TAFTA
The Case for an Open Transatlantic Free Trade Area

Jaime García-Legaz
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Foreword by
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FOREWORD

IT IS TIME TO REINFORCE THE ATLANTIC LINK

In today's world, prosperity, freedom and democracy cannot be properly understood without resorting to the United States and Europe. In addition to historical, cultural, human and emotional bonds, we share common values that are essential to our societies: the defense of individual freedom, human rights, democracy, the defense of peace. The more united we have been, the more our societies have progressed and helped the world to avert the threat of Nazism and Communism. Today, this is all the more evident in the area of security in which, together, we stand as the best guarantee for our freedom and that of our allies.

The deep economic crisis that we are enduring on both sides of the Atlantic has demonstrated the importance of the transatlantic economy in the global context and has shown just how integrated European and American economies are, adding to the relevance of this relationship for our societies. Accounting together for over 50% of global GDP and 30% of world trade, the US and Europe are to each other the most important trading partners. Every day, transatlantic economy exchanges 2 billion euros in goods and services. Europe and the US are the first investors and the first job generators.

The transatlantic relationship is strong and in good health. In recent years, technological advances have brought our societies even closer, enhancing the value of our common aspirations for peace and prosperity. In absolute and relative terms, our economies have never been so interrelated and thus benefited so many people. It is for this reason that the current economic crisis and the purpose of overcoming it must be used as a boosting force to achieve further integration and the strengthening of the transatlantic link in the economic area, with an FTA as its cornerstone.

This agreement would generate significant benefits for both sides in terms of GDP, but foremost of all, it would involve significant advantages for consumers and workers. Sound regulatory measures would generate important benefits in sectors such as energy, telecommunications, finance or services. Innovation and creativity in our societies would be encouraged, becoming an engine of progress for all citizens.

Furthermore, economic integration between both sides of the Atlantic would not only affect relations between America and Europe, it would also show a positioning with regard to other emerging economic and political blocs. In recent decades, the center of gravity of world economy has shifted to the Pacific as countries like China or India joined the global economy. Given the strength of the Asian economies, the best alternative is becoming more efficient and more competitive, and a transatlantic bloc would thus generate a geostrategic rebalancing, the implications of which would go far beyond purely economic motivations.

Due to their global relevance, Europe and the United States together could establish technological standards and become a global reference in many fields. Moreover, the stronger the transatlantic link, the greater its significance to highlight our common values of democracy and freedom on other countries. They would be offered to become a part of this attractive market conditional upon democratic openness and commitment to existing common values.

This proposal does not advocate just a simple free trade agreement. It goes much further. It seeks to reduce barriers of all kinds, not just commercial ones, to homogenize regulations, increasing mutual recognition of standards, intellectual property rights, to deregulate and liberalize services to create more efficient markets and encourage the free exchange of people, goods and services between both sides of the Atlantic. In other words, the close historical ties between America and Europe would cease to bear the current obsolete economic barriers and we would shift into an Atlantic economic integration. The task, though ambitious in its objectives, is not idealistic. It identifies the specific areas to be improved and the regulatory changes needed. It is basically a handbook for anyone who is willing to assume the leadership of this idea.

The alternative of preserving the status quo is not a valid option. The Atlantic is lagging behind the Pacific and the world is facing dramatic geostrategic changes that will redefine political balances before which Europe and the United States should have a common position. If we lose the momentum and the train of history, our societies run the risk of not identifying each other as strategic allies but instead turn to see our relationship as a tactic partnership if and when common interests arise.

FAES Foundation already proposed an Atlantic Prosperity Area in 2006*. This second edition expands and specifies the overall growth strategy, reinforcing everything that joins us together, at a time when it is more necessary than ever to work so that the 21st century does not diminish our collective ability to influence before the rise of new powers or coalitions. This will entail working in other areas and not just the economic field to seek agreements and additional partners which lie beyond our traditional geographic areas

Economic integration is thus a strengthening of our ties to spread our values and maintain our global influence, in addition to creating jobs and becoming an engine of economic growth.

In 1930, the crisis led numerous countries to establish protectionist measures, plunging the world into depression and reducing the levels of prosperity which had been

* FAES Foundation (2006), *A case for an Open Atlantic Prosperity Area,* http://www.fundacionfaes.org/record_file/filename/3048/A_case_for_an_open_Atlantic_Prosperity_Area_II.pdf

achieved. Let us learn from the past and open our economies. Political leaders are not only judged by their management, history will remember them according to their ability to prepare their countries, prepare them to succeed in the long term and to face extraordinary challenges. The transatlantic economic area is a historic opportunity to build the largest economic prosperity area in the world. A market for over 700 million people, with the possibility of opening it to third countries, which would create jobs and wealth and would serve as a global benchmark. Together, America and Europe will continue being the world reference and creating prosperity and progress, not only for their citizens but for millions of people worldwide.

José María Aznar
President of FAES Foundation

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DEFINING THE TAFTA

The Civilizational Bond between the United States and Europe

The United States and Europe cannot be fully understood apart from one another: the American political model could not have come into being without the support of European ideas, and Europe was able to come out of two World Wars as free and democratic in large part due to American efforts. The transatlantic link is thus part of the essence of the European Union and the United States, both of whom share core values, principles, and objectives, and both of whom face similar threats:

1. Europeans and Americans share fundamental ideals such as democracy, respect for human rights, individual liberty, economic freedom, and the Rule of Law.

2. Europeans and Americans both face the threat of Islamic terrorism. The 11 September, 2001 terrorist attacks against the US; the 11 March, 2004 attacks against Spain; the 7 July,

2005 attacks against the United Kingdom; several attacks against Turkey during 2005[1]; and new terrorist attacks against US officials in Northern Africa in 2012 have generated a consensus among developed nations: the most effective way to face the threat of terrorism is collectively.

3. Europeans and Americans share the same concerns about global human challenges such as poverty and pandemics.

4. The financial crisis that started in 2007 has had dramatic effects in the US and the EU. Most of the rest of the World is back on a path of steady growth and job creation. By 2012, the term “economic crisis” is only used in the US and the EU on a regular basis but not in China, India, or in most of the emerging economies.

During the 2007 EU-US Summit, political leaders from both sides agreed on the monumental importance of this civilizational bond. They described the existing transatlantic economy as being at the “forefront of globalization,” affirming the deep-rooted nature of the Atlantic bond:

The United States and the European Union are each other’s most important economic partners, reflecting historical ties as well as a wide range of common fundamental values, such as the importance of free enterprise, Rule of Law, property rights,

[1] It should be remembered that Turkey is already negotiating its accession to the European Union.

free trade, and competition, and the protection of health, safety and the environment for our citizens and workers.[2]

The transatlantic relationship is also an interdependent partnership in global economic leadership: the combined economies of both the EU and US account for over half of global GDP in terms of value and little less than half of global GDP in terms of purchasing power, making the transatlantic area the most prosperous and influential market in the world.[3]

The Atlantic drift, however, whenever it becomes politically relevant, weakens both the EU and the US, particularly in the context of a rapidly changing and progressively interconnected world. According to a 2011 report prepared by the Center for Transatlantic Relations, "as globalization proceeds and emerging markets rise" the transatlantic area, comprising the EU and US, will shift "from a position of preeminence to one of predominance–still considerable, but less overwhelming than in the past."[4] Transatlantic economic convergence, based on the advent and development of *barrier-free trade and investment* between the EU and US, would forestall such a trend and strengthen the transatlantic economy beyond precedent.

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2 EU-US Summit (2007), "The Framework for Advancing Transatlantic Economic Integration between the United States of America and the European Union," http://www.state.gov/p/eur/rls/or/130772.htm (Nov. 3, 2011).

3 The Center for Transatlantic Relations at Johns Hopkins University (2011), *The Transatlantic Economy, 2011: Annual Survey of Jobs, Trade, and Investment between the United States and Europe*, http://transatlantic.sais-jhu.edu/bin/s/s/te_2011.pdf (Nov. 3, 2011).

4 Ibid.

What the TAFTA Is

The Establishment of a Barrier-Free Transatlantic Market

The establishment of barrier-free trade and investment between the EU and US, which we have termed **TAFTA**, would involve the free flow of goods, services, capital and knowledge between both sides of the Atlantic. The aim of such an arrangement is the achievement of even greater levels of economic integration within the transatlantic area. Full economic integration between the EU and US would result in the creation of a barrier-free transatlantic market[5] of more than 700 million people, most of whom are relatively affluent and well-educated by global standards.

In order to establish the TAFTA, we propose the removal of all tariff, non-tariff and regulatory obstacles to the free and transparent functioning of the transatlantic market. In this vein, we believe that policymakers on both side of the Atlantic should seek to identify and remove these obstacles and distortions in transatlantic traffic as well as attempt to prevent the establishment of new barriers against third countries. The ultimate goal is to link the transatlantic area, meaning the EU and US, into the broader area of global prosperity that economic globalization has continually increased year after year. The project to establish the TAFTA is based on the firm conviction that transatlantic prosperity and global prosperity feed off of each other in a mutually profitable cycle.

5 Erika Mann (2003), "The Transatlantic Market: A leitmotiv for economic cooperation," Draft Paper, November, p. 21.

A high-level political agreement between the EU and US would be the proper way to formalize the TAFTA. A new partnership agreement between the EU and US, rather than merely between EU Member States and the US, is therefore necessary to consolidate the transatlantic relationship, manage its development cooperatively, and encourage greater and continual involvement from lawmakers on both sides of the Atlantic.

The implementation of the TAFTA would require:

1. The *identification of barriers* in the transatlantic economy; this must be done in both a horizontal and a sector-by-sector basis.[6]

2. The *elaboration of an action plan* that includes detailed and specific proposals to remove the identified barriers, both on a sector-by-sector basis as well as overall. The action plan should include:

    - A concrete timetable for the removal of barriers and the establishment of the TAFTA. [7]

[6] Chapter 4 delves into this topic.

[7] In its 2008 report, *Completing the Transatlantic Market*, the Transatlantic Partnership Network (TPN) envisaged a general target date of 2015 for the completion of a transatlantic market. The TPN maintains that "a target date will focus directly disparate efforts at deepening the transatlantic economic relationship by creating bureaucratic and political accountability." The latest TPN report is available at http://www.tpnonline.org/pdf/TPN%20Completing%20the%20Transatlantic%20Market%20-%20Second%20Annual%20Report.pdf (Nov. 3, 2011).

- Area-specific actions and stages, as well as respective target dates and benchmarks against which medium-term progress can be measured.

- Area-specific dialogues and new consultation mechanisms between EU and US regulators.

- A long-term road map outlining the course of action for the implementation of the TAFTA.

- An institutional structure for political supervision. Together with the USTR and the European Commission, the Transatlantic Economic Council (TEC)[8] meetings should be the institutional structures overseeing the implementation of the TAFTA.

- Feedback mechanisms to aid the regulatory reform process; the goal would be to generate productive and ongoing dialogues between government institutions, lawmakers, businesses, and other interested parties *while* regulatory reforms are being introduced, adopted, amended, or rejected.

Some academics consider that both EU and US policymakers should not forget to address other concerns that are often raised in regard to the prospect of greater transatlantic economic integration. Such concerns typically include topics

[8] The nature and goals of the TEC are explained in the third part of this chapter, "The Evolving Framework for Transatlantic Cooperation."

like the US foreign account deficit, the euro-dollar exchange rate, and the state of the transatlantic trade relationship (i.e., whether it is "balanced or unbalanced")[9].

We believe that, although important in themselves, the aforementioned concerns are ultimately misplaced in a discussion about the TAFTA. The establishment of the TAFTA does not require the coordination of the euro-dollar exchange rate or the harmonization of EU and US monetary and fiscal policies. Even if the euro-dollar exchange rate were coordinated, the results would be largely ineffective or even counterproductive. Transatlantic currency shifts have an uneven impact across the Atlantic because of the deep integration of corporate activity and the importance of intra-company investments and related-party trade.

More importantly, and as a matter of principle, citizens are better protected against harmful government policies through the power of regulatory and policy competition. The same principal applies with regard to fiscal policies. If tax competition is the rule within the EU, it must also be the rule within a barrier-free transatlantic community.

For this reason, it is important to highlight that the TAFTA involves institutional competition in exchange rates, monetary policy, tax policy, and public services so that public goods can

[9] Cfr. Daniel Gros and Thomas Mayer (2005), '*All Quiet on the Transatlantic Front? Deficits, Imbalances and the Transatlantic Economy*', in Hamilton and Quinlan (eds.), op. cit.

be supplied and financed, to the greatest possible degree, in accordance with the preferences of individuals. In similar fashion, competition among currencies and their central banks would help such currencies stay on the straight and narrow. Moreover, institutional competition adapts the public sector to the multifarious choices of variously inclined citizens living in different localities. In essence, the type of institutional competition involved in the TAFTA would be likely to generate results similar to the Tiebout effect.[10]

This approach to a future barrier-free Transatlantic Market is basically shared by the High Level Working Group on Growth and Jobs. Its latest report, released in June 2012, concludes that a wide range and ambitious Free Trade Agreement–which is just part of the more ambitious proposal we advocate–between the EU and the US would maximize its positive effects on growth and jobs.

The Removal of Barriers to Transatlantic Trade

1) Tariff Barriers

Traditional trade barriers are typically the result of tariffs and quotas or quantitative restrictions (QR).

[10] Charles Tiebout (1956), "A Pure Theory of Local Public Expenditures," *Journal of Political Economy*, no 54, pgs. 416-424. Tiebout argued that if citizens are able to move among an array of communities, all of which offer different levels of public service and, correspondingly, impose different levels of taxation, said citizens will, in choosing where to reside, vote with their feet. Some will choose low levels of taxation and services, some high.

These barriers are easily tackled through a Free Trade Agreement, which is one of the legal instruments envisaged by the GATT to promote free trade.

In fact, both the EU and the US have engaged into free trade agreements with many third countries, as a pragmatic way to dismantle trade and investment barriers in the context of a frozen multilateral trade Agenda, after several unsuccessful ministerial meetings within the Doha Round.

2) Regulatory Barriers

However, the most harmful barriers to transatlantic trade and investment do not have to do with tariffs and QR, but with regulatory barriers.

Regulatory trade barriers are regulations established by governments to achieve specific objectives, such as guaranteeing the quality of certain products (e.g., in food safety), the maintenance of standards (e.g., university certifications), or the stability of the financial system, that may however harm international trade and investment.

Trade conflicts between developed countries often arise as a result of significant regulatory differences in a specific area, such as in the use of Genetically Modified Organisms (GMO's) or the use of hormones to breed livestock.

As the result of domestic legislation adopted democratically and in politically sensitive areas, regulatory trade barriers are both non-traditional and non-discriminatory in nature. The genuine object of regulation is not supposed to be to discriminate against a product or service because of its country of origin, but rather to achieve certain legitimate ends of governments.

However, the fact that such ends may be legitimate, and that such regulatory barriers do not discriminate according to the origin of the product or the nationality of the supplier of the service, does not mean that they do not obstruct the traffic of transatlantic economic operators, at times unnecessarily. Currently, regulatory barriers arising from divergent regulations represent the most significant obstacles to a free flow of trade and investment between the EU and the US. For this reason, the establishment of the TAFTA involves the mitigation and, where possible, removal of this latter and newer type of trade barrier, the *regulatory barrier*.

Far from being easy, the removal of regulatory barriers is in fact a very complex and difficult matter. National regulations respond to national political priorities and are adopted according to democratic legislative procedures. The aims of these regulations reveal the way in which a society works and how it understands the relationship between the individual and government. National regulations also reflect a society's historical experience, its current situation, and its expectations concerning the future. In this sense, it is easy to understand why regulatory differences between the EU and US have been and will remain difficult to resolve: such divergence is deeply rooted in each side's particular experience and traditions.

Despite such regulatory friction, however, both the EU and the US represent the fundamental nucleus of the Western world. They share values and traditions to a far greater extent than other regions do with them, and because they have grown from shared cultural roots, their ways of life are inextricably linked. For such reasons, transatlantic regulatory reform will always be possible, even if it will remain difficult.

The only truly necessary prerequisite for such regulatory reform is a high degree of political commitment by both the EU and US. Without the existence and development of high-level political support, all the initiatives to bring the regulatory frameworks of the EU and US into greater harmony with each other will be unsuccessful.

3) Removing Regulatory Barriers

As has been mentioned previously, the establishment of the TAFTA requires policymakers to (1) identify regulatory barriers to trade and investment and (2) prepare an action plan detailing how to remove said barriers. In order to achieve these goals, policymakers must begin by drawing up an inventory of existing barriers and, subsequently, implement an action plan that takes into account the unique problems and details inherent to each of the identified barriers.

It is important to highlight, however, that policymakers should not limit the identification of transatlantic trade barriers to a mere list of predetermined areas. Policymakers on both sides of the Atlantic should strive to formulate the priorities, principles, and criteria to be used in choosing what trade area barriers merit study and reform. These priorities and principles could then be set down in the evolving action plan.

Once the barriers to transatlantic trade have been properly identified, two general sets of policy instruments would be used to achieve their removal and prevent the establishment of new barriers. These instruments may be thought of as the future pillars of a "Regulatory Bridge" between the EU and US.[11]

One set of instruments would be used to reduce or eliminate *currently* existing barriers to transatlantic trade, while the other set would be used to ensure that *future* regulations do not create unnecessary barriers.

- The **proactive measures** designed to eliminate or mitigate *existing regulatory barriers* to transatlantic trade and investment include:

  - Negotiating mutual recognition agreements, with the ultimate goal of establishing international standards.
  - Applying common regulatory principles in legislation.
  - Holding dialogues between EU and US lawmakers and regulators.
  - Holding regular consultation and information exchange sessions.
  - Harmonizing divergent regulatory regimes, but only as an instrument of last resort.

[11] Some have argued in favor of "something like a Regulatory Partnership Initiative" in order to remove regulatory barriers. Cfr. Peterson et. al. (2005), op. cit.

- The **pre-emptive measures** designed to prevent the establishment of *future regulatory barriers* to transatlantic trade and investment include:

    - Developing transatlantic regulatory principles on a joint basis, including both general and sector-specific principles.
    - Creating a *permanent* mechanism for dialogue between EU and US lawmakers and regulators.
    - Establishing *early-warning* mechanisms concerning national regulatory initiatives that risk hindering transatlantic trade flows.
    - Reinforcing cooperation on vital issues in international fora, such as the OECD.
    - Commissioning studies on the impact that domestic regulatory legislation has on bilateral trade.

The TAFTA initiative recommends a flexible approach to transatlantic regulatory cooperation based on mutual trust between the EU and US; different approaches should obviously be used for different areas and sectors. In addressing *vertical barriers* to trade, such as regulatory divergences in the automotive industry, the mutual recognition of regulations (in conjunction with a statement of equivalence of legislation) would likely be the best approach. In addressing certain *horizontal barriers*, such as regulatory divergence in accounting standards, the establishment of new and independent transatlantic advisory regulatory bodies, which would operate on the basis of shared transatlantic interests and strive to develop international regulatory standards, would be preferable.

4) Achieving Regulatory Convergence

In the case of most European and American sectors and industries, the harmonization of regulatory standards on the basis of the EU single-market model is not a realistic approach. The accelerated approximation of EU and US regulatory frameworks and the reinforcement of transatlantic regulatory coordination is, in contrast, the appropriate means by which to establish the TAFTA.

It is widely believed that fundamental differences exist between the European and American approaches to regulation, such as in consumer protection and food safety. As a result, regulatory convergence between the EU and US is expected to remain a medium or perhaps even long-term prospect. There is, however, no evidence suggesting a fundamental difference in the way the citizens of the EU Member States and of the US understand regulatory legislation, including legislation related to consumer protection and food safety. On the contrary, recent history has shown that there is ample ground for both sides to reach agreements on regulatory convergence.

It should be remarked that transatlantic regulatory convergence does not involve the forfeiture by national regulatory institutions of their authority to regulate on domestic issues. The idea behind transatlantic regulatory convergence is, rather, to design arrangements by which EU and US regulatory institutions are able to safeguard national regulatory objectives without placing undue restrictions on the work that transatlantic businesses engage in. This *converged* arrangement would greatly increase transatlantic trade and investment flows, to the benefit of both the EU and US.

The accelerated alignment of regulatory policy measures can take two forms:

- ***Ex ante* convergence** can be successfully applied in areas where regulatory policies and frameworks remain in an early phase of development, such as online data and privacy protection. The formulation of common regulatory principles and the establishment of early-warning mechanisms constitute the essence of this approach.

- ***Ex post* convergence** can be successfully applied in areas that are already highly regulated, like the pharmaceutical or financial sector. The mutual recognition of regulatory standards between the EU and US and the establishment of transatlantic coordination and consultation mechanisms, involving regulators and legislators on both sides of the Atlantic, constitute the essence of this approach.

In order to achieve the mutual recognition of regulatory standards, as well as regulatory convergence, between the EU and US, policymakers on both sides will have to make a sustained effort. Policymakers will have to find a way to reinvigorate transatlantic political dialogue by including all the appropriate EU and US institutions and stakeholders with an interest in moving toward the TAFTA. To this end, policymakers should devote more resources to the study of transatlantic business transactions: how EU and US businesses interact, how the EU and the US economies are intertwined, and how they occasionally clash.

Other Barriers

Regardless of advances made with regard to non-traditional barriers (i.e., regulatory barriers), other discriminatory barriers may remain. Such barriers[12] also hinder the full development of the transatlantic market, even though their importance is relatively minor when compared to non-traditional regulatory barriers.

Such barriers can mitigate or even vitiate the progress achieved by regulatory reforms. For example, if a mutual recognition agreement concerning certification rules for a particular occupation were reached, but the demand for nationality or residency were maintained for people who want to offer the service related to the certification in question, the usefulness of that mutual recognition agreement would be considerably attenuated, to say the least.

To ensure the efficacy of the Regulatory Bridge, TAFTA advocates would have to complement the initiative by pushing for a mutual EU-US commitment to eliminate or reduce foreign equity restrictions, and residency and nationality demands.

Regarding trade in goods, the most important traditional barriers between the EU and US lie in the politically-sen-

[12] Other examples of traditional and discriminatory barriers include nationality or residency demands for foreign traders and foreign equity restrictions.

sitive agricultural sector. The importance of achieving greater levels of transatlantic regulatory convergence in this sector should always be kept in mind, given its relative weight in both economies and its effect on living standards. The continued development of the transatlantic relationship overall is tied to the progress of transatlantic cooperation in this particular sector. The principal reason for this is that progress in this field would have the effect of making both parties' commitments to greater transatlantic integration in all areas absolutely clear.

In addition, TAFTA advocates should propose the elimination or significant reduction of those traditional barriers that exist between the EU and the US, on the one hand, and third countries, on the other. The elimination or reduction of such barriers would be carried out in accordance with the WTO's most-favored-nation (MFN) principle.[13] Although the TAFTA would undoubtedly lead to a special relationship between the EU and US, it would not lead to a preferential or exclusive relationship.

Other barriers known as *trade defense measures*, which include anti-dumping rights, compensatory or anti-subsidy rights, and trade safeguard measures, have taken the place of tariffs in the field of protectionism. Trade defense measures, which are necessary tools in the hands of trade au-

[13] MFN (most-favored-nation) duties are the lowest tariff rates that a given WTO member country charges another; WTO members are required to extend MFN status to all other WTO members. According to the WTO, the MFN principle is based on the idea that "countries cannot normally discriminate between their trading partners."

thorities to prevent and react to illegal trade practices, now represent as well a significant proportion of the cost of protectionist policies. An effective and politically visible way of reducing the risk of trade conflict–or even battles–between the EU and US would be to adopt a ban on the use of such measures on a bilateral basis. Such a ban would fit into the larger framework of reinforced EU-US economic cooperation, which is the basis of the TAFTA.

Ultimately, the establishment of the TAFTA will require the consolidation of the Transatlantic Economic Council's institutional and jurisdictional framework; the expansion of private sector support and involvement; the adoption of early-warning mechanisms by means of which EU and US policymakers can detect potential regulatory conflicts and deactivate them in a timely manner; the implementation of EU-US coordination mechanisms in multilateral fora; and the further development of the Community dimension within the EU.

What the TAFTA Is Not

Not just a Free Trade Area: an FTA and a WTO+ Agreement

The purpose of the TAFTA is not just the institution of a transatlantic free trade area in goods and services or the establishment of a customs union. The TAFTA project is an initiative aimed at enhancing trade and investment flows between the EU and the US chiefly through the reduction and/or elimination of traditional–tariffs and quotas–and non-traditional transatlantic barriers (i.e., divergences in regulatory standards) that EU and US businesses must face in navigating the traffic between both regions. The ultimate target of the TAFTA is full economic integration across the Atlantic between the EU and the US.

In theory, nothing could stop the EU and US from just setting up a transatlantic free trade area (FTA) for both goods and services; the establishment of an FTA is certainly an option–a good option–under the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade and Services (GATS). But while a transatlantic FTA in goods and services would likely succeed in eliminating some of the existing traditional barriers between the EU and US, such as tariffs and quotas, it would be incapable of dealing with the most damaging of barriers: non-traditional barriers resulting from divergent standards and rules; specifically, these could include national security concerns, divergent data and consumer protection standards, and the partiality of domestic procurement rules, to name only a few.

For such reasons, the adoption of an FTA between the EU and US would be insufficient to promote the establishment of a barrier-free transatlantic area for goods, services, and capital. A WTO+ agreement, also compatible with the WTO rules, would be the perfect complement to an FTA between the EU and the US.

So ideally, the establishment of the TAFTA would cover ground that a hypothetical EU-US FTA, by definition, could not. The object of the TAFTA is the dismantling of all transatlantic regulatory barriers, and it is precisely *these* barriers that would remain untouched in the event of a transatlantic FTA not complemented with a WTO+ agreement.[14]

Not an Exclusive Club for Rich Nations

In order to avoid the inefficiencies that result from trade diversion and ensure that the TAFTA develops into an open community, rather than an exclusive club, policymakers should pursue a novel application of the most-favored-nation (MFN) principle that would allow any third countries to participate in the TAFTA as long as they are willing and ready to fulfill the conditions established by the EU and the US. In this way, no country would be forced to face new discriminatory barriers *as a result* of the establishment of the TAFTA. The requirements for participation in the TAFTA would be public, transparent, and non-discriminatory. States capable of complying with the established requirements would automatically be given the right to join.

Third countries that come to participate in the TAFTA would benefit from both the EU's and US' open markets, and any pre-existing free trade agreements between *either* the US or the EU *and* such third countries could be expanded so as to include *both* Atlantic partners in the pre-existing agreement. This would be the equivalent of the EU and US offering the rest of the world a "super-Doha."

[14] It should also be noted that all the TAFTA proposals concerning regulatory reform are fully compatible with WTO rules on the matter (for example, Article 6 of the Technical Barriers to Trade (TBT) Agreement, or Article VII of the GATS, on mutual recognition agreements).

Given that the TAFTA would operate on the basis of an inclusive and open-ended membership standard, its establishment and development within the transatlantic area would gradually redound to the benefit of various economies throughout the world.

Not a Substitute for Other Multilateral Fora or Regional Projects

The project to establish the TAFTA does not involve rejecting or undercutting institutional mechanisms or initiatives that are already underway. Rather, the TAFTA project aims to take these existing structures on board by revitalizing them and adding additional initiatives when necessary. In other words, the object of the TAFTA is to imbue existing transatlantic structures with a new political momentum.

The TAFTA project also involves a renewed impulse to multilateralism. In this sense, any progress achieved by the EU and US in the TAFTA agenda will have a positive influence over the next round of negotiations of the Doha Development Agenda. The TAFTA project and the WTO negotiation process would have a complementary relationship–each being a distinct building block on the way to world trade liberalization and integration.

In addition to the WTO, the TAFTA project aims to enhance the institutional framework for EU-US economic relations by strengthening the Transatlantic Economic Council (TEC). Together with the USTR and the European Commission, the TEC will likely be the keystone institution in the development of the

TAFTA, as it is able to enlist the support of high-level experts and prominent actors from the worlds of business, academia, and politics in the service of EU-US economic cooperation.

The various transatlantic dialogues already in existence, in particular the TransAtlantic Business Dialogue (TABD),[15] would also play an important role in the development of the TAFTA. Such dialogues include the TransAtlantic Consumer Dialogue (TACD),[16] the Transatlantic Legislators' Dialogue (TLD),[17] the TransAtlantic Labour Dialogue (TALD),[18] the TransAtlantic Environment Dialogue (TAED),[19] the TransAtlantic Development Dialogue (TADD),[20] and the Transatlantic Policy Network (TPN).[21] These dialogues can play a fundamental role in advising the high-level committee appointed to draw up the TAFTA *action plan*.

