/comm/trade/bilateral/usa/1109tep.htm>> (visited 15 May 2004).

TABD: the Transatlantic Consumer Dialogue (TACD), the Transatlantic Environment Dialogue (TAED), and the Transatlantic Labour Dialogue (TALD). Furthermore, in 1999 the Transatlantic Legislator's Dialogue (TLD) was founded. However, none of the dialogues were as active as the TABD, and in 2000 the TAED was even dissolved due to a lack of funding by the US.¹⁴

4. *Transatlantic Early Warning System 1999*

On the basis of the previous three agreements, the EU and the US set up a "Transatlantic Early Warning Mechanism" at the Bonn Summit in June 1999. The aim was to establish principles and guidelines for the identification and prevention of possible trade conflicts. This Early Warning System had become necessary as transatlantic summits were increasingly dominated by long-standing trade conflicts regarding the import of bananas, hormone-fed beef, FSCs, etc. As both sides were afraid that these disputes would disrupt the entire transatlantic partnership, as well as undermine the credibility of the WTO, they were looking for ways to prevent these conflicts through an institutionalized framework.

The joint US-EU statement laid out a set of principles to ensure this objective: first, transparency was seen as the basis for early warning which should be provided for by information exchange between the two partners: "Early warning is intended to improve the capacity of each side to take the others side's interests into account at an early stage when formulating policy, legislative, or regulatory decisions, without limiting each side's existing decision-making autonomy."¹⁵

Second, each side should ensure that "its internal procedures enable it to detect at an early stage trade, other economic, diplomatic, and global issues that have a transatlantic dimension, including policy, legislative, or rule-making initiatives." Potential trade and investment problems which were identified should then be reported to the TEP Steering Group, while "diplomatic, global or other problems" should be announced to the NTA Task Force. The two groups should ensure that the items, which had the potential to become trade conflicts, were followed up, "notably by assigning contact points, facilitating consultations and agreeing on timelines for reporting back."¹⁶

The TEP Steering Group and the NTA Task Force should then inform the Senior Level Group, which has the task to prepare the annual summits between the US and the EU. On the basis of the information presented by the two groups, the Senior Level Group should define the issues to be put on the agenda of the bilateral summits. As such, the work of the TEP Steering Group would be dealt with at the highest level. However, this bilateral Early Warning System focuses on the identification of potential problem areas. It does not force the EU or the US to alter the contested regulation or directive in question. Both sides are thus able to point out the potential sources for

¹⁴ Pollack, in: Petersmann/Pollack (eds.), *Transatlantic Economic Disputes*, 65 (90).

¹⁵ Joint EU-US Statement on 'Early Warning' Mechanism of June 1999, available on the Internet: <<http://trade-info.cec.eu.int/doclib/html/111711.htm>> (visited 20 May 2004).

¹⁶ Ibid.; US-EU Summit Outlines Early Warning System, Falls Short on Services, *Inside US Trade* (25.07.1999), 1, 15 ff.

conflict; however this does not imply that conflicts will be prevented or solved in the future.¹⁷

Between 1998 and 2002, the TEP Steering Group dealt with a variety of potential and actual trade problems: the EU raised concerns regarding the US Section 201 Safeguards Investigation on Steel Wire Rod, US Harbor Services Tax/Fee, the Byrd Amendment, “Carousel” Legislation or US Sarbanes-Oxley legislation. In return, the US raised concerns on the EU Directive on Waste from Electrical and Electronic Equipment (WEEE), the European ban on tallow/animal feeds (specific risk material), Airbus A380 (governmental financial support), Hush kits (EC rules on aircraft noise) or poultry exports to the EU.¹⁸

In October 2000, the European Commission issued an overview and assessment of the actions taken in the various areas of the TEP, the TEP Action Plan, and the Early Warning Mechanism. They regarded the overall performance of the TEP Steering Group as “very satisfactory” concerning the raising of potential trade disputes. However, the follow-up and the resolution of conflicts were seen as problematic:

