

Mildner, Stormy; Ziegler, Oliver

Article — Published Version

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Intereconomics

Suggested Citation: Mildner, Stormy; Ziegler, Oliver (2009) : A long and thorny road: Regulatory cooperation under the framework for advancing transatlantic economic integration, Intereconomics, ISSN 1613-964X, Springer, Heidelberg, Vol. 44, Iss. 1, pp. 49-58, <https://doi.org/10.1007/s10272-009-0277-z>

This Version is available at:

<https://hdl.handle.net/10419/66195>

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Stormy Mildner* and Oliver Ziegler**

A Long and Thorny Road

Regulatory Cooperation under the Framework for Advancing Transatlantic Economic Integration

When the European Union and the United States agreed on the Framework for Advancing Transatlantic Economic Integration at the EU-US Summit on 30 April 2007, creating the Transatlantic Economic Council (TEC), they praised themselves for opening a new era in transatlantic regulatory cooperation.¹ Transatlantic integration and growth were said to be enhanced and efforts to reduce barriers to transatlantic trade and investment redoubled. However, after two meetings of the TEC with only modest achievements, enthusiasm has faded quickly and finger pointing has begun anew. What went wrong?

Harmonising or mutually recognising regulatory systems is anything but easy. Until now, progress on transatlantic economic integration has proved slow and coverage of sectors and industry-specific problems has remained incomplete. The two TEC meetings present only further steps on a long and thorny road towards closer regulatory cooperation. The Council's limited success can be attributed to a variety of reasons. To some extent, there are severe difficulties in establishing reciprocity in negotiations as well as a lack of appropriate methodologies for assessing the adverse impact of regulations on industry. Even more important, harmonisation or mutual recognition of standards and regulations requires complex legislative changes in an often highly politicised policy environment. Especially when dealing with issues such as consumer protection, health and food standards, opinions strongly differ about the role of science in managing risk. In addition, it is imperative for negotiators to include not only the heads of independent and often domestically oriented regulatory agencies but also legislators, that is, the European Parliament and the US Congress. Moreover, cooperation requires a high degree of trust in the rule-setting competency of the negotiating partner, which has often proved difficult due to strongly diverging regulatory philosophies and styles.

Expecting quick results from the TEC under these conditions was thus more than ambitious – in particu-

lar given the slow progress under previous integration frameworks. One of the pillars for transatlantic cooperation is the New Transatlantic Agenda (NTA), signed in 1995, aiming at “progressively reducing or eliminating barriers that hinder the flow of goods, services, and capital”.² Key part of the NTA was the creation of a “people-to-people dialogue system” (for consumers, labour, environment and business) to encourage public and civil society input. Yet, since the agenda included neither commitments to comprehensive coverage nor deadlines, it never achieved much political momentum. Of the four dialogues, only the business dialogue (TABD) has met with regular frequency, while the other three have languished.³ When in 1997 the TABD promoted the conclusion of several mutual recognition agreements (MRAs) between Washington and Brussels, the step was considered a promising milestone in transatlantic regulatory cooperation. These MRAs were to eliminate duplicative testing and certification in six sectors (telecom equipment, pharmaceuticals, medical devices, electromagnetical compatibility, electric safety, and recreational craft). However, tensions grew when the USA failed to implement the agreement with respect to three of the sectors which were initially of greatest interest to the

¹ European Commission, DG Enterprise and Industry: Transatlantic Cooperation Enters New Era, 9 October 2007, http://ec.europa.eu/enterprise/library/ee_online/art37_en.htm.

² European Commission, DG Trade: The Transatlantic Economic Partnership, 30 September 2004, http://ec.europa.eu/trade/issues/bilateral/countries/usa/pr290904a_en.htm.

³ Yet, over the course of time, the Transatlantic Consumer Dialogue (TACD) has evolved from an initial “Anti-TABD body” to a serious partner with constructive ideas for transatlantic consumer protection (personal Communications with TABD and TACD representatives in June 2008).

* Senior Researcher, Americas Division, German Institute for International and Security Affairs (SWP); Lecturer, Hertie School of Governance, Berlin, Germany.

** Ph.D. Candidate, Free University of Berlin; Fellow, Americas Division, German Institute for International and Security Affairs (SWP), Berlin, Germany.

EU.⁴ The same year an ambitious attempt by Sir Leon Brittan to create a New Transatlantic Marketplace failed mainly due to French opposition. To compromise, both partners agreed on the far less ambitious Transatlantic Economic Partnership at the 1998 EU-US Summit. While the agreement emphasised the need to tackle technical barriers to trade, the results remained as sobering as expected. Not only did many of the participants consider the “low-hanging fruits” as being picked already, but closer cooperation among regulators could also not prevent new conflicts from arising. Disputes escalated over agricultural subsidies, tax and aircraft production subsidies, steel tariffs, and a variety of food safety and environmental laws and regulations. When the 2002 Positive Economic Agenda also turned out not to be ambitious enough to add political momentum to facilitate settlement of these disputes, both partners seriously revitalised their efforts in 2005 to tackle the philosophical and procedural questions that hitherto had hindered transatlantic regulatory cooperation. A newly created High Level Regulatory Forum was intended to reconcile the diverging systems. Yet, similar to the preceding initiatives it initially suffered from a lack of sustainable political commitment.

Revitalising the Transatlantic Agenda

Consequently, in 2007, transatlantic business still suffered from the complexity and costs of having to comply with different regulatory regimes. Contrary to average customs duties in transatlantic trade of less than four per cent – with the exception of some areas with high import tariffs, such as trade in agriculture and textiles – non-tariff market access barriers (NTBs) continued to seriously hamper trade. The Framework for Advancing Transatlantic Economic Integration,⁵ which was signed at the 2007 EU-US Summit at the urging of German Chancellor and then EU Council President Angela Merkel, once again aimed at deepening transatlantic economic integration by eliminating NTBs posed by regulations such as norms and standards.

