

THE RELATIONSHIP BETWEEN US AND EU AS MEMBERS OF WTO

LUDMILA POŠIVÁKOVÁ

Law faculty, Pavol Jozef Šafárik University in Košice, Slovak
Republic

Abstract in original language

Článok sa zameriava na hlavné črty vzťahu medzi Európskou úniou a Spojenými štátmi ako členmi WTO, základné črty ich sporov a ich riešenie v podmienkach WTO. Keďže sú členmi WTO, ich obchodné politiky musia byť založené na požiadavkách WTO/GATT. Spory medzi nimi sú ovplyvnené o.i. používaním rastových stimulátorov v hovädzom mäse, daňami a leteckými dotáciami.

Key words in original language

Európska únia, Spojené štáty, WTO, vzťah, spor

Abstract

The article is focused on the main features of the relationship between the EU and the US as members of the WTO, main features of disputes and their solutions in terms of the WTO. As members of the WTO, trade policies both of them have to be based on requirements of the WTO (GATT). Disputes between them are affected i.a. by usage of hormone growth promotes in beef, taxes or aircraft subsidies.

Key words

European Union, United States, WTO, relationship, dispute

1. INTRODUCTION

The relationship between the United States and the European Union as members of the World Trade Organization¹ is a transatlantic relationship of two big regional subjects. Market regulation of these regional subjects entailing a potential “clash” of different economic cultures and is the new battlefield in international trade.² Settlement of transatlantic trade disputes between these two members of the WTO has become a common feature of the WTO activities. The goal of this article is to focus on legal aspects of trade relationships between The United States and The European Union as members of The World Trade Organization. For presentation of this relationship is useful to mention at first some information about the WTO and settlement of disputes of this organization. Then we will refer about the US and the

¹ The contribution was prepared as part of the project: APVV-0823-11.

² Koopmann, G.: The EU, the USA and the WTO- an Uneasy Relationship. In: *Intereconomics: Review of European Economic Policy*, 2004, vol. 39, issue 2, pp. 58.

EU as members of the WTO and finally some facts about disputes affecting relationship of these two members. Because we can say, that the story of dispute settlement at the World Trade Organization (WTO) is, in large part, the story of the transatlantic relationship between the United States (US) and European Community (EC), now European Union.³

2. THE WORLD TRADE ORGANIZATION

The World Trade Organization (WTO) is the principal global international organization that deals with trade rules between nations. The goal of this organization is to help producers of goods and services, exporters and importers conduct their business.⁴ The WTO is rules-based, member-driven organization what means that all decisions are made by member governments, and the rules are outcome of negotiations among members.⁵ Major principles of the World trade organization, namely reciprocity and nondiscrimination, are simple rules. They can deliver an efficient outcome, when they are used together. Both rules can help to neutralize externalities resulting from terms-of-trade effects.⁶

Countries seeking to join the World Trade Organization must negotiate the terms of their accession with current members, as provided for in Article XII of the WTO Agreement.⁷ The accession process strengthens the international trading system because it ensuring that new members understand and implement WTO rules from the outset.⁸

But aim of this article is not the functioning of the WTO. We would like to focus on WTO Dispute Settlement, which is mainly issue of

³ Busch, M. L., Reinhardt, E.: Transatlantic Trade Conflicts and GATT/WTO Dispute Settlement. [online] Dostupné na internete: <<http://userwww.service.emory.edu/~erein/research/florence.pdf>

⁴ What is the WTO? [online] Dostupné na internete: <http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm

⁵ The WTO. [online] Dostupné na internete: <http://www.wto.org/english/thewto_e/thewto_e.htm

⁶ Breuss, F.: Economic Integration, EU-US Trade Conflicts and WTO Dispute Settlement. [online] Dostupné na internete: <<http://eiop.or.at/eiop/texte/2005-012a.htm>

⁷ "...any state or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO..."

⁸ WTO Accessions. [online] Dostupné na internete: <<http://www.ustr.gov/trade-agreements/wto-multilateral-affairs/wto-accessions>

trade relationship between The United States and The European Union.

2.1. WTO Dispute Settlement

One of the unique features of the WTO in comparison to other international organizations is dispute settlement.⁹ As Palmetter describes, The World trade organization was established by transformation of GATT within the Uruguay Round negotiations,¹⁰ which the most significant achievement was Dispute Settlement Understanding.¹¹

The WTO's procedure for resolving trade conflicts¹² under the Dispute Settlement Understanding is significant for enforcing the rules and for ensuring that trade flows smoothly. A dispute occurs when one member government believes another member government is violating an agreement, which authors are member governments themselves, or a commitment that it had made in the WTO.¹³ Without a means of settling disputes, the rules-based system would be less effective because the rules could not be enforced. The WTO's procedure underscores the rule of law, and it makes the trading system more secure and predictable. But the point is not to pass judgment. The priority is to settle disputes,¹⁴ through consultations if possible. Under the old GATT a procedure for setting disputes existed, but it had no fixed timetables, rulings were easier to block and settlement of disputes took a long time. The Uruguay Round agreement brought more clearly defined stages in procedure. This agreement also, in

⁹ Breuss, F.: WTO Dispute Settlement: An Economic Analysis of Four EU-US Mini Trade Wars- A Survey. In: Journal of Industry, Competition and Trade, 2004, pp. 275.

