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Dispute and Conflict Resolution in U.S.-EU Economic Relations: The Antidote of Regulatory Cooperation

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DISPUTE AND CONFLICT RESOLUTION IN U.S.-EU ECONOMIC RELATIONS: THE ANTIDOTE OF REGULATORY COOPERATION

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INTRODUCTION

The post-Cold War context has created a new dynamic and perhaps a tenser situation that will govern U.S.-European Union ("Union" or "EU") bilateral relations. In October 1994, in a Paris conference on European security, Commissioner Hans van den Broek noted that Europe, the United States, Japan, and Southeast Asia had become the poles of a new quadripolar international economic system. Neither the Union nor Japan, still in the process of defining new foreign and security strategies, had found ways to translate their considerable economic strength into commensurate political influence.

Running parallel with these political changes is the creation of the new World Trade Organization ("WTO") and the approval of the Uruguay Round of trade negotiations ("Uruguay Round"), ushering in a new international economic relations era. Both the United States and the Union successfully handled the complex negotiations and the ratification of the Uruguay Round, after a number of mainly procedural internal delays on both sides of the Atlantic. The universalism of the WTO augurs positively for resolving trade disputes between the United States and the fifteen-member Union.

Nonetheless, it is the divisive trade disputes, rather than the unifying cultural and historical bonds, that attract attention. The news stories that U.S. and European citizens read about each other are more often about trade conflicts than job creation. EU farm subsidies were a make-or-break issue during the Uruguay Round negotiations; U.S. countervailing duties on steel likewise threatened escalating trade tensions.

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In fact, new feuds are brewing, heightened by slow growth, high unemployment in Europe, continuing industrial restructuring, sharper competition from the Asia-Pacific area, and fiscal stress at home. Both the United States and Europe are increasingly turning to the temptation of new industrial policies to promote their respective industries. Government-led industrial policy unfailingly means new subsidies, tariffs, or restrictions against lower-cost imports. Industrial policies rooted in "managed trade" and economic nationalism of one kind or another tend to protect special domestic interests and promote national champions. We have seen evidence of this policy, on both sides of the Atlantic, in the sectors of agriculture, textiles, and steel. Semiconductors, entertainment, services, and investment rules will increasingly pose the same type of difficulties.

I. *THE 1990 TRANSATLANTIC DECLARATION AND THE 1994 EU-U.S. BERLIN SUMMIT*

It is useful to recall the historical background against which these new policies and the conflicts they may engender have evolved. The United States has a long history of supporting and, some might say, defending the process of European unification, even in the face of a reassessment of its strategic interests in the post-Cold War era. The Union remains the largest single trade and investment partner of the United States. The Transatlantic Declaration,[1] adopted by the United States and the European Community on November 20, 1990, reasserts the common goals of the two partners and lays out principles of cultural, economic, educational, and scientific cooperation. The Transatlantic Declaration also sets forth an institutional framework for biannual consultations between the presidents of the United States and the EU Commission.

The July 1994 EU-U.S. Summit of Berlin ("Berlin Summit") set up three temporary groups of experts, which are to report to the next summit meeting in 1995. They are preparing discussion on three issues: the definition of ways and means to strengthen democracy and economic cooperation with and between Central and Eastern European countries through combined EU-U.S. actions, definition of ways and means to improve

1. Transatlantic Declaration, *reprinted in* PARTNERSHIP: THE EUROPEAN UNION AND THE UNITED STATES IN THE 1990s 4-5 (1993).

joint efforts in EU-U.S. international relations, in particular, in the field of common foreign and security policy and EU-U.S. cooperation in fighting organized crime and drug trafficking. The Berlin Summit confirmed the view, shared by the EU and U.S. policy makers, that current structures can effectively handle dispute resolution even if they cannot anticipate or forestall disputes.

II. *EU-U.S. INSTITUTIONAL COOPERATION: TENTATIVE MODELS*

Technology breakthroughs in fields such as information technology and telecommunications are changing the economic structures of European and U.S. societies. Policy makers in both economic areas, as a result, face similar challenges. Typically divergent approaches to common problems, however, ensure mutually incompatible policy frameworks. At its September 1994 meeting, the U.S.-EU Sub-Cabinet, made up of EU Director General for External Economic Relations Horst G. Krenzler and U.S. Undersecretary of State for Economic Affairs Dr. Joan Spero, pledged to develop further the concept of regulatory cooperation in order to decrease trade and investment frictions often arising from different regulatory systems.

Formal institutionalized bilateral cooperation in the wake of the 1990 Transatlantic Declaration has in fact taken place only in a limited number of areas. These areas may provide incipient models for bilateral trade and investment issues. A few examples are illustrative of the complex task ahead.