The project to establish the TAFTA would also enhance the EU's "Europe 2020" program (and vice-versa).[22] The success

[15] Information on the TABD is available at http://www.tabd.com/ (Nov. 3, 2011).

[16] Information on the TACD is available at http://tacd.org/ (Nov. 3, 2011).

[17] Information on the TLD is available at http://www.europarl.europa.eu/intcoop/tld/default_en.htm (Nov. 3, 2011).

[18] Information on the TALD is available at http://streitcouncil.org/index.php?page=transatlantic-labour-dialogue-tald (Nov. 3, 2011).

[19] Information on the TAED is available at http://streitcouncil.org/index.php?page=transatlantic-environment-dialogue-taed (Nov. 3, 2011).

[20] Information on the TADD is available at http://ec.europa.eu/development/icenter/repository/eu_us_roadmap_food_security_en.pdf (Nov. 3, 2011).

[21] Information on the TPN is available at http://www.tpnonline.org/mission.html (Nov. 3, 2011).

[22] Information on Europe 2020 is available at http://ec.europa.eu/europe2020/index_en.htm (Nov. 3, 2011).

of Europe 2020 could even be thought of as an important prerequisite for the establishment of the TAFTA, given that a reinvigorated EU economy–the object of Europe 2020–would undoubtedly stimulate transatlantic economy.[23] In 2010, the European Council remarked that Europe 2020 would help Europe "recover from the crisis and come out stronger, both internally and at the international level."[24]

Moreover, the revitalization of the transatlantic link could help Europe catch up with the US in terms of productivity. Research done by the OECD on the matter strongly suggests that the liberalization of product markets and the removal of trade barriers ultimately translate into higher productivity levels. Such a boost, particularly at the present time, would be especially welcome in Europe. In contrast, political decisions that block transatlantic and intra-European mergers and acquisitions are the exact opposite of what is needed.[25] The continued prosperity of either the EU or the US has become inextricably bound up with the prosperity of both. In this sense, the establishment of a transatlantic bridge for productivity is a far more realistic approach to EU-US trade re-

[23] We believe the 2010 "Progress Report on Europe 2020," prepared by the European Commission, presents the right strategy for the EU to improve its economic performance. The report is available at http://ec.europa.eu/europe2020/pdf/1_en_annexe_part1.pdf (Nov. 3, 2011).

[24] The conclusions of the European Council of June 2010 are available at http://ec.europa.eu/eu2020/pdf/council_conclusion_17_june_en.pdf (Nov. 3, 2011).

[25] Past examples of such decisions include the French government's interference in a bid by Pepsico (a US multinational) to take over Danone (a French company), as well as the Bank of Italy's interference in a bid by BBVA (a Spanish multinational bank) to take over Italy's Banca Nazionale del Lavoro. At the same time, the trade practices of third countries also affect the performance of EU companies, but we will not elaborate on this wide-ranging and complex issue in the present report.

lations than the consideration of "counterweight" theories and contentious debates over "Europe vs. America."

Renewal of growth in Europe will also make the implementation of the multilateral agenda easier. Opening markets to third countries inevitably generates resource re-allocation: job destruction followed by job creation. But in a more rapidly growing European economy, the swift and sudden shocks of resource re-allocation will be easier to absorb.

In this manner, the TAFTA would revitalize transatlantic economic confidence and serve as a powerful symbol of the mutual EU-US commitment to economic liberalization and regulatory cooperation. As a new and unprecedented economic arrangement, the TAFTA would also enjoy a highly visible political status and serve as an ongoing demonstration to the world of the indefeasible kinship between the nations of Europe and the United States.

The Evolving Framework for Transatlantic Cooperation

The reinforcement of economic relations has been on the EU-US bilateral agenda for the last twenty years. During this time, the EU and US have adopted a series of formal arrangements aimed at enhancing transatlantic cooperation.

The New Transatlantic Agenda (1995)

In December 1995, the EU-US Summit launched the New Transatlantic Agenda (NTA), which aimed to strengthen mutual economic relations, create new transatlantic bridges, and expand global trade. The NTA provided a new and unprecedented framework allowing the EU and US to move from joint consultation to joint action in four major areas: (1) world trade; (2) global challenges; (3) peace promotion, stability, democracy, and development; and (4) transatlantic divergences. In the words of its founding agreement, the NTA sought "to create a New Transatlantic Marketplace by progressively reducing or eliminating barriers that hinder the flow of goods, services and capital between [the EU and US]."[26]

The NTA, and the accompanying EU-US Joint Action Plan,[27] also established a senior-level dialogue structure that allowed both sides to embark on a series of specific cooperative endeavors and create a number of institutionalized dialogues.[28] The TransAtlantic Business Dialogue (TABD), for instance, is a CEO-led private-sector group that was established by the EU and US in 1995 as part of the NTA talks. The TABD offered businesses on both sides of the Atlantic a forum in which to promote further economic integration and a means by which to present specific policy recommendations to both the US Department of Commerce and the European Commission.

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[26] The joint statement of the NTA is available at http://www.eurunion.org/partner/agenda.htm (Nov. 3, 2011).

[27] The joint statement of the EU-US Joint Action Plan is available at http://www.eurunion.org/partner/actplan.htm (Nov. 3, 2011) and at http://www.eeas.europa.eu/us/docs/joint_eu_us_action_plan_95_en.pdf

[28] See United States mission to the European Union, available at http://useu.usmission.gov/transatlantic_relations.html

The Transatlantic Economic Partnership (1998)

During the 1998 EU-US Summit, both sides tried to reinvigorate the NTA by launching the Transatlantic Economic Partnership (TEP).[29]

The adoption of the TEP enabled the EU and US to intensify their efforts to reduce and eliminate transatlantic barriers through closer cooperation between each side's regulatory agencies. The EU and US did this by focusing on joint initiatives in areas where there was already goodwill on both sides and where mutual gains had the potential to be substantial–such as in financial markets.

In November 1998, the European Commission and the US adopted a rolling work program, entitled the TEP Action Plan.[30] This document identified areas for common action on a bilateral as well as multilateral basis. Some elements of this plan took the form of trade negotiations, while others took the form of cooperation initiatives.

The TEP Steering Group was set up in order to manage day-to-day transatlantic trade and investment relations; its general object was to prevent trade conflicts and resolve trade frictions. Specifically, the Steering Group monitored the ful-

[29] The joint statement of the TEP is available at http://www.eurunion.org/partner/summit/Summit9805/econpart.htm (Nov. 3, 2011).

[30] The text of the TEP Action Plan is available at http://eeas.europa.eu/us/docs/trans_econ_partner_11_98_en.pdf (Nov. 3, 2011).

fillment of TEP objectives and provided a horizontal forum for bilateral consultation and early warnings on any matter of relevance to trade and investment. It was also responsible for implementation and development of the Positive Economic Agenda (PEA),[31] a series of trade-related initiatives designed to promote transatlantic cooperation and increase gains from trade for both sides. The initiatives established under the PEA included the implementation of the Guidelines on Regulatory Cooperation and Transparency, developed in 2002, and the Financial Markets Dialogue, a bilateral forum for the discussion of complex financial and regulatory issues. The Financial Markets Dialogue in particular, was the PEA's single most important achievement given that it spurred exchanges between EU and US regulators on accounting standards and the implementation of the Basel II capital accords.

The Framework for Advancing Transatlantic Economic Integration (2007)

During the 2007 EU-US Summit, political leaders from both sides established the Framework for Advancing Transatlantic Economic Integration between the United States of America and the European Union.[32] At present, the Framework is the

[31] Information on the PEA is available at http://trade.ec.europa.eu/doclib/docs/2006/june/tradoc_114066.pdf (Nov. 3, 2011).

[32] The Framework, under the auspices of which the Transatlantic Economic Council was established, was adopted in April of 2007 by US President George W. Bush, European Council President Angela Merkel, and European Commission President José Manuel Barroso. The joint statement of the Framework is available at http://www.state.gov/p/eur/rls/or/130772.htm (Nov. 3, 2011).

pre-eminent agreement between the EU and the US on transatlantic cooperation and integration and, as such, represents the standard by which progress in transatlantic cooperation is currently assessed.

The Framework envisions a transatlantic relationship built on regulatory integration and mutual prosperity. In the preamble to the joint agreement, EU and US leaders recognize the series of global economic benefits and global spread of Western economic values that greater transatlantic cooperation would entail:

> […] deeper transatlantic economic integration and growth will benefit our citizens and the competitiveness of our economies, will have global benefits, will facilitate market access for third countries and will encourage other countries to adopt the transatlantic economic model of respect for property rights, openness to investment, transparency and predictability in regulation, and the value of free markets.[33]

In the short term, the Framework calls upon EU and US policymakers and legislators to lighten the load of transatlantic regulatory burdens. The means established by the Framework to “remov[e] barriers to transatlantic commerce” include: (1) “rationalizing, reforming, and, where appropriate, reducing regulations to empower the private sector”; (2) “achieving more effective, systematic and transparent regulatory cooperation to reduce costs associated with regulation to consumers and producers”; (3) “removing unnecessary differences between [EU and US] regulations to foster economic integra-

[33] Ibid.

tion"; and (4) "reinforce[ing] the existing transatlantic dialogue structures in regulatory cooperation."[34]

The Transatlantic Economic Council (2007)

In order to carry out the vision set forth in the Framework, EU and US leaders also established the **Transatlantic Economic Council** (TEC)[35] during the 2007 summit. The TEC is currently the pre-eminent institution dealing with transatlantic economic cooperation, while the Framework, as was mentioned previously, is the pre-eminent agreement.

The TEC's general mission has been to "oversee the efforts outlined in [the] Framework, with the goal of accelerating progress." The TEC is responsible for aiding and coordinating the work of regulators, trade officials, and policymakers on both sides of the Atlantic, setting priorities and helping to design methodologies for the mitigation of both horizontal and sectoral (i.e., industry-specific) barriers to transatlantic trade.

The work of the TEC is particularly important to transatlantic integration in two ways. In terms of technical expertise, the TEC "brings together senior US and EU economic policy and regulatory officials for interdisciplinary discussions and joint work on issues critical to transatlantic economic integration." And in terms of harnessing diplomatic clout and generating long-term

[34] Ibid.

[35] Information on the TEC is available at http://www.state.gov/p/eur/rt/eu/tec/c33255.htm (Nov. 3, 2011).

momentum, the TEC lends indispensable "political guidance and support to important cooperation initiatives."[36]

In addition to accelerating the goals of the Framework by "developing metrics, setting deadlines and targets, and monitoring progress," the TEC has been tasked with the following objectives, among others:

1. Adopting a formal work program in line with the goals of the Framework.

2. Facilitating joint action and cooperation between the EU and the US as well as between legislators and stakeholders.

3. Convening a group comprised of individuals experienced in transatlantic issues, drawing in particular from the heads of existing transatlantic dialogues; such a group could provide input and guidance to EU-US Summits on priorities for pursuing transatlantic economic integration.

4. Heading the preparation of annual reports to be presented to EU-US Summit leaders; such reports would deal with the "goals, metrics for meeting those goals, deadlines, achievements, and areas where more progress is needed."

5. Reviewing the EU-US economic relationship on an ongoing basis in order to maximize progress in existing transat-

[36] The EU-US TEC Joint Statement, adopted on 17 December, 2010, is available at http://www.whitehouse.gov/sites/default/files/TEC_Joint_Statement_12-17-10.pdf (Nov. 3, 2011).

lantic dialogues and consider the phasing out of technical dialogues that have fulfilled their mission or are otherwise no longer necessary.

6. Reviewing its own progress in achieving the objectives of the Framework on at least a semi-annual basis.[37]

Recently, the TEC has also pursued a pre-emptive approach to transatlantic regulatory cooperation that is very similar to one of the pillars of the aforementioned “Regulatory Bridge.” During the TEC’s fifth meeting, in December 2010, EU and US leaders agreed that ensuring early transatlantic cooperation in emerging areas and sectors where regulatory regimes and principles had not yet been fully established, or were only beginning to be established, would be an effective and proactive way to enhance regulatory cooperation in the present as well as prevent, or at least mitigate, unintended regulatory divergence in the near future.[38] The TEC describes this method of proactive and pre-emptive regulatory cooperation as *upstream regulatory cooperation*.

To this end, the TEC tasked the **High-Level Regulatory Cooperation Forum** (HLRCF),[39] a transatlantic institution that had been created during the 2005 EU-US Summit, with the goal of estab-

[37] The goals of TEC are laid out in the joint agreement of the Framework.

[38] See the previously mentioned EU-US TEC Joint Statement, adopted on 17 December, 2010.

[39] Information on the HLRCF is available at http://ec.europa.eu/enterprise/policies/international/cooperating-governments/usa/regulatory-cooperation/index_en.htm (Nov. 3, 2011).

lishing the common principles and best practices upon which future regulations could be based. During a speech delivered before the Peterson Institute for International Economics in December 2010, European Trade Commissioner and TEC co-chair Karel De Gucht stressed the importance of the TEC adopting a pre-emptive regulatory approach which addressed "technical regulations before they are enacted into law." Indeed, the singular advantage of the pre-emptive approach to transatlantic regulatory cooperation is that it allows EU and US policymakers to identify and call attention to potentially damaging legislative proposals from either side before they are passed into law. According to De Gucht, for the EU and US to attempt to "address each other's concerns at an early stage" would be "relatively much easier than trying to amend a regulation already in force."[40]

The TEC also tasked the **Innovation Action Partnership** (IAP),[41] a government-to-government forum it had established in 2009, with providing "high-level direction to joint EU-US efforts to strengthen innovation and promote the commercialization of emerging technologies and sectors."[42] The TEC has directed the IAP to focus its efforts on three general areas:

1. Developing **innovation policy**, so as to "encourage productive, growth-enhancing activities."

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[40] A transcript of the speech, entitled "The International Trade and Investment Policy of the European Union in the Next Decade" is available at http://www.iie.com/publications/papers/print.cfm?researchid=1732&doc=pub (Nov. 3, 2011).

[41] Information on the IAP is available at http://www.state.gov/p/eur/rt/eu/tec/c34871.htm (Nov. 3, 2011).

[42] See the EU-US TEC Joint Statement, adopted on 17 December, 2010.

2. Assuring **access to raw materials** by means of "cooperation in the area of trade policy and on collaborative research, including on recycling and substitution."

3. Promoting "the development and use" of a **bio-based** and **eco-friendly economy**.

The TEC was designed to be headed by a US Cabinet-level official and a European Commission member. Currently, it is co-chaired by Michael Froman, US Deputy National Security Advisor for International Economic Affairs, and by Karel De Gucht, European Commissioner for Trade.

Enhancing Transatlantic Cooperation Today

Today's deeply integrated transatlantic economy has yet to be matched by an adequate institutional infrastructure. If EU and US policymakers are to successfully manage and increase the current level of transatlantic economic integration, they must first deepen transatlantic political cooperation substantially.

Fortunately, as a result of a variety of TEC-led initiatives and dialogues, exchanges between the EU and US have gradually become more systematic and productive. Regular dialogue has now been established between various policymakers and interlocutors on both sides of the Atlantic, and a number of regulatory cooperation initiatives have been implemented or are being planned.

Despite such progress, however, the transatlantic cooperation agenda has not yet managed to generate sufficient political momentum in either the EU or US. TEC co-chair Karel De Gucht has even stated that he "[does not] want to *overburden* the TEC with expectations" (emphasis added).[43] To the contrary, we believe the TEC should be reformed and enlarged, in both responsibility and scope. Enhancing the TEC would be among the surest ways to increase the political visibility of the EU-US economic relationship and make transatlantic integration the high-profile issue it deserves to be.

As the fifth anniversary of the creation of the Transatlantic Economic Council approaches, EU and US leaders should seize the opportunity to reinvigorate the transatlantic relationship by moving toward the TAFTA.

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[43] See the previously cited transcript of his 2010 speech, entitled "The International Trade and Investment Policy of the European Union in the Next Decade."

2

THE TRANSATLANTIC ECONOMY – TOO BIG TO FAIL

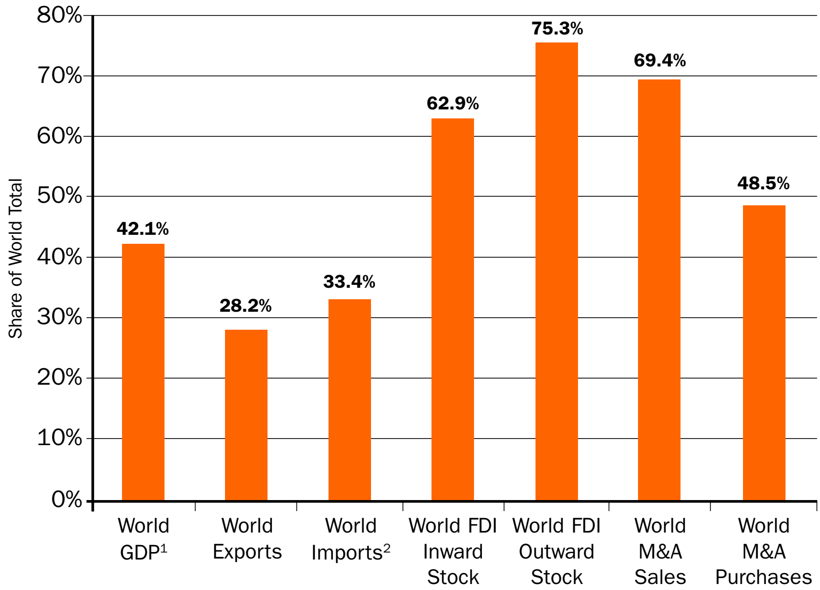
It is fashionable to speak of the transatlantic partnership as being past its prime. According to this view, the US and Europe are no longer bound by common values and strategic objectives, and they lack the economic heft to drive global economic growth. Rather, excitement pivots around the BRICs–Brazil, Russia, India, and China–and the emerging markets in general. The latter, according to the consensus, are poised to lead the world economy in the future, with the US and Europe destined to lag behind.

To many people, the US-European economic partnership conjures up images of the Cold War period, of a bygone era that has been all but relegated to the dustbin of history. Many in the US wrote off Europe as long ago as 1981. That was the year when US exports to Asia exceeded US exports to Europe for the first time. This seminal shift in trade was widely reported in the media and deemed irrefutable evidence that future global growth was shifting from West to East–or from Europe to Asia. In subsequent years, this view was bolstered and reinforced by China's unrelenting economic rise, coupled with the economic dynamism of developing Asia. Concurrently, Europe's underwhelming economic performance, along with its rising public sector debt and declining innovation capabilities, lent credence to the notion that Asia was on the rise and Europe was in decline. Corporate America, accordingly, needed to shift its attention and resources towards the Asia-Pacific region while downgrading relations with its Atlantic partner.

Nothing of the sort actually happened, however. For the past three decades, Europe has remained the primary strategic focus of US multinationals on account of Europe's large and wealthy consumer market and pool of skilled labor. Over the 2000-2010 period, Europe accounted for 55% of total US foreign direct investment (FDI).

However unglamorous the transatlantic economy may appear to the mainstream, the economy that spans the Atlantic is the largest and most powerful in the world. Over the past few decades, no two economic entities in the world have been as economically fused as the US and Europe: in 2010, they constituted an Atlantic commercial artery valued at roughly $5 trillion. In 2009, the US and Europe represented roughly 42% of world GDP (based on PPP estimates), while accounting for 28% of world exports and one-third of world imports. In addition, both the US and Europe accounted for 62.9% of the inward stock of foreign direct investment (FDI) and roughly 75% of outward FDI stock. These figures suggest that the largest share of world FDI stock is to be found in the transatlantic economy. Indeed, if there is a poster boy for globalization–or for the cross-border economic fusion between two world regions–the transatlantic economy is it.

GRAPH 1.
The Transatlantic Economy vs The World



Source: UN, IMF, figures for 2009
[1] Based on PPP estimates
[2] Excluding Intra-EU, Norway, Switzerland and Iceland trade

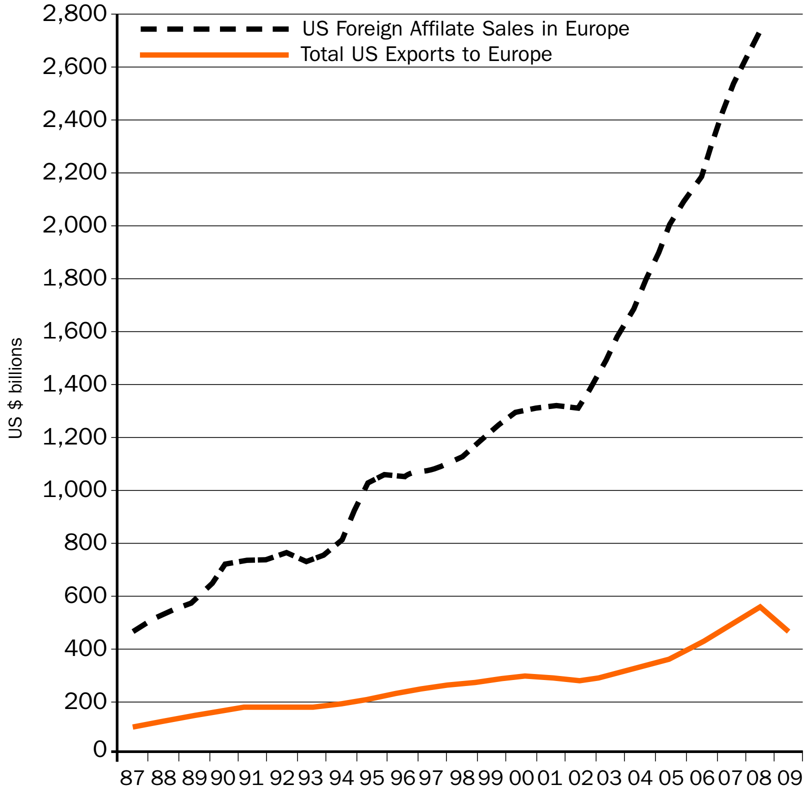
To many, this will come as a surprise. This is because the common metric by which international commerce is measured is cross border trade–or exports and imports. For centuries, trade has been the standard benchmark for global commerce, and based on such a metric, Asia matters more to the US than Europe; total trade between the US and Asia amounted to $1.1 trillion in 2010, compared to the $568 billion in trade between the US and Europe. In the same year, US exports to Asia were 40% larger than US exports to the

EU. It would appear, therefore, that the numbers and trends are clear: the US has greater commercial interests in, and is more dependent on, dynamic Asia, rather than stodgy Europe.

Such a verdict, however, is not necessarily accurate, because standard trade figures are an incomplete metric by which to measure global commerce. A more accurate and comprehensive metric would include figures on foreign direct investment and the sales of foreign affiliates. Indeed, companies more often compete through foreign direct investment, by establishing a local presence in various foreign markets, than through arm's-length trade.

As the world's most globalized enterprises, US and European multinationals deliver goods and services to overseas customers through foreign affiliates more often than through exports. On this basis, Europe, rather than Asia, is easily the world's most important geographic market for Corporate America. In 2008, US foreign affiliate sales in Europe totaled \$3.1 trillion, compared to foreign affiliate sales of \$1.5 trillion in Asia. Foreign affiliate sales in Europe were double those of Asia, in other words. The reason why Europe so easily trumps Asia as the world's most important commercial market for US companies is that the US' foreign direct investment roots run deepest across the Atlantic, not the Pacific. The great majority of Corporate America's 20,000-plus foreign affiliates scattered around the world are embedded in Europe–another fact that will likely surprise many readers.

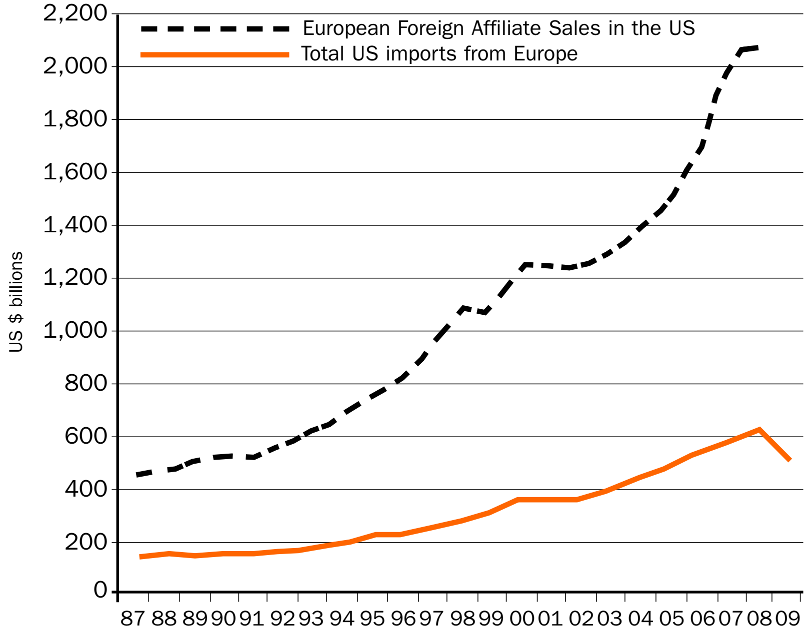
GRAPH 2.
Sales of US Affiliates in Europe vs US Exports to Europe



Source: Bureau of Economic Analysis
Majority-owned non-bank affiliates

Additional figures also reflect the deep integration of the transatlantic economy. In 2008, (the last year for which data was available) US affiliate sales in Europe were nearly six times larger than US exports (goods and services) to Europe. Similarly, in 2008, European affiliate sales in the US ($2 tril-

GRAPH 3.
Sales of European Affiliates in the US vs US Imports from Europe



Source: Bureau of Economic Analysis
Majority-owned bank and non-bank affiliates

lion) were almost three and a half times larger than US imports from Europe ($625 billion). In order to understand the primacy of foreign affiliate sales over trade in the EU-US relationship, one must first come to grips with the formidable commercial edifice that has been constructed across the Atlantic over the past sixty years.

The Ties that Bind: Just How Integrated is the Transatlantic Economy?

Over the past half century, foreign affiliates on both sides of the Atlantic have constructed a formidable commercial infrastructure, which the following metrics make evident:

Foreign Affiliate Output

In their own right, US affiliates in Europe and European affiliates in the US are among the largest economic forces in the world. For instance, the total output of US foreign affiliates in Europe ($638 billion in 2008, the last year for which data was available) and of European affiliates in the US ($423 billion) is greater than the total gross domestic output of most nations. The combined output of transatlantic foreign affiliates is now in excess of $1 trillion. One puts the figure into perspective by noticing that the combined output of transatlantic affiliates is equivalent to the total output of South Korea or Mexico. As a separate unit, and in terms of output, transatlantic affiliates rank among the top 20 economic producers in the world.

On a global basis, the aggregate output of US affiliates reached nearly $1.2 trillion in 2008, with Europe accounting for roughly 53% of that total. The UK, where US investment ties are among the deepest, accounted for 26% of total affiliate output in Europe, followed by Germany (15%), and France (9%). These three nations accounted for roughly half of total US affiliate output in Europe during 2008. By sector, the total output of US affiliates in each of these nations was almost evenly split between services and manufacturing.

In the US, European affiliates, most notably British firms, are major economic producers in their own right. In 2008, the output of British affiliates in the US reached nearly $108 billion, or roughly a quarter of the European total. The output of German affiliates operating in the US totaled $83 billion, or one fifth of the total, while the output of French affiliates accounted for 14% of the total. In addition to European affiliates, only Corporate Japan has a real economic presence in the US: in 2008, the output of Japanese affiliates totaled $87 billion, which was well below the output of British affiliates but slightly above that of German affiliates. Overall, foreign affiliates contributed nearly $670 billion to US aggregate production in 2008, with European affiliates accounting for nearly two-thirds of the total.

Assets of Foreign Affiliates

The global commercial presence of the US has never been larger: the aggregate foreign assets of corporate America totaled over $11.4 trillion in 2008; the bulk of these assets–roughly 60%–were located in Europe. In 2008, US assets in the UK alone totaled $1.6 trillion, which amounts to 14% of the global total and surpasses the total combined assets of the US in Asia, South America, Africa, and the Middle East. In addition, US assets in the Netherlands ($1.2 trillion) were the second largest in the world in 2008. As to foreign-owned assets in the US, Europe's stakes remain sizable despite having declined 7.5% in one year: from $9.3 trillion in 2007 to $8.6 trillion in 2008. The UK was the largest holder of US assets ($2.1 trillion) in 2008, followed by Switzerland ($1.6 trillion). France and Germany were the third and fourth largest holders of US assets, respectively.

Affiliate Employment

The common perspective is that when it comes to hiring workers overseas, the bulk of corporate America's workforce toils in developing nations. The reality is different, however. Most foreign workers on the payrolls of US foreign affiliates are employed in industrialized nations, notably within Europe.