Knowing from experience that this would not be feasible without continuous political support and cooperation beyond the annual summits, both partners created the Transatlantic Economic Council (TEC) to steer and evaluate regulatory cooperation as well as

to prevent and mitigate trade conflicts. Currently, the TEC is chaired by Daniel M. Price, assistant to the US President for International Economic Affairs (formerly Al Hubbard, National Economic Council chairman) and European Commission Vice-President Günter Verheugen. Through the creation of the TEC, the bilateral relationship has gained a new dimension and is more binding in character than in the past.

As part of the 2007 initiative, the two trading partners also agreed on several lighthouse priorities projects including mutual recognition of financial market regulations, enhanced protection of intellectual property rights (particularly in third markets), development of common standards regarding secure trade, and the establishment of a regular dialogue on investment barriers. Furthermore, the EU and the USA signed a first-stage Air Transport Agreement (Open Skies). Progress was also made with regard to reconciling the differences between accounting standards. The TEC held its first meeting in Washington on 9 November 2007, at which an investment dialogue was launched. Additionally, the TEC established a road map for reaching mutual recognition of US and EU Customs-Trade partnership programmes (referring to border security measures adopted in both regions) by 2009.

Slow Progress under the TEC

However, after this hopeful start, the second meeting of the TEC on 13 May 2008 achieved few concrete results: both the EU and the USA affirmed their commitment to promoting open investment policies. The EU promised to make sure that trade in cosmetics was not disrupted by its new chemical directive REACH, and the US Occupational Safety and Health Administration made certain concessions with respect to conformity assessment of electrical products, including suppliers' declaration of conformity. In addition, the EU announced that it would promote a positive decision on the equivalence of US accounting standards (GAAP) to EU rules in the course of 2008. Nonetheless, many frictions persisted, such as a 25% limit on the voting stock of US airlines for foreign investors due to security aspects. On trade in cosmetics, the EU will prohibit the sale of cosmetics tested on animals as of March 2009, while the US Food and Drug Administration (FDA) requires those tests for sales in the United States. Trade officials are already predicting the dawn of a serious new trade dispute.⁶ With regard to customs and border protection the TEC did not tackle US legislation requiring 100% scanning of containers bound for US ports. Most of all, the second TEC

⁴ Gregory Shaffer: *Managing US-EU Trade Relations through Mutual Recognition and Safe Harbor Agreements: 'New' and 'Global' Approaches to Transatlantic Economic Governance?*, in: Ernst-Ulrich Petersmann, Mark Pollack: *Transatlantic Economic Disputes*, Oxford 2005, pp. 297-325.

⁵ Framework for Advancing Transatlantic Economic Integration between the European Union and the United States of America, April 2007, http://ec.europa.eu/external_relations/us/sum04_07/framework_transatlantic_economic_integration.pdf.

⁶ Personal communication with USTR official, 1 July 2008.

meeting in Brussels as well as the subsequent EU-US summit in Brodo, Slovenia, were overshadowed by a serious conflict over poultry, which was declared a litmus test for transatlantic economic relations by United States Trade Representative Susan Schwab. The following comments on major issues on the TEC agenda are intended to provide an understanding of the Council's (modest) achievements and the reasons thereof. It should be noted that the issues discussed do not follow a particular order but, rather, mirror the TEC's mixed agenda.⁷

Accounting Standards and Financial Services

What really drives transatlantic economic integration are investment flows. In 2006, EU investment in the USA accounted for 28% of the global amount invested by the EU abroad. The USA is the main foreign investor in the EU, accounting for 48% of total EU FDI inflows. The same holds true the other way around: with nearly 59% of total US investment outflows in 2006, the EU ranks first in US FDI destinations. At the same time, no other region in the world has invested as much in the United States as Europe: up to three quarters of all FDI stocks in the USA are held by European companies.⁸ The abolishment of reconciliation requirements of the International Financial Reporting Standards (IFRS) to US Generally Accepted Accounting Principles (GAAP) was therefore lauded as one of the biggest successes of the first TEC meeting in November 2007. In the 2007 Framework for Advancing Transatlantic Economic Integration, the USA and the EU had agreed "to promote and seek to ensure conditions for U.S. GAAP and IFRS to be recognized in both jurisdictions without the need for reconciliation by 2009 or possibly sooner." Until then, the Security and Exchange Commission (SEC) had required reconciliation between these two accounting standards – an expensive and time-consuming process – as a common base for investors to compare companies. However, with global capital markets becoming more interlinked, the rise of the euro and, most of all, the growing acceptance and use of IFRS worldwide, the SEC recognised the strong arguments for the elimi-

⁷ Business representatives in general complain about the composition of this agenda, which was selected by governments and lacks issues of current interest to the transatlantic business community such as solvency and collateral insurance. For one representative of the US Chamber of Commerce this is part of the problem: "Some of these issues might have been brought up by the TABD, e.g. this animal tests issue, but the rest of these things are not part of the current agenda. I think that the TEC's struggle is just a reflection of that. We kind of went with an agenda that didn't have a lot of buy-in from the business communities' perspectives." Personal communication, 7 July 2008.

⁸ Daniel S. Hamilton, Joseph P. Quinlan: *The Transatlantic Economy 2008*, Center for Transatlantic Relations, Washington DC 2008, p. vi.

nation of the reconciliation requirement one week after the first TEC meeting.⁹ Now it is Europe's turn to accept financial statements based on US GAAP. According to a recently published report by the Committee of European Securities Regulators (CESR), US-American standards comply with all the required convergence criteria.¹⁰ The EU will likely declare the recognition of US-GAAP soon.