The early warning mechanism has proven its usefulness as a means to flag the existence of potential trade problems before they become trade disputes and to bring them, if necessary, to the attention of the Senior Level Group (SLG) and Ministers. However, the follow-up to the specific items raised, and the solution of the problems, have often depended on the nature of the item and the position of each side’s administration.¹⁹

In its conclusion, the European Commission criticized particularly the lack of political will on both sides to reconsider their trade policy and existing regulatory barriers for the successful prevention of trade conflicts. Other negative points regarding the working basis for the TEP Steering Group included:

- the difficulties to have established regulations and practices on both sides changed in order to take into account the other party’s interests and concerns;
- the difficulties of solving problems caused by the different decision-making structures on both sides of the Atlantic;
- the large number of issues which hinders appropriate focus on priorities;
- the lack of resources in both administrations devoted to the TEP.²⁰

¹⁷ *Pollack*, in: Petersmann/Pollack (eds.), *Transatlantic Economic Disputes*, 65 (87 f.).

¹⁸ An Illustrative List of Recent Early Warning Items with the US of January 2004 by the European Commission, available on the Internet: <<http://europa.eu.int/comm/trade/issues/bilateral/countries/usa/lewi.htm>> (visited 16 June 2004); TEP Early Warning Issues from June 1999 until March 2002 by the US Trade Representative, available on the Internet: <<http://www.ustr.gov/regions/eu-med/westeur/2002-03-TEP-earlywarning.pdf>> (visited 16 June 2004).

¹⁹ European Commission, *The Transatlantic Economic Partnership Overview and Assessment*, DG TRADE.E.3 of October 2000, available on the Internet: <<http://trade-info.cec.eu.int/doclib/html/11172.htm>> (visited 10 May 2004).

²⁰ *Ibid.*

5. *Positive Economic Agenda 2002*

Despite the various transatlantic agreements and political declarations, as well as the Early Warning System, progress on the solution of trade conflicts remained slow. Therefore, at the EU/US summit in Washington, DC, in May 2002, the Positive Economic Agenda (PEA) was adopted. Instead of focusing on trade conflicts and transatlantic differences, the PEA looked for possible areas of bilateral cooperation to foster transatlantic commerce. Thus, the PEA was in part a reaction to the negative results of the Early Warning System and the problems of the TEP Steering Group, which had already been criticized by the European Commission in its report from October 2000. A “PEA Roadmap” was established in December 2002 to define the most promising sectors for cooperation. Initial areas included the financial markets dialogue, guidelines for regulatory cooperation and transparency, SPS issues, the insurance sector, and electronic customs.²¹ Thus, in contrast to the Early Warning System, the PEA tried to reduce conflicts through closer bilateral cooperation.

6. *The TEP Steering Group Today*

The TEP Steering Group is still active today and confers several times a year – mostly by video conference – for a review of central issues in the transatlantic economic relationship. On the US side, it is chaired by Assistant US Trade Representative for Europe & the Mediterranean *Catherine Novelli* and, on the EU side, by *Ian Wilkinson*, Director for Sectoral Trade Questions and Market Access, Bilateral Trade Relations III in the DG Trade of the European Commission. Originally, the TEP Steering Group was designed to act as an early warning system for bilateral trade conflicts, and to deal with all aspects of trade policy that may escalate in the future. However, today it is most active with respect to implementing and managing the various issues of the Positive Economic Agenda. The TEP Steering Group is the main forum for coordinating the EU/US economic relationship, and is promoting bilateral regulatory cooperation between the EU and the US.