In 2008, roughly 42% of the US' global overseas workforce of 10.1 million was located in Europe (this figure only takes into account majority-owned foreign affiliates, however). The bulk of these workers were based in the UK, Germany, and France. The European workforce of US majority-owned foreign affiliates was almost evenly split between manufacturing and service workers. With this in mind, it is interesting to note that, in 2008, US affiliates employed just as many manufacturing workers in Europe (1.9 million) as they did in 1990. While the aggregate number has stayed the same, however, the geographic distribution of US manufacturing employment in Europe has shifted over the past fifty years. In general, the US has shifted its operations toward lower-cost locations like Ireland and Spain, at the expense of higher-cost locations like the UK and Germany. Between 1990 and 2008, for instance, US affiliate manufacturing employment in the UK and Germany fell by roughly 34% and 14%, respectively. Manufacturing employment in Ireland and Spain, meanwhile, soared over 27% and 18%, respectively. Even with the decline of manufacturing employment in Germany, however, the manufacturing workforce of US affiliates in Germany alone totaled 387,000 workers in 2008–not far from the manufacturing workforce of US affiliates in China (410,000). In Ireland, US affiliates employed nearly 90,000 workers in 2008, a larger number than those employed by US affiliates in Sweden or Switzerland.

When it comes to affiliate employment, trends in the US are similar to Europe's. Despite prevailing notions about European companies decamping for cheap labor markets in central Europe or Asia, the reality is that most foreigners working for European companies outside the EU are American. In 2008, European majority-owned foreign affiliates directly employed roughly 3.6 million US workers. The top five employers in the US were firms from the UK (957,000), Germany (614,000), France (550,000), Switzerland (394,000), and the Netherlands (371,000). Also in 2008, European firms employed two-thirds of all US workers on the payrolls of majority-owned foreign affiliates.

In aggregate, the transatlantic workforce directly employed by US and European foreign affiliates in 2008 was roughly 8 million strong. It is important to note, however, that these figures understate the employment effects of mutual investment flows because they are limited to direct employment and do not account for the indirect employment effects of non-equity arrangements, such as strategic alliances, joint ventures, and other deals. Moreover, affiliate employment figures do not include jobs supported by transatlantic trade flows, and trade-related employment is substantial in many US states and European regions.

Research and Development (R&D) of Foreign Affiliates

While most multinationals still tend to cluster their R&D expenditures and activities in their home country, foreign affiliate R&D has become more prominent over the past decade as firms seek to share development costs, spread risks, and tap into the intellectual talent of other nations. Alliances, cross-licensing of intellectual property, mergers, acquisitions, and other forms of cooperation have become more prevalent characteristics of the transatlantic economy in the past decade. The internet, in particular, has been a great boon to transatlantic R&D.

In 2008, R&D expenditures among US foreign affiliates totaled $37 billion. The bulk of such activity was carried out in developed nations, where the largest pool of skilled labor resides. Of that $37 billion, US affiliates destined $24 billion to Europe, or nearly 65% of total R&D expenditures. The UK, Germany, France, Sweden, and Ireland were the markets where R&D expenditures by US affiliates were greatest. These five nations accounted for nearly three-fourths of US global spending on R&D in 2008.

In the US, meanwhile, R&D expenditures among majority-owned foreign affiliates totaled nearly $40.5 billion in 2008. A significant share of this total came from leading European companies operating in the energy, chemicals, telecommunications, and automobile sectors, among others. By country, British-owned affiliates were the largest foreign source of R&D expenditures in the US in 2008. Swiss-owned affiliates accounted for the second largest percentage of R&D expenditures, with a 17% share, followed by France with a 15% share.

Foreign Affiliate Sales

In 2008, majority-owned US foreign affiliate sales (goods and services) hit a record $5.2 trillion, well in excess of US exports of $1.6 trillion. Europe accounted for over half of that $5.2 trillion, with sales totaling a record high of $2.8 trillion. In a reflection of just how important Europe is to Corporate America, US foreign affiliate sales in Europe were roughly double those in the entire Asia/Pacific region. In addition, US affiliate sales in the UK ($622 billion) exceeded aggregate US affiliate sales in Latin America. And while US affiliate sales in China have soared over the past decade, it is important to remember that these sales have risen from a *low* base and remain well below comparable sales figures in Europe. For example, although in 2008 US foreign affiliate sales in China ($131 billion) were slightly higher than US affiliate sales in Italy ($129 billion), US affiliate sales in China during the same year remain *well below* US affiliate sales in Germany ($347 billion) or France ($232 billion).

Foreign affiliate sales are also the primary means by which European firms deliver goods and services to consumers in the US. In 2008, for instance, majority-owned European foreign affiliate sales in the US ($2 trillion) were more than four times larger than US imports from Europe (roughly $500 billion). For virtually all European nations, foreign affiliate sales in the US easily exceeded the value of correspon-ding US imports from these nations.

TABLE 1.
Global Engagement: Foreign Affiliate Sales vs Trade

$ billions, 2008	US Foreign Affiliate Sales vs Trade
Global Sales of US-owned Affiliates[1] (G&S)	5.202,2
Total US Exports (G&S)	1.839,0
US Sales of Foreign-owned Affiliates[2]	3.448,6
Total US Imports (G&S)	2.537,8
European Sales of US-owned Affiliates[1]	2.726,1
US Exports to Europe (G&S)	558,4
US Sales of European-owned Affiliates[2]	2.063,9
US Imports from Europe (G&S)	624,9

Source: Bureau of Economic Analysis
[1]Majority-owned non-bank affiliates
[2]Majority-owned affiliates

Foreign Affiliate Profits

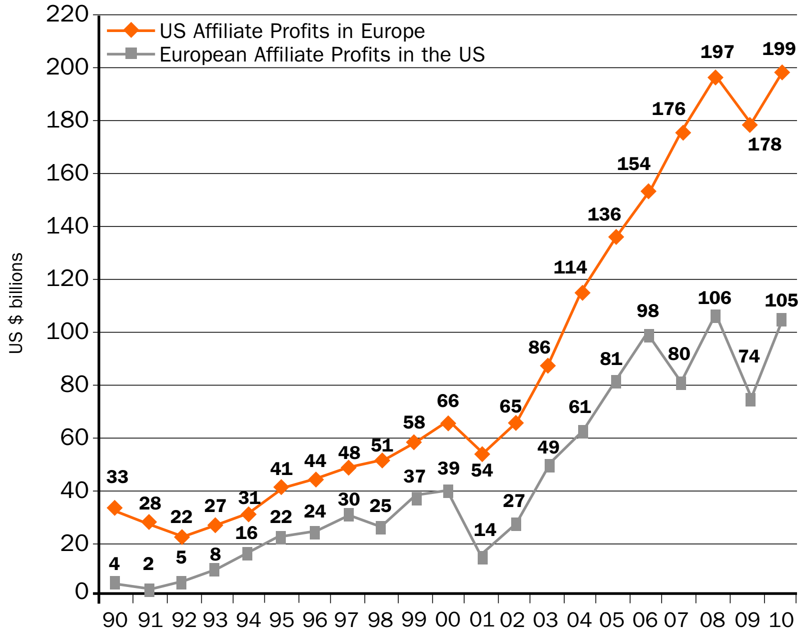
Between 2002 and 2007, the transatlantic economy enjoyed a boom in profits, although the tide turned in the second half of the year and into 2008. That year, US affiliates in Europe earned $192 billion, which represents an increase of nearly 10% from the previous year. In the first half of 2008, US affiliate profits in Europe had increased by 9% relative to the same period a year before. But as the bottom fell out during the final quarter of 2008, US affiliate profits in Europe plunged along with the rest of the global economy. The profits picture was hardly any better in 2009, during which US affiliate income in Europe dipped 10%, reverting back to 2007 levels; steep declines were also registered in most major markets.

Along with the rebound in global growth, however, US affiliate income in Europe has rebounded. In addition, as is standard fare, Europe remains the most profitable region in the world for US multinationals. Even in a bad year like 2009, Europe accounted for just over 53% of total US foreign affiliate earnings. And since 2000, the region has accounted for nearly 57% of total US foreign affiliate earnings.

Similarly, the US remains the most profitable market in the world for many European multinationals. European foreign affiliate profits in the US actually rose by roughly 10% in 2008, although they plunged by 11% in 2009. However, as the US economy improved over 2010, European affiliate profits in the US did so as well.

The bottom line is that the transatlantic economy remains a very important source of profits for both US and European multinationals. This dynamic is further underscored by the simple fact that no two economies have become more integrated than the US and Europe over the last quarter century. As a result of such large foreign direct investment flows between both sides of the Atlantic, US affiliates in Europe are increasingly indistinguishable from local European firms and European firms in the US are often indistinguishable from local American companies.

GRAPH 4.
Profits[1] Reaching Peak Again



[1] Income of affiliates
Source: Bureau of Economic Analysis. Data through 2010

Fortifying the Transatlantic Economy

Globalization has been led by the deep level of integration that exists between both transatlantic partners. Indeed, globalization has taken place more rapidly and intensely between the US and Europe than between any other two continents or regions in the world. Against this backdrop, any rift or divisions that threaten to pull the transatlantic economy apart would not only have ramifications for the US and Europe, but for the world at large as well. The next chapter highlights the emergence of a multipolar world, with emerging nations, notably China, poised to exert greater influence and control over the global economy.

The rise of the "Rest"–or key developing nations like China, India, and Brazil–is among the most significant secular trends of our times. However, globalization cannot re-emerge from the financial crisis, becoming more vigorous and inclusive in the process, without the participation and support of the transatlantic partnership. By its sheer economic size, the transatlantic economy cannot but matter: it is too big to fail. Globalization will stumble or even fail without the full support and participation of the US and Europe.

In light of this, US and European legislators and policymakers need to better educate their respective constituents and fellow citizens on the benefits of greater cooperation and mutual coordination between the transatlantic partnership and the emerging markets. The zero-sum attitude contained in the phrase "they win, we lose" has to be jettisoned in favor of a more enlightened debate concerning the risks and rewards of participating in the currently unfolding global economy. Pragmatism should replace dogmatism. Politicians should muster the political courage necessary to tell fellow citizens the simple truth: the economic future of the West is inextricably tied to the success of the Rest; their success, to a large degree, is our success.

Globalization can only proceed if leaders in both developed and developing nations educate their constituents on the benefits of cross-border flows of trade, capital, people, and ideas. Ideally, more consumers and workers in the US and Europe would then come to understand that their livelihoods will be increasingly determined by growth among developing nations. Under such a scenario, the prevailing consensus of yesteryear–that China's rise parallels the decline of the US and Europe–would be turned on its head. For their part, developing nations would strike a more conciliatory note with the West on key multilateral issues like global climate change, global trade, and nuclear proliferation. Additionally, China would choose to cooperate, rather than compete, with the US in such fields as global climate change and energy security and would also partner with the US in boosting world growth and ending misery in Africa. Finally, Russia, Turkey, India, Brazil, and other newly emerging regional powers would actively work with the US and Europe in overcoming the world's most pressing challenges.

Rather than working independently of each other, therefore, the US and Europe should consider the following transformational initiatives:

- Further integration of transatlantic capital markets, so as to allow greater access to transatlantic capital and generate economic efficiencies that would help promote growth. With regard to the ongoing financial crisis, leaders on both sides of the Atlantic should consider the creation of a transatlantic "bad bank." Such a move would help improve the impaired balance sheets of banks on both sides of the Atlantic and pave the way for greater transatlantic financial integration and coordination.

- The establishment of a wider and deeper Transatlantic Market, with a notable emphasis on reducing and eliminating barriers in transatlantic service activities. Such a process would not only promote growth in the near term but also reinforce and strengthen the global competitiveness of both the US and Europe.

- The adoption of joint strategies to strengthen the energy security of the transatlantic partnership. In a similar vein, both parties should work toward the alignment of goals and objectives related to the environment and global climate change.

All of these issues have been broached and debated at length in the past, although little energy and coordination has been forthcoming from either side of the Atlantic. With the transatlantic economy in need of a major 'reset' however, the present appears to be an ideal time for transformational policies.

Similarly, now is the time to push ahead in numerous other areas that require joint EU-US cooperation. More transatlantic coordination and common goal-setting is needed in areas such as biofuel standards, container cargo security, green product standards, reinsurance, healthcare, intellectual property rights, import product standards, accounting standards, and other areas where regulatory standardization would help promote growth on both sides of the Atlantic.

The bottom line is that the world cannot afford transatlantic economic failure. Unfortunately, conflict and competition, rather than cooperation and collaboration, have dominated the transatlantic partnership over the past few years.

In this vein, the financial crisis has done more to divide the US and Europe than to unite them.

But the financial crisis also represents an opportunity for transatlantic leadership, which the world needs now more than ever. Cyclical forces (weak economic growth) and secular dynamics (the growing clout of emerging markets) should be met by a renewed transatlantic effort aimed at tackling and overcoming many of the barriers that stand in the way of further EU-US integration. Rather than muddling through–the most likely scenario–the transatlantic partnership should approach the present crisis as a golden opportunity to fundamentally alter the global economic dynamic.

With both the US' and European financial systems impaired by the toxicity of non-performing loans, what better time than now to establish a transatlantic capital market? With the transatlantic economy staggering as a result of the global recession of 2008-2009, what better time than now to push ahead with the idea of a deeper and more integrated transatlantic marketplace? And as both the US and Europe struggle with global climate change and face significant energy deficits, what better time than now to aggressively coordinate responses to these global challenges?

In the end, the current economic crisis presents a unique opportunity for leaders on both sides of the Atlantic to rewrite and reconfigure some of the basic fundamentals of the transatlantic economy. Rather than looking inward and retreating behind protectionist barriers, EU and US legislators and policymakers should seek to establish a new and sounder course for the transatlantic economy by adopting bolder and more far-reaching initiatives. An aggressive and coordinated response by the EU and US to the global economic crisis would serve to underline and enhance the transatlantic partnership's role as one of the most important components of the global economic order.

Pending Trade Disputes

Though substantial progress has taken place in US-EU cooperation, there are serious problems in the transatlantic trade relation that require some attention–and political courage.

A good example of those problems is the set of trade disputes between the EU and the US. Most of them are being solved within the WTO trade dispute settlement bodies. Most of them are politically sensitive *dossiers* that have poisoned the commercial relation between both sides of the Atlantic for many years.

One could think that it is nonsense to think of a comprehensive and ambitious transatlantic trade and investment agreement while both parties are not capable of reaching a peaceful or negotiated solution to the long list of trade disputes.

In any case, a negotiated solution would be good news in some of the most problematic dossiers, such as the Boeing/Airbus case, in which both blocs threat with dramatic commercial sanctions. There are other politically sensitive disputes, such as the ones resulting from the extra-territorial application of US laws–those that deal with companies engaged in trade with Cuba and Iran.

3

THE TRANSATLANTIC ECONOMY IN A MULTI-POLAR WORLD

As outlined in the previous chapter, the weight of the global economy has rested squarely on the shoulders of the transatlantic partnership for the last sixty years. The transatlantic partnership has been responsible for constructing the edifice and establishing the institutions that have led to the West's global economic pre-eminence since the end of World War II. As a result, during the second half of the 20th century, the US and Europe have been the world economy's standard-bearers, rule makers, regulators, and enforcers–controlling global institutions like the World Bank, the International Monetary Fund, and the World Trade Organization, along with its predecessor, the General Agreement on Trade and Tariffs.

Today, however, change is in the air. The past is no longer prologue–not after the 'Made in America' financial crisis of 2007-2008, which has devalued and discredited the US-led model of capitalism. The Great Financial Crisis and the ensuing global recession have left the transatlantic economy weaker and less capable of shaping a future global economic agenda. And while the legitimacy and credibility of the transatlantic partnership were called into question as a result of the 2007-2008 crisis, the three D's–deficits, debts, and demographics–will continue to weigh heavily on the partnership during the decade to come. Against this backdrop, it becomes apparent that the transatlantic-centric global economy of the past three decades is being reshaped and will continue to be reshaped. The Group of 7 is now the Group of 20, with developing nations having gained a much larger say in global governance institutions. New economic powers are on the ascent–led by nations like China, India, Brazil, and Turkey. These emerging players are less inclined to simply follow the global rules that have been laid out by the US and the West in general. Developing nations, or 'the Rest,' have their own ideas about how the global economy should be managed, and they are now in very strong position vis-à-vis the West to exert greater authority concerning global governance issues. The days when the West led, and 'the Rest' followed, are over.

The Aftershocks of the Global Financial Crisis

It is now commonplace to speak of a seminal shift in global economic activity. It has become abundantly clear that developing nations, led primarily by China, have emerged as the world's new economic powerbrokers in the early 21st century. Even before the Great Financial Crisis of 2007-2008, the global economic clout of the so-called Rest had been on the ascent. The financial crisis only served to expedite a global shift that had already been taking place for the past decade; it only fast-forwarded the rise of China, India, and other emerging markets, while also accelerating the relative decline of the US and Europe.

As a new decade dawns, the transatlantic partnership confronts a world that is quite different from the one that existed a mere decade ago. At the beginning of the 21st century, few questioned the global primacy of the US economy and the benefits of free market capitalism. US-led globalization–greater openness to foreign trade and investment, industry deregulation, and the unfettered cross-border movement of capital, goods, and people–was the overarching precept according to which many countries operated, a mega-trend so powerful and ubiquitous that it was thought of as irreversible.

In the post-crisis world, however, the global landscape has become radically different. After living well beyond their means for years, and following massive bank bailouts and recession-fighting policies, the developed nations are deep in debt and seemingly condemned to undergo a prolonged period of slow growth. The public sector debt of the developed nations has soared over the past few years, a burden that threatens to sap the global clout of both the US and Europe and, by extension, the transatlantic alliance. The US is exhausted by most accounts: its economic superpower status has been diminished by costly wars, the financial crisis, and massive liabilities associated with future entitlement programs. Meanwhile, Europe appears increasingly impotent–too demographically stagnant, too far in debt, and too distracted by its own problems to be anything other than a passive player on the global scene. In addition, the sovereign debt problems of Europe's periphery threaten to undermine European unity and integration. Free-market capitalism will survive, but not in the unregulated, anything-goes, shop-'til-you-drop, leverage-to-the-hilt guise of the past quarter century.

The developing nations, in contrast, have not only led the way forward during the past two years–emerging from the global economic recession far quicker and stronger than the developed nations–they have also increased and fortified their presence in a number of key sectors that had long been under the domain of the West in general and the transatlantic partnership in particular. Sectors such as energy, mining, steel, automobiles, telecommunications, power generation, alternative energies, and finance are being increasingly contested and controlled by developing nations. The EU and US have been caught flat-footed by the fact that Chinese firms are now on the cusp of becoming global leaders in electric cars, solar panels, and wind turbines; and they have been caught by surprise by the fact that Brazil is now a legitimate agricultural and energy powerhouse as well as a direct threat to the energy and agricultural complexes of both transatlantic partners. India's growing software industry, the expanding technological capabilities of South Korea and Taiwan, the economic takeoff of Africa, the increasing financial might of Shanghai: all of these trends, and more, are being driven by non-Western forces and are emblematic of a new world economy whose rhythm reflects the beat of developing nations far more than that of the standard-bearers of the post-World War

II global economic order, the US and Europe. As it continues to develop, this trend will radically reconfigure global economic activity.

The global financial crisis has thus yielded a global economic landscape that is more complex, fluid, and multi-polar. Global power and influence are now more diffused among nations and regions, making it more difficult to coordinate and craft solutions to pressing global problems like climate change, the proliferation of nuclear weapons, the long-running Doha Round of multilateral trade negotiations, and the developmental challenges of poverty-stricken Africa. This shifting backdrop will require far-reaching adjustments on the part of the transatlantic partnership and key multilateral institutions like the United Nations Security Council, the International Monetary Fund, the World Bank, and other Western-dominated institutions that have long held sway over global economic governance.

TABLE 2.
Global Shift: The Growing Role of Developing Nations

	1980-2005	**2005-Forward**
Global Economic Growth	Laggard/Dependent	Leader/Independent
Global Governance	Passive	Active
Global Commodity Prices	Price Taker	Price Setter
Global Innovation/Technology	Imitation	Innovation
Global Industry Standards	Adopt	Create/Tweak
Global Corporate Strategy	Passive/Reactive	Proactive
Global M&A	Recipient	Originator

The Rise of the "Rest" and the Challenges to the Transatlantic Partnership

> *"The next twenty years of transition toward a new international system are fraught with risk."*
>
> ***Global Trends 2025*, *National Intelligence Council***

For the EU and US, the unfolding multi-polar world is filled with numerous risks and challenges. Adding to the heightened sense of uncertainty, the transatlantic partnership is no longer in control of the global economy and the rest of the world knows it. The days when the developed nations dictated the global economic agenda, dominated multilateral institutions, and determined the key forces influencing global economic activity are over. To paraphrase China's President, Hu Jintao, the students are no longer willing to take orders from the teachers. In other words, the policies and structures of the past have become unacceptable to developing nations, notably China. Feeling confident and emboldened, and sensing that their time has come, the developing nations are poised to flex their new muscle and prepared to challenge the Western status quo.

A particularly worrisome aspect of this newly emerging order is the fact that developing nations are increasingly coming to control the world's critical economic inputs: natural resources, capital, and labor. The long-standing monopoly the West previously enjoyed in terms of devouring the world's natural resources is over. During previous decades, as long as consumers in developing nations remained poor and lacked the income to purchase a computer, car, or good meal, the West did not have to compete with such nations for oil, copper, or soybean, among other commodities. For much of the post-Cold War era, the equation was rather simple: the developing nations produced commodities, the West consumed them. Today, the expanding global middle class being generated by emerging nations is drastically altering the global resource equation. In addition to making more demands on the world's physical infrastructure, developing nations are today exerting ever greater control over critical resources like oil, rare earth minerals, copper, coal, and a variety of other commodities. The transatlantic partnership is therefore in direct competition with the Rest for natural resources, and this dynamic could very well lead to more tension between the well-endowed Rest and the depleted, resource-deficient West.

How big is the rising middle class being generated by the Rest? According to the World Bank, the middle class of the developing nations is relatively small but poised to expand rapidly over the next few decades. The middle class of the developing nations already numbers some 400 million people, a figure roughly one-third larger than the entire US population, and is expected to triple in size over the next two decades, increasing to 1.2 billion shoppers by 2030. By then, the developing nations will account for 93% of the global middle class, up from 56% in 2000.[44] This estimate suggests ever rising levels of consumption in the developing nations; yet even today, the emerging market consumer outspends the US

[44] World Bank, *Global Economic Prospects*, 2009, Washington D.C.

consumer. In 2010, for instance, the US accounted for roughly 27% of global consumption while emerging markets accounted for 34%. A decade ago, the percentages were roughly reversed: in 2000, the US accounted for nearly one-fifth of global imports while having a population that was less than 5% of the global total. At this time, the US consumer was the most potent spending machine on earth. By 2009, America's share had dropped to 13%.

Times have changed, in other words. Where in the past factory workers in Asia would trudge off to work on Saturday morning, today they are more likely to head for the local shopping malls for a day of socializing and shopping. Granted, those heading for the shopping malls on weekends are still the lucky few relative to the rest of the general population. But the size and scale of this emerging and pent-up demand for electronic goods, appliances, automobiles, skin-care products, clothing, and other goods is increasingly allowing emerging market consumers to set global trends, lead in global fashion, and drive global sales in a number of industries. In a seminal shift, global consumption is titling towards developing nations and away from the EU and US.

While the West seems condemned to a prolonged period of thrift and austerity, conspicuous consumption is rapidly becoming prevalent in places like Brazil, India, Turkey, and other emerging markets. The fact that China's automobile market is now larger than the US' is emblematic of this trend. What is good for China, therefore, is now good for General Motors, who is a market leader *in* China. GM's automobile sales in China soared to over 1.8 million vehicles in 2009 and expanded by nearly 30% again last year. Various other transatlantic multinationals–capital goods manufacturers, technology providers, global consumer brand leaders, luxury goods providers–have enjoyed a robust demand in emerging markets over the past year, with the likes of China, Russia, Turkey, and other rising countries becoming an increasingly critical source of profit.

But while some companies stand to benefit from surging consumer demand in the emerging nations, the effect of this demand on the macro balance sheet of both the US and Europe is more problematic. For instance, while booming auto sales in emerging markets is a blessing for US automobile manufacturers, it is a curse for the average American and European consumer. As more consumers in China, Turkey, Egypt, and other emerging countries take to the road in their shiny new cars, world oil prices will continue to rise; such a state of affairs will redound to the detriment of the energy-dependent American and European consumer.

Most Americans remain unaware of the rising middle classes of the developing nations and what this new consuming cohort means for the world's already stretched natural resource base. They have yet to recognize that as the new global consuming class adopts Western lifestyles–moving from the village to the city, driving to work, working in air-conditioned offices, consuming more protein–the increased demand for energy, water, agricultural goods, and other natural resources will drive prices higher.

TABLE 3.
Control of Key Commodities: Developing vs Developed
(Share of World Production)

	1999	2009		1999	2009
Oil			**Wheat**		
Developing	75,9	81,1	Developing	69,3	73,1
Developed	24,1	18,9	Developed	30,7	26,9
Natural Gas			**Soybeans**		
Developing	57,1	64,5	Developing	53,3	58,4
Developed	42,9	35,5	Developed	46,7	41,6
Coal			**Geothermal***		
Developing	62,4	75,1	Developing	48,9	46,7
Developed	37,6	24,9	Developed	51,1	53,1
Iron Ore			**Solar**		
Developing	73,2	80,8	Developing	51,1	87,0
Developed	26,8	19,2	Developed	48,9	13,0
Bauxite			**Wind**		
Developing	61,9	67,6	Developing	11,5	27,9
Developed	38,1	32,4	Developed	88,5	72,1
Copper			**Ethanol**		
Developing	76,6	83,5	Developing	69,2	41,5
Developed	23,4	16,5	Developed	30,8	58,5
Palladium & Platinum					
Developing	92,2	91,9			
Developed	7,8	8,1			

Note: *2000 (latest available)
Sources: BP Statistical Review 2010, US Geological Survey, United Nations Food & Agriculture Organization

In particular, the transatlantic energy future remains fraught with risks related to the global concentration of oil supplies. Increasingly, more and more of the world's proven oil reserves are controlled by states and state-owned companies whose interests are not aligned with either the EU or US. While ExxonMobil, Chevron, Total, and British Petroleum rank as some of the largest energy firms in the US and Europe, in terms of proven reserves these Western oil giants pale in comparison to Gazprom of Russia, Sinocpec and PetroChina of China, Petronas of Malaysia and various Middle East giants that sit atop a huge share of the world's proven oil reserves, which are what really matter in the oil industry.

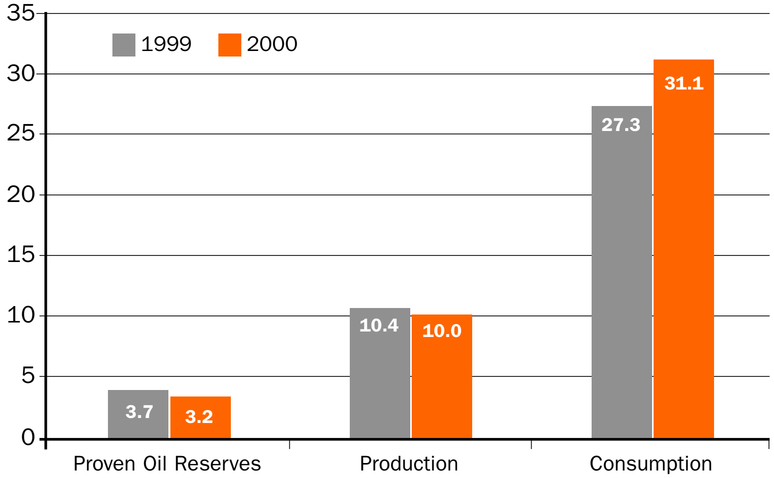
More than 90% of the world's proven oil reserves, therefore, are held by national oil companies that are either partially or fully controlled by their respective governments. Energy is too large an industry and too profitable a sector to be left to the private sector in nations like Saudi Arabia, Mexico, Venezuela, Malaysia, Kuwait, and others. And these nations, along with others, have even restricted the access of Western oil companies to their oil industries during the past few years. In a stunning shift in the global balance of energy power, privately owned multinationals now produce just 10% of the world's oil and hold just 3% of its reserves. In the fast-approaching future, "Big Oil" will have an entirely different meaning.

The energy future of the transatlantic economy is also at risk because of the rise in wealth and consumption in Asia. In addition to worrying about their overriding dependence on foreign oil, the EU and US should be concerned about the stunning disconnect between Asia's inexorable rise in oil consumption, on the one hand, and the region's paltry oil reserves, on the other.