At its November 2007 meeting, the TEC also launched an Investment Dialogue aimed at reducing barriers to transatlantic investment and promoting open investment regimes globally. National security aspects and the current financial crisis have created new questions, particularly with respect to government discrimination against different types of investment vehicles such as sovereign wealth funds (SWF). While business leaders stress the important role SWFs play in recycling balance of payments surpluses, government officials in Europe and the USA fear that SWFs might be used by governments to pursue their foreign policy objectives. They thus emphasise the need for voluntary codes of conduct and transparency. The Investment Dialogue is seen as a tool to help tackle these challenges. Apart from its references to the work of the International Monetary Fund (IMF) to develop a voluntary set of guidelines,¹¹ however, it has developed limited momentum so far. Nonetheless, against the background of the current financial crisis, the TEC could prove invaluable regarding future regulatory measures on capital markets, particularly the implementation of the Basel II accord on capital requirements in the United States. The recent call of the Leaders of the Group of Twenty (G20) to "ensure that financial institutions maintain adequate capital in amounts necessary to sustain confidence" was approved by President Bush.¹² The TEC now offers the perfect platform to discuss further steps in more detail.

⁹ In August 2008 the SEC released a Roadmap towards IFRS. While only some 100 selected US companies are allowed the use of IFRS as of 2009, the Roadmap envisages a mandatory use of IFRS for US issuers beginning in 2014. Christopher Cox: *Proposing a Roadmap toward IFRS*, 27 August 2008, http://www.sec.gov/news/speech/2008/spch082708cc_ifrs.htm.

¹⁰ The Committee of European Securities Regulators: *CESR's Advice on the Equivalence of Chinese, Japanese and US GAAPs*, March 2008, http://www.cesr-eu.org/data/document/08_179.pdf.

¹¹ International Working Group of Sovereign Wealth Funds: *IWGF Reaches a Preliminary Agreement on Draft Set Generally Accepted Principles and Practices (GAPP) – Santiago Principles*, 2 September 2008, <http://www.iwgf-swf.org/index.htm>.

¹² G20: *Declaration of the Summit on Financial Markets and the World Economy*, Washington DC, 15 November 2008, <http://www.g8.utoronto.ca/g20/2008-leaders-declaration-081115.html>.

Open Skies

The transatlantic air transport agreement, which came into force on 30 March 2008, replaced several existing bilateral agreements between individual EU member states and the United States. It permits every US and EU airline to fly between any city in the EU and any city in the United States. The agreement was viewed as a major achievement of the 2007 EU-US summit – albeit opening transatlantic trade in aviation really happened in advance of the TEC process. With about 48 million annual passengers between the EU and the USA, the agreement covers by far the biggest international air transport market. The combined US and EU freighter fleet accounts for more than 70 per cent of the world total. Open Skies promises considerable employment and welfare benefits. A recent report by Booz Allan Hamilton estimates that the removal of all market access restrictions could bring up to €12 billion over the first five years in consumer benefits.¹³

The second round of Open Skies talks started in Slovenia in May 2008. Items on the agenda were the liberalisation of the domestic flights markets, which are still kept closed by both negotiating partners, as well as obstacles to investment in aviation. US airlines may acquire up to 49 per cent of the shares of European airlines. The USA, on the other hand, is sceptical about foreign ownership of more than 25 per cent of the voting stock of US airlines, fearing this could impair the government's access to the US civil air fleet during wars and other emergencies and security issues related to terrorism. Even though financially stricken airlines, such as Continental or United Airlines, might wish for foreign capital inflow, many members of Congress are concerned that US airlines would be the main takeover targets if mergers between them and European carriers were allowed. Echoing concerns of their constituencies at home they caution against shifting jobs abroad. Moreover, the USA worries that the EU proposal for an "open aviation area" would inevitably entail excessive regulation, particularly flight curfews due to noise regulations.¹⁴ It is thus particularly the US Congress that needs to be convinced about loosening investment restrictions. A modest attempt by the administration to give foreign minority investors in US airlines more say on operational issues ran into a roadblock in Congress and had to be withdrawn in

2006. Boyden Gray, Special Envoy for European Affairs, argued, "It's going to take a lot of work to persuade our Congress that this is something that should be allowed."¹⁵

Another conflict is looming. In July 2008, the European Parliament adopted legislation on including aviation in the European Union's Emissions Trading System (ETS) from 2012. All flights starting and landing in Europe, including intercontinental flights, are to be included in the ETS from 1 January 2012. The USA quickly announced that it would retaliate with trade sanctions if the EU made any attempt to force foreign airlines to comply with its emissions trading system.¹⁶ The US Federal Aviation Administration (FAA) criticised that this regulation would be a tax on the rest of the world to subsidise EU spending.

Intellectual Property Rights Protection

Progress in the area of intellectual property rights has been slow due to diverse regulatory traditions. In the EU, as in almost all countries worldwide, the following rule is applied: when two people apply for a patent on the same invention, the first person to have filed the application will get the patent, regardless of the date of actual invention ("first-to-file"). Contrary to this, the USA follows the "first-to-invent" principle, i.e., the person able to prove that he or she had an idea first is granted the patent on it. Inventors have a one-year grace period to apply for a patent. In this period, the inventor can freely publish the invention without losing patent rights. However, this means losing all potential patent rights in the EU, since filing for a patent after publication of the idea is not possible there. Substantial transatlantic differences also exist with regard to what is patentable. In America not only technical innovations, but also software and business methods are patentable. In accordance with the European Patent Convention only technical innovations are patentable in the EU, not business methods or pure-play software. The EU and the USA are therefore working towards patent law harmonisation, but on a global rather than a bilateral level. The TEC consultations are intended to facilitate coordination between the two partners. Both are members of the B+ Group of industrialised countries who are engaged in the World Intellectual Property Organisation's (WIPO)

¹³ Booz Allen Hamilton Ltd.: The Economic Impact of an Open Aviation Area between the EU and the US, 2007, http://ec.europa.eu/transport/air_portal/international/pillars/global_partners/doc/us/eu_us_study_executive_summary.pdf.