¹⁰ Dispute Settlement Understanding is agreement which established the dispute settlement system and was negotiated as part of the Uruguay Round in 1995.

¹¹ Busch, M. L., Reinhardt, E.: Transatlantic Trade Conflicts and GATT/WTO Dispute Settlement. [online] Dostupné na internete: <<http://userwww.service.emory.edu/~erein/research/florence.pdf>

¹² For more information about the WTO and its procedures, see: Agreement Establishing the World Trade Organization and its annexes. [online] Dostupné na internete: <http://www.wto.org/english/docs_e/legal_e/04-wto.pdf

¹³ Dispute settlement. [online] Dostupné na internete: <http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm

¹⁴ Settling disputes is the responsibility of Dispute Settlement Body, which consists of all WTO members, and it can establish „panels“ of experts to consider the case when two sides cannot agree.

contrast with GATT, made it impossible for the country losing a case to block the adoption of the ruling.¹⁵

The dispute settlement process is also about preserving the balance of political advantage from negotiated rules and schedules, and the sanctions process is as much to do with preventing abuse as correcting it. According to some opinions, dispute settlement at the WTO serves three essential functions: to clarify and interpret the agreements that have been negotiated in the WTO; to prevent abuses that would diminish the benefits that countries derive from WTO membership; and to preserve the balance of benefits and obligations negotiated by the political process.¹⁶ But essential functions of DS system, as basic, are stated in article 3 of DSU: first, to promptly settle disputes; second, to preserve members' rights; and third, to clarify the meaning of the existing provisions.¹⁷

The great accomplishment, but not only, of the DSU was the establishment of an Appellate Body. It helps to ensure some consistency across findings, but there is no possibility of appeal when panels authorize retaliation. There have been some inconsistent awards of authorization to retaliate, particularly with respect to violations of the prohibition on export subsidies, which have their own dispute settlement provisions. By authorizing retaliation but limiting its size, the WTO helps to prevent disputes in which both parties and the trade system could be severely damaged.¹⁸

2.2. Retaliatory measures

At first side, it has to be mentioned that the DSU does not actually use the term "retaliation," but term "suspension of concessions or other obligations. Most of time, a complaining member would choose to suspend obligations in such a way that it can restrict trade of the responding member. Retaliation is linked to the implementation stage of WTO dispute settlement. It is complaining member's response to non-implementation by a responding member of an adverse ruling by the WTO's Dispute Settlement Body. Retaliation should represent a

¹⁵ A unique contribution. [online] Dostupné na internete: <http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm

¹⁶ Josling, T.: WTO Dispute Settlement and the EU- US Mini Trade Wars: Commentary on Fritz Breuss. In: Journal of Industry, Competition and Trade, December 2004, Vol. 4, Issue 4, pp. 337- 338.

¹⁷ Understanding on rules and procedures governing the settlement of disputes. [online] Dostupné na internete: <http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf

¹⁸ Lawrence, R. Z.: The United States and the WTO Dispute Settlement System. [online] Dostupné na internete: <http://www.hks.harvard.edu/fs/rlawrence/United%20States%20and%20the%20WTO%20Dispute%20Settlement%20System.WTO_CSR25.pdf

measure of last resort used only after failed attempts by the complaining and responding members at agreeing on mutually agreeable compensation. It's important to remind that retaliation is subject to multilateral authorization by DSB, because retaliatory measures constitute a departure from basic WTO obligations.¹⁹ Authorization for retaliation is granted just temporary, as long as the member retaliated against has not implemented the underlying adverse Dispute Settlement Body ruling. Retaliation is not intended as punishment or compensation for past economic harm of complaining member.²⁰

The Dispute Settlement Body and therefore a Dispute Panel has a power to authorize the suspension of trade concessions by a complainant to respondent where there is a harm, nullification or impairment, according to the paragraph 2 of Article XXIII of GATT 1994. Following this provision, Members of the WTO are binding to accept the rulings of the DSB and also for the DSB to permit sanctions against countries acting contrary to the WTO rules. Compensations and the suspension of concessions, which is of Most-Favoured Nation (MFN) treatment, to a WTO Member are intended as temporary measures. They are only implemented if the recommendations and rulings of the DSB are not acted upon within a reasonable time period. These measures cannot be applied retrospectively. Where nullification or impairment is ruled to have occurs, a respondent may choose between compensation (may have form of tariff reductions and is voluntary) and suspension of concessions (it's default means of restitution and is more complex) as the form of restitution. The grounds for compensation, the suspension of concessions and retaliation are established by Article 22 of the DSU and the magnitude of any compensation or suspension of concessions is required to be equivalent to the level of harm caused by illegal measure.²¹

3. US AS A MEMBER OF WTO

The United States of America has been member of WTO since January the 1st 1995.²² The official sites of the Office of the United States Trade Representatives stated that the core of trade policy of the US is permanent support to multilateral trading system based on rules. The US, working through the World Trade Organization, is one of

¹⁹ See: Art.7.3, 22.1 of the DSU.