A promising and ambitious example goes under the heading of the "EU-U.S. Information Society Dialogue," whose second meeting took place on November 28-29, 1994, in Washington, D.C. Director General for Telecommunications, Information Market and Exploitation of Research Michel Carpentier represented the Commission, with the U.S. represented by Ambassador Vonya McCann. As the Union liberalizes its telecommunications infrastructures and the United States introduces reforms in the new Congress, possible cooperative opportunities exist in areas such as mobile telecommunications, intellectual property rights, satellite communications, universal service, and standardization. A new round of plenary meetings on the Information Society Dialogue is scheduled for the spring of 1995.

Another tentative model is that of a successful instance of cooperation on the higher education front. The EU and the United States face the common challenge of creating and preparing individuals for high quality jobs in a fast changing labor market. The U.S. Department of Education and the European Commission's Task Force on Human Resources (now Directorate General XXII) launched exploratory cooperation in the area of higher education. Announced in 1993 and being currently implemented, twenty-three joint EU-U.S. projects, involving some two hundred faculties on both sides of the ocean, were selected from over 240 proposals in five academic areas, including environmental and natural sciences.

Preliminary reviews of these projects at a November 1994 conference in San Diego indicate that this innovative form of multilateral cooperation, each involving partners in a number of European countries and states of the Union, innovatively advances the frontiers of knowledge and encourages regional institutions such as universities that are less skilled at international collaboration. The program has made faculty and student mobility possible and it has also allowed for the construction of transatlantic networks. Among these twenty-three joint EU-U.S. higher education projects is the Georgia Institute of Technology's establishment of the Transatlantic Consortium for the Study of Management of Technology with three partner European graduate institutions, the Twente School of Management and Technology in The Netherlands, the Henley College of Management in the United Kingdom, and the Graduate School of Business of Grenoble, France.

A third example of formal institutionalized collaboration offers the greatest implementation challenges. The EU Commission and the U.S. Department of Justice signed a bilateral Agreement Regarding the Application of Competition Laws on September 23, 1991 ("Agreement").[2] It was largely aimed at enhancing cooperation and effective enforcement of their respective competition laws. The spirit of the Agreement was also

2. Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of their Competition Laws, 30 I.L.M. 1491 (1991), 61 Antitrust & Trade Reg. Rep. (BNA) No. 1534, at 382 (Sept. 26, 1991).

predicated on a desire to avoid encroachment on foreign jurisdiction and to reduce conflicts of law.

On the European side, the Agreement was challenged by three Member States in the European Court of Justice on the grounds that the Council of Ministers ("Council"), rather than the Commission, was the proper entity to have signed it. In August 1994, the Court found that the Commission lacked the competence to conclude the Agreement, though it did not address any issue of substance. As a result, the Commission has transmitted a proposal to the Council thereby ensuring compliance with the Court's decision.

Similarly, the Agreement has raised questions in the United States as to the eventual enforcement of such an agreement should the European Commission and the U.S. Department of Justice take legal action in furtherance of the Agreement. It is clear that the role of U.S. courts would be paramount in the Agreement's execution. A recent antitrust consent decree by Judge Sporkin reaffirms the central role of the judiciary and hints at a line of legal reasoning that would be applied to this U.S.-EU antitrust agreement.[3] The decision notes that Congress intended for the courts to "play an independent role in the review of consent decrees as opposed to serving as a mere rubber stamp."[4] In short, the Agreement is not self-enforcing, and must rely on the review of the federal judiciary in "evaluating the public interest."

III. *REGULATORY COOPERATION: FERTILE BUT TREACHEROUS GROUNDS*

The main benefits of bilateral regulatory cooperation are expected to be in the further easing of impediments to trade between the world's largest trading partners. Small and medium-sized firms require rapid, easy, and cheap access to export markets. Incompatible regulations are major impediments. The pace of development and introduction of products further requires flexible and adjustable regulations on both sides of the Atlantic. Thus, regulatory cooperation could provide a stimulus to trade as well as to U.S.-EU investment.

Former EU Commission President Jacques Delors is often

3. U.S. v. Microsoft Corp., 159 F.R.D. 318 (D.D.C. 1995).
4. *Microsoft*, 159 F.R.D. at 329.

quoted as stating that it behooves policy makers and business executives to "prevent the deep relationship between the world's premier powers from descending to the level of disputes about pasta and hormones. The bond between the Community and the United States merits better than that."[5] The stakes are high: over US$1 trillion in goods, services, and capital cross the ocean in both directions every year. This exchange is increasingly strained.