¹⁴ Andrzej Zwanięcki: U.S.-EU Aviation Talks Bring Prospect of Broader Markets, 27 May 2008, <http://useu.usmission.gov/Article.asp?ID=0C1CC8EE-BA5D-47DB-9FA1-7C430F5E5545>.

¹⁵ Reuters: EU and U.S. Start Talks to Lower Aviation Barriers, 15 May 2008, <http://www.iht.com/articles/2008/05/15/business/skies.php>.

¹⁶ EurActiv: Aviation and Emission Trading, 10 July 2008, <http://www.euractiv.com/en/climate-change/aviation-emissions-trading/article-139728>.

efforts to negotiate a Substantive Patent Law Treaty (SPLT).¹⁷

However, consensus on a common transatlantic SPLT draft has not yet been reached. On the European side, this is mainly due to the fact that patent law is for the most part subject to Member States' jurisdiction. The EU has still to reach an agreement on the introduction of an EU-wide patent law – despite several attempts by the European Commission. In the USA it is Congress that hinders US rapprochement. A current Patent Reform Act, introduced in spring 2007, proposes switching from first-to-invent to first-to-file. While in September 2007, the House of Representatives voted 220 to 175 for the legislation, the Senate has not yet reached an agreement. If the bipartisan bill were to pass, it would constitute the first significant reform of US patent law in over 50 years. Proponents of the first-to-invent system argue that it benefits small inventors, who may be less experienced with the patent application system, and gives more time to make improvements and develop the idea. Proponents of the bill argue that first-to-invent requires the United States Patent and Trademark Office (USPTO) to undertake lengthy and complicated proceedings to try to determine who invented something first when claims conflict. They also make first-to-invent responsible for the backlog in applications at the Patent Office as well as low-quality patents (patent registration of pseudo-innovations, etc.) Against long odds, USPTO and the European Commission have – upon the advice of the TEC – agreed to a roadmap to “support and facilitate international patent law harmonization”.¹⁸ Whether they manage to overcome the deadlock in Europe and the USA remains to be seen.

Supplier's Declaration of Conformity

A second issue discussed under the TEC and often cited as success deals with the different systems for guaranteeing the safety of low-voltage electrical products. In the EU, suppliers of electrical products can make a declaration that the product is safe based on testing that they carried out themselves. Contrary to this, in the US system companies are obliged to have their products tested and certified by third parties: National Recognised Testing Laboratories (NRTLs). While the US Occupational Safety and Health Administration (OSHA) was long reluctant to consider changes in the

surrounding regulation due to safety concerns, the electronics and electrical equipment industry in both Europe and the USA emphasise the exemplary safety records as well as the flexibility of the European approach. They criticise the US system for being slow, inefficient and costly. Furthermore, they are very much in favour of a global system of “one standard, one test, accepted everywhere”.¹⁹ Thus, they fear that OSHA's opposition to the European approach would send the wrong signals – particularly to emerging countries who are introducing their own systems of conformity assessment and look to the USA and the EU as potential models.

Responding to pressure from both the TEC and industry, Edwin Foulke, Assistant Secretary of Labour for OSHA, agreed to publish a request for information (RFI) concerning the use of supplier's declaration of conformity (SDoC) for certain electrical and electronic equipment used in the workplace. Since 20 October 2008 all stakeholders are asked for input on the current system in the United States. The public comment period on the RFI will close on 20 January 2009. However, because it is OSHA alone that is in charge of the regulation, and not the US administration or Congress, it remains an open question what will happen as a result of this request. In fact, incremental changes are not to be expected – particularly given OSHA's recent proposal to increase the number of locations where product certification functions can be performed by NRTLs. Although the proposal was advertised as an additional step to facilitate trade in electrical products, it does not seem to precede the abolition of third party testing.

Registration, Evaluation and Authorisation of Chemical Substances

A particular worry to US producers is the new European Chemical Directive REACH (Registration, Evaluation and Authorisation of Chemical Substances). This new approval procedure, which came into force on 1 June 2007, seeks primarily to offer better protection for human health and the environment from risks related to chemical substances. REACH is based on two principles. First, it shifts the responsibility for assessing and managing the risks posed by chemicals produced, used and imported from regulators to industry, which is required to provide the appropriate safety in-

¹⁷ World Intellectual Property Organisation: Substantive Patent Law Harmonization, 2008, <http://www.wipo.int/patent-law/en/harmonization.htm>.

¹⁸ European Commission-US roadmap to support and facilitate international patent law harmonization, November 2007, http://ec.europa.eu/internal_market/indprop/docs/patent/docs/tec_ipr_roadmap_en.pdf.

¹⁹ US Chamber of Commerce and Business Europe: Unleashing Our Economic Potential. A Primer on the Transatlantic Economic Council, 2008, p. 14, http://www.uschamber.com/NR/rdonlyres/elw4wf4t2snno5ugx2j6zwmalahwpvspyipi65nxncslh3jma2e4hj-6cyo2hjwalzjzwyayl4udn4ug4kkmkr33leyeb/14110_EconPotential_LR.pdf.

formation. Second, based on the principle “no data, no market”, REACH is intended to close the information gap on the more than sixty thousand existing substances on which hardly any data have been gathered so far. Under REACH only those substances may be brought into circulation for which sufficient valid data on their characteristics (physical properties, toxicity, etc.) are available.