²⁰ Malacrida, R.: Designing WTO Retaliatory Measures: The Case For Multilateral Regulation Of The Domestic Decision- Making Process. [online] Dostupné na internete: <<http://ebookbrowse.com/malacrida-domestic-process-of-designing-retaliatory-measures-august-08-doc-d340823663>

²¹ Kerr, W. A., Gaisford, J. D., eds.: Handbook on International Trade Policy. Cheltenham, UK: Edward Elgar Publishing Limited, 2007, pp. 504.

²² United States of America and the WTO. [online] Dostupné na internete: <http://www.wto.org/english/thewto_e/countries_e/usa_e.htm

the world leaders in the reduction of trade barriers and to expand global economic opportunity, improve living standards and reduce poverty.²³ According to some estimate, US incomes are some 10 percent higher than they would be if the economy were self-sufficient.²⁴

The US membership in the WTO requires the US open their own markets to the benefit of American consumers and industries using import. It also supports trade liberalization abroad, opening markets and keeps them open for US exporters. WTO Agreement implementing these commitments in written, so there is less temptation for governments to meet and re-save the harmful trade barriers under the short term political pressures. The main reason why many governments not based barriers to US exports of the agreements signed with the US government to reduce barriers and keep them to a minimum. Governments are aware that in the event that would raise tariffs beyond the "bound" rates written in WTO agreements, or by others violated provisions aimed at maintaining the open market, they would be subject of the dispute, which was resolved within WTO dispute settlement system.²⁵

Following the report of the Council on Foreign Relations,²⁶ The WTO provides more benefits to the United States than GATT did. These benefits lie on provisions which cover more issues interesting for United States: The WTO includes rules on standards and technical barriers to trade; it protects intellectual property; it covers agriculture and services. But the biggest advantage of the WTO is that it includes a mechanism to enforce these rules, the dispute settlement system. This has reduced the need for the United States to resort to unilateral retaliatory measures, limiting an important source of tension between the United States and its partners and so generating a significant foreign-policy dividend. Indeed, since the advent of the dispute settlement system, the United States has generally abided by its agreement not to impose unilateral trade sanctions against WTO

²³ The World Trade Organization. [online] Dostupné na internete: <<http://www.ustr.gov/trade-agreements/wto-multilateral-affairs/-world-trade-organization>

²⁴ Lawrence, R. Z.: The United States and the WTO Dispute Settlement System. [online] Dostupné na internete: <http://www.hks.harvard.edu/fs/rlawrence/United%20States%20and%20the%20WTO%20Dispute%20Settlement%20System.WTO_CSR25.pdf

²⁵ Americans Reaping Benefits of U.S. Membership in WTO. [online] Dostupné na internete: <<http://www.cato.org/publications/commentary/americans-reaping-benefits-us-membership-wto>

²⁶ See: Lawrence, R. Z.: The United States and the WTO Dispute Settlement System. [online] Dostupné na internete: <http://www.hks.harvard.edu/fs/rlawrence/United%20States%20and%20the%20WTO%20Dispute%20Settlement%20System.WTO_CSR25.pdf

members without WTO authorization (The Banana case is probably exception). Anyway, the shift to multilateral enforcement helps ensure the legitimacy of the trading system.

4. EU AS A MEMBER OF WTO

European Union is a single customs union with a single trade and tariff policy. European Union's participation in the WTO started in January the 1st 1995, since when EU became a member of WTO. The 27 member States of the European Union are also WTO members in their own right. The European Commission, the EU's executive arm, speaks for all EU member States at almost all WTO meetings. According to some opinions, the EU Council could be viewed not just as an intergovernmental institution gathering a group of Member States' representatives on a regular basis through its various committees, but rather as an accountable legislative body, analogous to the US Senate.²⁷ The EU is, in addition to the WTO, a member of some groups in the negotiations (former coalitions in the WTO), as Friends of Ambition (NAMA)-seeking to maximize tariff reductions and achieve real market access in NAMA, or "W52" sponsors-proposal for "modalities" in negotiations on geographical indications and "disclosure."²⁸

European Union, and also some others organizations as, for example, the North American Free Trade Agreement (NAFTA), the Southern Common Market (MERCOSUR), is considered as good example of Regional Trade Agreement (RTA). Today's Multilateral Trading System consists of the world-wide liberalization ambitions under the WTO and of a subset of numerous RTA. Increasing integration in the EU, on the one hand increases its negotiation power at the WTO, on the other hand it diminishes the need for settling trade disputes within its borders and, hence, makes hands free for conflict settling vis à vis third countries. In the transatlantic trade disputes the EU is more often the complaining than the defending party.²⁹