Illustrative List of Recent Early Warning Items (last updated 1/2004)

- US anti-terrorism initiatives, esp. transport security and bio-terrorism preparedness act
- US Sarbanes-Oxley legislation
- EC Trade Barrier Investigation regarding mustard
- US ban on imports of Spanish clementines
- US anti-dumping and anti-subsidy procedures on uranium
- Byrd Amendment (concerning US trade defence procedures)
- US blanket safeguards procedure on imports of steel
- US ban on imports of EC food and animals (related to foot and mouth disease)
- US WTO Obligations in several procedures of US Federal Communication Commission

²¹ EU and US Agree on Positive Economic Agenda at Summit of May 2002, available on the Internet: <<http://europa.eu.int/comm/trade/bilateral/usa/pr030502.htm>> (visited 12 May 2004).

- US Hollings Bill (prop. rules on acquisitions of US telecom companies by foreign comp.)
- Trade considerations in US Exxon Florio national security procedures
- US rules of the Securities Exchange Commission (link with US extraterritorial sanctions)
- US proposed rules on tyre certification
- Renewal of US Iran Libya Sanctions Act
- US Air XXI rules
- US Bilateral Investment Treaties with EU accession countries
- Airbus A380 (governmental financial support)
- Hush kits (EC rules on aircraft noise)
- Exports of US Poultry to the EU
- EU's Conformity Assessment Agreements with Eastern European Countries
- EU rules on solid wood packing (parasites)
- EU proposed tax rules on digital products
- EU legislation on Transmissible Spongiform Encephalopathy, etc.

Source: <http://europa.eu.int/comm/trade/issues/bilateral/countries/usa/lewi.htm>

D. Assessment of the bilateral conflict solution under the TEP Steering Group

This leads to the question of how successful bilateral dispute settlement has been under the TEP Steering Group in solving various transatlantic trade disputes. One way of conflict prevention lies in the early warning function of the TEP Steering Group. It is difficult to assess the actual role of this group in solving or preventing transatlantic conflicts at an early stage. For example, the published reports of the TEP Steering Group only describe in detail the progress on transatlantic mutual recognition agreements (e.g. about MRAs on marine safety equipment, in the architectural and engineering services sector or the insurance sector). Regarding the Early Warning System, the latest report published at the Göteborg summit in June 2001 states only:

“The TEP Steering Group made continued use of the Early Warning Mechanism as a tool for providing opportunities for each side to address questions and concerns of the other side in a non-contentious manner. During this semester, ‘early warning’ discussions contributed to the satisfactory resolution of a number of cases.”²²

Afterwards no more reports were published in order to ensure the intimacy of the intergovernmental discussions according to a senior official of the European Commission. However, from these few reports it remains unclear whether the early warning function was actually used at a stage where legislative or regulatory decisions were formulated as laid down in the Early Warning System, or if both sides were only deliberating conflicts where regulatory measures had already been established.²³

²² EU-US Summit Göteborg, Report of the Transatlantic Economic Partnership Steering Group of June 2001, available on the Internet: <http://europa.eu.int/comm/external_relations/us/sum06_01/tepsg.htm> (visited 12 May 2004).

²³ *Meng*, in: Petersmann/Pollack (eds.), *Transatlantic Economic Disputes*, 507 (511 f.).

The TEP Steering Group also has been active in solving trade disputes after the contested regulations became effective; however, the results have been mixed. On the one hand, the system was successful in solving conflicts regarding technical regulations like in the Hush kits case. Hush kit devices are used on older aircraft to adhere to the noise pollution standards of the International Civil Aviation Organization (ICAO). However in 1990, the EU adopted a regulation banning the use of airplane Hush kits for environmental and noise reasons. The EU also decided that from March 2002 onwards, the use of aircraft with Hush kits which were registered in the United States and other third countries was forbidden in the EU. In response, the US filed a complaint at the ICAO. Intense bilateral negotiations followed within the framework of the TEP Steering Group, which led to a compromise in October 2001. The Hush kits case is thus an example for a successful bilateral trade solution.²⁴

Since the adoption of the Positive Economic Agenda in May 2002, the focus of the TEP Steering Group has changed. It has since mostly been dealing with the various issues of the Positive Economic Agenda. The following results were achieved – one year after the PEA became effective:

- launch of Financial Markets Dialogue and agreement on “timelines” between the EU and the US;
- resumption of exports of Spanish clementines to the US;
- launch of EU/US regulatory cooperation in four priority areas: cosmetics, automobile safety, metrology and nutritional labeling;
- establishment of a Mutual Recognition Agreement (MRA) on certificates of conformity for marine equipment (signed in February 2004);
- steady progress towards the resumption of US poultry meat exports to the EU;
- successful completion of the exploratory talks designed to begin negotiations on the facilitation of trade in organic products.²⁵

However, despite some successes under the Early Warning System and the Positive Economic Agenda, the TEP Steering Group was unable to resolve some of the long-standing ideology conflicts, as in the case of hormone-fed beef or GMOs.

However, when asked about the overall efficiency of the TEP Steering Group in preventing and solving bilateral trade disputes, a senior official working in the DG Trade of the European Commission emphasized that in his view efficiency was not the real debate. In many cases, strong industrial interests were behind the trade issues concerned, so that it was difficult and sometimes impossible to solve these problems through bilateral consultation. Whenever trade problems between the EU and the US were not reconcilable they were submitted to the WTO dispute settlement system. In his view, issues that were bound to go to the WTO would go to the WTO anyway. According to him, the most important function of the TEP Steering Group was the fact that it was an indispensable forum where both sides could expose issues that concern them, thus establishing mutual understanding for the views of the other side.

²⁴ *Pollack*, in: Petersmann/Pollack (eds.), *Transatlantic Economic Disputes*, 65 (74); Testimony of David L. Aaron, Undersecretary for International Trade, on Hushkit Rule of September 1999, available on the Internet: <<http://www.useu.be/ISSUES/hush0913.htm>> (visited 12 May 2004).

²⁵ The Positive Economic Agenda of May 2002, available on the Internet: <<http://trade-info.cec.eu.int/doclib/html/114066.htm>> (visited 12 May 2004).

E. Transatlantic conflicts between bilateral and multilateral dispute settlement

As already mentioned, the EU and the US can choose to resolve their conflicts through the legal dispute settlement system of the WTO or through bilateral negotiations. Until today, both are the most frequent users of the WTO dispute settlement system: in 2004, the EU listed 27 transatlantic trade disputes which were registered at the WTO: 19 cases were launched by the EU against the US, while in eight cases the US filed complaints against the EU.²⁶ In many cases both sides did not even try to resolve the conflict through bilateral consultations before turning to the WTO.

There are several reasons for the EU and the US to use the WTO dispute settlement: First, neither side likes to change existing laws and regulations unless they really need to. Therefore, the complainant needs the pressure of a Panel or an Appellate Body decision before the other party really makes an effort to change. Second, the EU and the US will also resort to the WTO when they want a definite interpretation of existing trade rules. Thirdly, in some cases one party is simply trying to gain negotiating leverage to show that the other party is also in violation of WTO rules. An example is the FSC case where the US suspected that the EU took the conflict to the WTO in 1998 – almost 14 years after the FSC provisions came into effect in 1984 – as a reaction to the US challenge of the EU banana regime and the hormone beef case.²⁷

In contrast to the legal system of the WTO, the bilateral negotiations between the EU and the US within the TEP Steering Group follow a political approach. However, because of the binding character of the dispute settlement system of the WTO, the bilateral, more diplomatic, approach has gradually lost its importance, although the WTO procedure also provides for bilateral consultations. While the empirics of transatlantic dispute settlement might point in the direction of the WTO system, it is important to analyze how both sides should ideally handle the different trade conflicts in the three categories outlined above: 1) market access, 2) industrial policy, and 3) ideology conflicts.