Regulatory differences are often the cause of trade disputes. The 1990 Transatlantic Declaration also commits the two parties to strengthen the multilateral trading system, beyond bilateral initiatives. Ratification of the WTO and ongoing dialogue on technical and non-tariff barriers and standards reflect this emphasis. The new and stronger General Agreements on Tariffs and Trade's ("GATT") Technical Barriers to Trade agreement is also a direct recognition of the commitment to multilateralize the impact on trade of regulatory divergences. Lacking adequate means to resolve regulatory differences bilaterally, the United States and the Union have had to escalate disputes to GATT panels at the multilateral level with unsatisfactory outcomes. Examples can be adduced.

On the issue of U.S. car taxes, a GATT Panel reviewed the compatibility of the U.S. luxury excise tax on cars (the so-called gas-guzzler tax) and the Corporate Average Fuel Economies ("CAFE") penalties with GATT's Article III rules on national treatment. In September 1994, the Panel decided that the U.S. luxury car tax was neither protectionist in nature, nor did it have such an effect, and thus was indeed consistent with the policy goal of conserving fuel. On the issue of the CAFE requirements, the Panel found the methodology inconsistent with provisions of GATT.

A June 1993 GATT Panel ruled that the United States violated its GATT undertakings by imposing countervailing duties on imports of hot-rolled lead and bismuth carbon steel from France, Germany, and the United Kingdom. This particular GATT Panel was instituted at the request of the European Union. Its main objective was to examine U.S. government anti-subsidy decisions imposed as a result of the U.S. steel industry's

5. M.M. NELSON & G. J. IKENBERRY, ATLANTIC FRONTIERS: A NEW AGENDA FOR U.S.-EC RELATIONS 9 (1993).

suit against foreign competitors upon the 1992 expiration of the voluntary export restraint system.

The annual report of the EU Commission Report on U.S. Barriers to Trade and Investment lists an increasing number of extant U.S. legislative provisions and pending congressional bills that condition the principle of national treatment and create the possibility, in the Commission's view, of discrimination against U.S. affiliates of European companies.[6] Many of these provisions may give rise to multilateral dispute resolution panels. Proper bilateral consultation and regulatory cooperation would most probably forestall utilization of multilateral panels as a last resort.

Issues of conditional national treatment are increasingly the subject of high-level exchanges between the European Commission and the U.S. Administration. The bilateral mechanisms do not provide a satisfactory procedure or format to address these issues. Regulators must learn from each other. This has begun in the international technical standards area, e.g., mutual recognition of conformity assessment, good laboratory practices, and consultations in specified priority sectors, where progress has been slow but incremental and continuous. This area of possible regulatory collaboration is far less politicized though no less complex than trade and investment.

IV. *THE SHAPE OF THINGS TO COME: OF BANANAS AND SEMICONDUCTORS*

In January 1995, the EU Commissioner for External Relations and Common Trade Policy, Sir Leon Brittain, and the U.S. Special Trade Representative, Mickey Kantor, met and tried unsuccessfully to resolve two pending trade regulatory differences. The first issue concerned the entry of Austria, Finland, and Sweden into the Union. The United States, in furtherance of Article XXIV(6) of GATT, seeks compensation resulting from higher import duties that the new member countries will levy on chemicals, plastics, electronics, computer components, precision equipment, and some agricultural products. Such a tariff increase in the high-tech sector is estimated at US$1 billion in export losses by the United States.

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6. SERVICES OF THE EUROPEAN COMMISSION, REPORT ON U.S. BARRIERS TO TRADE AND INVESTMENT, Doc. No. I/194/94 (April 1994).

In the semiconductor sector, Finland and Austria had a duty-free policy. They now will levy a fourteen percent duty under the EU Common Customs Tariff. The EU Commission has said that increased duties are offset by cuts in engineering product and textile sectors for the new EU member states' external tariffs. The Commission may decide to maintain new members' import duties at their pre-entry levels, which are usually lower, until negotiations with the United States are completed.

The second issue worthy of note is the dispute over EU rules regarding banana imports. EU rules tend to favor bananas from former British and French colonial areas. Banana imports from Latin America are limited to about two million tons a year of the total 3.6 million ton market in the EU. The United States has stated that the rule impacts negatively on U.S. agribusiness firms exporting from Latin America and Hawaii, and it has threatened retaliatory action under Section 301 of U.S. trade laws.

CONCLUSION

The lessons are clear. The trade regulatory issues that divide the United States and the Union should be tackled before they reach the multilateral WTO conflict resolution machinery. Until EU-U.S. economic relations are better aligned and anticipatory mechanisms of cooperation are put in place, global trade agreements and dispute resolutions will be difficult to reach.