Only customs unions, like the EU, conduct a common commercial policy with a common external tariff. All other RTAs consist of a looser arrangement with a free trade arrangement. The most important trading partner for the EU is the USA. The EU and the USA are each other's main trading partner and account for the largest bilateral trade

²⁷ Leal- Arcas, R.: The EC in the WTO: The three- level game of decision making. What multilateralism can learn from regionalism. [online] Dostupné na internete: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=594943

²⁸ The European Union and the WTO. [online] Dostupné na internete: <http://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm

²⁹ Breuss, F.: Economic Integration, EU-US Trade Conflicts and WTO Dispute Settlement. [online] Dostupné na internete: <<http://eiop.or.at/eiop/texte/2005-012a.htm>

relationship in the world. The EU and the USA are also each other's most important source for Foreign direct investment (FDI).³⁰ The USA was the largest investment partner of the EU, accounting for nearly 45% of both outward and inwards flows of FDI.³¹

As we can focus on the EU as regional organization and the WTO as manifestation of multilateralism, the problems that the enlarged EU will face in its internal decision- making process can be paralleled to the WTO's decision- making process, and thus the European experience can be used as guidance in the WTO forum. So we could learn from EU's benefits and avoid the mistakes of the European experience in the decision- making process of international trade fora.³²

5. US/EU DISPUTES WITHIN WTO

Trade relationship between states, for example US and EU, is characterized by trade rules which are an unruly mix of economic, political and legal constructs.³³ According to high level of US- EU commercial interactions, trade intensions and disputes are not unexpected. Major trade conflicts between US and EU have varied causes. The disputes are involving agriculture, aerospace, steel, etc. Other conflicts arise when one of these WTO members initiate actions or measures to protect or promote their political and economic interests. The underlying cause of these disputes over such issues as sanctions, unilateral trade actions and preferential trade agreements are different foreign policy goals and priorities of Brussels and Washington. These bilateral trade disputes have real economic and political consequences for the bilateral relationship. They can be weakening efforts of the two partners to provide strong leadership to the global trading system.³⁴ Anyway, trade disputes have a potential of turning into the conflicts. But both sides lose out most times. To

³⁰ Foreign direct investment- direct investment into production in a country by a company in another country, by buying a company in the individual country or by expanding operations of an existing business in that country.

³¹ Breuss, F.: Economic Integration, EU-US Trade Conflicts and WTO Dispute Settlement. [online] Dostupné na internete: <<http://eiop.or.at/eiop/texte/2005-012a.htm>

³² Leal- Arcas, R.: The EC in the WTO: The three- level game of decision making. What multilateralism can learn from regionalism. [online] Dostupné na internete: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=594943

³³ Josling, T.: WTO Dispute Settlement and the EU- US Mini Trade Wars: Commentary on Fritz Breuss. In: Journal of Industry, Competition and Trade, December 2004, Vol. 4, Issue 4, pp. 337.

³⁴ Ahearn, R. J.: Trade Conflict and the U.S.- European Union Economic Relationship. [online] Dostupné na internete: <<http://fpc.state.gov/documents/organization/71826.pdf>

prevent such conflicts, countries have agreed on trading rules and joined the WTO to mediate disputes.³⁵

5.1. Cases with usage of retaliatory measures

The WTO Dispute Settlement Mechanism (DSM) allows for sanctions, mostly via retaliatory tariffs in present. It offers a cooperative interpretation of non-compliance. For example, if only two countries are involved in a trade dispute within the multilateral agreements of the WTO a collapse of an agreement is not plausible. Then we have to weigh economic values against political values. It's more understandable that the complainant and respondent may lose in welfare terms, both governments, for political economy motives, still prefer the outcome to the initial situation. However, each retaliatory action answering the non-compliance with a former agreement has incalculable consequences, especially when the retaliation is not executed with some form of transfers, but with imposing retaliatory tariffs. That's the reason why someone state that retaliation in the present form never can "rebalance" the original status.

According to Breuss, tariffs from an economic point of view are very bad instruments for countermeasures. Although the right to request financial reparation for a wrongful act, including damages incurred in the past, is a basic principle of international law in case compliance is not possible the question is the method in which sanctions should be executed. A much more efficient and easier retaliation instrument than tariffs would be direct transfers from the government of the non-complying country to the government of the country having got the authorization of compensation by the WTO. The government authorized for compensation could than easily redistribute the received transfers to the companies which suffered the concrete loss. In his point of view, whether transfers as retaliatory measures would also be covered by the present DSU legislation is an open question. Article 22.1 DSU never speaks about tariffs explicitly but only about compensation and the suspension of concessions or other obligations. Suspension of concessions implies as a rule the reintroduction of tariffs as the major part of concessions.³⁶

Speaking about retaliation with tariffs, this sanction as a rule a decision by the arbitrators under Dispute Settlement Understanding³⁷

³⁵ Free trade in peril. [online] Dostupné na internete: <<http://news.bbc.co.uk/2/hi/business/342821.stm>

³⁶ Breuss, F.: WTO Dispute Settlement: An Economic Analysis of Four EU-US Mini Trade Wars- A Survey. In: Journal of Industry, Competition and Trade, 2004, pp. 309.

