Transatlantic trade: Hard sell

By Shawn Donnan

Today the EU-US trade talks are facing a growing number of political obstacles

One morning last month Giorgio Bocedi, a rotund Italian lawyer with a practised charm, stood up in a brightly-lit university classroom in the Washington DC suburbs and began extolling the virtues of eight centuries of cheesemaking tradition – and the 245,170 cows responsible for producing the world’s Parmigiano reggiano.

Those cows – and the 3,439 dairy farmers around the northern Italian city of Parma that they belong to – helped produce 3.279m wheels of parmesan each year, Mr Bocedi boasted. And yet still there were pretenders. “The name Parmesan has been used for a long time in America. But we don’t know why. Usually it is used in association with Italy!”

Within minutes he had handed over to Patrick Kole, a representative of the Idaho Potato Commission, who was eager to defend the importance of Idaho’s soil in growing the unique tuber and to point out the injustice of a pizza company registering the US state’s name as a trademark in Germany.

“We know exactly what is going to go on top of that pizza,” Mr Kole declared. “Kartoffel! Potatoes!”

Both men’s presentations in defence of the value of regionally-linked foods were made to EU and US negotiators now engaged in the laborious process of trying to construct what, should their work succeed, will be the largest regional trade alliance in the world. They were also emblematic of what, a year after talks were launched, has become one of the dominant features of the negotiations.

Hailed by David Cameron, the UK prime minister, as a “once-in-a-generation prize” that would “fire up” economies on both sides of the Atlantic as they tried to escape the shadow of the 2008 global financial crisis, the Transatlantic Trade and Investment Partnership, to give it its official name, has from day one been billed as a “21st-century” trade agreement. It would eliminate duelling regulatory regimes and the other non-tariff barriers that now complicate the flow of goods, services and capital across the Atlantic. It would move beyond the realm of tariffs and other traditional trade topics and tackle issues relevant to today’s digital economy. Beyond that the goal, as US and EU trade officials
regularly point out, is to create something “transformative” that will serve as a model for all future agreements.

Yet a year into the negotiations, the pursuit of a 21st-century agreement looks as though it risks becoming bogged down in 19th-century issues such as the trade in cheese or potatoes.

Days before Mr Bocedi made his case for Parmesan, 175 members of the US Congress issued a call for US negotiators to resist the EU’s push to include its own strict geographical rules governing the branding of cheeses such as Parmesan. The call from Congress had even made the front page in the tiny dairy state of Vermont, where the Burlington Free Press boldly told the EU to “Back off our cheese”. “Hang on to your Gorgonzola, America,” the article began.

The threat that a trans-Atlantic-cheese war might break out is minuscule and the issue of “geographic indicators”, as the regional labels are known, is undoubtedly a small, though sensitive, part in the discussions over building a transatlantic trade pact.

But it is also emblematic of the increasing noise that is surrounding the negotiations as they accelerate towards a goal of concluding a deal by the end of 2015. Whether it is the volatile politics of globalisation in the EU and the US, a heated debate over what rights investors should have guaranteed under any agreement, or simply the head-spinning complexity of the regulatory task at hand, it is clear that the honeymoon is over and that the obstacles are emerging.

Negotiators insist that, behind closed doors, a pact is taking shape, even if talks are still at the early stages. Most of the past year has been spent discussing how to approach big subjects such as bringing “coherence” to transatlantic regulation of cars, chemicals and other sectors, and how to overcome longstanding stumbling blocks such as an EU ban on hormone-fed beef and strict import rules for genetically modified organisms. But they have now begun to hammer out actual texts in some areas.

“There is a lot of work ahead of us, but we are making steady progress and we have a firm understanding of the key issues that need to be resolved,” Mike Froman, the US trade representative, said at the end of May’s fifth round of negotiations.

Backers of a deal on both sides of the Atlantic insist the economic case remains strong. The US and EU still face difficult recoveries from the financial crisis. And, while the real economic impact will depend on what an agreement ends up looking like, business groups and governments in both the US and Europe still frame the argument in favour of a deal in terms of boosting trade and creating jobs.

Its advocates also argue that the strategic case for an agreement has only grown stronger over the past year.

When the talks started, the geopolitical justification offered for an EU-US trade deal was the rise of China and the need to get on the front foot in writing the rules of global commerce for the next century – particularly in a world where multilateral negotiations were stalled.

“We need to maximise our influence by sticking together, and leading by example,” Karel De Gucht, the EU trade commissioner, told an audience in Poland on Friday.

These days, however, the strategic reasoning more often has to do with the Ukraine crisis and the newly-aggressive Russia it has revealed. The signing in May of a $400bn, 30-year gas supply contract between Moscow and Beijing came as EU negotiators were again pressing their case for including an ambitious energy chapter in TTIP. Besides finding a way to accord European companies the same access to cheap oil and gas that their American counterparts now enjoy, EU negotiators also are eager to secure an alternative supply of gas to Russia in order to reduce members’ dependence on the country. For all the progress and the geopolitics, however, the reality is that the deal is facing a growing number of obstacles, many of them political.