I. Market Access Conflicts

In general, the first category of market access conflicts receives (with the exception of agriculture) low publicity and does not really strain US/EU relations. In addition, WTO rules in this area are comprehensive and unambiguous. Therefore, these conflicts can in most cases successfully be dealt with at WTO level. One example for a successful conflict resolution in this area is the dispute about US safeguard measures on European steel imports. In March 2002, President *Bush* issued protective tariffs of up to 30% against 15 steel products for three years as a remedy against – in his view – unfairly subsidized imports. In response, the EU established a WTO Panel in May 2002 which decided that the US safeguard measures violated international trade rules, as there was no clear evidence that the increased imports had caused serious injury to

²⁶ European Commission on WTO Dispute Settlement of March 2003, available on the Internet: <http://europa.eu.int/comm/trade/issues/respectrules/dispute/index_en.htm> (visited 2 June 2004).

²⁷ *Meng*, in: Petersmann/Pollack (eds.), *Transatlantic Economic Disputes*, 507 (515 f.); *Ahearn*, CRS Report for Congress 2002, 6.

the domestic steel industry; in November 2003 the Appellate Body upheld the decision. The EU threatened to impose retaliatory tariffs of as much as 30% on goods up to 2.2 billion dollars in early December. However, before these tariffs could come into effect, President *Bush* decided to lift the sanctions on steel imports. In this conflict WTO rules were clear and unambiguous, and as such helped solve the transatlantic trade conflict before it escalated and turned into a trade war. However, the EU and the US should be committed to implement the Panel decisions as soon as possible in order not to strain the relationship unnecessarily, unlike in the case of the EU banana regime (EU) or the Byrd Amendment (US).

II. Industrial Policy Conflicts

Disputes in the industrial policy area have become central to transatlantic trade conflicts. They affect national policies like competition, subsidies and support measures, and are thus more difficult to solve than the previous category. Most of the cases are not brought to the WTO (with the exception of FSC) because the measures taken often may not constitute a definite violation of WTO rules. Another reason is that the accused party will be hesitant to change its industrial policy which is part of its domestic policy strategy. If, however, one party is forced to change, it will most likely file a complaint against comparable policy measures of the other party at the WTO, which could lead to a tit-for-tat development within the multilateral framework.²⁸ This became apparent in the conflict about subsidies for Airbus and Boeing. The US requested a WTO Panel against unfair subsidies for Airbus, and the EU countered with a case against Boeing. Therefore both sides rightly decided to solve this conflict bilaterally to find an extensive and transparent solution of the subsidy issue. Also, as a reaction to the FSC case the US is still considering to implement a Panel procedure against various EU tax measures.

If the WTO is often not the right institution to solve these conflicts, how can conflict resolution in this area be strengthened? One way to improve the resolution of industrial policy conflicts is through the advancement of unambiguous international rules. There are already WTO agreements on technical barriers to trade, subsidies and countervailing measures, etc. which were negotiated during the Uruguay Round. However, in other areas such as competition policy, investment or government procurement, comprehensive rules are still missing and it is unlikely that the Doha Round will strengthen the rules in these areas. On the contrary, the WTO framework agreement which was negotiated in Geneva in August 2004 explicitly dropped the three Singapore issues concerning “transparency in government procurement”, the “relationship between trade and investment”, and the “interaction between trade and competition policy”, leaving only “trade facilitation” on the agenda of the Doha Round.

Another very effective way of improving conflict resolution in the industrial policy area is through closer bilateral regulatory cooperation. The European Commission stressed in this context that “there is a strong link between regulatory cooperation and early warning: many trade disputes derive from the fact that different regulatory ap-

²⁸ *Hufbauer/Neumann*, SAIS Working Paper Series WP/01/02 (2002), 9.

proaches are taken in the EU and the US to the same problem.”²⁹ Therefore the TEP Statement and Action Plan, and the Positive Economic Agenda stress the importance of regulatory cooperation and mutual recognition agreements as a way to prevent future conflicts. The TEP steering group is very active in this area. As a consequence, various agreements have been signed between the EU and the US in the field of marine equipment, metrology, safe harbor privacy principles, veterinary equivalence, customs cooperation, competition, etc.³⁰