Asia is a region that accounts for over 30% of global output, is home to half of the world's population, is the industrial workhorse of the global economy, and is in the midst of an urban boom. In light of all this, Asia's proven oil reverses appear to amount to the proverbial drop in the bucket: At the end of 2009, the region's reserves accounted for just 3.2% of the global total. And Asia's reserves-to-production ratio (an indicator of how long proven reserves would last at current production rates) is less than fifteen years.

Meanwhile, the region's share of global oil production has slipped during the past decade, sliding from 10.4% in 1999 to 10% in 2009. Asia produces many things but oil, unfortunately, is not one of them. Barring the discovery of significant new oil fields, the region's contribution to global oil production is in a secular decline. This is hardly an encouraging trend for the West, given that Asia's secular decline in production takes place against the backdrop of its soaring secular demand. Fed by rapid industrialization and urbanization, along with rising automobile ownership rates, Asia's oil consumption soared by 25% between 1999 and 2009, and now accounts for nearly one-third of the global total–a record share.

GRAPH 5.
Asia's Insatiable Thirst for Oil
(% of Global Total)



Source: British Petroleum (BP Stadistical Review of World Energy, July 2010)
Data through December 31, 2009

In China, oil consumption nearly doubled during the last decade, rising from 4.5 million barrels per day in 1999 to nearly 9 million barrels in 2009. Oil production, however, rose just 18% over the same period; in 2009, moreover, the nation's production was less than half the nation's total consumption, a gap that has forced China to expand its overseas search for oil. To this end, Beijing has, over the last decade, become a key investor, donor, and creditor in resource-rich nations like Nigeria, Angola, Argentina, Venezuela, Equatorial Guinea, Gabon, the Republic of Congo, Afghanistan, and a host of emerging nations.

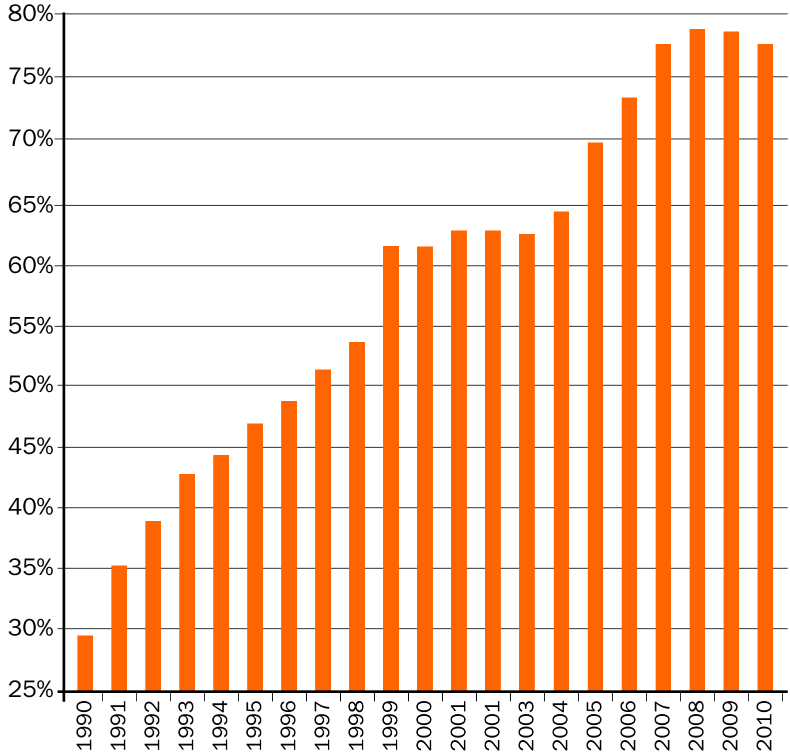
Asia's other giant, India, has embarked on a mission similar to China's, increasingly scouring the world for stable energy supplies.

In a country where over two-thirds of the population is under the age of 35, India's oil consumption is just 37% of China's. This gap, no doubt, will likely narrow in the future as more and more Indian consumers embrace cars and as more and more people migrate from the farm to the city. As a result, the world's oil infrastructure will come under even more stress. In terms of energy, therefore, the transatlantic partnership faces a double threat: (1) more of the world's oil is coming under the control of state-owned firms whose interests are not aligned with either the EU or US, and (2) Asia's soaring oil demand–along with its rapidly evolving consumer base–far outweighs its oil production capacity.

The search for resources goes beyond oil, however. The future price of copper, silver, iron ore, meat, corn, wheat, soybeans, and other commodities will increasingly reflect the rising per capita incomes and attendant jump in consumption among the citizens of developing nations. As a result, the World Bank estimates that by 2030 the worldwide demand for food will have risen by 50% and the demand for meat by 85%. This means that, barring a huge jump in supplies, EU and US consumers will have to pay even higher prices for commodities. Rising water scarcity is another critical issue, given that it directly affects the price of food, real estate, industrial inputs, and a host of other products.

In a seminal shift, then, the price of world resources will increasingly be set by forces that originate outside the transatlantic economy. This will leave Western consumers in the unusual position of being price takers, rather than price setters, and of being subject to the whims of suppliers and consumers in emerging markets.

GRAPH 6.
Developing Countries' Share of World International Reserves
(% of Global Total)



Source: International Monetary Fund., International Financial Statistics
Data through September 30, 2010.

The New Financial Power Brokers and the Battle for Brains

Capital is yet another critical input that the Rest is increasingly gaining control over. Indeed, at the end of 2010, nearly 80% of the world's total foreign exchange reserves–in effect, the globe's excess savings–were in the vaults of developing nations. This total equates to roughly $7 trillion, a figure that includes China's $3 trillion in reserves, accumulated largely by running a massive trade surplus with the US, and over $300 billion among Middle East oil producers, obtained as a result of the secular rise in oil prices. These variables, coupled with the surge in debt among developed nations, have triggered a stunning shift in global financial power. Simply put, the debt is in the West, the savings in the East; the poor are "rich," the rich are "poor."

Because most of the critical inputs to economic growth, such as consumers, natural resources, and capital, now lie outside the control of the transatlantic economy, the global influence of both the EU and US has declined. In the future, both transatlantic partners will have to compete for these resources, as well as for another key input: skilled labor.

The war for global talent is underway, with the likes of China, India, Brazil, and others increasingly drawing from a dwindling pool of globally skilled workers at the expense of the transatlantic partnership. The US is losing its *first-mover advantage* when it comes to attracting the world's best and brightest. Even though Silicon Valley and the American university system continue to attract some of the world's most talented scientists and engineers, the appeal of the US is not as powerful as it once was.

More and more, highly skilled workers that would have done virtually anything in the past to reach US shores are staying home. Meanwhile, talented immigrants in the US are returning home, prompting some to warn of "reverse brain drain" in the US, UK, and other Western nations. A number of factors are behind both of these trends. Most notably, the global diffusion of research and development has led to the relocation of more and more of the world's top-notch research, which has moved to the hyper-growth markets of China and India. Microsoft, Intel, Google, IBM, and General Electric are just a few of the high-tech leaders in the West that have opened R&D centers in India over the past decade. By doing so, these high-tech leaders have kept India's local talent *at* home while luring India's overseas workers to *return* home.

Largely overlooked by many in the West, both India and China are actively courting their fellow countrymen and women residing overseas, hoping to lure these migrating brains back home by offering them grants, cash awards, lab equipment, apartments, and other goodies. Whether India or China succeed or not matters to the US, because, among other reasons, skilled immigrants have been key drivers of the US high-tech industry for decades. According to research done by tech entrepreneur Vivek Wadhwa, immigrant-founded tech companies generated $52 billion in revenue and employed 450,000 workers in 2005.[45] During the same year, immigrants also founded 35% of all start-ups in the semiconductor industry. In computers/communications and software industries, the figures were 31.7% and 27.9%, respectively. These figures underscore the phenomenal role that immigrants have played in driving US technological innovation.

[45] Vivek Wadhwa, "A Reverse Brain Drain," *Issues in Science and Technology*, summer 2009, and "Is the US Experiencing Its First Brain Drain?" *New America Media*, March 31, 2009.

In the future, the EU and US will no longer be able to assume that the world's most skilled immigrants will automatically flock to them in search of opportunity. As more and more opportunities around the globe become available to the world's best and brightest, the transatlantic partnership will increasingly become just one region among many vying for the world's most talented workers. In addition, the looming war for global talent hardly comes at a propitious time for the EU and US, given both parties' aging workforce. In the US, an aging labor force, coupled with the deteriorating quality of public education and the dearth of US-born students taking advanced degrees in science and engineering, are serious causes for concern. During the 2004-05 academic year, roughly 60% of engineering doctoral students and 40% of master's degree students were foreign nationals; in addition, non-US citizens also comprised the bulk of the US graduate student population in science, technology, engineering, and medicine.

That is hardly an encouraging sign for the US technology sector, in particular, or for the US manufacturing base, which is rapidly running out of skilled manufacturing workers. The same problem also afflicts Germany, where skilled labor shortages have been a pressing issue for the past few years.

Going Global: The Hunted Are Now the Hunters

Another challenge to the transatlantic partnership has to do with the global focus and outward push of multinationals domiciled in developing nations. As was mentioned previously, shopping has become a favorite pastime for consumers in developing nations. But they are not alone. Large corporations headquartered in Mexico, Brazil, China, India, and other emerging markets have also acquired a taste for shopping, particularly foreign shopping. Cross-border mergers and acquisitions, which used to be the nearly exclusive preserve of Western firms, are now increasingly being carried out by firms from developing nations.

For decades, the "hunted" (firms from the developing nations) were no match for the "hunters" (firms from the developed nations), because the former lacked the capital, management expertise, brand recognition, and other core competencies to effectively compete with the latter beyond their home market. In some cases, capital controls and other government restrictions in developing nations kept such companies firmly rooted in local markets.

Times have changed, however, and global deal-making is but another lost monopoly of the West. Aspiring multinationals from developing nations are increasingly becoming more aggressive bidders for assets in other emerging markets, crowding out Western multinationals from acquiring oil fields in central Asia, telecommunication companies in Africa, and banks in Argentina, to name a few instances. In addition, firms from developing nations have strategically set their sights on assets and popular brands in the EU and US, creating a whole new competitive landscape for many Western firms in the process.

In short, emerging corporate giants have joined the fray in hunting for global assets, spending nearly $650 billion in foreign mergers and acquisitions in 2007, the peak year for global M&A activity. A decade earlier, firms from developing nations had spent just $60 billion, accounting for less than 5% of the global total. By 2010, however, their global share had jumped to nearly 35%. While cross-border M&A deals initiated by firms from developing nations have traditionally been directed at other firms from developing nations, firms from developed nations are increasingly finding themselves in the crosshairs of corporate entities from South Korea, Mexico, China, and others. The reasons for this have to do with the general appeal and manifold benefits of developed markets, including access to global brands, cutting edge technology, wealthy consumers, and effective distribution channels. These are all key variables that compel corporations from emerging markets to initiate M&A deals with corporations from the EU and US. This is why, more and more, the Rest is investing directly in the West.

The Next Phase of Globalization – Made in China, Turkey, Brazil, Russia…

The world has undoubtedly changed. We have reached the end of globalization as a process determined and designed by the US, but not the end of globalization as such, provided the EU and US are able to embrace a new global configuration with new characteristics, including the rising influence of China, India, Brazil, and Russia. This new global configuration represents a significant challenge to the transatlantic partnership, which has long been the pre-eminent force driving the world economy.

The challenges facing China, India, Russia, and other key developing nations are no less daunting. Are these nations ready to assume the mantle of global leadership? Will they be able and willing to subordinate national self-interest for the good of the global commons when it comes to tackling weighty issues like climate change, nuclear proliferation, and the need to bring aid and development to the world's poorest nations? The answers to these questions are unclear. What is clear is that globalization is likely to survive, although it will continue to assume a more non-transatlantic character.

The globalization process during the late 20th century was largely driven and dictated by the West. Under this framework, globalization was only nominally "global" since cross-border flows of trade, capital, and people were generated primarily by the EU and US. In the pre-crisis world, the bulk of foreign direct investment flowed to and from the developed nations, plus a few outliers like China. Global mergers and acquisitions were the exclusive preserve of the rich nations. Trade and investment ties between developing nations were mostly shallow, forcing many countries like Brazil, Turkey, Poland, and Mexico to rely on the EU and US for export growth. Companies from developing nations were mainly traders and, as such, depended on their ability to export goods to foreign customers. Multinationals from the West, on the other hand, were largely investors relying on in-country foreign affiliates to deliver goods and services to overseas markets. Meanwhile, the cross border flow of people was largely one-way: from poor to rich nations. Global commodity prices were in effect set by the West and the world's best minds predominantly sought to migrate to the EU and US.

In the years ahead, though, the axis of the global economy will increasingly revolve around the developing nations, particularly China. In the multi-polar world that is now unfolding, the Rest will set the tempo for global growth and demand a greater say in global governance institutions. The pace of cross-border trade and investment among developing nations will accelerate. Traditional foreign direct investment flows will be altered, with more investment emanating *from* developing nations and more investment flowing *to* developed and developing nations alike. Global M&A deals will increasingly reflect the growing influence of developing nations, as emerging corporate giants from Brazil, Mexico, India, and other nations increase their global footprint. Having once been the imitators, developing nations are now poised to emerge as the technological innovators. Even though the transatlantic economy will remain a beacon of hope and a primary destination for many of the world's best and brightest workers, rapid economic growth in India, China, and a host of other developing nations will continue to entice more of the best and brightest to return home or dissuade them from leaving in the first place.

A Brave New World

Many in the EU and US understand the rise of the Rest as a threat. This is unsurprising, given the 9% unemployment rate in the US and the need for austerity measures in the EU. The status quo is in flux and the transatlantic partnership has lost its ability to exert its traditional influence over the global economic order. The 2008 US-led financial meltdown has led to a loss of credibility in the transatlantic partnership's ability to lead. Confronting massive deficits, a mountain of debt, and an army of elderly voters, the response by the EU and US, predictably, has been to turn inward and become more defensive.

It does not, however, have to end badly for the transatlantic partnership. If the West and the Rest can come to recognize their mutual interdependence and move down the path of mutual cooperation, the future could very well be a win-win for both parties, as opposed to a zero-sum game. The developed nations, with their aging populations, dwindling labor force, and mature markets, are in demographic need of the young labor force and rapidly growing consumer markets of developing nations.

At present, the sale of automobiles, computers, fast-food, and other goods and services is increasing at a faster rate outside of the EU and US than inside of them. Against this backdrop, the earnings of multinationals from developed nations are increasingly being leveraged to global demand in developing nations. Not only do developed nations need the new markets provided by developing nations, they also need the natural resources found in developing nations–natural gas from Russia in the case of the EU, and crude oil from the Middle East and Africa in the case of the US. Moreover, developing nations have emerged as a key source of skilled and semi-skilled labor for both the EU and US.

And since developing nations, particularly China, are in possession of massive international reserves, they have become a critical source of capital for the transatlantic partnership. Because the US is the largest debtor nation in the world, its continued access to the excess savings of developing nations is essential; without such access, the US would face yet another financial crisis. The same holds true for many of the EU's most indebted nations: they need access to the surplus capital of developing nations, lest their financial struggles become even more burdensome.

For their part, developing nations should neither take comfort nor satisfaction in the recent economic travails of the wealthy nations, given that their economic future is unequivocally tied to that of the West. Developing nations remain dependent on developed nations for export growth, technological competencies, managerial skills, and global distribution networks. Ultimately, the fates of developed and developing nations are bound tightly together: they have, in effect, become mutually dependent on one another.

In addition to working together more closely, therefore, it is imperative that leaders and policymakers in both developed and developing nations pledge to educate their respective populations and constituents on the benefits of greater cooperation and mutual coordination. The fate of globalization hangs in the balance.

The transatlantic partnership, for its part, must seek the benefits of greater regulatory cooperation and integration if it is to restore its own credibility and enhance its capacity to lead. Globalization cannot re-emerge, and become more vigorous and inclusive in the process, without the participation and support of the transatlantic partnership. Although the global influence of the West has been diminished as a result of the 2008 financial crisis, the West must remain a predominant actor in the next phase of globalization. Merely by virtue of its size, the transatlantic economy is still vital to the future growth and management of the global economy. In order for globalization to work in the future, therefore, the EU and US must re-energize the transatlantic partnership.

Several contentious issues, however, threaten to drive a wedge within the transatlantic relationship, including, most notably, US-led wars in the Middle East, global climate change, and the scope and scale of financial regulatory reform. At a time when the world faces such monumental global challenges, a divided and fractious transatlantic relationship is the opposite of what is needed. A productive and harmonious relationship between the EU and US, rather, is required if the world is to maintain a free and open trading environment, stop the proliferation of nuclear weapons, answer the challenge of global climate change, and assist in raising millions of people out of poverty.

Jointly, the EU and US should take the lead in reforming the multilateral trading system and restructuring existing multilateral institutions like the IMF and the World Bank, ceding more influence to developing nations in the process. The transatlantic partnership should also seek to further develop renewable energies, enlisting, whenever possible, the support and participation of India, China, Russia, and other emerging market stakeholders. The willingness of the developing nations that make up the Rest to cooperate with the EU and US will increase as the propensity of the EU and US to work together to address the daunting economic problems of our times increases.

Before pursuing greater economic cooperation with one another, however, and before trying to reform global governance institutions to reflect the rise of the Rest, the EU and US must first get their own economic houses in order. Until they do, the EU and US will not be able to regain the credibility necessary to lead on global issues. The most effective way for the West to regain its credibility vis-à-vis the Rest is through the implementation of the necessary, albeit painful, economic reforms at home. For the US, this means lowering the federal budget deficit to more manageable levels and reducing the nation's dependence on foreign capital and oil. For the nations of the EU, this means implementing fiscal restraint and adopting measures to establish a more flexible and competitive labor market.

Ultimately, the EU and US need to understand that the economic future of the transatlantic partnership is inextricably tied to the economic future of developing nations.

4

HOW TO REMOVE TRANSATLANTIC BARRIERS AND MAKE THE TAFTA A REALITY

Political Leadership is Needed

Establishing the TAFTA is an ambitious agenda that will require consistent and committed political action over a period of several years. Removing barriers to trade and investment across the Atlantic will generate political friction and powerful lobbying pressure both in the EU and the US. Strong political courage will be needed in order not to surrender to these pressures.

Up to now, attempts to build a proper transatlantic framework have been unsuccessful. Efforts by the EU and US to negotiate sector-specific Mutual Recognition Agreements (MRAs) in various areas have often resulted in large amounts of time and energy being spent and relatively little being achieved. Additionally, the implementation of certain MRAs has been poor.

The adoption, in 2002, of the EU-US Positive Economic Agenda and the Regulatory Road Map did not prosper to the degree expected: they were taken over by trade negotiators rather than developed as bilateral frameworks dominated by trade-offs and pragmatic solutions. The 2005 EU-US summit decision to establish the High-Level Regulatory Cooperation Forum (HLRCF) was undoubtedly a step in the right direction, although it has yet to become the transatlantic institution it has the potential to be. Visionary thinking is necessary in order to bring about greater levels of transatlantic integration, as James Elles, MEP and former Chairman of the European Ideas Network, has suggested:

> Perhaps the most important deficit affecting these initiatives has been the lack of an overarching vision for a comprehensive redesign of the transatlantic economic partnership to mirror the consequences of deep economic integration. Yet such a vision is critical to attracting sustained political will among policymakers on both sides of the Atlantic that is needed to drive efforts at strengthening the US-European economic partnership forward.[46]

In this sense, the 2007 EU-US summit decision to establish the Framework for Advancing Transatlantic Economic Integration as well as the Transatlantic Economic Council (TEC) represents an unprecedented move forward in the EU-US trade relationship.

Real progress will remain elusive until high-level political leaders on both sides become more involved in the reform process. EU and US political leaders have an essential role

[46] James Elles (2006), "The Transatlantic Market: A reality by 2015?". Paper presented at the CSIS TPN meeting, April.

to play by helping to clear decision-making bottlenecks, by encouraging regulators to adopt common approaches to rules and rule-making, and by directing policymakers to develop common EU-US positions at key international fora, such as the WTO. In addition, transatlantic leadership is needed to reenergize Doha on a global level, implement a Doha-plus agenda, and give the global economy a much needed boost.

TAFTA Benchmarks

The TAFTA model is based on reinforced *political and legislative dialogue*, the *mutual recognition of regulations and standards*, *regulatory convergence* and the *adoption of global standards*. The implementation of such a model would provide a powerful example of regulatory cooperation that third countries could aspire to emulate. At the same time, it would provide the EU and US with the capacity to exercise joint economic leadership within multilateral institutions on issues related to market liberalization and regulatory cooperation. The TAFTA would not simply allow the EU and US to form a globally dominant trade bloc; it would allow the EU and US to lead the way in shaping the future *concept* of global trade, accelerating the pace of liberalization and non-tariff barrier reductions around the world while establishing a new institutional model for regulatory convergence.

In order to institute the TAFTA, EU and US policymakers must achieve a series of benchmarks, the most important of which include:

- A specific and privileged but non-discriminatory **EU-US relationship.**

- A "**rendezvous clause**," defining the regular meetings to be held by the various regulatory cooperation fora, ranging from the highest level of annual summits to the lower levels.

- "**Safe harbor agreements**," establishing practical ways of making regulatory systems inter-operable without either side having to abandon its essential principles. The adoption of the TAFTA would not require the formal harmonization of EU and US regulatory principles, but would lead to their de facto harmonization through the continual work of regulatory agencies and firms. Safe-harbor agreements also offer positive lessons for other areas.

- A "**standstill clause**," making it impossible to create new trade or financial obstacles between the EU and the US once the TAFTA agreement comes into force.

- A "**sunset clause**," establishing clear and defined timetables for eliminating barriers in the transatlantic economy.

- **Transparency mechanisms,** reducing administrative burdens for countries and producing savings for businesses that seek to operate internationally.[47]

[47] See the OECD Trade Policy Working Paper (2011), "Transparency Mechanisms and Non-Tariff Measures: Case Studies," http://www.oecd-ilibrary.org/trade/transparency-mechanisms-and-non-tariff-measures_5kgf0rzzwfq3-en (Nov. 7, 2011).

The Implementation of the TAFTA

Ensuring the Effective Implementation of the TAFTA Agreements

The establishment of the TAFTA should take place by means of a formal agreement. A new partnership agreement between the EU and US would help both partners to secure the transatlantic relationship and manage its development cooperatively; such a partnership would then encourage greater involvement by political communities on both sides of the Atlantic.

The TAFTA agreement should include:

- A political agreement to launch formal negotiations. This should happen before the summer of 2013.
- A reasonable time period for negotiations, that will take between one year and a half and two years.
- A specific timetable for the removal of barriers and the implementation of the agreement. We believe the TAFTA agreement should be concluded and signed no later than 2015 and fully implemented by 2025. To achieve this end, we suggest the following calendar:
    - June 2015 Transatlantic Summit: signature of the TAFTA Agreement.
    - December 2015: adoption of the action plans.

- June 2016 Transatlantic Summit: first assessment of the results achieved.

- Area-specific actions, clearly defined stages, and appropriate target dates for completion against which progress could be measured at a mid-term stage. The TAFTA initiative should include timetables and review mechanisms that allow policymakers to assess progress regularly and, where necessary, make adjustments in accordance with changes in the overall environment.

- Area-specific dialogues and new consultation mechanisms between regulators.

- A road map outlining the course of action for the implementation of the TAFTA agreement.

- Feedback mechanisms on the regulatory reform measures that regulatory agencies, businesses, and other interested parties propose and introduce.

At least initially, the USTR, the European Commission and the Transatlantic Economic Council (TEC) could serve as the institutional and political structures responsible for supervising the TAFTA agreement. The annual summit meetings between the US, the European Commission, and the governments of the EU Member States could serve as the institutional fora where EU and US policymakers meet on a regular basis in order to oversee the gradual implementation of the TAFTA. Within this framework, EU and US leaders and policymakers would be able to provide the political supervision and initiative necessary for the establishment of the TAFTA. Such an institutional structure could also serve as an important forum for high-level discussions in areas where negotiations on regulatory convergence or administrative cooperation had previously reached a gridlock. The TEC would be able set out a broad framework for transatlantic political dialogue and cooperation on matters related to the TAFTA. In this sense, every annual EU-US summit should be committed to:

- Monitoring timetables in order to ensure that targets are met.
- Ensuring the continuous improvement of the TAFTA project.

With extensive stakeholder participation, policymakers at each meeting would be able to continually define responsibilities, allocate tasks, set new objectives, and ultimately monitor progress towards the long-term goal of a 100% barrier-free transatlantic market.

Ensuring the Effective Enforcement of the TAFTA Agreements

The agreement for the establishment of the TAFTA should incorporate an important additional point: a guarantee for the application of sectoral agreements reached in both the EU and the US, irrespectively of how jurisdiction at various political and administrative levels is distributed on either side of the Atlantic–the US Federal administration and US states, on the one hand, and the European Commission and EU Member States, on the other.

Such a guarantee would help to resolve the problem created by the fact that, in the US, certain competences correspond to either the federated states or federal regulatory agencies and, in the EU, certain competences correspond to either the Member States or regional EU authorities.

Removing Tariff Barriers

Fortunately, tariffs between the EU and US are generally low, averaging less than 3% of an annual trade flow that is nearly $5 trillion.[48]

Tariffs on products in sensitive sectors *are* higher, however. For example, the highest tariff barriers between the two regions lie in the agricultural industry. The average MFN tariff on agricultural goods entering the EU is 13.5%,[49] while the average MFN tariff on agricultural goods entering the US is 4.7%.[50]

However, it must be noted that the MFN tariffs charged by the US on agricultural goods –the ones applied to EU

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[48] The Centre for Transatlantic Relations at Johns Hopkins University (2011), *The Transatlantic Economy 2011: Annual Survey of Jobs, Trade and Investment between the United States and Europe*, http://transatlantic.sais-jhu.edu/transatlantic-topics/transatlantic-economy-series.htm (Nov. 7, 2011).

[49] The World Trade Organization's "Tariff Profile" for the EU-27 is available at http://stat.wto.org/TariffProfile/WSDBTariffPFView.aspx?Language=E&Country=E27 (Nov. 7, 2011).

[50] The World Trade Organization's "Tariff Profile" for the US is available at http://stat.wto.org/TariffProfile/WSDBTariffPFView.aspx?Language=E&Country=US (Nov. 7, 2011).

products on a general basis include substantial tariff crests[51].

In terms of non-agricultural products, average tariff barriers to trade between the EU and the US remain low. The average MFN tariff on non-agricultural goods entering the EU is 4%, while the average MFN tariff on non-agricultural goods entering the US is 3.3%.

The conclusion is that both the EU and the US would benefit greatly from removing all tariff barriers in this sector.

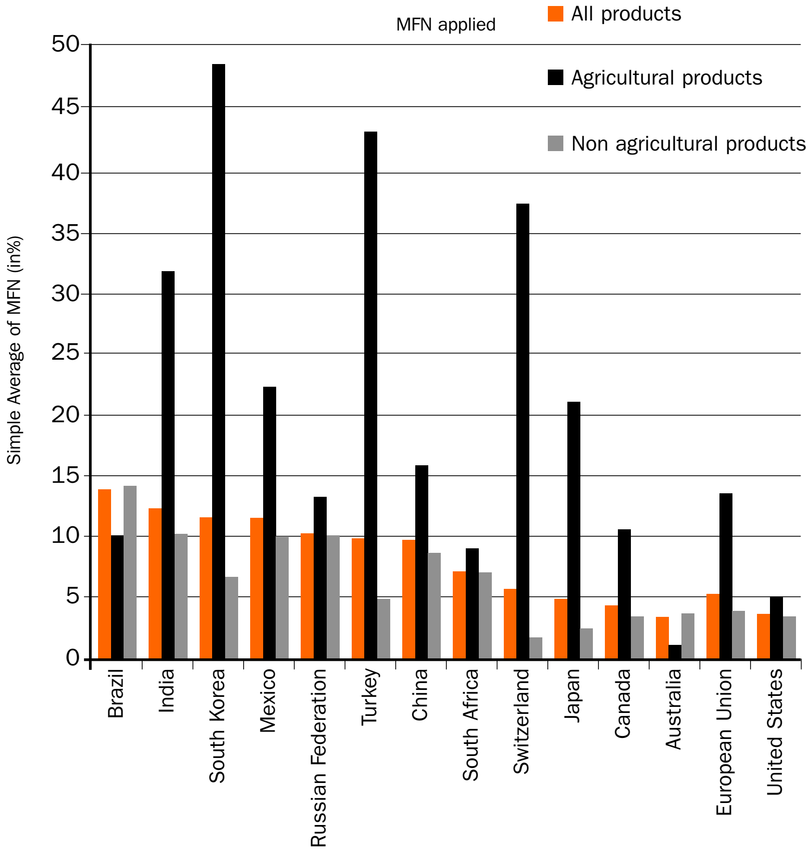
As the following graph shows, the average MFN tariff level for all products remains relatively low in both the EU and the US–5.3% and 3.5%, respectively. It should be noted, however, that tariff levels in the EU are more widely dispersed than those in the US. Additionally, EU and US simple average tariff rates mask higher protection rates for certain tariff lines and hide the impact of preferential trade agreements.[52]

Overall, US tariffs on primary goods coming from Europe are low, while tariffs on foodstuffs and clothing remain high. In par-

[51] For instance on tobacco (350% *ad valorem* specific or compound rate of 32.2 cents/kg) and peanuts (163.8% raw and 131.8% preserved).