The regulation has been hotly contested and has caused one of the biggest lobbying efforts in the EU.²⁰ It is particularly the US cosmetics industry which so far has considered REACH discriminatory as US products had to be pre-registered much earlier than the corresponding European products. While the European Commission has meanwhile affirmed that it will “undertake the necessary steps within its competence to ensure transparent implementation, legal certainty and non-discriminatory trade”, US companies also fear that REACH will create a “black list effect”, pushing substances out of the market even before they are evaluated. This applies in particular to those substances defined under REACH as chemicals of high concern. Even though intense consultations have been conducted since the EU Commission published its first White Paper entitled “Strategy for a Future Chemicals Policy” in 2001, no agreement on the contentious points has been reached so far. Moreover, US trade officials are increasingly complaining about the new European competitive advantage provoked by REACH: “[N]ow it’s actually an opportunity to enhance their [European companies’] competitiveness. If you’re inside you’re better off than outside.”²¹ Finally, according to the Seventh Amendment of the EU Cosmetics Directive, the EU will prohibit the sale of cosmetics tested on animals as of March 2009, while the US Food and Drug Administration (FDA) requires those tests for sales in the United States. While the TEC has emphasised cooperation between the FDA and the European Commission, the potential threat of splitting the market has not yet been tackled.

Whether the TEC will be able to find a solution remains uncertain. For a convergence of chemical regulations legislative changes would be necessary on both sides of the Atlantic. However, given the difference in risk assessment between the EU and the USA with respect to chemicals – a joint approach on risk assessment and risk management not being very

likely – there is little room for regulatory cooperation. As Reinhard Quick, Director of the Brussels office of the German Chemical Industries’ Association puts it: “REACH is a prime example of how unilateral legislative acts can kill any bilateral cooperation”.²²

Biofuels

Differing standards also represent a potential impediment to the increasing global trade in biofuels. The USA is market leader in transforming corn to ethanol, Brazil is top in the production of bioethanol from sugar cane, and Germany is market leader in producing biodiesel from rapeseed oil. The International Energy Agency estimates that global biofuel production will more than quadruple by 2030. Therefore, first steps were taken towards a work plan on the harmonisation of biofuel standards by EU, US and Brazilian standard setting bodies in early 2007. Brazil was included in the negotiations not just because the country is the world’s second largest producer of bioethanol after the USA, but also because most national standards for bioethanol are modelled according to Brazilian standards. Deviations in standards can primarily be traced back to differing climatic conditions, the use of different raw materials and varying market structures.

At the 2007 EU-US summit the EU, the USA and Brazil agreed on a Biofuels Standards Roadmap, delineating steps necessary to achieve greater compatibility among their biofuel standards to facilitate the increasing use of biofuels as well as international trade. The trilateral working groups convoked by the national regulatory authorities in July 2007 – one for bioethanol, one for biodiesel – developed a White Paper on Internationally Compatible Biofuel Standards (December 2007), which delineates those aspects of technical standards for biofuels that are already more or less compatible, those aspects that would be too difficult to make compatible, and those aspects that can be brought into closer alignment through continued effort. The European, US and Brazilian standards for bioethanol showed little difference, which is primarily due to the less complex chemical composition of bioethanol. Only the maximum volumes for the water concentration of ethanol standards deviated: the EU has set a very low maximum volume in order to eliminate potential engine damage; the US and Brazil operate with higher volumes. Much more pronounced are deviations in biodiesel standards, which can primarily

²⁰ Jacques Peikmans: REACH: Getting the Chemistry right in Europe, in: Daniel Hamilton, Joseph Quinlan: Deep Integration, Washington/Brussels 2005, pp. 221-235.

²¹ Personal Communication with USTR official, 11 July 2008.

²² Reinhard Quick: Transatlantic Regulatory Cooperation on Chemicals – An Idealist’s Dream?, Conference Paper, University of Michigan Conference on Systemic Implications of Transatlantic Regulatory Cooperation and Competition, Ann Arbor 8-9 May 2008, p. 4, http://www.fordschool.umich.edu/news/event_details/reg_coop_and_comp_08/documents/Quick_final.pdf.

be traced back to differences in diesel engine types and raw materials in biodiesel production as well as to regionally specific emission regulations.

A failure to harmonise biodiesel standards could have negative implications not only for the global biodiesel market but also for trade in vehicles since diesel engine technology would diverge and exporters to the USA and the EU would have to equip vehicles with different engines. But the harmonisation of different biodiesel standards is a sensitive issue especially for the EU, since diesel-powered vehicles have a much larger market share in Europe than in the United States. Another obstacle to the negotiations is posed by the criticism of European biodiesel producers regarding the subsidisation of biodiesel in the United States. Imports of biodiesel into the EU market come mainly from the United States, with other imports accounting for a minor share of the market. In late April, the European biodiesel umbrella organisation called upon the EU Commission to impose punitive tariff duties on subsidised US biodiesel. In mid-June, the EU initiated anti-subsidy and anti-dumping investigations into imports of biodiesel from the United States.²³ Congress is not in a hurry to reduce biodiesel subsidies since they give US producers of soybean-based biodiesel a distinct export advantage. Given the United States' strong farm and agribusiness lobbies, it remains to be seen whether subsidies will be reduced any time soon.