In addition, at the last EU/US summit in Washington, DC, in June 2005, both sides adopted the so-called “2005 Roadmap for US-EU Regulatory Cooperation” with the aim of further promoting bilateral regulatory cooperation. This roadmap establishes a senior-level dialogue on best regulatory policies and practices, encourages the identification of resources and mechanisms to support exchanges for US and EU experts and the expansion of successful sectoral initiatives. Furthermore a dialogue on standard issues is encouraged. The TEP Steering Group is called to assess regularly the implementation of these guidelines as well as analyze the progress of regulatory cooperation in general.³¹

With these measures the EU and the US try to enhance bilateral cooperation in the field of industrial policy in order to improve the prevention and resolution of trade conflicts. So far, transatlantic regulatory cooperation emphasizes the exchange of information and early notification of new regulations; yet it does not involve joint rulemaking or the need to change rules and regulations which are regarded as trade barriers in the transatlantic market. In this context it could be useful, if the early warning procedure – where the TEP Steering Group is a key agent – could get a more binding character, and if both sides could consider giving up some regulatory sovereignty in the rule-making process. As such, many conflicts in the field of industrial policy could be successfully dealt with on a bilateral level. However, in this context it must be stressed that regulatory cooperation between the EU and the US will remain difficult as there are substantial differences in the regulatory requirements and approaches on each side.

III. Ideology Conflicts

The last category, concerning ideology conflicts, is the most difficult to solve. Putting these cases, which involve valid national non-trade concerns, to the WTO can endanger the multilateral dispute settlement system, especially when the losing party cannot comply with the rulings because of widespread public concerns. This can clearly be demonstrated in the case of hormone-fed beef, where the EU rather ac-

²⁹ European Commission, The Transatlantic Economic Partnership Overview and Assessment, DG TRADE.E.3 of October 2000, available on the Internet: <<http://trade-info.cec.eu.int/doclib/html/11172.htm>> (visited 10 May 2004).

³⁰ Outcome of EU US Cooperation of January 2004 by the European Commission, available on the Internet: <<http://europa.eu.int/comm/trade/issues/bilateral/countries/usa/outcome.htm>> (visited 5 May 2004).

³¹ The United States and the European Union Initiative to Enhance Transatlantic Economic Integration and Growth of June 2005, available on the Internet: <www.whitehouse.gov/news/releases/2005/06/print/20050620-17.html> (visited 21 June 2005).

cepted sanctions than changed existing rules. The legally correct decision of the WTO Appellate Body did not help solve the conflict. Thus, bilateral conflict resolution in this sensitive policy area becomes indispensable.

A case of successful bilateral conflict resolution in this field concerned the protection of personal data privacy. Underlying this conflict were different views on how to protect personal information: while the US approach is characterized by self-regulation of the US industry, the EU adopted regulations governing the use of private data in the public and private sectors. In October 1998, the EU directive “on the Protection of Individuals with Regard to the Processing of Personal Data and the Free Movement of such Data” became effective, which prohibited EU member states to allow transfers of personal data of European citizens to countries which were considered to provide inadequate data protection; this article also applied to the US. Therefore, the US feared that US subsidiaries in Europe could be restricted in their communication with their parent companies in the US. Furthermore, the EU wanted to guarantee its citizens the right to have access to the data collected on them and to have an independent arbitrator dealing with conflicts regarding data protection. Although the EC directive entered into force in October 1998, the EU did not block any data transfers to the US in order to solve the problem through bilateral negotiations, also in the framework of the TEP steering group. Finally in March 2000, both sides negotiated an Agreement on Safe Harbour Principles where US companies can certify themselves voluntarily if they want to participate and fulfill the European safe data requirements. Through the Safe Harbour Agreement the EU and the US can retain their individual approaches to data privacy while US companies who are interested in the European market can register to fulfill European requirements.³² Only through bilateral negotiations, both sides were able to solve this sensitive data privacy problem.