[52] Cfr. Nicoletti et al. (2003). The MFN tariff rates are *ad valorem* and do not include specific tariffs. The latter are frequently used on agricultural and food products with effects that are both less transparent and often more restrictive than *ad valorem* duties. In addition, MFN tariff rates do not include preferential tariffs, the importance of which has been growing in recent years with the expansion of regional trade agreements. Trends in MFN tariff protection reflect reductions agreed to in the Uruguay round, with some differentiation according to sectors.

GRAPH 7.
Average MFN tariff levels in the EU-27, US, and other leading economies



Source: compiled by author based on the *World Tariff Profiles 2010*, prepared jointly by the World Trade Organization, the United Nations Conference on Trade and Development (UNCTAD), and the International Trade Center (ITC).

ticular, the US has relatively high tariffs on European sugar exports. In similar fashion, EU tariffs on goods coming from the US are high in clothing products, sugar, and processed foods.

TABLE 4.
Averages of *final bound duties and MFN applied duties* for the EU and US

	EU		US	
Product Groups	**Final bound duties, avg.**	**MFN applied duties, avg.**	**Final bound duties, avg.**	**MFN applied duties, avg.**
Animal products	24,1	23,2	2,6	2,5
Dairy products	52,3	49,4	21,1	16,2
Fruit, vegetables, plants	10,3	11,3	5,5	4,9
Coffee, tea	6,6	6,6	3,7	3,6
Cereals and preparations	21,3	17,5	3,7	4,0
Oilseeds, fats, and oils	5,1	5,5	4,7	4,2
Sugars and confectionary	26,4	27,5	15	9,1
Beverages and tobacco	21,8	19	16,4	13,5
Cotton	0,0	0,0	4,8	2,5
Other agricultural products	4,3	4,7	1,1	1,1
Fish & fish products	11,2	11,8	1,2	1,0
Minerals & metals	2,0	2,0	1,7	1,8
Petroleum	2,0	3,1	1,8	1,5
Chemicals	4,6	4,6	2,8	2,8
Wood, paper, etc.	0,9	0,9	0,4	0,5
Textiles	6,5	6,6	7,9	8,0
Clothing	11,5	11,5	11,4	12,1
Leather, footwear, etc.	4,2	4,2	4,3	4,0
Non-electrical machinery	1,7	1,9	1,2	1,2
Electrical Machinery	2,4	2,8	1,7	1,7
Transport equipment	4,1	4,3	3,1	3,0
Manufactures, n.e.s.	2,5	2,7	2,1	2,6

Source: compiled by author based on the *World Tariff Profiles* 2010.

To provide an indication of tariff variation *within* the EU and US for various agricultural and non-agricultural product groups, averages of *final bound duties* and *MFN applied duties* are presented in the table 4.[53]

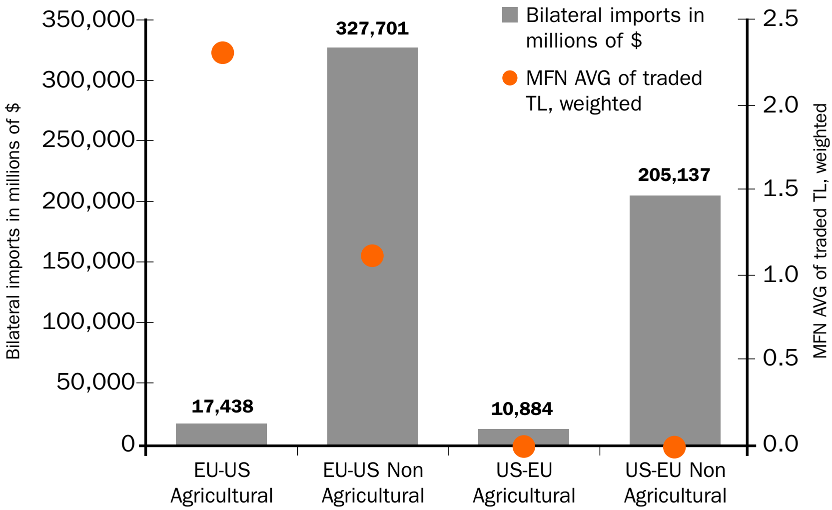
As can be gleaned from the preceding table and graph, EU and US tariff rates for textiles and clothing remain above their average protection levels for non-agricultural products.[54] And tariff rates for sugar, tobacco, and dairy products remain above the average protection levels for agricultural products. Furthermore, average EU and US tariff rates for agricultural products are higher than average EU and US tariff rates for all products. The EU's average agricultural tariff levels, in particular, are noticeably high relative to the EU's overall tariff levels. Such a disparity serves to highlight the difficulty attached to reducing agricultural tariffs in European countries.

The bilateral trade relationship between the EU and US also presents an important disparity, particularly with regard to EU tariffs for agricultural products: the average agricultural tariffs imposed by the EU on the US are disproportionately high in comparison to the average agricultural tariffs imposed by the US on

[53] *Final bound duties* are duties that have been "bound" at a certain rate; they cannot be raised above that rate unless compensation is paid to the affected party. *MFN* (most favored nation) *applied duties* are the lowest tariff rates that a given country charges another; WTO members are required to extend MFN status to all other WTO members.

[54] Cfr. OECD (2005), "*The Benefits of Liberalizing Product Markets and Reducing Barriers to International Trade and Investment: The Case of The United States and the European Union*," Economics Department Working Paper 432, Paris, June. Cfr. Transatlantic Business Dialogue (2005), "*Report to the 2005 US-EU Summit: A Framework for Deepening Transatlantic Trade and Investment.*

GRAPH 8.
Average bilateral imports and MFN tariffs for the EU and US



Source: compiled by author based on the *World Trade Profiles 2010.*

the EU. The following graph illustrates this point by presenting the differences *between* the EU and US in terms of bilateral imports and tariffs for agricultural and non-agricultural products:

In addition, the value of trade between the EU and US in agricultural products pales in comparison to the value of trade in non-agricultural products. However, precisely in light of the uniquely high trade volume that exists between the EU and US in non-agricultural products, it should be evident to political leaders on both sides that efforts to further reduce both agricultural and non-agricultural tariffs in transatlantic trade, particularly *tariff peaks*, would yield substantial benefits.

EU-US tariff barriers could be easily removed through a traditional Free Trade Agreement.

Non-Tariff Barriers

Non-tariff barriers, or non-tariff measures, are non-traditional barriers to trade and investment. As the Organization for Economic Co-operation and Development (OECD) has highlighted, non-tariff barriers have traditionally been associated with a restricted number of trade barriers enforced at the border. Currently, however, non-tariff barriers include both *at-the-border* and *behind-the-border* measures.

Non-tariff Border Measures

Quantitative controls such as quotas and voluntary export restraints were mostly abolished at the time of the implementation of the Uruguay Round. In the EU and US, quantitative controls mainly consist of *trade remedies*. Although these trade remedies are meant to be distortion-correcting rather than distortion-creating, such measures may occasionally harm trade and protect uncompetitive local producers. Other non-tariff border measures are generally implemented in the name of public health and/or national security concerns. In certain cases, customs procedures and Rules of origin practices applied by the EU and US become trade-restrictive.

Non-tariff Behind-the-Border Measures

These barriers are the result of regulatory measures, government procurement procedures, subsidies, aids for production, domestic tax measures, competition policies, intellectual property rights, investment-related measures, and, to a lesser extent, state trading entities. More specifically, behind-the-border non-tariff barriers may also involve environmental, safety, health, sanitary and phytosanitary, and administrative standards and regulations designed for industrial products.

While many of these measures are applied, de facto, at the border, and are therefore perceived as *border* measures, they are directly linked to domestic policies and are applicable to both domestic and imported goods. On both sides of the Atlantic, such measures cause concern when they are not transparent and involve (1) costly testing, certification, and inspection procedures and (2) burdensome packaging and labeling requirements. In addition, it is difficult to determine the exact degree to which several of these behind-the-border measures restrict trade.

All WTO member countries have a legitimate right to adopt any domestic trade measure they deem appropriate, *provided* they obey WTO rules by, among other things, refraining from discriminating between domestic and foreign producers. Currently, EU and US policymakers can help prevent the non-tariff trade *policies* they adopt from becoming non-tariff trade *barriers* by ensuring that such policies remain non-discriminatory, transparent, and efficient in terms of administrative procedure.

Where the Barriers Are: the Three-Wall Protection System

As was mentioned previously, tariffs and traditional quantitative restrictions are no longer a major impediment to trade. As tariffs have declined, they have been supplanted by a *three-wall* *protection system* consisting of (a) State control over foreign direct investment (FDI), (b) state control over industries, and (c) asymmetric regulation, which includes, among other measures, quota protections (e.g., safeguard measures, anti-dumping policies, and anti-subsidy duties), government procurement policies, anti-trust policies, and various regulatory standards. All of these trade barriers undermine the achievements of WTO negotiations, with disputes concerning dumping practices and public subsidies being particularly harmful to trade relations.

The three-wall protection system thus constitutes what could be described as the most powerful, opaque, and durable manifestation of *neo-protectionism* currently in existence.

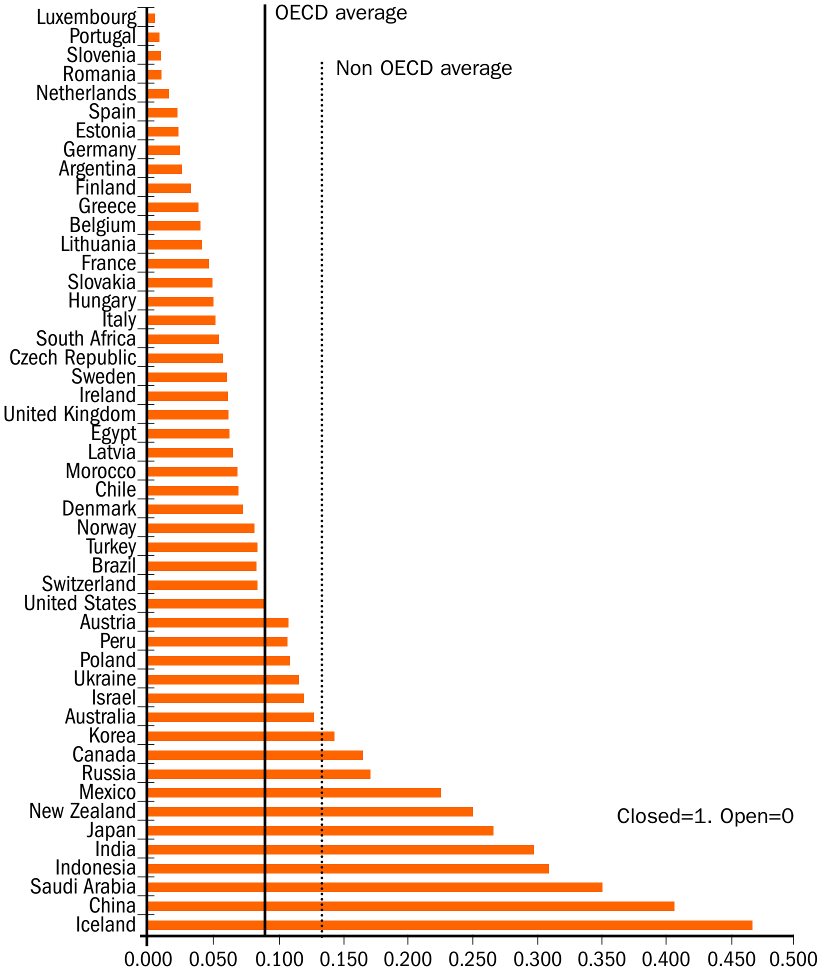
The First Wall of Protection: State Control over Inward FDI

In markets that require investment to achieve effective access to customers, if a government wants to protect a certain industry from foreign competition, control over inward FDI is a powerful instrument for the achievement of this aim. By obstructing the inward flow of FDI, governments can put foreign competitors at a disadvantage in relation to domestic competitors.

According to studies done by the OECD, FDI controls on manufacturing are low in both the EU and US. In France, Germany, and the United Kingdom, FDI restrictions are highest in the maritime and air transport sectors, as well as in the fishing sector. In the US, FDI restrictions are highest in the electricity, transport, and fishing sectors. It is worth noting that FDI restrictions in the US transport and electricity sectors are much higher than

GRAPH 9.

Statutory restrictions on foreign direct investment (FDI) in all OECD and G-20 countries. FDI Regulatory Restrictiveness Index



The Indicator ranges from 0 (open) to 1 (closed)
Source: compiled by author based on the *2010 FDI Regulatory Restrictiveness Index*, prepared by the OECD.

those in France, Germany, or the United Kingdom. In addition, average FDI restrictions levels in the US are significantly higher than those in Europe, as the graph 9 demonstrates.

The Second Wall of Protection: State Control

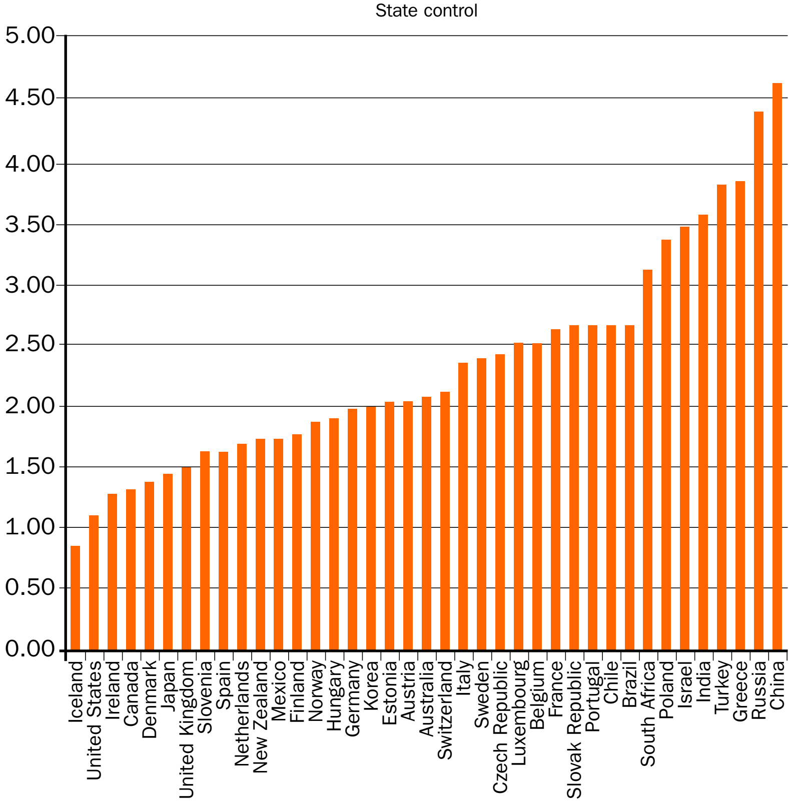
Another effective way in which a state can protect certain industries from foreign competition is through public ownership. A state that owns a controlling stake in various sectors of an economy constitutes a powerful barrier to foreign investment flows. This problem is particularly acute in the regulated sectors of an economy, where public ownership over incumbent companies is common.

In addition to direct state ownership, protections of this sort can also take place in an indirect fashion through state-owned industrial companies or financial institutions that hold a controlling stake in *other* companies. Central, regional, and even local governments can implement these types of obstacles by acting through public or pseudo-public corporations.

For over a decade, the OECD has studied a comprehensive range of different regulatory barriers to competition in various countries and codified its findings into a series of indicators of overall product market regulation (PMR).[55] The following graph,

[55] According to the OECD, the "Indicators of Product Market Regulation (PMR) are a comprehensive and internationally-comparable set of indicators that measure the degree to which policies promote or inhibit competition in areas of the product market where competition is viable. They measure the economy-wide regulatory and market environments in 30 OECD countries in (or around) 1998, 2003 and 2008, and in another 4 OECD countries (Chile, Estonia, Israel and Slovenia) as well as in Brazil, China, In-

GRAPH 10.
Levels of state control of business enterprises in all OECD and BRICS countries



The Indicator ranges from 0 (least restrictive) to 5 (most restrictive).
Source: compiled by author based on the 2008 *OECD Indicators of Product Market Regulation.*

dia, Russia and South Africa around 2008; they are consistent across time and countries." The PMR Indicators, which are based on a broad survey of economy-wide and industry-specific structural policy settings, study regulations in three main areas: (1) state control of business enterprises, (2) legal and administrative barriers to entrepreneurship, and (3) barriers to international trade and investment.

which is one such indicator, shows the differences in levels of state control between various leading global economies.

The level of state involvement in business operations is evidently higher in EU Member States than in the US.[56] This means that European countries make greater use of command and control regulations of the kind that, for instance, establish mandatory opening hours for shops or universal service requirements for telecoms.

The Third Wall of Protection: Asymmetric Regulation

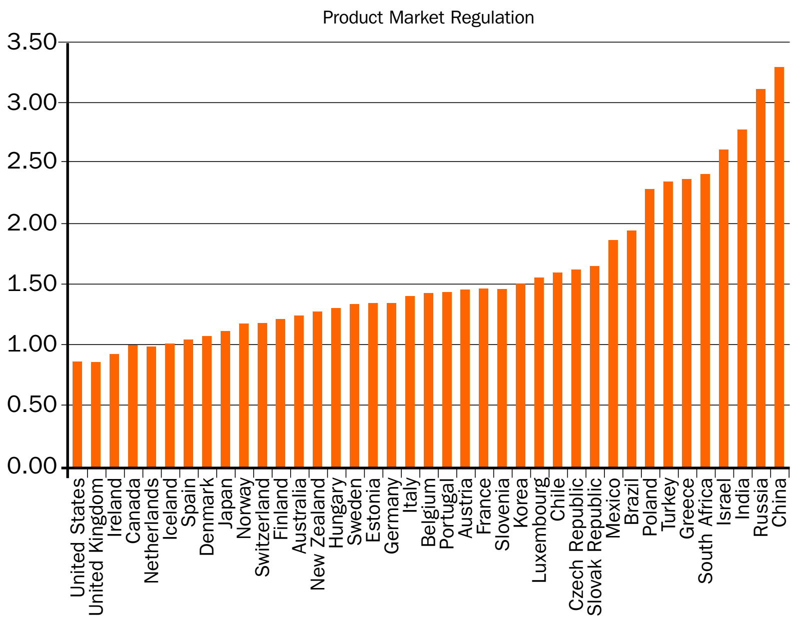
If foreign competitors manage to scale the two previously mentioned walls, they must still face a third: asymmetric regulation coupled with restrictions to market access. Efforts need to be made on both sides of the Atlantic to ensure that foreign-owned firms operating in a given host country face the same regulatory environment as domestic companies and have access to the same markets. The problem of asymmetric regulation and lack of market access is particularly acute in the service sector, where non-traditional trade hurdles often find fertile ground for growth.[57]

[56] As the OECD has highlighted, higher PMR scores indicate that a country has a relatively restrictive set of product market regulations, while lower PMR scores suggest that the regulatory environment in question is more conducive to competition. It is important to remember, however, that lower PMR scores do not necessarily indicate that there is less *overall* regulation in a given economy, only that there is less regulation of the kind that inhibits competition in product markets. Regulations that serve important and legitimate social objectives, such as those covering health, environmental, and safety standards, for example, are not taken into account in the computation of PMR scores.

[57] Because services tend to be intangible and non-storable, they are generally subject to trade barriers in the form of prohibitions, quotas, quantitative restrictions, or government regulations of the sort that limit the number of firms that may contest a market or control the nature of their operations.

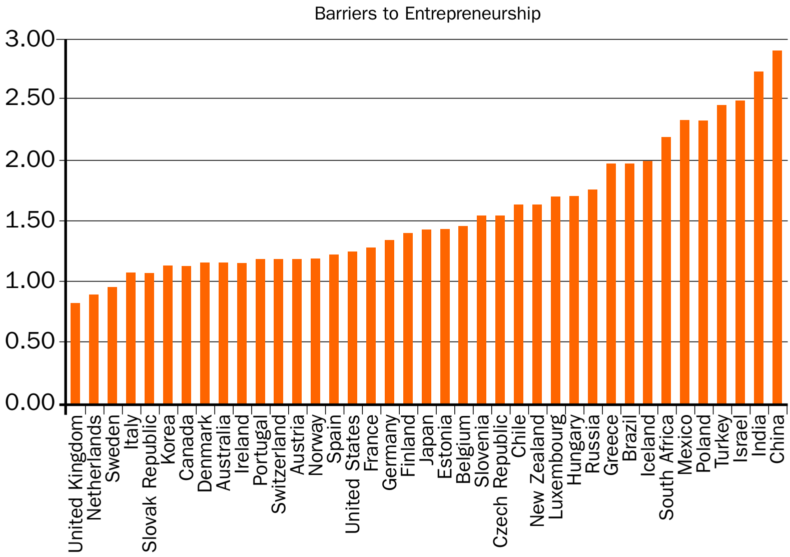
Overall levels of product market regulation in a given economy are a significant indication of the regulatory environment that foreign competitors will have to face upon entering, or trying to enter, said economy. The following graph shows the differences in levels of overall product market regulation between various leading economies. As is noticeable, product markets are more heavily regulated in European countries than in the US, to the detriment of competitiveness in the former.

GRAPH 11.
Levels of product market regulation in all OECD and BRICS countries



The Indicator ranges from 0 (least restrictive) to 5 (most restrictive).
Source: compiled by author based on the 2008 *OECD Indicators of Product Market Regulation.*

GRAPH 12.
Level of barriers to entrepreneurship in all OECD and BRICS countries



The Indicator ranges from 0 (least restrictive) to 5 (most restrictive).
Source: compiled by author based on the 2008 *OECD Indicators of Product Market Regulation.*

With regard to barriers to entrepreneurship, the difference between the US and European countries is less significant, as the following graph shows. On the one hand, overall barriers to entrepreneurship in the UK, the Netherlands, Italy, Denmark, Ireland, Portugal, Austria, and Spain are lower than those in the US. On the other hand, overall barriers in France, Germany, Belgium, the Czech Republic, Luxembourg, Hungary, Greece, and Poland are higher than those in the US.

Lower barriers to entrepreneurship indicate less regulatory opacity, lighter administrative burdens on start-ups, and fewer constraints on competition in general. Higher barriers to entrepreneurship in a given economy can therefore inhibit the efforts of foreign competitors trying to operate in said economy, to the detriment of overall trade relations.

Regulatory Barriers to Trade and Investment

As was stated before, tariffs do not currently represent a major obstacle to transatlantic trade, as they affect only a small part of the transatlantic economy. Transatlantic regulatory barriers, however, *do* represent a continuing and significant source of trade conflict as well as a removable obstacle to increased prosperity on both sides of the Atlantic. Safeguard measures, anti-dumping policies, anti-subsidy duties, and a slew of various regulatory barriers all combine to undermine the progress achieved by multilateral trade negotiations.

For the most part, regulatory barriers consist of nationally imposed regulations that end up generating obstacles to international trade and investment. It is important not to underestimate the harmful effects that transatlantic regulatory barriers can generate. In April 2008, a European Commission report on US barriers to trade and investment described transatlantic regulatory barriers as "significant impediments to trade and investment between the EU and the US," and, as a result, made the following recommendation:

A more integrated and streamlined transatlantic regulatory environment would significantly reduce costs for producers and consumers on both sides of the Atlantic and improve the competitive situation of EU and US companies in the global economy. As the world's two most important trading partners there is much to gain from fewer barriers to bilateral trade and investment.[58]

The former Vice-President of the European Commission, Sir Leon Brittan, has argued that regulatory obstacles constitute the most significant cause of potential trade disputes in the future.[59] For this reason, among others, enhanced cooperation between the EU and US should not be regarded as "an optional extra," but rather as "an economic, political and regulatory necessity."[60]

If left unaddressed, transatlantic regulatory obstacles to trade will continue to generate intractable disputes between the EU and US. In addition, because the resolution of regulatory trade conflicts requires regulatory cooperation between the parties to the conflict, such conflicts are even more difficult to resolve than traditional tariff disputes. Regulatory cooperation,

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58 The 2008 European Commission report, "United States Barriers to Trade and Investment," is available at http://trade.ec.europa.eu/doclib/docs/2008/april/tradoc_138559.pdf (Nov. 7, 2011).

59 Lord Brittan of Spennithorne (2000), "Transatlantic economic partnership: breaking down the hidden barriers," in George A. Bermann, Matthias Herdegen and Peter L. Lindseth (Eds), *Transatlantic Regulatory Cooperation – Legal Problems and Political Prospects*, Oxford: Oxford University Press, p. 17.

60 Cfr. Alexander Schaub (2004), Testimony before the Committee on Financial Services, US House of Representatives, May 13, p. 2. The testimony is available at http://ec.europa.eu/internal_market/finances/docs/general/2004-05-13-testimony_en.pdf (Nov. 7, 2011).

in turn, requires the adoption of appropriate procedures for mutual consultation and the exchange of information, the implementation of domestic legislation impact studies, and/or the adoption of mutual recognition agreements.

Despite considerable advances in recent years, the framework for EU-US economic and regulatory policy cooperation, as well as the institutional structures necessary for political dialogue, have lagged behind developments in transatlantic trade and investment. If transatlantic integration is to be fostered, and if its implications are to be managed successfully, EU and US policymakers and regulators will have to catch up with their business counterparts by reforming their respective regulatory regimes and further strengthening EU-US cooperation mechanisms.[61]

Product market deregulation, for instance, has been shown to be an effective way to reduce the amount, and mitigate the negative impact of, regulatory barriers. Research carried out by the OECD has shown that product market deregulation, rather than mere tariff reductions, has long been the principal source of economic gain for advanced economies. This finding should not be surprising, as it is well known that the negative impact that traditional barriers, tariff and non-tariff alike, have on trade is small in comparison to that of domestic product market regulations; these regulations are very often substantial, particularly, as was mentioned previously, in the service sector.

[61] James Elles (2006), "The Transatlantic Market: A reality by 2015?," Transatlantic Policy Network.

With regard to EU-US investment flows, which are large and growing, both sides need to make further efforts in order to ensure that EU and US firms operating in one another's markets face the same regulatory environment as domestic companies. The EU-US service sector regulatory regime could also be reformed along such lines, with the EU's Single Market Program serving as a guide on the liberalization of this sensitive area. By applying the myriad lessons learned from the adoption of the Single Market Program, EU and US policymakers will be better equipped to enhance transatlantic trade in services.

In thinking about reforming the transatlantic economic relationship, it is important to keep in mind that most of the regulatory barriers that currently exist between the EU and US can and should be tackled bilaterally. In fact, a bilateral understanding between the US and the EU on *quantitative forms of protection* could form the cornerstone of a global trade agreement that limits their unilateral use.

It is also important to maintain a realistic perspective. The gradual integration of the transatlantic economy makes trade disputes inevitable, to some degree. To hope for a "zero trade-disputes scenario" is mere wishful thinking. In order to move forward in an effective and pragmatic manner, the EU and US must focus on:

1. Minimizing trade disputes through increased regulatory cooperation and the adoption of *early-warning mechanisms*. Such mechanisms would allow policymakers from both

sides to spot problems and identify solutions at very early stages in the regulatory and legislative process.

2. Making a firm commitment to exhaust all existing bilateral consultation and dialogue procedures before making use of the WTO Dispute Settlement Body, which should function as a last resort. In addition, both sides must commit to exercising restraint in the imposition of trade sanctions.

The priority for EU and US policymakers, in any case, must be to tackle those regulatory barriers that have become the most significant obstacles to the full development of transatlantic commerce. To this end, the standard for improving EU-US regulatory cooperation set down by the Transatlantic Business Dialogue (TABD) is worth keeping in mind: "*approved once, accepted everywhere in the transatlantic market*." The TAFTA project provides the policy reforms necessary to achieve this standard.

Removing Horizontal Barriers

Trade Defense Measures: Safeguard Measures, Anti-Dumping and Anti-Subsidies

In order to establish the TAFTA, it is urgent for both EU and US policymakers to eliminate safeguard measures, anti-dumping measures, and subsidized exports as tools of transatlantic trade.