³⁷ E.g. in the "Hormones" case that "the suspension by the United States of the application to the European Communities and its member States of tariff concessions and related obligations under GATT 1994 covering trade in a maximum amount of US\$ 116.8 million per year would be consistent with Article 22.4 of the DSU."

is interpreted as the authorization for the complaining party to impose countermeasures up to the level of nullification or impairment in the form of additional 100% ad valorem duties. The retaliatory tariff is meant to be and is usually prohibitive what means that the imports of the targeted products of the retaliation list come to a halt absolutely or that they decline markedly. So no tariff revenue can be collected or only a limited amount. When either the US or the EU is retaliating against each other following violating the WTO agreements we have the situation of a (retaliatory) „trade war,” in which both parties reduce trade by imposing trade contracting measures simultaneously. For fairly low dimension of these disputes we call them „mini trade wars.” Out of the large number of Dispute Settlement cases, in only seven occasions the WTO-Dispute Settlement authorities (Arbitrators) allowed the complainant party to introduce retaliatory measures against another WTO member. Concerned EU-US trade dispute, there were three such cases, namely the Hormones case, the Bananas case and the FSC case.³⁸

5.1.1. Hormones case³⁹

In the beginning of this case, in 1986-1987, the United States invoked GATT dispute settlement under the Tokyo Round's Technical Barriers to Trade Agreement in response to the EU's initial ban on hormone-treated meat in the 1980s. They also instituted retaliatory tariffs on EU imports, which stayed in effect until May 1996. In 1996, both subjects had requested WTO consultations in an attempt to resolve the dispute. In April 1996, the United States requested a WTO dispute settlement panel case against the EU, claiming that the ban is inconsistent with the EU's WTO obligations under the WTO agreement on Sanitary and Phytosanitary (SPS). Australia, Canada, and New Zealand joined the United States in the complaint. But the EU maintained the ban. In 1997, the WTO dispute settlement panel released its report, in which agreeing with the US that the ban violated several provisions of the SPS Agreement. Specifically, the EU ban was found to violate SPS requirements that such measures: a) be based on international standards, guidelines or recommendations (Article 3.1); b) be based on a risk assessment and take into account risk assessment techniques developed by the relevant international organizations (Article 5.1); and c) avoid arbitrary or unjustifiable distinctions that result in discrimination or a disguised restriction on international trade (Article 5.5).

³⁸ Breuss, F.: Economic Integration, EU-US Trade Conflicts and WTO Dispute Settlement. [online] Dostupné na internete: <<http://eiop.or.at/eiop/texte/2005-012a.htm>

³⁹ Complainants: United States (WT/DS26) and Canada (WT/DS48). For summary of Hormones Case, see: The Hormones case. [online] Dostupné na internete: <http://www.wto.org/english/tratop_e/sps_e/sps_agreement_cbt_e/c5s3p1_e.htm

The WTO Appellate Body, in 1998, on the EU appeal, found that the EU ban did contravene the EU's obligations under the SPS Agreement, but left open the option for the EU to conduct a risk assessment of hormone-treated meat. A WTO arbitration panel ruled subsequently that 15 months from the date of the decision would be a reasonable period of time for the EU to conduct its assessment. By the deadline, the EU did not complete its scientific review and decided it would not consider removing the ban before conducting additional review. So the US retaliated by imposing its current trade sanctions against US imports of EU products from 1999. Following the 1997 WTO decision, the EU ordered various research studies and performed scientific reviews of the issue. In 1999, as justification for continuing the ban, the EU offered scientific reviews and opinions that estradiol may be carcinogenic. In 2003, EU press release claimed that EU's scientific reviews constitute thorough risk assessment based on current scientific knowledge and thus fulfill the EU's WTO obligations. Accordingly, in 2003, the EU issued a new directive and revised its ban to permanently ban estradiol and provisionally ban the five other hormones. US trade and veterinary officials have repeatedly rejected the EU studies, claiming that the scientific evidence is not new information nor does it establish a risk to consumers from eating hormone-treated meat. The United States also claims that these findings ignore even scientific studies by European scientists. In 2004, the EU requested WTO consultations. They claimed that the United States should remove its retaliatory measures since the EU has removed the measures found to be WTO inconsistent in the original case. In 2005, the EU initiated new WTO dispute settlement proceedings against the United States and Canada. Panel report from the March of 2008 cited fault with all three parties (EU, United States, and Canada) on various substantive and procedural aspects of the dispute. The EU had not presented sufficient scientific evidence to justify the import ban and the United States and Canada had maintaining their imposed trade sanctions. The panel found procedural violations of both parties under the WTO Dispute Settlement Understanding by unilateral actions. Both parties filed appeals citing procedural errors and disagreements with the panel findings.