The shadow cast by the revelations that the US National Security Agency was listening in on Europeans, including Angela Merkel, the German chancellor, remains. It has made negotiations over how to guarantee the free transatlantic flow of data, something businesses argue is crucial in today’s economy, incredibly sensitive, even as officials have vowed to treat privacy issues in a separate agreement.
A surge in support for anti-establishment parties in last month’s European Parliament elections has also complicated the politics of trade in the bloc. Some of the biggest winners in that election, such as Marine Le Pen’s National Front, have actively campaigned against the deal.

Even if a majority of the European Parliament that will eventually have to ratify a deal remains firmly pro-trade, there are fears the election result will begin to infect the national politics of EU member states.

President François Hollande of France and his Socialist party, which has traditionally viewed the cause of free trade with a sceptical eye, have become vocal backers of the EU-US deal. But Ms Le Pen’s strong showing in the May elections may be changing that. Already last week Laurent Fabius, the French foreign minister, was linking a looming heavy fine for BNP Paribas, France’s largest banks, to the EU-US trade talks and threatening consequences, echoing a line first uttered by Ms Le Pen.

The reality is that politics was having an impact on the negotiations even before the elections.

Both sides have agreed to put off hard negotiations on some of the most controversial areas of discussion – such as agricultural tariffs – until after the seating of a new European Commission and November midterm elections in the US. The latter has already complicated President Obama’s efforts to secure “fast-track” negotiating powers for trade deals.

They have both also displayed a willingness to bend easily to politics. Vocal opposition in Germany and other EU member states to a proposed dispute settlement mechanism, which would allow foreign investors to take governments to international arbitration panels to seek compensation, caused the EU to suspend negotiations on the investment chapter earlier this year. The US has also stuck by its refusal to include financial services regulation in the negotiations, with the Treasury opposed on territorial ground. Some Democrats worry it would weaken post-crisis financial regulations such as the Dodd-Frank law.

Privately, officials on both sides complain that the other seems stuck in limbo and unwilling to make what ought to be even easy decisions. “Whenever we bring something up with the US side they say: ‘That’s very interesting, we’re willing to talk about it. But please don’t mention it in public before the fourth of November’,” when the US has midterm elections, says one senior EU official.

There are other signs of tensions. The tabling of initial tariff offers from both sides in February triggered a pointed back and forth after Mr De Gucht complained publicly about the US’s “lack of ambition”. The episode has caused officials to move more deliberately on the offers on services and government procurement, though all are expected to have been tabled by the end of the summer.

For now, the political will to overcome the obstacles and pull off a deal seems to be firm. Business groups are continuing to speak out in its favour. Mr De Gucht and Mr Froman are also determined to set the negotiations on an “irreversible” path, aides say.

There are concerns about timing, however. Mr De Gucht is due to fly to Washington this week in part to try to keep the talks on track. If a deal is not concluded by the end of next year, the 2016 US presidential campaign could interfere, leaving its fate in the hands of Mr Obama’s successor. The trope in Washington is that trade votes rarely succeed in election years, although experts insist that a deal with Europe is likely to be less contentious than most the US has signed.

Bernard Hoekman, director of the global economics programme at the European University Institute in Florence, argues that the biggest challenge on both shores of the Atlantic remains selling the value of a deal that is being negotiated behind closed doors. It is also difficult to make the case for a free-trade agreement when debates over inequality and globalisation are very much in the public conversation.

Ultimately, making that case is going to depend on the deal itself and whether it ends up being as transformative as promised. “It’s fundamentally still the same challenge,” Mr Hoekman says. “How much is going to be there? And is it really worth the effort in terms of the gains?”

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Legal protections: clause at centre of disputes with states

Until recently, “investor-state dispute settlement” was a term used mostly in trade and investment treaties to protect foreign investors from rogue actions by governments, usually in the developing world.

These days the clauses are at the centre of negotiations on a trade deal between the advanced economies of the EU and the US.

Faced with increasingly vocal opposition to ISDS articulated on social media and by member states including Germany, the European Commission was forced this year to suspend negotiations with the US over the investment chapter of the mooted Transatlantic Trade and Investment Partnership.
● What is at issue?
ISDS clauses allow companies to take governments to international arbitration panels to seek compensation if they feel their investment has been hurt by government action.

Until a few years ago cases were rare. But there has been a surge in filings by companies taking an ever broader view of what constitutes a legitimate cause for action. According to the Organisation for Economic Co-operation and Development, 57 ISDS cases were filed against governments in 2013, almost half of them in developed economies.

● Why is that contentious?
Increasingly ISDS cases are based on regulatory actions rather than simple cases of expropriation. In a high-profile case, Philip Morris International has taken Australia to an arbitration panel over its introduction of plain-packaging laws for cigarettes. Vattenfall, the Swedish energy company, has challenged Germany’s decision to phase out nuclear power. Eli Lilly has filed a case against Canada over a court decision invalidating two drugs.

Opponents argue the cases have become a tool for big corporations to challenge domestic regulations.

● So what’s the solution?
EU and US trade officials argue that by closing loopholes and tightening the rules, an ISDS clause in a transatlantic deal would go a long way to ending abuses. It would also set an example for investment treaties both parties are negotiating with China and other countries

Opponents, including some trade lawyers and the conservative Cato Institute, argue such a clause is simply unnecessary. The EU and US have functioning judiciaries that provide protection for foreign investors.