At present, both sides abuse such tools. By the end of 2009, for instance, the EU had 135 anti-dumping and eight anti-subsidy measures in force.[62] With regard to the transatlantic relationship as a whole, the EU's Directorate-General for Trade published a report on trade defense measures in June 2010 in which it made the following assessment:

> With 23 measures at the end of 2009, the US remains the country with the highest number of trade defense measures in force against the EU. It should however be noted that the number of measures decreased as compared to 2008 and no new investigations were initiated and no new measures imposed in 2009. The measures currently in force are 20 AD [anti-dumping] and 3 CVD [countervailing duty] measures [*sic*].[63]

Agreements that stringently qualify and limit all appeals to "dumping" and "serious injury" as well as the subsequent and corresponding demands for anti-dumping and safeguard measures are needed. The political consequences of interventions against free trade, such as in the case of subsidized exports, are grave because they foster conflict among trading nations and constrain economic growth. Subsidized biodiesel exports from the US, for instance, have been able to unfairly injure the EU biodiesel industry since at least 2007.[64] Because the US biodiesel industry receives subsidies predominantly by way of tax credits, it enjoys an unfair

[62] The European Commission (2009), "28th annual report on the European Union's anti-dumping, anti-subsidy, and safeguard activities," http://trade.ec.europa.eu/doclib/docs/2010/december/tradoc_147086.pdf (Nov. 10, 2011).

[63] The European Commission (2010), "Overview of third country trade defense actions against the European Union," http://trade.ec.europa.eu/doclib/docs/2010/june/tradoc_146274.pdf (Nov. 10, 2011).

[64] The European Commission (2008), "United States Barriers to Trade and Investment," http://trade.ec.europa.eu/doclib/docs/2008/april/tradoc_138559.pdf (Nov. 10, 2011).

advantage both within the US and within the EU, where it is able to sell its product at below market price. In 2009, the EU decided to respond by adopting provisional anti-subsidy measures against these subsidized exports.[65] In 2011, the European Commission announced plans to increase and extend countervailing measures against US biodiesel exporters; such measures might be extended to last until 2014 if the Commission's proposal is approved by EU Member States.[66]

It is obvious from experience, as well as from the very nature of the WTO dispute settlement mechanism, that pushing for the reduction or elimination of subsidized exports, anti-dumping, and safeguard measures is the best way to enhance barrier-free trade in the transatlantic area. The WTO Agreement on Subsidies and Countervailing Measures,[67] which expressly prohibits "subsidies contingent [...] upon export performance" or "contingent [...] upon the use of domestic over imported goods," should be reinvigorated and more effectively enforced. In addition, sunset clauses limiting the duration of legitimate trade defense measures, including anti-subsidy measures, to five years–which both the WTO

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[65] James Kanter, "Europe Considers a Tariff on Biofuels," *The New York Times*, February 23, 2009, http://www.nytimes.com/2009/02/24/business/worldbusiness/24biofuel.html (Nov. 10, 2011).

[66] Juliane von Reppert-Bismarck, "EU finds US evasion of biodiesel tax," *Reuters*, March 25, 2011, http://www.reuters.com/article/2011/03/25/us-eu-trade-biodiesel-idUSTRE72O51320110325 (Nov. 10, 2011).

[67] The World Trade Organization (1995), "Agreement on Subsidies and Countervailing Measures," http://www.wto.org/english/docs_e/legal_e/24-scm.pdf (Nov. 10, 2011). A summary of the agreement is available at http://www.wto.org/english/tratop_e/scm_e/subs_e.htm (Nov. 10, 2011).

Agreement on Subsidies and Countervailing Measures and the WTO Anti-Dumping Agreement[68] contain–should be made more stringent and effective.

A transatlantic trade area that is free of safeguard measures, anti-dumping measures, and subsidized exports, and which is also open to other nations willing to forgo these trade defense measures, would likely create unprecedented levels of prosperity in the North Atlantic area and represent a giant step forward in the pursuit of global free trade. Achieving this will not be easy, however. The growth of special interests around trade defense measures, which tend to favor well-connected groups at the expense of the general public and the prosperity of society as a whole, has made the task of policymakers and legislators on both sides particularly difficult. Despite such difficulties, EU and US policymakers must strive to minimize the use of trade defense measures if they are to seriously attempt to establish the TAFTA.

Technical Barriers to Trade: a TBT+ TAFTA Agreement

Technical barriers to trade have become relevant obstacles to free trade between the EU and the US.

[68] The World Trade Organization (1994), "Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade" ("Anti-Dumping Agreement"), http://www.wto.org/english/docs_e/legal_e/19-adp_01_e.htm (Nov. 10, 2011). A summary of the agreement is available at http://www.wto.org/english/tratop_e/adp_e/antidum2_e.htm (Nov. 10, 2011).

TBTs are a particular version of regulatory barriers. One example is the implementation of regulations theoretically aimed to consumer protection, for example that require exhaustive inspection of products, both national and imported. Since inspection of imported products is significantly more costly, these regulations are in fact effective protectionist measures. They can all be referred to as trade obstacles to trade.

A TBT+ agreement to remove all technical barriers to trade between the EU and the US is of outmost importance as part of the WTO+ package of the TAFTA.

Market Access

As basically open markets, national treatment questions are not the main source of concern in neither the EU nor the US with regard to market access.

However, market access is a concern both in the US and the EU. The main issue has to do with regulatory fragmentation resulting from federal structures of government. States, regions or other sub-federal bodies can be the source of regulations or anti-trust decisions that can turn into serious trade obstacles.

In order to ensure the effectiveness of the TAFTA, both the EU and the US should commit to the effective liberalization and opening of markets at the federal and sub-federal levels (State, regions).[69]

[69] This is the approach of the CETA, currently under negotiation between Canada and the EU.

Public Procurement

As part of the program creating the European Common Market, EU Member States agreed to deregulate their national public procurement markets. As a result, European firms from any Member State are able to bid for public contracts offered by another Member State without facing discrimination on the basis of the bidding firm's country of origin.[70] Firms from all EU Member States thus compete for publicly awarded contracts on an equal basis.

Specifically, the 1990 Utilities Directive opened public procurement to competition in sectors which had been excluded up until that time, in particular, the water, energy, transport, and telecommunications sectors. After a wide-ranging debate, the European Council also agreed to include a *reciprocity clause*, the aim of which was to limit the benefits of the Directive to the EU and thus prevent the free-rider effect, i.e., countries outside the EU being able to take advantage of a liberalized EU procurement market while also discriminating against EU bidders within their own markets. Under the reciprocity clause, (1) European producers enjoy a 3% preferential price treatment in the awarding of public contracts, and (2) European contracting bodies are allowed to exclude bidders who do not produce at least 50% of their goods or services within the EU.

The standard established by the reciprocity clause was designed to apply to countries that did not offer the same kind of

[70] In the same way, public and semi-public institutions are able to acquire goods and services of greater quality and at a better price, thus stimulating competition and contributing to economic development.

liberalized and non-discriminatory procurement regime as the EU. In terms of bilateral trade relations, the reciprocity clause became an instrument used by European companies to negotiate with the US and thus evade the application of the US' discriminatory procurement legislation–particularly the enforcement of the 1933 Buy American Act, which requires US government bodies at a federal and state level to prefer American bidders in awarding procurement contracts.[71] In other words, the EU used its reciprocity clause as leverage in trade negotiations: if the US wanted the EU to withdraw the clause, it first had to adopt an international agreement on procurement rules.

In April 1993, the EU reached a partial agreement with the US under which the reciprocity clause would not be applied in certain cases, mainly in the electronic equipment sector. In exchange, the US eliminated discriminatory laws affecting European tenders for federal electricity procurement offers. The US also began a process to eliminate the buy-American clauses at a sub-federal level. This agreement was only partial, however, since most of the public sector in Europe maintained enforcement of the reciprocity clause, above all in the telecommunications sector. In response, the US applied sanctions against the EU,[72] to which the

[71] The Buy American Act gives a preferential price treatment of 6%-12% for products of American origin in all purchases by federal agencies. It also requires a "made in the USA" content of 50%. Although the act was initially applied to goods, it has inspired similar clauses for services. The act allows for the purchase of foreign products only in certain circumstances, such as when the purchase of an American product is not in the public interest.

[72] Under Title VII of the 1974 Trade Act, which was subsequently amended by the 1988 Omnibus Trade and Competitiveness Agreements Act, the US designated the EU as a region maintaining discriminatory practices against the US and applied economic sanctions (except in the electrical sector) amounting to approximately $20 million a year.

EU, in turn, responded by applying its own set of measures.[73] The decision by the US to repeal its sanctions against the EU in early 2006 prompted the EU to respond in kind.[74]

With the conclusion of the Uruguay Round in April 1994, the EU signed the Agreement on Government Procurement (GPA) in order to open up the European public procurement market to further competition. The agreement, which is part of the WTO framework, came into force in 1996.[75] In terms of both details and areas covered, the 1996 GPA is more ambitious than the 1979 GATT agreement. The GPA includes goods, services, and public works, and it is not limited to central government offers, but covers procurement at a sub-federal and even non-State level.[76] It is important to highlight, however, that this agreement does not cover all the practices and areas of public procurement. Certain reciprocal exceptions between countries which have

[73] By means of Regulation No 1461/93, the EU responded by applying economic sanctions against the US amounting to approximately $15 million a year.

[74] EU Council Regulation (EC) No 352/2006, "repealing Regulation (EEC) No 1461/93 concerning access to public contracts for tenderers from the United States of America," http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:059:0007:0007:EN:PDF (Nov. 10, 2011).

[75] The Agreement on Government Procurement is based on the principles of national treatment, non-discrimination, and transparency of procedures; it provides a system of thresholds linked to obligations and a mechanism for conflict resolution by the aggrieved parties. Because the US is also a signatory to the agreement, a large proportion of its previously acquired commitments have been integrated into it. The text of the agreement is available at http://www.ustr.gov/trade-topics/government-procurement/wto-government-procurement-agreement (Nov. 10, 2011).

[76] In the case of the US, 37 of the 50 states have agreed to enter into the GPA, with their administrations adopting letters of commitment with the Federal Administration. The Annex 2, Appendix I section of the GPA for the US is available at http://www.wto.org/english/tratop_e/gproc_e/appendices_e.htm#us (Nov. 10, 2011).

signed the agreement do remain. Obviously, such exceptions, or discriminatory clauses, violate the spirit of the agreement. The European Commission has estimated that public transport and airport services have been the sectors most affected by such clauses; the EU, moreover, is very competitive in both.

In the US, discriminatory procurement legislation is generally based on the concept of national security. The US Defense Department, with the biggest source of public procurement contracts in the US, often discriminates against foreign bidders on the basis of the 1941 Defense Appropriation Act, or Berry Amendment, as it is more commonly known.[77] The Berry Amendment has been justified by the argument that US national security would be seriously compromised if the needs of a particular agency were revealed to persons who do not have the security clearance required to access classified information. In addition, the Berry Amendment's scope has been gradually extended to include a wide range of products that are only tangentially related to national security interests, such as textile products. Despite the fact that the concept of national security can be invoked under Article XXIII of the GPA to limit defense sector procurement to foreign suppliers,[78]

[77] Other sources of procurement restrictions in the US include the National Security Act of 1947 and the Defense Production Act of 1950. Executive Order 10582, adopted in 1954, permits the rejection of foreign bids for reasons of "national interest" or "national security."

[78] Article XXIII allows all WTO parties to invoke the concept of "essential security interests" and "national security" to refuse foreign tenders. Although the article indicates that national security exceptions cannot be applied as "a means of arbitrary or unjustifiable discrimination between countries" or as "a disguised restriction on international trade," it does not contain clear and specific standards on the type of cases to which national security exceptions can be applied. Article XXIII, "Exceptions to the Agreement," is available at http://www.wto.org/english/docs_e/legal_e/gpr-94_02_e.htm (Nov. 10, 2011).

the use of this article by the US Defense Department has led to an excessive and disproportionate reduction in the range of US procurement contracts available to foreign bidders.

The US Defense Department, for its part, has denied abusing the GPA national security exception. In order to adequately defend its claim, however, the US would first need to establish clear and precise guidelines identifying what kinds of procurement bids are covered under the GPA and what kinds are exempted under Article XXIII. As things now stand, the concept of national security may be used as a justification to limit procurement competition exclusively, or at least principally, to US commercial providers, as has been done in the area of space launching services. The US Commercial Space Act of 1998 stipulates that, in general, the US Federal Government shall "acquire space transportation services from United States commercial providers."[79] The law has effectively barred European companies from competing for the majority of US satellite launch contracts.

The US Defense Department has also signed reciprocal Memoranda of Understanding (MoU) with certain "qualifying countries,"[80] whom the US consequently favors, and by whom

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[79] 105th Congress of the United States of America, "Commercial Space Act of 1998 (H.R. 1702), Section 201 – Requirement to Procure Commercial Space Transportation Services," http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_cong_bills&docid=f:h1702enr.txt.pdf (Nov. 10, 2011).

[80] US Department of Defense, "Contracting with qualifying country sources," http://www.acq.osd.mil/dpap/dars/dfars/html/current/225_8.htm#225.872-1 (Nov. 11, 2011).

the US expects to be favored, in the awarding of procurement contracts. Under such reciprocal MoU, the US Defense Department deems it "inconsistent with the [US] public interest to apply restrictions of the Buy American Act" to "qualifying countries."[81] Despite the fact that 14 out of the 21 countries with which the US currently holds MoU are EU Member States, the EU continues to be concerned about the practical application of the provisions of these MoU. This is because the MoU are completely subject to US laws and regulations, meaning the US Congress could decide to impose new restrictions on any given year. In this way, reciprocal MoU constitute a potential form of procurement discrimination that is adverse to the idea of a barrier-free transatlantic procurement regime.

In order to advance toward a more predictable and open transatlantic procurement regime, the US needs to adopt a legal framework that clearly and unambiguously defines the kind of supplies that are essential to its national security. A potential model for such a future framework might be found in the European Commission's 2006 Interpretive Communication concerning the precise application of Article 296 of the Treaty on European Union in the area of defense procurement. Article 296 establishes an exception to common market competition for a Member State acting to protect "the essential interests of its security which are connected with the production of or trade in arms, munitions and war material."[82] Conse-

[81] Ibid.

[82] Treaty on European Union (2006), Article 296, p. 173, http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/ce321/ce32120061229en00010331.pdf (Nov. 11, 2011).

quently, the aim of the Interpretive Communication is to "prevent possible misinterpretation and misuse of Article 296 in the field of defense procurement" and "clarif[y] the existing legal framework" in order to take "a necessary first step towards greater openness of European defense markets."[83] In this sense, the European Commission stipulated that,

> This [Interpretive] Communication can neither give an interpretation of Member States' essential security interests nor determine *ex ante* to which procurement contracts the exemption under Article 296 [of the Treaty on European Union] applies or not. It will rather give contract awarding authorities some guidance for their assessment whether the use of the exemption is justified.[84]

Although its scope is obviously limited to EU Member States, the Commission's Interpretive Communication can be a useful tool for thinking about ways to effectively address EU-US procurement disputes that originate in national security exceptions.

Procurement disputes between the EU and US can also be the result of exceptions at the sub-federal level. The US Buy American Act, which is very present at a sub-federal level in

[83] European Commission (2006), "Interpretative communication on the application of Article 296 of the Treaty in the field of defense procurement," http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=COMfinal&an_doc=2006&nu_doc=779 (Nov. 11, 2011). A summary of the Commission's interpretative communication is available at http://europa.eu/legislation_summaries/internal_market/businesses/public_procurement/l33235_en.htm (Nov. 11, 2011).

[84] Ibid.

more than half of US states, applies restrictions of the buy-local kind in one form or another. Some such restrictions prohibit public bodies from acquiring goods and services of foreign origin, others lay down requirements concerning the local content of purchases, and others guarantee preferential prices for local suppliers. These restrictions not only reduce the likelihood that a European exporter will be able to enter the US market, they also dissuade American state and local governments from employing European producers who *do* manage to enter the US market. In this way, local domestic producers in the US are able to secure public contracts through the ordinary justice system or lobbying campaigns. In either case, local producers do not actually need to out-compete European bidders to secure public contracts.

Normally, foreign bidders who are also GPA signatories are exempted from restrictions under the Buy American Act. However, the implementation of these kinds of exceptions also produces a considerable degree of legal uncertainty. EU and US policymakers could resolve many of the problems experienced by European suppliers in winning public contracts in the US by increasing the areas covered under the GPA, clarifying the manner in which regulations are to be enforced, and eliminating certain exceptions introduced by the US.

Though Buy American policies and difficulties at the sub-federal level suggest there is little room for optimism in terms of procurement regime reform in the US itself, the procurement sector is so fundamental to transatlantic cooperation in international trade and competition that reforming US procurement law simply cannot be discarded as a goal. It should be kept in mind, however, that any EU-US agreement in this area must be designed so as not to jeopardize or encumber WTO or World Intellectual Property Organization (WIPO) negotiations.

In terms of sub-federal practices, the conflict that arose between the EU and US as a result of a 1998 procurement law made by the US State of Massachusetts is worth recalling. The conflict combined two of the most intractable problems of international procurement. Firstly, there was the problem of a US sub-federal government undermining, and possibly even violating, the US federal government's international commitments and obligations. This kind of conduct has been a constant object of concern for the EU, as repeated annual reports on trade barriers in the US attest. Secondly, the Massachusetts procurement law had an extra-territorial regulatory effect, as the policies of foreign (and US) companies in Burma fell within its scope. In accordance with the law, sanctions were imposed on companies with financial interests in Burma on the grounds that the country's illegitimate military government had repeatedly violated human rights. The government of Massachusetts kept lists of companies that possessed business interests in Burma and made it illegal to procure goods supplied by companies on that list, with the exception of essential goods, such as medicines, or of goods for which there was no comparable offer available.

The proliferation of measures like the Massachusetts law motivated the EU, and later Japan, to bring the case before the WTO. However, the case never reached the WTO Dispute

Settlement Body, since the Massachusetts law was successively struck down by the US district federal court, the US federal appeals court, and the US Supreme Court. In 2000, the US Supreme Court found the Massachusetts procurement law unconstitutional because it undermined Federal statutes concerning Burma and therewith violated the Supremacy Clause of the US Constitution.

Although the US Supreme Court decision declaring the Massachusetts procurement law unconstitutional was unanimous, it was based exclusively on the argument concerning the separation of powers (specifically, the implications of the supremacy clause).[85] The Supreme Court's decision gave rise to numerous interpretations concerning sanctions that could be implemented in the case of future sub-federal procurement law. In fact, in addition to Massachusetts, a variety of states, including California, Connecticut, New York, and Texas, among others, had proposed similar laws extending their interests abroad, although they subsequently withdrew them. It should not be forgotten, however, that future sub-federal procurement laws in any given US state could

[85] Essentially, the US Supreme Court stated that US states should not become involved in US foreign policy. The Court maintained that the Massachusetts law on Burma undermined the aims and natural effects of at least three clauses of the federal law: a) the discretionary powers of the President to impose economic sanctions against Burma (in this case the federal sanctions were limited to new investments by US companies); b) application of limited sanctions to American persons and new investments; c) the guidelines for the President to proceed diplomatically on the development of a multilateral strategy with respect to Myanmar. Thus, sanctions by the federal government against Burma have priority over the Massachusetts law insofar as "The state Act is at odds with the president's intended authority to speak for the United States among the world's nations in developing a comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma." (Judge David H. Souter writing for the court).

resemble the Massachusetts Burma law and therefore contribute to a renewing of tensions between the EU and US with regard to procurement. The following are some of the measures that could be adopted to prevent or resolve conflicts of this kind:[86]

- US policymakers should carry out a comprehensive legal analysis in order to assess the level of conformity and congruity between US sub-federal laws and international trade agreements entered into by the US federal government, including those agreements the government has entered into under the WTO framework.

- US policymakers involved in making transatlantic policy should strive to better inform sub-federal government officials of the US government's foreign commitments and the restrictions on US state laws arising from such commitments. In this vein, it is important for the federal government to reinforce its collaboration with the various US state administrations.

- As a potentially beneficial preventive measure, officials from the various US states should take part in relevant EU-US summits and/or transatlantic dialogues, such as the Transatlantic Business Dialogue.

- The US business sector should continuously and actively monitor the implementation of policies at the lo-

[86] Matthew Schaeffer, *Lessons From The Dispute Over The Massachusetts Act Regulating State Contracts with Companies Doing Business with Burma (Myanmar)*, Robert Schuman Centre for Advanced Studies, European University Institute.

cal state level that have the potential to cause international tension.

- With regard to conflict resolution, the WTO may not be the most suitable body to which to appeal, since there are various requirements that have to be met before GPA regulations become applicable in US states. Even if the WTO successfully issues a verdict on a given complaint, the problem would only be resolved if the US state in question decided to amend its conduct or if the US federal government demanded compliance from the state. As an alternative means of settling conflicts over procurement law, and as a way to reduce litigation costs, the EU should consider whether it would be more effective to appeal to the US constitutional system rather than the WTO dispute settlement mechanism.

- Parties opposed to discriminatory procurement practices by US states, such as EU Member States, should attempt to influence US court decisions regarding procurement legislation by presenting amicus curiae reports. By making their appeals within the US legal system, EU Member States might, on occasion, be able to influence the outcome of certain US cases, particularly cases that concern US foreign policy.

It should not be forgotten, with regard to filing appeals before a US state government court, that procurement disputes originating in buy-local restrictions for foreign bidders are less likely to be resolved in favor of the foreign party than procurement disputes originating in restrictions that have a foreign policy dimension (such as the case of the Massachusetts Burma law). Suits filed in American courts and which concern Buy American or buy-local clauses do not have much of a chance of succeeding. These kinds of protectionist laws for sub-federal state procurement appear to have survived all previous legal challenges. Thus, while the EU tries to obtain greater coverage under sub-federal restrictions, preferential treatment given by US state governments to local suppliers will continue to cause friction in international trade negotiations.

Essentially, EU-US negotiations on the subject of US sub-federal protectionism are more or less paralyzed. In accordance with the GPA annex detailing the obligations of sub-federal US government entities, there are currently only 37 US states that–in addition to reaching procurement contract thresholds of nearly $600 thousand for supplies and services and $8.3 million for construction–award procurement contracts "in accordance with the provisions of th[e] [GPA] agreement."[87] The remaining 13 states have so far retained their right to establish new protectionist legislation restricting procurement opportunities for foreign bidders. In this way, the absence of a real commitment to the provisions of the GPA by certain US state governments means that EU-US disputes will be difficult to resolve within the WTO framework.

In summary, there have been varied measures adopted in the US at a federal and/or sub-federal level that have re-

[87] The Annex 2, Appendix I section of the GPA for the US is available at http://www.wto.org/english/tratop_e/gproc_e/appendices_e.htm#us (Nov. 10, 2011).

stricted the access of foreign suppliers to contracts offered by public and semi-public bodies. In addition to those measures already mentioned, a relatively recent example has been that of the contracts awarded by the US Agency for International Development (USAID) for reconstruction in Iraq.[88] These types of contracts are excluded from the GPA framework, although they are not directly related to cooperation and development.

Another kind of procurement restriction, which generally takes place at the local level, is the US policy of promoting small businesses. In accordance with the Small Business Act of 1953, US public bodies have to award at least 20% of their contracts per fiscal year to small businesses in the corresponding sector. While it is true that the promotion of SME's is also an important part of EU policy, it should be underlined that a government's preference for these kinds of businesses does not justify exempting such businesses from GPA rules. Such exceptions will always favor domestic industry and restrict the ability of foreign companies to enter a given market. Both sides should analyze their respective procurement regimes in order to determine the possibility of establishing procurement regimes that do not discriminate against foreign suppliers.

A possible model for such an analysis could be taken from the reports on foreign trade barriers that the Office of the US Trade Representative publishes annually. These reports offer

[88] These are extremely large contracts for the reconstructing of Iraq and the Provisional Coalition Authority. Arguments have been put forward supporting restrictions of competition. They include preserving access of contracts to those who made possible the liberation of the Iraqi people.

an assessment of the different kinds of barriers that various countries impose on US exports. The most recent of these reports, the 2011 National Trade Estimate Report on Foreign Trade Barriers,[89] identifies some of the provisions of the 2004 EU Utilities Directive as imposing significant trade barriers between the EU and US in the area of government procurement. The EU implemented the Utilities Directive to further liberalize the EU procurement regime and bring it into compliance with the WTO Government Procurement Agreement:

> In view of the international rights and commitments devolving on the [European] Community as a result of the acceptance of the [Government Procurement] Agreement, the arrangements to be applied to tenderers and products from signatory third countries are those defined by the [Government Procurement] Agreement. The [Government Procurement] Agreement does not have direct effect. The contracting entities covered by the Agreement which comply with this [Utilities] Directive and which apply the latter to economic operators of third countries which are signatories to the [Government Procurement] Agreement should therefore be in conformity with the [Government Procurement] Agreement. It is also appropriate that this [Utilities] Directive should guarantee for [European] Community economic operators conditions for participation in public procurement which are just as favorable as those reserved for economic operators of third countries which are signatories to the [Government Procurement] Agreement.[90]

[89] Office of the United States Trade Representative, *2011 National Trade Estimate Report on Foreign Trade Barriers*, http://www.ustr.gov/webfm_send/2751 (Nov. 14, 2011).

[90] EU Utilities Directive No. 2004/17, "coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors," http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0017:en:HTML (Nov. 14, 2011), Paragraph 14, Preamble. The EU Utilities Directive was implemented in January 2006.

The 2011 US National Trade Estimate Report, however, criticizes the EU Utilities Directive because it "requires open, competitive bidding procedures, but discriminates against bids with less than 50 percent EU content that are not covered by an international or reciprocal bilateral agreement."[91] Certain discriminatory clauses in the Utilities Directive establish the possibility of rejecting bids made by foreign companies that do not plan to make at least 50% of the procured product in the EU–unless such businesses are covered by a bilateral or multilateral agreement. In accordance with the EU Utilities Directive, "any tender submitted for the award of a supply contract may be rejected where the proportion of the products originating in third countries […] exceeds 50% of the total value of the products constituting the tender."[92] This discriminatory requirement applies to suppliers of goods and services in the water (production, transport and distribution of drinking water), energy (gas and heating), urban transport (buses, urban trains, trams, etc.) and postal services sectors.

The EU Utilities Directive also brought important benefits to the EU-US procurement relationship that should not go unnoticed. For example, the Utilities Directive had provisions that covered "certain contracts awarded by contracting entities operating in the telecommunications sector." The US had long been calling for the liberalization of EU procurement regulations in the telecommunication sector.

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[91] Op. cit., *2011 US National Trade Estimate Report on Foreign Trade Barriers*, p. 133.

[92] Op. cit., EU Utilities Directive, Paragraph 2, Article 58.

Another EU directive worth underlining is the 2004 EU Public Procurement Directive.[93] In very clear and straightforward language, the Public Procurement Directive established non-discrimination as a principle for the awarding of procurement contracts: "Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way."[94] In its Preamble, the Public Procurement Directive further underlined the principle of non-discrimination:

> Contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition. As a result, it is appropriate to allow the application of two award criteria only: "the lowest price" and "the most economically advantageous tender.[95]

Subsequently, the 2007 EU Remedies Directive was implemented in order to "improv[e] the effectiveness of review procedures concerning the award of public contracts."[96]

In 2009, the EU adopted the Defense and Security Directive, the aim of which was to liberalize and modernize the Eu-

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[93] EU Public Procurement Directive No. 2004/18, "on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts,"http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:134:0114:0240:en:PDF (Nov. 14, 2011). Like the Utilities Directive, the Public Procurement Directive was implemented in January 2006.

[94] Ibid., Article 2.

[95] Ibid., Paragraph 46, Preamble.

[96] EU Remedies Directive No. 2007/66, "with regard to improving the effectiveness of review procedures concerning the award of public contracts," http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:335:0031:01:en:HTML (Nov. 14, 2011).

ropean defense market by exposing it to greater levels of competition. The Directive also carried a "public security" exception that, among other things, allowed EU Member States to "retain the power to decide whether or not their contracting authority/entity may allow economic operators from third countries to participate in contract award procedures."[97]

As for the US, the section on "Foreign Acquisition" of the US Federal Acquisition Regulation (FAR) stipulates that the Buy American Act "restricts the purchase of supplies, that are not domestic end products, for use within the United States." As an exception, the FAR adds that "a foreign end product may be purchased if the contracting officer determines that the price of the lowest domestic offer is unreasonable or if another exception applies," as is the case for "acquisitions subject to certain trade agreements."[98]

Evidently, the removal of the most significant discriminatory procurement regulations in both the EU and US would generate substantial economic gains for both sides.[99] It is estimated that a reduction in trade barriers caused by government pro-

[97] EU Defense and Security Directive No. 2009/81, "on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defense and security, " Paragraph 18, Preamble, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:216:0076:0136:en:PDF (Jul. 13, 2009).