In October 2008, the WTO Appellate Body issued a mixed ruling that allows for continued imposition of trade sanctions on the EU by the United States and Canada, but also allows the EU to continue its ban on imports of hormone-treated beef (by stating that the EU's ban is not incompatible with WTO law).

The WTO Appellate Body's reversal of the panel on this issue of scientific evidence has led some to argue that this is a potentially precedent-setting decision that might be perceived to instruct dispute settlement panels to be more deferential to national governments when

the relevant scientific evidence is not available to make an objective risk assessment.⁴⁰

In this dispute, brought by Canada and the United States, the EU has refused to remove its import restrictions despite to be found as illegal by a WTO panel and has willingly accepted retaliation on the grounds that its import restrictions are justified by health fears over the long-term effects on consumers.⁴¹

5.1.2. The Bananas case⁴²

In 1993, the Council of the European Union adopted Reg. No. 404/93 on the common organization of the market in bananas and subsequent EU legislation, regulations and administrative measures, including those reflecting the provisions of the Framework Agreement on Bananas (the “BFA”). This regulation established a regime for the importation, sale and distribution of bananas (Common Market Organization for bananas), and implement, supplement and amend that regime. The import regime with a complicated tariff-quota system had two ideas. First, to have a common trade regime for EU’s Single Market and second, to prefer ACP countries (African, Caribbean, Pacific) at the expense of traditional bananas supplier from Latin America and the USA. The Bananas dispute with the EU started in 1996. Ecuador, Guatemala, Honduras, Mexico and the USA filed a complaint against this import regime for bananas (with the third parties Saint Lucia, Dominican Republic, Nicaragua and Jamaica) at the WTO by starting formal consultations with the EU and WTO panels were set up. The EU import regime was found to be illegal by the WTO in 1997. The main criticisms were the setting aside of a quantity reserved solely for ACP imports (failure in “non-discrimination requirements” of Article XIII of GATT 1994), and the allocation of licenses on a “historical” basis. According to WTO, in the Bananas case several WTO provisions or agreements are violated, respectively: GATT (I, II, III, X, XI, XIII), Licensing, Agriculture, TRIMS and GATS (II, XVI, XVII). The EU adjusted its Common Organization of the Market in Bananas with the Council Regulation (EU) No 2587/2001, coming into force as of January 1, 2002. The US government lifted its sanctions as of 1 July 2001, as a consequence of the earlier agreement with the USA and Ecuador.

⁴⁰ Johnson, R., Hanrahan, Ch. E.: The U.S.- EU Beef Hormone Dispute. [online] Dostupné na internete: <<http://www.nationalaglawcenter.org/assets/crs/R40449.pdf>

⁴¹ Kerr, W. A., Gaisford, J. D., eds.: Handbook on International Trade Policy. Cheltenham, UK: Edward Elgar Publishing Limited, 2007, pp. 504.

⁴² Complainants: Ecuador, Guatemala, Honduras, Mexico, United States (WT/DS27). For summary of Bananas case, see: EC- Bananas III. [online] Dostupné na internete: <http://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds27sum_e.pdf

The Banana dispute is a very complex case, involving goods trade and services, tariffs and quotas and a whole bunch of countries. In addition to the USA and the Latin American producers also the 78 ACP countries and the EU are involved in the Banana case.⁴³ To make the story even more complex,⁴⁴ in this case arose an important procedural dispute over the relative primacy and sequencing of compliance and compensation. The US wanted to retaliate immediately while the EU argued that this could only be done if its new trade measures for bananas were found not to comply with the WTO rules. An arbitration panel ruled that an Article 21.5 ruling was not a prerequisite for action under Article 22.6, but its decision has never been adopted.⁴⁵

5.1.3. The Foreign Sales Corporations case (FSC)⁴⁶

The US tax income tax concession for foreign sales corporations was first raised in GATT by the EU based on earlier legislation in 1973. The US argued that the concession did not constitute a subsidy but has agreed to amend its legislation according to WTO findings. The EU is not convinced that the amendments so far proposed will go far enough.⁴⁷

In 1997 the EU requested for consultations on the US Internal Revenue Code and related measures establishing special tax treatment for Foreign Sales Corporations. The FSC scheme provides for an exemption to the general tax rules which results in substantial tax savings for US companies. The EU argued that the exemptions from the US direct taxes of a portion of FSC income related to exports and of dividends distributed to US parent companies constitute export

⁴³ Within the EU there are at least four groups with different trade regimes before the EU implemented its common organization of the market in bananas in 1993: a) free trade countries (Austria, Finland, Germany, and Sweden); b) Tariff imposing countries (Belgium, the Netherlands, Luxembourg, Denmark and Ireland); c) ACP supplied countries (Italy and the United Kingdom); d) Countries with own production (France, Greece, Spain and Portugal). In each of these groups the welfare implications of the EU banana regime of 1993 were different.