However, bilateral negotiations about ideology conflicts do not always lead to the desired results, as can be seen in the GMO case: in 1998, the EU established a de facto moratorium on the approval of new GMOs in the EU. Following this moratorium, the US and the EU started intense bilateral negotiations about the different national approval procedures within the TEP Steering Group, which led to the creation of a TEP Biotech working group and an EU-US Biotechnology Forum. These forums provided a useful basis for bilateral consultations; however, the positions of the EU and the US remained far apart because they were only willing to offer limited concessions.³³ As the talks proceeded for years without any results, the US initiated a WTO dispute settlement procedure in May 2003. Although the EU approved a corn variety in May 2004, the final WTO ruling on the European approval and labeling system is still pending. Thus the conflict remained unresolved, even though both sides tried to solve this conflict on a bilateral level. Underlying this specific conflict are again different approaches to risk assessment and the role of the state: in general, the EU supports a proactive form of consumer protection while the US supports a reactive form of consumer protection. Therefore, the US will regard every proactive regulation as a trade barrier while the EU will regard a reactive regulation as disrespect for consumer

³² *Pollack*, in: Petersmann/Pollack (eds.), *Transatlantic Economic Disputes*, 65 (98 ff.); *Decker*, *Handelskonflikte*, 190 f.

³³ *Decker*, *Handelskonflikte*, 155; *Pollack*, in: Petersmann/Pollack (eds.), *Transatlantic Economic Disputes*, 65 (77, 98 ff.).

protection.³⁴ These differences need bilateral negotiations and diplomatic solutions. However, the GMO case clearly demonstrates that especially in sensitive conflicts where the public is widely opposed the political will is failing to take the concerns of the other side into consideration and to solve the conflict diplomatically. Neither the EU nor the US at that time were willing to support a bilateral solution, although this would have been the most promising way to solve the conflict permanently. Especially in highly politicized cases both sides must therefore improve their commitment to work bilaterally, as the WTO is the wrong forum for conflict resolution.

F. Conclusion

For the past decades, the EU and the US have cut traditional trade barriers like tariffs and quotas, leaving divergent domestic regulations as the main dividing line. Therefore, in the future, most of the transatlantic trade conflicts will deal with issues where national policies like norms and standards, technical regulations or, most importantly, health concerns and consumer and environmental protection clash. Different national attitudes and values are at the core of “new” transatlantic trade disputes. In these cases, international rules do not provide adequate ways to solve these conflicts effectively before they turn into high-profile disputes. It is therefore desirable that both sides – with the help of the TEP Steering Group – increasingly search for diplomatic solutions in the field of industrial and ideological conflicts, focusing on mediation and problem-solving rather than legal accuracy.

Further improvements of the Early Warning System and bilateral dispute settlement seem to be necessary to achieve this goal, but most importantly more commitment is needed on both sides as the majority of conflicts does not stem from a lack of early warning, but from the decision of one side not to take the views and concerns of the other side into account, and to pass and maintain the trade-distorting measure in question. The crucial point which decides whether the EU and the US will be able to prevent or resolve conflicts in the future is therefore the political will: both sides must be seriously committed to finding a mutually satisfying compromise in order not to disturb the transatlantic relationship. This is particularly important when sensitive national issues such as food safety are concerned. The transatlantic partnership cannot afford many long-standing conflicts such as the hormone beef or the GMO case.

The EU and the US together remain the driving force for a system of global economic and political governance. Even though major new economic and political players such as China, Brazil or India have emerged on the global scene, transatlantic cooperation is still indispensable. Without the joint effort of the EU and the US, major economic and political challenges ranging from the successful conclusion of the Doha Round to demographic, technological, energy or security issues cannot be dealt with successfully. Therefore both sides must work on a strong economic partnership – unhampered by trade wars – as the basis for global cooperation.

³⁴ *Hufbauer/Neumann*, SAIS Working Paper Series WP/01/02 (2002), 12; *Managing Risk Together: U.S.-EU Regulatory Cooperation*, The Atlantic Council of the United States, Bulletin (Nr. 2, 2003), 1-7.

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