[98] Federal Acquisition Regulation, section 25/001, https://www.acquisition.gov/far/loadmainre.html (Nov. 14, 2011).

[99] ECORYS (2009), *Non-Tariff Measures in EU-US Trade and Investment*, pp. 187-88, http://trade.ec.europa.eu/doclib/docs/2009/december/tradoc_145613.pdf (Nov. 14, 2011).

curement regulations would yield $1.2 billion per year for the US economy and $12.6 billion per year for the EU economy. The EU economy's gains would be significantly higher due in large part to the fact that US procurement regulations concerning foreign acquisitions are significantly more restrictive than EU regulations in the same area; EU procurement regulations concerning foreign acquisition are, however, less susceptible to the potentially mitigating effects of foreign legal suits, although neither the EU nor the US procurement regime is significantly actionable in this regard. The sectors that would benefit the most from government procurement liberalization in the EU are the motor vehicle, chemicals, and food and beverage industries. In the US, it is the electronics, metal production, and machinery industries that would stand to benefit the most from procurement liberalization. The construction industry would benefit tremendously in both markets.

With a view to improving the international procurement regime and harness the benefits of greater competitiveness and open trade, the European Commission is planning to put forward "a legislative proposal for an EU instrument to help secure and increase symmetry in access to public procurement markets in developed countries and large emerging market economies."[100] Such a move could help to liberalize government procurement regulation across the globe, as it is based on a sound premise: If the EU procurement regime

[100] European Commission, communication on "Trade, Growth, and World Affairs," p. 2, November 9, 2010, http://trade.ec.europa.eu/doclib/docs/2010/november/tradoc_146981.pdf (Nov. 14, 2011).

gives foreign bidders significantly greater access to EU contracts, then other countries should strive to give European bidders a comparable level of access. This EU initiative is a push in the right direction and a reflection of a growing political will to level the playing field in the international procurement market. A 2010 report prepared by the European Commission's Directorate-General for Trade states: "We [the EU] will continue to press for more opening of procurement abroad, and we will in particular fight against discriminatory practices."[101]

Without a doubt, the substantial liberalization of EU and US public procurement regulations is a necessary condition for the reduction of trade barriers between the EU and US. Such regulatory liberalization is also a prerequisite for the establishment of a barrier-free transatlantic public procurement market. A WTO+ Agreement aimed to open up the number of suppliers, to increase the threshold and the number of industries, as well as to remove the Buy American clauses for EU companies, should be a crucial part of the TAFTA.

Regulatory Standards

Regulatory cooperation between the EU and US is an extraordinarily important component of their economic relationship and represents an essential means by which both partners can increasingly enjoy the full benefits of the transatlantic market. Reg-

[101] European Commission Directorate-General for Trade, *Trade, Growth, and World Affairs: Trade Policy as a Core Component of the EU's 2020 Strategy*, p. 6, http://trade.ec.europa.eu/doclib/docs/2010/november/tradoc_146955.pdf (Nov. 14, 2011).

ulatory friction between the two systems, on the other hand, adversely affects the development of transatlantic trade. The principal aim of transatlantic regulatory cooperation is the prevention of duplicate regulatory measures and the avoidance of regulatory divergence and incompatibility. If the regulatory standards regimes of the EU and US achieved a greater degree of transatlantic coherence–which may be accomplished by means of mutual recognition policies, regulatory convergence, or a combination of the two–both economies would benefit greatly. Simply put, streamlining the transatlantic regulatory relationship would increase transatlantic trade flows. Greater regulatory cooperation would also hinder the ability of individual states and entrenched business interests to use regulations in sensitive areas (such as in health, the environment, and public safety) to establish arbitrary barriers to free trade and foreign investment.

Because the EU and US have long adopted different approaches to regulatory issues, however, convergence will likely prove difficult. Negotiations in this field are often complex by definition, as they generally affect numerous agencies on both sides of the Atlantic. The approach and framework of each regulatory model reflects differences in the governmental structure and administrative tradition of the EU and US: each side has its own responsibilities and mandates to honor.

The EU generally pursues a more prescriptive approach, by means of which regulators inform a given industry how they should conform to established regulations. In addition, EU regulatory bodies tend to base their rules on the *precautionary principle*. The US has criticized the precautionary principle by alleging that it does not take relevant scientific data sufficiently into account and that it results in over-zealous preventive regulation. The 1992 Rio Declaration on Environment and Development stated the following regarding the precautionary principle: “where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”[102]

In a February 2000 communication on the precautionary principle, the European Commission made clear that the principle could be invoked whenever the potentially dangerous effects of a phenomenon, product, or procedure had been identified by means of an objective scientific evaluation–even when such an evaluation could not establish the magnitude of the risk with a sufficient degree of certainty: “A decision to take measures without waiting until all the necessary scientific knowledge is available is clearly a precaution-based approach.”[103] The Commission described the decision to apply the precautionary principle in any given case as, by definition, one that was:

> exercised where scientific information is insufficient, inconclusive, or uncertain and where there are indications that the possible effects on

[102] The Rio Declaration was adopted by the governments participating in the UN Environment and Development summit that took place in Rio de Janeiro, Brazil, in June of 1992. Despite its explicit reference to environmental protection, the application of the Declaration in practice has been expansive, extending to consumer policy and human, animal, and plant health.

[103] European Commission (2000), “Communication from the Commission on the precautionary principle,” http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=COMfinal&an_doc=2000&nu_doc=1 (Nov. 16, 2011).

> the environment, or human, animal or plant health may be potentially dangerous and inconsistent with the chosen level of protection.[104]

Since the US does not apply a precautionary principle, the principle's legal implications constitute the main source of regulatory divergence between both transatlantic partners. Barrier-free regulatory convergence could only be achieved if both parties reached an agreement to either apply or eliminate the precautionary principle.

Regulatory regimes that subscribe to the precautionary principle ignore the fact that, in certain situations, the absence of precautionary measures can lead to lower costs for private businesses and consumers as well as increased growth overall. Public opinion that is sympathetic to the precautionary principle is often accustomed to noticing only the advantages of regulatory measures while remaining generally unaware of the economic damages that result from their excessive imposition. Regulators tend to think generally and primarily about their own market and their own companies and, consequently, neglect to consider the impact that their proposed regulations might have on foreign companies. In addition, the precautionary principle has, at times, contributed to the achievement of objectives that are not strictly limited to environmental protection or public health; these objectives include the imposition of protectionist barriers, restrictions on the use of private property, and the increase of state interference in the lives of individuals.

[104] Ibid.

Unlike Europe, the US bases its regulatory model on a legislative approach that is more geared towards results. Regulators specify certain requirements and then leave the various industries and producers at liberty to achieve them in the manner that most suits their needs. Regulatory decisions are often taken on the basis of more scientific grounds and as the product of rigorous risk analysis. In addition, the process of legislative revision in the US is different from the process employed in the EU. Under the EU model, decisions made by regulatory agencies are often in need of political support, since the agencies are understood to have been established to carry out technical, scientific or various other specific tasks. Under the US model, in contrast, lawmakers give regulatory agencies greater independence and encourage the public to participate in the process.

Such a difference in the legislative review processes of the EU and US is bound to continue to generate regulatory barriers between them. But even when divergent standards do not generate barriers per se, they can still hinder the development of economies of scale, hindering the global competitiveness of both the EU and the US. For example, the use of different standards for voltage and frequency (the US standard of 120 volts at a frequency of 60 Hz, and the European standard of 220-240 volts at a frequency of 50 Hz) have meant that electrical equipment cannot easily be run in both transatlantic markets. The same applies in the case of incompatible traditional TV standards: Europe uses the Phase Alternating Line (PAL) standard (France being the exception, as it uses the *Système Électronique pour Couleur avec Mèmoire*, or SECAM, standard), and the US uses the National Television System Committee (NTSC) standard.

Markets for mobile telecommunications services have also experienced hurdles and a lower level of competitiveness as a result of different and incompatible transatlantic standards: the Global Systems for Mobile Communications (GSM) standard used predominantly in Europe vs. the Code-Division Multiple Access (CDMA2000) standard used predominantly in the US.[105] The same incompatibility of standards applies in the field of digital terrestrial television: Europe uses the Digital Video Broadcasting – Terrestrial (DVB-T) standard and the US uses the Advanced Television Systems Committee (ATSC) standard. Other notable examples of differing technical standards concern shoe sizes and textiles.

The Precautionary Principle and GMOs

The trade conflict between the EU and US over the regulation of *genetically modified organisms* (GMOs) is a particularly illustrative example of significant and long-lasting regulatory friction. The US is the world leader in the production of genetically-modified agricultural raw materials, while the EU regulatory regime is the main obstacle to the global expansion of these materials: regulations and authorization procedures for the cultivation and trade of GMOs are far more stringent in the EU than in the US. Since 1992, US regulators have determined that,

[105] Information on the development of international telecommunication standards, as developed by the UN's International Telecommunication Union, is available at http://www.itu.int/itunews/issue/2003/06/thirdgeneration.html (Nov. 16, 2011).

as a general rule, transgenic food requires no special regulation: it is sufficient to apply general laws for the sale of such products.[106] US regulators have thus authorized all transgenic products except those which have been clearly demonstrated to be harmful to health and the environment.

The EU, in contrast, employs the precautionary principle to regulate transgenic food in a more restrictive manner: the approval of national and expert committees in the EU is required for the sale of transgenic foodstuffs.[107] Specific EU legislation for these products considers both their makeup and the techniques used to make them. EU regulations are based on the premise that, by definition, the sheer novelty of GMOs generate scientific uncertainty and thus represent a potential danger that might manifest itself in the future. This is the EU's justification for using the precautionary principle to carry out an exhaustive preliminary assessment of GMOs before they are approved for entry into the common market. The EU model establishes a number of stages that GMO-based products have to pass before they can be marketed. Companies that want to market a GMO for the first time have to compile and present a complete analysis to the competent national authority concerning the environmental and/or health risks that such a product could pose. After the national regulating authority in ques-

[106] The US federal agencies involved in the regulation of GMOs are the APHIS (Animal and Plant Health Inspection Service), the EPA (Environmental Protection Agency) and the FDA (Food and Drug Administration).

[107] The EU agencies involved are the EFSA (European Food Safety Authority) and the CPVO (Community Plant Variety Office), whose task is to supply technical reports used in the drafting of corresponding directives.

tion emits a favorable judgment, it proceeds to relate its decision to the other EU Member States through the European Commission. Provided the Commission receives no objections from other Member States, the transgenic product is then approved for sale in the common market.

Evidently, these far-reaching differences between the EU and US on the regulation of GMOs deal with questions of both a scientific and ethical nature. This is not surprising, given that biotechnological agriculture involves risks of unknown magnitudes and procedures with the potential to wreak unprecedented effects on the state of biodiversity and consumer health. Each side's regulations reflect specific political and scientific judgments concerning the potential environmental and health effects of GMOs.

US critics, however, stress that the EU's GMO regulatory regime is less a reflection of scientific data than of a prejudice on the part of the general public and/or pressure groups who regard GMO-related technologies and products as a threat of some sort. According to US critics, overzealous EU regulations on GMO products are, to a significant extent, symptomatic of such prejudices. US industry representatives and policymakers, for their part, have long expressed discontent with the delays and costs that US companies have had to undergo in order to obtain the authorizations required to operate within the EU market. The US claims such obstructions constitute technical trade barriers, which, in addition to having a negative impact on US exports, violate WTO rules. Such criticism on the part of the US has increased as a result of the labeling and traceability requirements that have been imposed by the EU.

In May 2003, the US lodged a complaint before the WTO "concerning certain measures taken by the EC [European Communities] and its Member States affecting imports of agricultural and food imports from the United States."[108] The US claimed that the EU had instituted a de facto moratorium on the approval of biotech products in 1998 that had "restricted imports of agricultural and food products from the United States," resulting in a suspension of import authorizations, particularly for foodstuffs. The US considered this suspension to have constituted, in practice, an embargo.[109] In September 2006, the WTO Dispute Settlement Body (DSB) panel found that the EU "had acted inconsistently with its obligations" under the Sanitary and Phytosanitary Measures (SPS) Agreement "because the de facto moratorium led to undue delays in the completion of EC [European Community] approval procedures" and, more precisely, "because there were undue delays in the completion of the approval procedures" for "24 out of 27 biotech products identified by the complaining parties." In January 2008, the EU and US managed to "reach an agreement on procedures" in accordance with the WTO Dispute Settlement Understanding (DSU) framework.

[108] Information on the WTO Dispute Settlement Body's decision on "Measures Affecting the Approval and Marketing of Biotech Products" is available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds291_e.htm (Nov. 16, 2011).

[109] Following the US petition, the WTO condemned the EU for banning the use of certain growth hormones without scientific analysis of their inherent risks vis-à-vis meat consumption. The sanctions were established in July 1999 and consisted of an increase in customs rights on a range of products.

The aforementioned dispute shows how the precautionary principle can be used to give the state the discretionary power to decide what is good and what is bad for individuals and, consequently, to impose regulatory barriers to trade: the EU was able to ban the import of GMOs by invoking the precautionary principle to argue that it was protecting the environment and the health of consumers, despite the fact that no scientific study had demonstrated the negative health effects of GMOs. The precautionary principle, if misused, restrains economic growth and, in holding back the development of science and technology, hinders innovation.

Over the last decade, however, the EU's general position with regard to the cultivation and importation of GMOs has gradually softened. In March 2006, the European Commission authorized the "placing on the market" of "foods and food ingredients containing, consisting of, or produced from the genetically modified maize (*Zea mays* L.) line."[110] In March 2010, the European Commission made the landmark decision, based on a series of favorable safety-assessments that had been carried out by the European Food Safety Authority, to allow European farmers to grow GM potatoes.[111]

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[110] European Commission decision (2006/197/EC), "authorising the placing on the market of food containing, consisting of, or produced from genetically modified maize line 1507," http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:070:0082:0086:EN:PDF (Nov. 16, 2011).

[111] See "[European] Commission gives green light to genetically-modified potato," *EurActiv*, http://www.euractiv.com/en/cap/commission-gives-green-light-genetically-modified-potato-news-300965 (Nov. 16, 2011). Information on the EU stance toward GMOs is available at http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/58 (Nov. 16, 2011).

And in June 2011, the European Commission both renewed and amended its 2006 decision concerning genetically modified maize by extending its scope so as to also include "feed produced from such maize."[112] Also in June 2011, the EU harmonized its zero-tolerance regulation with regard to the presence of non-authorized GMOs in feed. Such legislation has given much wanted legal certainty to business operators across EU Member States who market feed that has been imported from non-EU countries. According to the Commission's regulation, "common methods of sampling" would also be used in order to ensure the "harmonization of the official controls of feed for the detection of GM material."[113]

The gradual opening up and reform of the EU GMO regulatory regime is a significant indication that closer EU-US regulatory cooperation is indeed possible. The adoption of regulatory standards that foster free trade and growth *while* addressing and satisfying appropriate health and environmental safety standards is essential to the advancement of such cooperation. The project to establish a more restricted, transatlantic version of the precautionary principle that takes just such a balance into account would benefit both transatlantic part-

[112] European Commission decision (2011/365/EU) "amending Decision 2006/197/EC as regards the renewal of the authorisation to place on the market existing feed produced from genetically modified maize line 1507," http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:163:0052:0054:EN:PDF (Nov. 16, 2011).

[113] European Commission regulation (No 619/2011), "laying down the methods of sampling and analysis for the official control of feed as regards presence of genetically modified material for which an authorisation procedure is pending or the authorisation of which has expired" http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:166:0009:0015:EN:PDF (Nov. 16, 2011).

ners. A restricted precautionary principle could be redesigned in such a way as to justify precautionary measures only in the case of a serious potential risk and only under certain strictly defined conditions agreed to in advance; in no case would this reformed version of the principle be invoked to justify arbitrary regulations. In its 2007 position paper on EU-US regulatory cooperation, the Transatlantic Consumer Dialogue (TACD) recommended that the precautionary principle be applicable "in cases when the scientific evidence is not conclusive *enough* to determine a level of protection but there is a necessity to take measures for the purposes of protecting public health, safety, or the environment."[114] [Emphasis added]

The transatlantic version of the precautionary principle could be based on the three guidelines that currently inform the way in which the principle is applied in the EU:[115]

- The principle would be applied on the basis of the most complete scientific evaluation possible. Such an evaluation would be able to determine the degree of scientific uncertainty at each stage.

- Every decision taken under the principle would be preceded by an analysis of the risks and potential conse-

[114] Transatlantic Consumer Dialogue, "Position Paper and Resolution on Horizontal Regulatory Initiatives in EU-US Regulatory Cooperation," p. 7, http://tacd.org/index2.php?option=com_docman&task=doc_view&gid=47&Itemid=40 (Nov. 16, 2011).

[115] Information on consumer safety and the precautionary principle in the EU is available at http://europa.eu/legislation_summaries/consumers/consumer_safety/l32042_en.htm (Nov. 16, 2011).

quences of *refraining* from taking any action. The decision in favor of action or inaction would largely depend on what the society in question considered to be an acceptable or unacceptable level of risk.

- As soon as the results of the scientific and/or risk evaluation become available, all of the interested parties should be allowed to participate in studying the various regulatory options available to them. The procedure should be as transparent as possible.

In addition to these specific guidelines, policymakers should, whenever they invoke the authority of the precautionary principle, also employ general principles of good risk management:

- Proportionality between the precautionary measures adopted and the level of protection required.

- Non-discrimination in the application of precautionary measures.

- Coherence between the measures and others that have been previously adopted in similar situations or using similar approaches.

- Analysis of the advantages and disadvantages of taking, or refraining from, taking action.

- Revision of the measures in light of new scientific knowledge.

Regulatory Cooperation Mechanisms

It is important to keep in mind, however, that regardless of how well EU and US policymakers reform the precautionary principle and regardless of how assiduously they codify its transatlantic application, the lack of comprehensive regulatory cooperation and convergence will continue to afflict the transatlantic relationship. Rather than being a mere means of settling regulatory disputes, comprehensive regulatory cooperation and convergence is also a means of systematically removing nontariff barriers and thereby a means of fostering free trade and investment. In order to be successful, regulatory cooperation negotiators from both sides must address such delicate issues as those relating to national sovereignty, national laws, the independence of regulators, different levels of power, and different legal and administrative procedures–these are the issues that lie at the heart of transatlantic regulatory divergence.

For this reason, the enhancement of regulatory cooperation mechanisms between the EU and US is the most effective way of forestalling future trade conflicts of all kinds, including, but not limited to, those caused by the misuse of the precautionary principle. EU and US policymakers need to understand that if both sides are to enjoy the benefits of an efficient and seamless transatlantic market, then both sides need to change how they think about the sovereign prerogatives and legislative mandates of their respective regulatory agencies. Regulatory cooperation and convergence, or lack thereof, is the central issue upon which most other trade issues will continue to depend. And while it is true that cooperation initiatives and agreements do not establish binding international obligations, they *do* provide both parties with a formal and ongoing process by means of which they may remain informed of the other's regulatory policies and initiatives. EU-US cooperation initiatives thus equip both parties with the ability to spot and address potential sources of future transatlantic regulatory conflict before these sources of conflict manifest themselves in protracted trade disputes and entrenched trade barriers.

Fortunately, over the last decade, the EU and US have established cooperation mechanisms with the goal of mitigating common regulatory problems and fostering transatlantic convergence. Gradually, these cooperation initiatives and mechanisms have become more robust and ambitious. In 2002, the EU and US completed long-running negotiations on a series of Guidelines on Regulatory Cooperation and Transparency. By outlining a broad range of cooperative activities intended to reduce trade conflicts caused by regulatory divergence, the Guidelines put long-term regulatory cooperation at the forefront of the EU-US trade relationship. The Guidelines sought to (1) improve the quality of regulatory proposals and reduce divergence in regulations through increased cooperation between regulators; (2) increase the degree of predictability in the development and establishment of regulations, holding information-sharing exchanges on a routine basis in pursuit of this end; (3) grant regulators the opportunity to provide their partners in other countries with recommendations; (4) promote public participation and confidence in regulatory policy by publishing clear and straightforward information concerning proposed technical regulations and by offering the general public a greater degree of access to pertinent documents; and (5) establish information-sharing exchanges on alternative regulatory approaches and unintended consequences. In June 2004, both parties adopted the Road Map for EU-US Regulatory Cooperation and Transparency, which, in addition to outlining a series of regulatory cooperation activities, explicitly detailed the decision-making process in the case of pharmaceutical products, cosmetics, and chemicals. The progressive implementation of the Guidelines and the Roadmap has brought about significant progress in a number of areas.

By working in line with the ambitious 2007 Framework for Advancing Transatlantic Economic Integration, and by cooperating under the auspices of the Framework's primary institution, the Transatlantic Economic Council (TEC), the EU and US have been able to make further progress on regulatory matters. Recently, the TEC has adopted the goal of eliminating "unnecessary regulatory divergences by fostering greater understanding of and convergence in [the EU and US'] respective approaches to the use of standards in support of regulation."[116] According to the TEC, several high-level meetings on the topic of "bilateral standards collaboration" between the US Department of Commerce (DOC) and the European Commission (EC) have been held over the years in what the TEC has termed the USDOC-EC Standards Dialogue. The Standards Dialogue has centered on issues related to stan-

[116] US State Department, "Framework for Promoting Transatlantic Economic Integration, Annex I: Fostering Cooperation and Reducing Regulatory Barriers," http://www.state.gov/p/eur/rt/eu/tec/131810.htm (Nov. 17, 2011).

dardization progress and implementation in specific sectors, the exchange of information on standards convergence policy, the difference in domestic standards policy between the EU and US, and joint concerns over standards divergence with third countries (e.g., China).

The EU-US High-Level Regulatory Cooperation Forum (HLRCF) has also made a substantial contribution to enhancing and deepening transatlantic regulatory cooperation. In 2008 and 2009, the HLRCF, in conjunction with EU and US officials, met to discuss common approaches concerning the design and implementation of regulatory standards.[117] In 2010, the HLRCF met to discuss progress in standards cooperation.[118] Under the auspices of the 2010 HLRCF meeting, the European Commission proposed reinforcing the "*ex post* evaluation of [regulatory] legislation." The goal of *ex post* evaluation is to conduct "systematic evaluations" of the impact and effectiveness of European regulatory standards legislation at every stage of the policy-making process: the preparation of initiatives, their adoption, their implementation, and their enforcement. The Commission also decided to carry out "fitness checks" on the current regulatory standards framework, placing special attention on industrial, environmental, social, and transport policy. Another initiative discussed by the Commis-

[117] *Europa* press release, "EU-US High-level Regulatory Cooperation Forum meets in Brussels today," http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/642&type=HTML (Nov. 17, 2011).

[118] EU-US High-Level Regulatory Cooperation Forum (2010), "Report of the 8th Meeting," http://ec.europa.eu/enterprise/policies/international/files/ecus-hlrcf-june-2010_en.pdf (Nov. 17, 2011).

sion during the meeting was the "Smart Regulation" program, which aims to "increase[e] transparency and stakeholder involvement" by effectively "supporting evidence-based decision making within the EU institutions." The US government, for its part, opted for following a "behaviorally informed approach" in order to study the impact and effectiveness of regulatory standards policy, employing cost-benefit analyses and publicizing the results of it research, thus "using disclosure as a low-cost, high-impact regulatory tool."

As a result of the HLRCF meeting, EU and US policymakers agreed on the necessity of highlighting areas of agreement between both partners as prospective areas for future standards cooperation. The adoption of common transatlantic standards in areas such as eco-design, natural use energy, and automobiles was proposed as "a possible way forward." In addition, EU and US officials concluded that there is still "considerable scope for employing common standards and conformance testing procedures in emerging areas of regulation" and that transatlantic standards cooperation could also serve "as a means of promoting innovation."[119]

In terms of *upstream regulatory cooperation*, the HLRCF drew an inventory of energy-efficient initiatives to be carried out by the European Commission and the US Department of Energy. Both the EU and US have agreed to increase "technical cooperation in regulation dealing with commercial refrigeration, solid state lighting and distribution transformers." These technical co-

[119] Ibid.

operation initiatives aim to ensure that the EU and US "work collaboratively on the development of new test procedures" and "support the adoption by recognized international bodies of mutually agreed upon test methods." These cooperation initiatives also seek to "harmonize minimum energy efficiency requirements" and "product test methods" between the EU and US whenever such harmonization is "feasible, legally permissible, and consistent with other program objectives." The HLRCF also pushed for enhanced standards cooperation between the EU and US in the area of food labeling, calling for the US Food and Drug Administration, the EU Directorate-General for Health and Consumers, and EU Member States to exchange information and perspectives on the topic.

Two of the most prominent transatlantic dialogues, both of which serve as advisory groups to the TEC, have also provided the governments of the EU and US with valuable advice on how to proceed with respect to regulatory standards cooperation. In 2007, the Transatlantic Consumer Dialogue (TACD) released a paper expressing its support for "a process of regulatory cooperation based on open, transparent multistakeholder discussions with an objective of improving regulation by achieving best practices."[120] Worthy of note is the fact that, in its paper, the TACD also expressed its concern over the possibility that "the flaws in the regulatory regimes on each side of the Atlantic" might "be exported and amplified through the process of regulatory cooperation."

[120] Transatlantic Consumer Dialogue (2007), "Position Paper and Resolution on Horizontal Regulatory Initiatives in EU-US Regulatory Cooperation," p. 5, http://tacd.org/index2.php?option=com_docman&task=doc_view&gid=47&Itemid=40 (Nov. 17, 2011).

In its 2010 report, the TransAtlantic Business Dialogue (TABD) advised the EU and US to make renewed efforts, "in partnership with the private sector," towards achieving the "acceptance of [regulatory] standards on an international level" by working with and through "international standardization bodies, including but not limited to the International Organization for Standardization (ISO), the International Electrotechnical Commission (IEC), and the International Telecommunication Union (ITU)."[121] According to the TABD, such an EU- and US-led effort to internationalize regulatory standards would "facilitate interoperability, enable broad dissemination of inventions, and reduce the costs of additive innovation." Insofar as regulatory standards become accepted at an international level, EU and US firms stand to benefit from the resultant economies of scale. In addition, the TABD advised the EU and US to push for a more vigorous enforcement of the WTO Agreement on Technical Barriers to Trade (TBT), which recognizes the ways in which "international standards and conformity assessment systems" can enhance "the conduct of international trade."[122]

A superior, and more gradual, alternative to the pursuit of barrier-free transatlantic trade by means of regulatory convergence is the pursuit of barrier-free transatlantic trade by means of *mutual recognition agreements*. This approach, by means of which the EU and US formally recognize one an-

[121] Op. cit., TransAtlantic Business Dialogue, "10 Innovation Policy Principles," policy principle 7.

[122] World Trade Organization, "Agreement on Technical Barriers to Trade," preamble, http://www.wto.org/english/tratop_e/tbt_e/tbtagr_e.htm (Nov. 17, 2011).

other's regulatory standards and conformity assessment procedures in various sectors, has the advantage of offering quicker and more efficient solutions to regulatory issues and of preventing the need for permanent negotiations, most of which need to be continually reopened as economies undergo rapid technological development. Mutual recognition agreements provide the EU and US with a practical way of making their regulatory regimes interoperable without either of them having to abandon their own basic standards.

In this vein, the 1998 EU-US Mutual Recognition Agreement (MRA) remains the most comprehensive and promising bilateral framework for mitigating the adverse effects of transatlantic regulatory divergence, although it is still a far cry from being completely satisfactory. The purpose of the EU-US MRA has been to help both partners determine the exact conditions under which they shall "accept or recognize results of conformity assessment procedures" that have been "produced by the other Party's conformity assessment bodies or authorities, in assessing conformity to the importing Party's requirements, as specified on a sector-specific basis."[123] Since its adoption, the EU-US MRA has mainly focused on, and contributed to significant economic growth in, six product sectors: telecommunications, electromagnetic compatibility, electrical safety, recreational craft, medical devices, and pharmaceutical manufacturing practices.

[123] The 1998 "Agreement on Mutual Recognition Between the European Community and the United States of America" is available at http://gsi.nist.gov/global/docs/mra/US-EU_MRA_Final_Version_1998.pdf (Nov. 17, 2011).

It is important to keep in mind that, in further developing and enhancing regulatory cooperation through the EU-US MRA, the transatlantic partnership has been following the same path the EU took with regard to its own Member States. After years of failed attempts to harmonize regulatory standards within the European community, the EU finally opted for promoting and pushing for the mutual recognition of standards among Member States. The project to further develop and expand the EU-US MRA thus builds upon a successful precedent.