⁴⁴ Breuss, F.: Economic Integration, EU-US Trade Conflicts and WTO Dispute Settlement. [online] Dostupné na internete: <<http://eiop.or.at/eiop/texte/2005-012a.htm>

⁴⁵ Kerr, W. A., Gaisford, J. D., eds.: Handbook on International Trade Policy. Cheltenham, UK: Edward Elgar Publishing Limited, 2007, pp. 504.

⁴⁶ Complainant: European Communities (WT/DS108). For summary of FSC case, see: US-FSC. [online] Dostupné na internete: <http://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds108summary_e.pdf

⁴⁷ Johnson, M. D. C.: US-EU trade disputes: Their causes, resolution and prevention. [online] Dostupné na internete: <<http://www.eui.eu/RSCAS/Research/Transatlantic/Johnson.pdf>

subsidies contrary to provisions of the GATT 1994 and the Agreement on Subsidies and Countervailing Measures (ASCM). The US introduced the FSC scheme in 1984 as a replacement of its old export promoting tax scheme condemned by a GATT panel in 1981. The EU decided to request the establishment of a WTO Panel in 1998 after unsuccessful rounds of consultations. According to the WTO Panel report, the FSC constituted a prohibited export subsidy under the Subsidies Agreement and an export subsidy in violation of the Agriculture Agreement. Since satisfactory change in the FSC regulations did not take place, the EU has requested the WTO to authorize trade sanctions on the US up to a maximum amount in the FSC trade dispute. The EU's objective was not the punitive duties on US products but the creation of an incentive for US to withdraw the illegal exports subsidy. The FSC case is quantitatively by far the most important case for both sides.

Contrary to the first two cases the FSC dealt with trade conflict between the EU and the US, when it would not have been solved, could have led to a trade war of considerable dimension and it would have involved nearly all sectors of both economies and change in sectoral competitiveness in both countries, which are not easily predictable.⁴⁸

5.2. Contemporary cases with importance

One of the key trade disputes between the United States (US) and European Union (EU) in present arises from the rivalry between Boeing and Airbus in the highly competitive large civil aircraft industry. Previous disputes on subsidy issues between the two largest aircraft manufactures peaked in early 90s. In 1992, the EU and the US regulated the government involvement in the large civil aircraft industry by a bilateral agreement, Agreement on large civil aircraft.⁴⁹ This agreement allowed each party to provide a certain level of support to their respective aircraft industry. Both Airbus and Boeing, obtained, under the terms of the joint agreement, several government aids for the development of large civil aircraft like the Airbus A380 and the Boeing 787 "Dreamliner."⁵⁰ While Airbus was supported in terms of agreement by voluminous loans ("launch aids" for the development of new planes), the aids granted in terms of the

⁴⁸ Breuss, F.: Economic Integration, EU-US Trade Conflicts and WTO Dispute Settlement. [online] Dostupné na internete: <<http://eiop.or.at/eiop/texte/2005-012a.htm>

⁴⁹ For the text of agreement, see: Agreement on Trade in Civil Aircraft (1992). [online] Dostupné na internete: <<http://www.jurisint.org/pub/06/en/doc/29.htm>

⁵⁰ Haak, A., Brüggemann, M.: The WTO Airbus- Boeing Subsidies Conflict, Overview on Latest Developments and Outlook. [online] Dostupné na internete: <<http://www.theworldlawgroup.com/files/file/docs/TW%20Boeing.pdf>

agreement to Boeing mainly consisted of government-financed Research & Development support to this US aerospace producer. But in 2004, the US unilaterally announced its withdrawal from the agreement and immediately filed a challenge at the WTO of all EU support ever granted to Airbus, even though the US had previously agreed to this support. In turn, the EU had just option to respond itself immediately with a parallel the WTO challenge of the US government support to the US aerospace industry, including benefits to Boeing under the so-called US Foreign Sales Corporation Scheme, which the US government had continued to provide to Boeing.⁵¹ So the Large Civil Aircraft case is subject of two ongoing cases, Boeing case and Airbus case.