Border Security and Trade

When the US Customs and Border Protection (CBP) and the European Commission Taxation and Customs Union Directorate adopted the US-EU Joint Customs Cooperation Committee (JCCC) Roadmap towards Mutual Recognition of Trade Partnership Programmes in March 2008, Jayson Ahern, Deputy Commissioner of CBP, underlined this as "... an important step toward achieving the U.S. and EU's shared objective of enhancing supply chain security." The EU and the USA hope to conclude a mutual recognition agreement by mid-2009, so that companies enrolled in either US Customs and Border Protection's Customs-Trade Partnership Against Terrorism (C-TPAT) or the EU's Authorised Economic Operator programmes will receive reciprocal fast-lane customs clearance.

Under C-TPAT, a direct response to the terrorist attacks of 9/11, those companies obliging themselves to individual security checkups will be eligible for accelerated customs clearance. To strengthen supply

chain security while at the same time allowing fast-lane customs clearance, US companies are obliged to guarantee that all business partners within their supply chain comply with the security criteria issued by US Customs and Border Protection since 2005. Albeit not being legally bound to do so, European companies therefore cannot elude providing the desired information. The resulting extra costs for securing production facilities and the introduction of control systems are high – in particular in view of also having to comply with the EU's own Authorised Economic Operator Programme (AEO) since early 2008. The corresponding roadmap thus aims at mutually recognising the two security partnership programmes (C-TPAT and AEO) in order to avoid costly double certifications in the EU and the United States.

However, there is one problem: the 9/11 Commission Recommendations Act, signed by President Bush in mid-2007, renders the initiative virtually meaningless. The US legislation, addressing the threat to border security and global trade posed by the potential for terrorist use of a maritime container to deliver a weapon, mandates that all US-bound containers must be scanned 100 per cent at port of shipment starting 1 July 2012 at the latest. This legislation is not to be confused with the 2002 Container Security Initiative (CSI), which pre-selects containers destined for the USA prior to loading on the ship in a foreign port according to risk assessment criteria.

While the CSI had received the support of the European Commission, the 100 per cent scanning requirement is hotly contested, since the resulting extra costs for securing production facilities and the introduction of control systems would be tremendous. The Department of Homeland Security expressed some concern based on a feasibility study conducted in selected ports in June 2008: while a pilot project found that the intended process would be feasible in small, relatively low-volume ports – even though requiring considerable efforts – 100 per cent cargo scanning would pose an insurmountable challenge to larger ports.²⁴ Also in June, world customs authorities asked the USA to repeal the law since the World Customs Organisation and various port authorities will be unable to provide the new equipment and staff needed to scan all containers bound for the US by the law's 1 July 2012, deadline.²⁵ Existing regulation, however, is

²³ EU Commission, DG Trade: Anti-dumping. EU Launches Investigation into US Biodiesel Imports, 13 June 2008, http://ec.europa.eu/trade/issues/respectrules/anti_dumping/pr130608_en.htm.

²⁴ US Government Accounting Office: Supply Chain Security, Challenges to Scanning 100% of U.S. Bound Cargo Containers, 2008, <http://www.gao.gov/new.items/d08533t.pdf>.

²⁵ World Customs Officials Want Repeal of New US Port Cargo Security Law, in: International Herald Tribune, <http://www.iht.com/articles/ap/2008/06/10/europe/EU-GEN-EU-US-Port-Security.php>.

unlikely to be eased soon by Congress, with US ports being regarded as the Achilles' heel of the US security system.

The Poultry Dispute

The differences and challenges mentioned above, however, were overshadowed by a serious dispute over poultry. The case has created a lot of frustration and finger pointing on both sides after USTR Susan Schwab had made it a litmus test for transatlantic economic relations. At the heart of the debate is an eleven year old European ban on US poultry meat. The ban focuses on the use of chlorinated water as a decontaminant by US farmers – a practice which is prohibited in the EU due to consumer protection. With an estimated loss of \$200 million a year for US producers, the embargo presents only a small fraction of the \$2.6 billion worth of transatlantic trade flows daily. However, given that so far neither US nor European scientists could back any health or environment concerns, the US side regards the ban as a protectionist move and a violation of international trade law. USTR Susan Schwab argued, "The poultry issue is one that has been of significant concern, both in its actual facts and its symbolic importance in terms of our ability to resolve transatlantic trade conflicts."²⁶ Lifting the import ban was, according to Daniel Price, of such great importance to the USA that the entire work of the TEC could be questioned if the case were not resolved. Despite enormous efforts by Günter Verheugen to provoke an abolition of the ban and a recent report by the European Food Safety Authority stating that the US method of disinfecting poultry was harmless to consumers, virtually all EU member states recently opposed lifting the import ban. Thus, at the TEC meeting in mid-May, Günter Verheugen could only promise to find a solution before the next TEC meeting, scheduled to take place in December 2008. Yet a quick solution to the quarrel does not seem likely, since the European Scientific Committee on Veterinary Measures Relating to Public Health dismissed the Commission's proposal to end the ban. The European Parliament subsequently passed a resolution in favour of maintaining import restrictions.

