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George A. Bermann
Columbia Law School, gbermann@law.columbia.edu

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Policy Recommendations for Dispute Prevention and Dispute Settlement in Transatlantic Relations: Legal Perspectives

GEORGE A. BERMANN

The concrete case-studies and general policy analyses that were the subject of inquiry in the conferences culminating in the present volume have predictably generated a series of distinctly legal—as well as political—reflections on dispute prevention and dispute settlement in the transatlantic arena. One of the merits of the dual (concrete and abstract) approach that has been adopted for these conferences is its capacity to provide a check against the risks that would result either from divorcing this study from the realities of disputes or from relying exclusively on potentially idiosyncratic dispute scenarios.

It is in a sense reassuring to find, as I have, that the general policy analyses neither refute, nor are refuted by, the case-studies taken as a whole. The result is a more confident statement of reflections from a legal perspective than is often possible and, in turn, a more confident sketching of what appear to be the most relevant policy recommendations.

I think it useful, at the outset, however, to make a few assumptions, which may not—it must be said—be universally shared. The first such assumption is that categorization of disputes will continue to operate as a useful descriptive and prescriptive tool, in the sense that a meaningful typology of disputes should continue to inform the analyses and policy recommendations brought to bear on dispute prevention and settlement. The second is that we are not committed to the notion of establishing new formal structures specific to EU/US trade disputes. From a legal perspective, at least, there appears to be little to be gained, and possibly significant costs to be incurred, in establishing a Transatlantic Free Trade Agreement specifically for purposes of preventing or resolving EU/US trade disputes.

It seems to me that the recommendations to emerge that are most important from a legal perspective are the following:

Transatlantic Economic Disputes. Ernst-Ulrich Petersmann and Mark A. Pollack.
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I. Monitoring and improving transatlantic regulatory co-operation processes

Precisely because of the legal complexities inevitably associated with the WTO dispute resolution process in all its phases, it is important from a legal perspective that there be monitoring and improvement of existing government-to-government processes for identifying and resolving disputes at a pre-WTO stage.

A specific way that emerged from the discussions for making such improvement is early bilateral use of scientific advisory bodies. The case-studies, and common sense, suggest that empanelling such bodies, upon identification of a problem but prior to the crystallization of policy differences, would facilitate producing scientific or technical understandings that may be critical to the early settlement of differences.

II. 'Intermediate direct effect'

A recurring issue, both in the case-studies and the general policy analyses, has been the prospect of providing for an 'intermediate' form of direct effect of WTO obligations. For advocates of increased efficacy of international or supranational legal norms, direct effect has always had a strong appeal. (The contribution of direct effect to the efficacy of EC law is well established in the literature.)

But, it may ultimately be more advantageous to situate direct effect somewhat differently. Rather than posit direct access by private parties to domestic courts to enforce the disciplines of WTO law, consideration should be given to more 'mediated' forms of direct effect. This is recommended on account of the regulatory incoherence that may flow from having potentially countless numbers of private claimants asserting their claims before a multiplicity of generalist judges lacking expertise, or any form of primary responsibility, for fashioning a consistent and coherent response to WTO-based claims.

Thus, consideration should be given to shifting the centre of gravity in the giving of national direct effect of WTO law away from domestic courts in the first instance and toward the domestic administrative process.

III. A 'restatement' of WTO law?

It rightly appeared idle to many participants in the conference deliberations to envision improvement in transatlantic dispute prevention and settlement in isolation from the evolution of substantive WTO law. This is especially the case, of course, because WTO law, from a practical point of view, is being more actively made in the course of dispute resolution than in international 'legislative' channels.

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It is not too early for WTO case-law to be made subject to serious study and criticism, with a view not only to improving the application of WTO law principles, but also to clarifying them and rendering them more coherent. Indeed, from the point of view of favouring dispute prevention and settlement, it may be more important that the law be certain and coherent than that it be substantively 'ideal'.

That having been said, it may be premature, given the modest number of rulings on any single set of provisions in the WTO agreements, to initiate a 'Restatement' as such. But it is not too early to subject the body of rulings that have emerged to a rigorous collective substantive law review, with a view toward an eventual Restatement of sorts. This could prove a useful instrument in activating a 'political correction' mechanism whereby a pattern of misguided or inconsistent WTO rulings might be reversed.

IV. The problem of WTO 'interface' with other international institutions

We have frequently observed the problem of 'interface' between the WTO and other international regulatory institutions. The problem commonly emerges in two contexts. One such context is that of 'linkages', that is to say, the question of whether and to what extent values other than facilitation of international trade should be taken into account in the elaboration of world trade law. The other context in which the problem arises is a more general one, namely that of legitimacy, democracy, and accountability.

The fact remains that the interface problem also has a more particular impact on WTO dispute prevention and settlement, if only due to the questions of 'proper forum' that inevitably arise. Not as much has been done as could be done by way of articulating the institutional relationship between the bodies primarily concerned with international trade and those primarily concerned with other values with which a trade imperative may from time to time conflict, or the substantive relationship between the norms and the rulings that these bodies produce. We are dealing with bodies, on the one hand, and norms and rulings, on the other hand, that are widely regarded as 'authoritative' within the realm they are authorized to regulate, but whose authoritativeness within the larger arena of international economic regulation is occasionally contested and in any event contestable.

Placing the interface problem in a dispute resolution context does not make addressing that problem any the easier. But it serves to make it all the more concrete and, in that sense, compelling.

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