5.2.1. Boeing case⁵²

In its WTO challenge against the US, the EU has challenged various US Federal, State and local subsidies benefitting Boeing. NASA has provided Boeing with more than US\$2 billion in subsidies through eight NASA-funded federal research programs through direct payments and free access to facilities, equipment and employees. The AB confirmed that the above programs provided subsidies in the form of a direct transfer of funds or the provision of goods and services by NASA to Boeing for which no fee is payable and for which Boeing acquired the commercial IP rights. The AB confirmed moreover that the US Department of defence (DOD) under its Research Development, Test and Evaluation programs has transferred to Boeing, at no cost, dual use technology worth up more than US\$1 billion for direct use in Boeing's production of Large Civil Aircraft as well as free access to DOD's facilities. The AB clarified that the relations between NASA and DOD on the one side, and Boeing on the other side was akin to that of a joint venture, with the essential feature that the fruits of the joint labour largely went to one partner, Boeing, which had provided none of the funding. Also Kansas and Washington State granted tax subsidies. According to the proceedings in this case, following the final report of the Appellate Body adopted by DSB, after the US compliance period, the US submitted a compliance report. After the EU reviewed the US compliance claims, the EU submitted a request for consultations on the US compliance of the DSU and a request for the authorization of countermeasures under the DSU. After compliance consultations where the US failed to provide detailed evidence to the EU to support its compliance claims, in present time the EU requested the establishment of a WTO

⁵¹ Background fact sheet WTO disputes EU/US Large Civil Aircraft. [online] Dostupné na internete: <http://trade.ec.europa.eu/doclib/docs/2010/september/tradoc_146486.pdf

⁵² Complainant: European Communities (WT/DS317, WT/DS353).

compliance panel to address the failure of the US to remove WTO-inconsistent subsidies to Boeing.⁵³

5.2.2. Airbus case⁵⁴

The US complaint was particularly aiming on the launch aids and loans granted to Airbus taking into consideration the fact that Boeing had not been supported by such funds. According to aviation experts, the US were also trying to prevent the EU from granting further launch aids to Airbus for the development of the A350, Airbus' competitor to the 787 "Dreamliner."⁵⁵

In this case, The Appellate Body overturned several key findings made by the Panel in favor of the EU. Certain subsidies remain, even though the economic impact of these support measures in the Large Civil Aircraft market has been found to be very limited, nowhere near the US allegations (claims). The interesting point of this case is the development of WTO appellate procedure. At the joint request of the parties, the Appellate Body, for the first time in an appellate proceeding, adopted additional procedures to protect the business confidential information and highly sensitive business information submitted in the proceedings, because that disclosure of such information could be "severely prejudicial" to the originators of the information.⁵⁶

6. CONCLUSION

The United States and European Union have a large bilateral trade relationship in the world which has a big potential. Cause the size and importance of trade ties the US and the EU are the key players in the global trade. They are the largest trade and investment partner for most of other countries. Its transatlantic relationship defines the shape of the global economy. For two economies of such commercial importance, the US and the EU encounter a number of trade disputes

⁵³ For more about Boeing case see: United States — Measures Affecting Trade in Large Civil Aircraft. [online] Dostupné na internete: <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds317_e.htm

⁵⁴ Complainant: United States (WT/DS316, WT/DS347). For more about Airbus case, see: European Communities — Measures Affecting Trade in Large Civil Aircraft. [online] Dostupné na internete: <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds316_e.htm

⁵⁵ Chanda, S.: The battle of the big boys: A critical analysis of the Boeing-Airbus dispute before WTO. [online] Dostupné na internete: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1944588

⁵⁶ EC and certain member states — large civil aircraft (DS316). [online] Dostupné na internete: <http://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds316sum_e.pdf

which are dealt through the dispute settlement mechanism of the WTO. Despite huge fuss disputes currently only impact small percentage of trade between the United States and the European Union.⁵⁷ For better cooperation the US and the EU established a High Level Working Group to identify policies and measures to increase US/EU trade and investment and in 2007 the Transatlantic Economic Council was set up to guide and stimulate the work on transatlantic economic convergence. So we can just wait for the effect of these group and council on trade between the US and the EU. However, the US and the EU are big subjects of trade and in every relationship, not excluding trade one, disputes arise all the time. But important is the will to settle the dispute and the way of this settlement.

Literature:

- Koopmann, G.: The EU, the USA and the WTO- an Uneasy Relationship. In: *Intereconomics: Review of European Economic Policy*, 2004, vol. 39, issue 2, pp. 58.
- Breuss, F.: WTO Dispute Settlement: An Economic Analysis of Four EU- US Mini Trade Wars- A Survey. In: *Journal of Industry, Competition and Trade*, 2004, pp. 275.
- Josling, T.: WTO Dispute Settlement and the EU- US Mini Trade Wars: Commentary on Fritz Breuss. In: *Journal of Industry, Competition and Trade*, December 2004, Vol. 4, Issue 4, pp. 337- 338.
- Kerr, W. A., Gaisford, J. D., eds.: *Handbook on International Trade Policy*. Cheltenham, UK: Edward Elgar Publishing Limited, 2007, pp. 504.

Contact – email

ludmila.posivakova@student.upjs.sk

⁵⁷ The EU's Trade Relationship with the United States. [online]
Dostupné na internete: <<http://www.eubusiness.com/topics/trade/usa>