For the sake of transatlantic regulatory cooperation, it is questionable whether the poultry case should remain the make or break test for the TEC. As a representative of the US Chamber of Commerce recently put it, "I think it was important for there to be a litmus test. There has been enough dialogue over the last 10 or 12 years and it was time to do something. But it was

not smart on the U.S.' part to make that litmus test poultry. Don't go and take an issue that has been at different stages in mortal combat, mortal trade combat since 1963 and decide that that's gonna be the first issue out of the box the TEC is gonna tackle."²⁷

Obstacles to Bilateral Regulatory Cooperation

As the issues discussed above illustrate, the success of EU-US attempts at transatlantic regulatory cooperation varies significantly by issue area. In some areas such as finance, US and EU regulators are working on commonly agreed rules, particularly due to the current financial crisis. However, in the areas of food safety, environment and security both partners operate with starkly different regulatory philosophies and styles in a highly politicised policy environment. At the heart of these differences lie strongly diverging risk perceptions. Whether the EU or the USA is the more precautionary actor clearly depends on the particular issue. The USA, for instance, is more precautionary when it comes to national security. The European counterpart, on the other hand, has become a much more risk-averse actor in the areas of food safety and the environment, such as with poultry meat or chemicals. When faced with uncertainties about the risks of these products, European regulators are much more willing to take precautionary measures than their American counterparts.²⁸ Thus, they seek to give more weight to risk avoidance over cost/risk-benefit analysis and to public preferences over scientific risk assessments. Vice versa, the U.S. administration opposes references to precaution and socio-economic impact analysis in these areas. According to the common credo "Don't fix what's not broken", US regulation tends to be motivated by the amelioration of market failures. Consumer protection is achieved by a punitive approach. Based on principles of legal liabilities, known as "torts", violators of basic health or environmental protection must provide financial compensation to the victims. Thus, the argument goes, these powerful legal disincentives make government regulatory action unnecessary. Justice is exercised after the damage has been done.

The European approach of preventing harm before it happens and regulating even in the face of uncertainty is, from a US point of view, often seen a guise for protectionist measures and an obstacle to regulatory cooperation in itself. According to this view, leaving the final assessment to legislative bodies opens the door for politicised decisions and, consequently, bad regula-

²⁶ Quoted in William Schomberg: EU Expects U.S. to Turn to WTO in Poultry Dispute, Reuters UK, 6 June 2008, <http://uk.reuters.com/article/rbssFinancialServicesAndRealEstateNews/idUKL0689325520080606>.

²⁷ Personal communication, 7 July 2008.

²⁸ David Vogel: The Hare and the Tortoise Revisited: The New Politics of Consumer and Environmental Regulation in Europe, in: *British Journal of Political Science*, Vol. 33, Part 4, October 2003.

tion. In the USA, it is therefore independent regulatory agencies that are in charge not only of risk assessment (based on sound science and cost-benefit analysis) but also risk management. As one US trade official recently emphasised, “I think it’s a different dynamic that is not fully appreciated by the people in the Commission that we have all these independent agencies – and supposedly that’s part of the problem. I honestly think that’s a strength of our system: better quality regulation because it is less political.”²⁹ Nonetheless, equally difficult to reconcile are differences stemming from varying foreign policy goals and national security preferences. Unlike in the case of consumer protection, here it is the USA which takes the more precautionary approach – at least since the terrorist attacks of 9/11. An example is Congress’ veto on fully opening up the voting stock of US airlines to foreign ownership.

Another obstacle to bilateral regulatory cooperation, already mentioned in the quote above, is the involvement of a multitude of independent regulatory agencies in EU-US negotiations. In the USA, for the most part, rule-making at the federal level is performed by agencies according to a delegation of power from Congress through enabling legislation (“administrative rule-making”). Agencies such as the Food and Drug Administration (FDA), the Environmental Protection Agency (EPA) or the Occupational Safety and Health Administration (OSHA), however, often operate under a mandate with focus on the domestic market only. To get these agencies involved in international trade affairs is politically difficult to achieve and often requires intervention by Congress. To complicate matters further, the USA and the EU also approach the drafting and implementation of regulation differently, reflecting varying governmental structures and administrative traditions. While the EU generally relies on a more “prescriptive” approach to regulation, by which its regulators inform industry exactly how it can conform to rules, the USA depends on a more “outcome-driven” approach, by which regulators specify certain performance requirements while granting industry considerable latitude in how to achieve them. Yet, the biggest obstacle for reconciling these differences in regulatory philosophies is that both sides view their approach as the better one. “We obviously believe that our regulatory approach works better in the long run because it tends to produce more flexible outcomes based on more appropriate risk management analyses. These outcomes, in turn, are better able to adjust and adapt to changing technologies and levels of knowledge,” stated Charles P. Ries, Principal Deputy Assistant Secretary for European and Eurasian

Affairs in a hearing before the US Senate.³⁰ In order to overcome this deadlock, both partners are increasingly looking for ways to promote more effective regulation focusing on prospective regulation rather than tackling existing problematic cases. An innovative and promising example is the Project on Emerging Nanotechnologies, which was initiated at the 2007 EU-US summit and aims at transatlantic regulatory cooperation in the early stages of the new technology.³¹

The Way Ahead

The rationale for deepening transatlantic cooperation is strong given the sheer size and importance of trade and investment flows across the Atlantic. Both partners have common and complementary interests in the economic sphere, and effective cooperation offers the promise of joint economic gains. Moreover, the transatlantic economic partnership rests on a solid foundation, including common interests and ideologies as well as a general overarching consensus about the structure of the international economic architecture such as the WTO. A strong institutional setting, including various transatlantic dialogues and annual high-level meetings, provides a platform for conflict resolution.³² The Transatlantic Economic Council is generally well-disposed to solve a number of current problems. Its high-level composition, the inclusion of private and legislative actors and the regular consultations with the heads of independent regulatory authorities are basic preconditions for the harmonisation of systemic differences.

Nonetheless, transatlantic economic cooperation is facing some serious challenges that go beyond the obstacles mentioned above. Above all, with the end of the Bush Presidency the direction of US trade policy will be hotly contested in the coming years on whether or not to use trade policy increasingly to promote the environment and labour rights, on how to employ trade remedy laws against unfair trade practices abroad, and on how to design and fund programmes which assist displaced workers. The reason is that public support for free trade is weakening. According to a CNN/Opinion Research poll in late June 2008, half of registered vot-

²⁹ Personal communication, 11 July 2008.

³⁰ Charles P. Ries, Principal Deputy Assistant Secretary for European and Eurasian Affairs: U.S.-EU Cooperation on Regulatory Affairs, Testimony Before the Senate Foreign Relations Committee Subcommittee on European Affairs 16 October 2003, <http://www.state.gov/p/eur/rls/rm/2003/25471.htm>.

³¹ The Project on Emerging Nanotechnologies: European Commission Gives Grant to Investigate Transatlantic Oversight of Nanotechnology, 6 February 2008, http://www.nanotechproject.org/news/archive/european_commission_gives_grant_to/.

³² Raymond Ahearn et al.: European Union-US Trade and Investment Relations: Key Issues, CRS Report to Congress, Washington DC 2008, pp. 14-15.

ers think that trade threatens the economy. Many blame the presumably misguided free trade policy of the Bush Administration for the large US trade deficit, declining wages, increasing income disparity and growing unemployment.³³ President-elect Senator Barack Obama, in particular, catered to this sentiment, repeatedly criticising free trade agreements such as the North American Free Trade Agreement (NAFTA) as unfair to American workers.³⁴ In addition, transatlantic economic integration played but a minor role in his agenda. Even in his July 2008 Berlin speech, Obama hurriedly skidded over trade issues.

The US Air Force contract for refuelling tankers could prove an early test for the transatlantic partnership under the new president. The US government reopened the \$35 billion contract, which was awarded to Airbus parent EADS and Northrop Grumman in early 2008, after the Government Accountability Office (GAO) reassessed the Air Force's decision and found significant errors, including the cost evaluation of the EADS and Boeing bids. What is more, the House Armed Services Committee linked the tanker competition to future WTO rulings on Airbus subsidies. Congressmen argued that EADS had an unfair advantage because Airbus received government launch money for the A330. In Europe, officials criticised that reopening the tanker deal was a politically motivated decision in an election year. The decision has widened the gulf between the European Union and the United States in aviation matters in particular as the Pentagon announced in mid-September that it would leave the decision in the competition between Boeing and EADS to the next administration. Obama commended the Pentagon's decision. The next president comes from Illinois, where Boeing's headquarters are located. He is likely to take a similarly tough stance on the Airbus/Boeing conflict as President Bush. And he will be no more inclined than Bush to lower US subsidies to Boeing. Moreover, increasing subsidies to other industries in the light of the current financial crisis – foremost the auto industry – could lead to new transatlantic friction.

However, there are also positive signs indicating a new push in transatlantic economic cooperation. It is expected that a President Obama will narrow the ideological gap between Europe and the USA with respect to cost-benefit analyses of regulations by dissociating himself from Executive Order 12866. The order, issued by Bill Clinton in September 1993, carries on Ronald Reagan's policy of presidential control of the regulatory process in the Office of Management and Budget (OMB) with a focus on monetary cost-benefit analysis.

³³ Bruce Stokes: Trading Gibes, in: National Journal, 26 July 2008.

³⁴ Cato Institute: Free Trade, Free Markets: Rating Congress, <http://www.freetrade.org/congress>.

Rumours, according to which Robert F. Kennedy jr. is eyed to head the Environmental Protection Agency, underline the assumption that Obama will place greater emphasis on social and environmental aspects with respect to regulation.³⁵

Regardless of ideological issues, regulatory cooperation, however, will remain difficult where national security issues or issues of consumer safety are concerned. Furthermore, success of the TEC strongly depends on the position of Congress. Whereas small regulatory deals can circumvent the Congress' legislative process, far-reaching policy decisions need its support.³⁶ This is not unthinkable: in December 2006, the US Senate passed a resolution calling for completion of the Transatlantic Market by 2015. Awareness in Congress of the transatlantic economic partnership has increased considerably in the last two years. However, at the end of the day, members of Congress as much as of the European Parliament are responsible to their constituencies – and not to interest groups on the other side of the Atlantic. It is therefore essential to raise awareness of the benefits of transatlantic regulatory cooperation, particularly among members of relevant subcommittees – e.g. on chemicals, patents and financial markets. The integration of the Transatlantic Legislators Dialogue into the advisory group of the TEC was an important step in this regard. Yet, it remains doubtful whether, in this institutional set-up, placing legislators on a level with interest groups (TABD and TACD) is doing the trick.

Overall, the new initiative will only bear fruit with continuous support from the highest political level. But how much political capital Barack Obama will want to invest into the Framework for Advancing Transatlantic Economic Integration strongly depends on tangible progress in the near future. Keeping long-term conflicts such as the poultry dispute on the TEC's agenda will not facilitate this task. As we have just seen, you cannot solve a thorny dispute by just shouting louder.

³⁵ The Washington Post reports on plans to appoint Kennedy to head the EPA (Juliet Eilperin: Robert F. Kennedy Eyed to Head EPA, The Washington Post, 6 November 2008). The policy of the Bush administration to concentrate rulemaking power in the White House was recently criticised by New York Times columnist Thomas Friedman: "[President Bush] has so neutered the Environmental Protection Agency that the head of the E.P.A. today seems to be in a witness-protection program. I bet there aren't 12 readers of this newspaper who could tell you his name or identify him in a police lineup" (Thomas Friedman: Mr. Bush, Lead or Leave, The New York Times, 22 June 2008).

³⁶ Kirsten Verclas: Commerce, Climate Change, and China: German-American Challenges in 2009, AICGS Issue Brief, 2 June 2008.