In deciding whether to make a greater effort in the pursuit of either regulatory convergence or mutual recognition, EU and US policymakers and political leaders should ultimately consider which of the two approaches is more likely to succeed given the character of the transatlantic economic relationship. If EU and US policymakers come to the conclusion that it would be excessively difficult to persuade both regions of the need to substantially harmonize their regulatory standards, then the main objective of transatlantic trade negotiations should be the enhancement and expansion of mutual recognition agreements. If, on the other hand, EU and US policymakers conclude that the convergence of technical and regulatory standards represents the most viable way to establish and secure a barrier-free transatlantic trade area, then the main objective of transatlantic trade negotiations should be the achievement of greater levels of regulatory cooperation and coordination procedures, with a view toward ultimate convergence. Moreover, it is important to add that in certain cases the mutual recognition of standards is simply impossible due to technical reasons.

Recent progress in EU-US regulatory cooperation

During recent years, significant advances in regulatory cooperation have been taking place in several industries:

- **Pharmaceuticals**

Currently, the US Food and Drug Administration (FDA) and the European Medicines Agency (EMA) collaborate vigorously on a number of medicinal product areas.[124] Working under the scope of confidentiality arrangements,[125] the FDA and EMA have been able to: (1) hold annual bilateral formal meetings, (2) hold ad hoc meetings addressing urgent requests for information, (3) exchange scientific staff with one another on a short-term basis, and (4) hold "cluster" meetings on various topics, including oncology products, orphan products, veterinary pharmaceuticals, pediatrics, vaccines, and pharmacogenetics. Remarkably, the FDA and EMA have already completed a uniform and common application form for the designation of orphan drugs.

In June 2008, the FDA and EU Directorate-General (DG) for Enterprise and Industry adopted the Transatlantic Administrative Simplification Action Plan, the aim of which was the achie-

[124] US State Department, "Framework for Promoting Transatlantic Economic Integration, Annex I: Fostering Cooperation and Reducing Regulatory Barriers, B. Sectoral Cooperation – Medicinal Products," http://www.state.gov/p/eur/rt/eu/tec/131900.htm (Nov. 17, 2011); EU Directorate-General for Health and Consumers, "Relations of the European Union with Third Countries," http://ec.europa.eu/health/international-activities/bilateral-relations/index_en.htm (Nov. 17, 2011).

[125] The 2007 "Confidentiality Arrangements Concluded Between the EU (EC and EMEA) and the US FDA/DHHS" are available at http://ec.europa.eu/health/files/pharmacos/docs/doc2007/2007_06/implementation_plan_final_200706_en.pdf (Nov. 17, 2011).

vement of “administrative simplification through transatlantic cooperation.”[126] The Action Plan involves EU-US administrative collaboration on 18 areas related to the medicinal industry, including inspections, biomarkers, scientific advice, anti-counterfeiting initiatives, product risk management, pediatric submissions convergence, business rules harmonization, and advanced therapy medicinal products, among others.

In November 2008, the FDA, EMA, and regulatory agencies of various other countries initiated a pilot program for the collaborative inspection of facilities that manufacture active pharmaceutical ingredients. The program’s aim has been to reduce international inspection duplication, increase the amount of information available on third country facilities, and foster the mutual recognition between partner agencies of the inspection findings of any one of them–with a view to taking such findings into account during the elaboration of future regulatory policy.

In 2009, the FDA and EMA published the General Principles of their parallel scientific advice program.[127] The program’s goal has been to provide “EMA and FDA assessors and sponsors” with a formal mechanism by means of which “to exchange their views on scientific issues during the development phase of new medicinal products.” The parallel scientific advice program fo-

[126] The 2008 “Medicines Regulation Transatlantic Administration Simplification Action Plan” is available at http://www.fda.gov/InternationalPrograms/FDABeyondOurBordersForeignOffices/EuropeanUnion/EuropeanUnion/EuropeanCommission/ucm114338.htm (Nov. 17, 2011).

[127] The 2009 “EMA-FDA General Principles - Parallel Scientific Advice” is available at http://www.fda.gov/InternationalPrograms/FDABeyondOurBordersForeignOffices/EuropeanUnion/EuropeanUnion/EuropeanCommission/ucm114345.htm (Nov. 17, 2011).

cuses on new products that lack development guidelines or for which FDA and EMA guidelines differ substantially. The expected benefits of the EU-US parallel scientific advice program include:

> Increased dialogue between the two agencies and sponsors from the beginning of the lifecycle of a new product, a deeper understanding of the bases of regulatory decisions, and the opportunity to optimize product development and avoid unnecessary testing replication or unnecessary diverse testing methodologies.[128]

- **Auto Safety**

In June 2008, the US National Highway Transportation Authority (NHTA) and the EU Directorate-General (DG) for Enterprise signed a memorandum of understanding (MoU) on motor vehicle safety and emissions standards.[129] More generally, the EU and US have collaborated through the United Nations Economic Commission for Europe (UNECE) in order to achieve the international recognition of electronic stability controls.

In addition, the EU and US are both contracting parties to the 1998 Agreement on global technical regulations for vehicle construction, the aim of which has been "to establish a global process for developing technical regulations."[130]

[128] Ibid.

[129] US State Department, "Framework for Promoting Transatlantic Economic Integration, Annex I: Fostering Cooperation and Reducing Regulatory Barriers, B. Sectoral Cooperation-Automotive Sector," http://www.state.gov/p/eur/rt/eu/tec/131806.htm (Nov. 17, 2011).

[130] The 1998 "Agreement concerning the Establishing of Global Technical Regulations for Wheeled Vehicles, Equipment and Parts which can be fitted and/or be used on Wheeled Vehicles," signed on June 25, is available at http://www.unece.org/fileadmin/DAM/trans/main/wp29/wp29wgs/wp29gen/wp29glob/globale.pdf (Nov. 17, 2011). Information on the World Forum for Harmonization of Motor Vehicle Regulations (WP.29) is available at http://www.unece.org/trans/main/wp29/meeting_docs_ wp29.html (Nov. 17, 2011).

The 1998 Agreement is one of the three agreements administered by the World Forum for Harmonization of Motor Vehicle Regulations (WP.29), a UNECE working party tasked with establishing a uniform set of internationally recognized vehicle design standards.

- **Cosmetics**

In 2008, the EU and US, along with Canada and Japan, concluded the Framework for International Cooperation on Alternative Test Methods (ICATM).[131] The aim of the ICATM Framework has been the establishment of "international cooperation in the critical areas of validation studies, independent peer review, and development of harmonized recommendations to ensure that alternative methods/strategies are more readily accepted worldwide."[132] In addition, the ICATM Framework has aimed "to ensure that new alternative methods/strategies adopted for regulatory use will provide equivalent or improved protection for people, animals, and the environment." Reducing the need for cosmetic testing on animals by fostering the use of alternative test methods is, in this way, an essential goal of the ICATM Framework.

In order to achieve these aims, the parties to the ICATM Framework have sought to guarantee "the optimal design and

[131] US State Department, "Framework for Promoting Transatlantic Economic Integration, Annex I: Fostering Cooperation and Reducing Regulatory Barriers, B. Sectoral Cooperation—Cosmetics," http://www.state.gov/p/eur/rt/eu/tec/131818.htm (Nov. 17, 2011).

[132] The 2008 "Framework for International Cooperation on Alternative Test Methods" is available at http://www.fda.gov/InternationalPrograms/HarmonizationInitiatives/ucm114518.htm (Nov. 17, 2011).

conduct of validation studies," establish "high quality independent scientific peer reviews of alternative test methods," and increase "the likelihood of harmonized recommendations by validation organizations on the usefulness and limitations of alternative test methods."

The EU and US both joined the ICATM Framework through their relevant regulatory agencies. The EU joined through the European Commission and the European Centre for the Validation of Alternative Methods (ECVAM), and the US joined through the FDA and the Interagency Coordinating Committee on the Validation of Alternative Methods (ICCVAM). The cosmetic regulatory authorities of the EU, US, Canada, and Japan together make up the International Cooperation on Cosmetics Regulation (ICCR).[133]

Between June 28 and July 1, 2011, the ICCR held its fifth annual meeting to discuss issues related to international cosmetic regulation. The meeting served as a forum for policymakers to hold in-depth dialogues with cosmetic industry trade associations from the represented countries. Policymakers focused on topics such as "alternative test methods, nanotechnologies, safety assessment principles, trace contaminants," and the "involvement of interested parties in [the] ICCR."[134]

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[133] Information on the ICCR working structure and membership is available at http://www.fda.gov/InternationalPrograms/HarmonizationInitiatives/ucm114513.htm (Nov, 17, 2011).

[134] A summary of the 2011 ICCR meeting is available at http://www.fda.gov/Cosmetics/InternationalActivities/ConferencesMeetingsWorkshops/InternationalCooperationonCosmeticsRegulationsICCR/ucm262211.htm (Nov. 17, 2011).

• **Consumer Product Safety**

Following the TEC's advice, the US Consumer Product Safety Commission (CPSC), the EU Directorate-General for Health and Consumer Policy (DG-SANCO), and the EU Directorate-General for Enterprise (DG-Enterprise) continued to work together through the Toy Safety Working Group, which was established in 2008.[135] According to a 2009 US State Department progress report on transatlantic integration, the Toy Safety Working Group "functions as a focal point to discuss the safety of imported products."[136]

The working group has, among other issues, discussed the format and content for product traceability labels and conformity declarations, standards for magnetic toys, testing methods for phthalates in toys and children's books, and the standardization of children's products.[137] The working group has also discussed the differences between EU and US legal frameworks on product safety, with a view to reaching agreements on cooperative approaches to common problems whenever possible.

During the 2010 High-Level Consumer Product Safety Trilateral Summit–which convenes the product safety authorities of the EU, US, and China–attending policymakers discussed "joint activities that could be undertaken to improve cooperation and

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[135] US State Department, "Framework for Promoting Transatlantic Economic Integration, Annex I: Fostering Cooperation and Reducing Regulatory Barriers, B. Sectoral—Import/Toy Safety Cooperation," at http://www.state.gov/p/eur/rt/eu/tec/131813.htm (Nov. 18, 2011).

[136] US State Department, "Review of Progress under the Framework for Advancing Transatlantic Economic Integration between the United States of America and the European Union" at http://www.state.gov/p/eur/rls/or/131050.htm (Nov. 18, 2011).

[137] Ibid.

the exchange of information to promote consumer product safety."[138] Among other concrete actions, the representatives of the EU's DG SANCO, the US's CPSC, and China's Administration of Quality Supervision, Inspection, and Quarantine (AQSIQ) agreed to "explore the possibilities of developing harmonized approaches for product traceability systems" and to "compare selected existing consumer product safety requirements in [the EU, US, and China's] respective jurisdictions with a goal of identifying areas for further convergence."

In addition, the representatives from each side also agreed to further develop bilateral information-sharing initiatives, such as RAPEX-China and the CPSC-AQSIC Manufacturer Notification Procedure. It should be noted that, because information-sharing is so integral to regulatory cooperation on product safety, the adoption of a *confidential* information-sharing mechanism between EU and US product safety authorities would do much to boost EU-US regulatory convergence in this field. According to a 2008 HLRCF report, the exchange of confidential information between the US CPSC and the EU DG-SANCO "would require a new agreement based on reciprocity, determining precise rules and procedures and specifying all the necessary guarantees for confidentiality."[139]

[138] The EU-US-China joint press statement for the High-level Consumer Product Safety Trilateral Summit, held in Shanghai on October 26, 2010, is available at http://www.cpsc.gov/PR/shanghai10262010.html (Nov. 18, 2011).

[139] High-Level Regulatory Cooperation Forum, "Joint Report to the Transatlantic Economic Council Spring meeting," pp 34-35, http://ec.europa.eu/enterprise/policies/international/files/tec_safety_en.pdf (Nov. 18, 2011).

As a result of the product safety trilateral summit, the EU, US, and China also expressed their intention to "assess the steps required to move towards a 'seamless surveillance' model of product safety enforcement involving cooperation between export, customs, and product safety authorities in [one another's] jurisdictions."

- **Chemicals**

The US Environmental Protection Agency (EPA) and the European Chemicals Agency (ECHA) have continued to engage in cooperative work through the OECD, pushing to increase the level of transparency in the adoption of regulatory policies and to decrease regulatory divergences in the chemicals industry between both sides.[140]

In December 2010, the EPA and ECHA signed a Statement of Intent to cooperate on chemicals safety and chemical management activities. The purpose of the Statement is "to enhance technical cooperation between the [EU and US] to share knowledge and exchange," although it "does not create any legal obligation" for either side.[141] In accordance with the scope of the Statement, the EPA and ECHA aim to engage in "scientific collaboration and information exchange," "ex-

[140] US State Department, "Framework for Promoting Transatlantic Economic Integration, Annex I: Fostering Cooperation and Reducing Regulatory Barriers, B. Sectoral Cooperation–Chemicals and Nanomaterials" at http://www.state.gov/p/eur/rt/eu/tec/131906.htm (Nov. 18, 2011).

[141] The "Statement of Intent between the European Chemicals Agency and the United States Environmental Protection Agency" is available at http://echa.europa.eu/documents/10162/13606/soi_echa_us_epa_20101220_en.pdf (Nov. 18, 2011).

change of operational experience," "active dissemination of public information and publications," and information sharing on "risk identification, risk assessment, and risk management tools." In particular, the EPA and ECHA seek to share the manner in which they verify confidentiality claims made by businesses, with a view to increasing the amount of information on chemicals available to the public in both the EU and US.[142] Both parties have agreed to cooperate by regularly exchanging technical knowledge, staff, training methods, and communication strategies.

Regarding the importance and future impact of the Statement of Intent, the Executive Director of ECHA, Geert Dancet, remarked that it would "lead the way to a closer co-operation between both regulatory authorities to the benefit of companies and citizens on both sides of the North-Atlantic Ocean."[143]

- **Cyber security**

In the 2010 EU-US Summit, the US Department of Homeland Security, the EU Directorate-General for Home Affairs, and the EU Directorate-General for Information Society and Media established the EU-US Working Group on Cyber-Security and Cyber-Crime. The purpose of the EU-US Working Group has been to develop cooperative approaches in dealing with common

142 ECHA press release, "ECHA and the US EPA start working together," http://echa.europa.eu/news/pr/201012/pr_10_28_soi_epa_20101220_en.asp (Nov. 18, 2011); EPA press release, "EPA and European Chemicals Agency Sign Agreement to Enhance Chemical Safety," http://yosemite.epa.gov/opa/admpress.nsf/0/39E0AC05307F270A852577FC0068C184 (Nov. 18, 2011).

143 Ibid.

problems related to cyber-crime and cyber-security, thus enhancing transatlantic security.[144] The Working Group aims to:

- Establish a cooperation program that enhances the incident management capabilities of both partners on a global scale.
- Engage the private sector and share good practices in collaboration with the private sector.
- Strengthen joint efforts to remove child pornography from the Internet by working with domain-name registrars and registries.
- Launch joint campaigns to raise awareness on cyber-security and cyber-crime on both sides of the Atlantic and foster information-sharing between both parties by means of such campaigns.
- Advance the Council of Europe's Convention on Cyber-Crime by expanding its scope so that it covers the entire EU and, therefore, all EU Member States.

If successful, the EU-US Working Group will be able to share valuable information with, and serve as a viable model

[144] *Europa* press release, "Cyber security: EU and US strengthen transatlantic cooperation in face of mounting global cyber-security and cyber-crime threats," http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/246 (Nov. 18, 2011); the "Joint Statement" from the November 2010 EU-US Summit is available at http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/597&type=HTML (Nov. 18, 2011).

for, other countries and regions facing similar problems related to cyber-security and cyber-crime.

The Working Group is scheduled to deliver its first progress report during the 2011 EU-US summit.

- **Food Safety**

In September 2005, the US Food and Drug Administration (FDA) and the EU Directorate-General (DG) for Health and Consumer Policy (DG-SANCO) signed an implementation plan on the sharing of confidential information related to food safety.[145] In signing the plan, the EU and US have sought to increase public health protections and address transatlantic barriers to trade in food. The type of confidential information that may be shared under the plan includes legislation concerning nutritional labeling, label claims, compositional criteria, added ingredients, cloned animals, feed alerts, and documents having to do with regulatory controls carried out by the FDA and DG SANCO. In addition, the plan allows DG SANCO's Rapid Alert System for Food and Feed and the corresponding US notification system to share information on emerging food safety situations. Such information-sharing may include, but is not limited to, product details, lab results, microbiological information, and data explaining the reason for a product recall or notification.

Unfortunately, despite the potential of the confidential information-sharing plan, trade conflicts related to food safety have

[145] The EU-US "Implementation Plan on the Sharing of Confidential Information" is available at http://www.fda.gov/InternationalPrograms/Agreements/MemorandaofUnderstanding/ucm107560.htm (Nov. 18, 2011).

persisted between the EU and US. In January 2009, the US filed a complaint with the WTO Dispute Settlement Body over the EU's prohibition of "the import of poultry treated with any substance other than water unless the substance has been approved by the EC [European Communities]."[146] By prohibiting the importation of poultry that had been chemically treated, the EU was "effectively prohibiting the shipment of virtually all US poultry to the EC," since the US often uses pathogen reduction treatments to reduce the amount of microbes on poultry meat. The WTO Dispute Settlement Body established a panel to decide the case in November 2009, but has not yet determined its composition. The dispute, therefore, remains unresolved.

More recently, the EU's DG SANCO has been holding technical consultations with a number of different US regulatory agencies. In addition to addressing regulatory differences in food safety, EU and US policymakers are working together to mitigate arbitrary regulatory divergences in agriculture, sanitary, and phytosanitary measures. In November 2009, the Joint Management Committee of the EU-US Veterinary Equivalence Agreement met to discuss a number of regulatory issues related to the trade of livestock products.[147]

[146] Information on the WTO Dispute Settlement Body's decision on "Certain Measures Affecting Poultry Meat and Poultry Meat Products from the United States" is available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds389_e.htm (Nov. 18, 2011).

[147] US State Department, "Framework for Promoting Transatlantic Economic Integration, Annex I: Fostering Cooperation and Reducing Regulatory Barriers, B. Sectoral Cooperation-Food Safety," http://www.state.gov/p/eur/rt/eu/tec/131816.htm (Nov. 18, 2011); US State Department, "Transatlantic Economic Council: Annex - Review of Progress Under the Framework for Advancing Transatlantic Economic Integration Between the United States of America and the European Union," http://www.state.gov/p/eur/rls/or/131050.htm (Nov. 18, 2011).

Future Initiatives for EU-US Regulatory Cooperation

Without a doubt, the solution to transatlantic regulatory divergence lies in increased dialogue and information-sharing between EU and US regulators. Although both sides have made substantial advances in reconciling regulatory approaches and strategies, they need to further increase their efforts if they are to achieve greater opening-up, flexibility, and progress on controversial issues. In this vein, EU and US regulators should aim for some of the following general objectives:

- Establishing greater levels of transparency in the regulatory processes of both sides.

- Ensuring that both parties are able to make commentaries on the legal processes of the other at a sufficiently early stage in the legislative process for their observations to be of practical use.

- Developing strategies that help prevent regulatory discrepancies and disputes before they occur or that contribute to their resolution once they have arisen.

- Encouraging the interested parties on both sides of the Atlantic to hold regular meetings and discuss relevant questions.

- Fostering greater levels of information-sharing, more regular technical exchanges, and more dialogue between the working groups of both sides.

EU and US regulatory agencies with similar objectives could, for instance, start initiatives to continually assess the potential impact of one another's proposed legislation on the transatlantic market. EU and US regulatory agencies might also find it fruitful to focus on and compare each other's regulatory policy directives in areas for which national laws have not yet been fully designed or adopted, or in areas in which new technologies and technological processes require new regulatory standards.

It is important to bear in mind, however, that in addition to having to focus primarily on their own responsibilities, particular objectives, and mandates, EU and US regulatory agencies do not always have the funds necessary to coordinate actions with their foreign counterparts. In addition, given the great diversity and complexity of contemporary political structures, few regulatory agencies have mandates that align perfectly well with the missions of other agencies. In light of such priorities, and in acknowledgment of such limitations, the most relevant goals for future transatlantic regulatory cooperation should include:

- Creating mechanisms that allow the regulatory agencies and institutions of both sides to gain a better and more structural understanding of one another, thereby increasing the level of mutual institutional trust between the EU and US; such understanding and trust is indispensable for both sides to be able to find viable and consensual solutions to common obstacles.

- Reforming EU-US dialogues and information-sharing meetings on the development of regulatory policy so as to make them more regular and systematic, and arranging such dialogues and meetings so that they take place at an earlier stage in the legislative process.

- Incorporating EU and US non-governmental agents into the regulatory cooperation process.

- Giving EU and US regulatory agencies the tools and budgets necessary for them to effectively coordinate policies with their transatlantic counterparts.

The improvement of transatlantic institutions also remains a top priority. While the European Commission and the US government continue to work on regulatory cooperation projects, they must also strive to broaden the mission of the Framework for Advancing Transatlantic Economic Integration and, concomitantly, expand the operational scope of the Transatlantic Economic Council (TEC). In addition, the High-Level Regulatory Cooperation Forum (HLRCF) could, in focusing on a specific set of priorities, give new impetus to current transatlantic initiatives. In line with recommendations made by the Transatlantic Business Dialogue, the HLRCF should:[148]

Producer compliance periods – push for the reform of regulatory compliance procedures so as to establish time windows which give producers, particularly small- and medium-sized pro-

[148] The letter addressed by the TransAtlantic Business Dialogue to the High-Level Regulatory Cooperation Forum Co-Chairs, Cass Sunstein and Heinz Zourek, on March 23, 2011, is available at http://www.tabd.com/images/stories/Letters/HLRCF_Letter_to_Sunstein__Zourek_final_23052011.pdf (June 6, 2011).

ducers, a sufficient amount of time and information to be able to comply and cope with new regulations. As things now stand, the details that producers need to know in order to ensure product compliance is often not finalized, and therefore not made available, until very close to the date of the regulation's entry into force; for this reason, producers are on occasion unable to comply with regulatory transitional periods.

Audit reform – convene EU and US officials and regulators to discuss the transatlantic and global implications of the European Commission's current plans for EU audit reform, particularly the potentially adverse effects that mandatory auditor rotation and changes in corporate governance rules could have on US businesses operating in the EU. The HLRCF must foster cooperation and information-sharing between EU and US policymakers with respect to EU audit reform and, in this way, prevent the establishment of new transatlantic regulatory barriers or overly divergent approaches.

***Ex post* assessment** – identify specific industries on which to carry out *ex post* impact assessments in order to determine both the effects of specific regulatory policies and the accuracy of previous regulatory impact assessments. In this way, the HLRCF could gain a deeper understanding of the effects of specific regulatory policies on specific industry markets and also learn to use regulatory impact assessments in a more accurate and effective manner.

Compatibility of regulatory regimes – advocate giving regulatory agencies the authority to recognize, based on a technical assessment of compatibility, the regulatory enactments of their counterparts across the Atlantic. Such a reform would improve the capacity of EU and US regulators to develop mutual recognition agreements with their transatlantic counterparts and, as a result, would accelerate and enhance regulatory mutual recognition within the transatlantic community.

In considering an eventual expansion of the Framework for Advancing Transatlantic Economic Integration, EU and US policymakers should strive to give the TEC the authority to:

- Address standards-related matters in a more direct manner.

- Address various other regulatory activities that are not currently being covered.

In addition, the TEC should develop a model confidentiality agreement that could be used, as appropriate, for the sharing of confidential information under a range of EU-US regulatory cooperation projects. A model agreement, based on the existing confidentiality agreement on pharmaceuticals between the US Food and Drug Administration and the EU Directorate-General for Enterprise, could be formally referenced in a renewed Framework or could be annexed to the existing Framework.

The TEC should also focus on identifying, in a general and ongoing manner, potential ways in which to enhance the effectiveness, scope, and authority of the Framework as the official body of principles guiding transatlantic economic integration.

Sanitary and Phytosanitary measures: an SPS+ TAFTA Agreement

A Chapter on SPS regulation is simply a must. The HLWG on Growth and Jobs highlights this chapter as one of the most relevant ones of the EU-US negotiation.

Both the EU and the US should aim to an SPS+ agreement, including WTO+ binding commitments to remove all kind of barriers to transatlantic trade resulting from SPS regulations.

SPS are of such importance to the US that the USTR officials have requested their EU counterparts to produce positive signals in this area prior to the launch of negotiations leading to an FTA. The dispute over *lactic acid* is a symbol of how far the EU is ready to go in accepting US sanitary and phytosanitary standards.

The HLWG has already established an action plan on SPS aiming to provide solutions to market access problems related to SPS. This action plan includes priorities on both sides.

With regard to the EU, the priorities have to do with US restrictions to imports related to the Creuztfeld-Jacobs disease and the Schmallenberg virus, pasteurized products, certain seafood varieties, as well as certain technical requirements related fruits and vegetables.

US priorities are the EU restrictions regarding the use of lactic acid in beef[149], imports of pork livestock, GMOs and SPS on citrus.

[149] The EU doesn't allow imports of beef treated with lactic acid, a regular practice in the US. This prohibition effectively prevents the implementation of the Memorandum of Understanding signed by the EU and US to find a solution to the WTO's panel on hormones.

Secure Trade

Upholding national security is the highest policy concern of any nation, which is why we believe the minimization of trade barriers in this area can only be accomplished through a very carefully designed framework of political cooperation between European and US authorized traders. Under such a framework, the EU and the US must strive to avoid hindering transatlantic trade flows while also refraining from undermining domestic security concerns. In other words, secure trade policies should be designed to have the lowest adverse effect on transatlantic trade compatible with domestic security concerns. In terms of transatlantic security policy, the TEC has described its objective as ensuring "that necessary security measures do not *unnecessarily* impede trade flows" (emphasis added).[150]

The best way to achieve this is through the implementation of mutual agreement arrangements for secure trade. As defined by the US Customs-Trade Partnership against Terrorism (C-TPAT), mutual recognition arrangements for secure trade are bilateral understandings between two customs agencies that allow the security standards and requirements of one to be recognized by the other and vice versa.[151] This arrangement aims to facilitate trade and establish "end to end supply chain security" for the signing parties. Supply chain security policies are international trade policies that have been adopted, with particular urgency

[150] US State Department, "Framework for Promoting Transatlantic Economic Integration, Annex V: Secure Trade," http://www.state.gov/p/eur/rt/eu/tec/131915.htm (Nov. 22, 2011).

[151] Information on mutual recognition arrangements for secure trade is available at http://www.cbp.gov/xp/cgov/trade/cargo_security/ctpat (Nov. 22, 2011).

since 9/11, to ensure and guarantee minimum security levels in world trade and investment flows.[152]

In this sense, the milestone achieved by the EU and US during the December 2010 TEC meeting, where both sides announced they had "reached an understanding on final steps towards mutual recognition of authorized traders," was an auspicious development. Such a mutual recognition arrangement between the US C-TPAT and the EU Authorized Economic Operator (AEO) would greatly enhance transatlantic trade while upholding security standards.[153]

One important remaining conflict between the EU and US that could muddle or retard future progress in secure trade cooperation, however, is the enactment of US legislation requiring a 100% scanning of containers headed for US ports beginning in 2012. During the 2008 TEC meeting, the European Commission had expressed its concern about this initiative's potential to add costs for economic operators and in effect become a new obstacle to transatlantic trade.

According to a 2009 report produced by the European research consultant ECORYS, "all sectors in the world economy where containerized sea transport occurs will be affected by 100 percent Container Scanning" and the legislative initiative is therefore "an important potential cause for regulatory diver-

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152 ECORYS (2009), *Non-Tariff Measures in EU-US Trade and Investment*, http://trade.ec.europa.eu/doclib/docs/2009/december/tradoc_145613.pdf (Nov. 22, 2011).

153 US State Department, "Annex 2: Transatlantic Economic Council – Sector Specific Statements," http://www.state.gov/p/eur/rls/or/153297.htm (Nov. 22, 2011).

gence."[154] In addition, 100% scanning would inevitably lead to an increase in costs for the transport supply chain, therefore significantly increasing the costs incurred by firms and, ultimately, consumers. The sectors that would most be affected include textiles, clothing, chemicals, electronics, cosmetics, machinery, construction, and transport services. In addition, 100% container scanning would "protect US sectors that compete with EU sectors using containerized transport–distorting the global level playing field" and having an overall deleterious effect on transatlantic trade flows.[155]

In contrast, abrogating the law requiring 100% container scanning would lead to annual economic gains totaling $12.7 billion for the combined EU and US economies. In addition, not instituting 100% container scanning, or gradually removing 100% container scanning by 2018 (if it is instituted by 2012), would lead to greater levels of security standards harmonization and would make joint EU-US counter-terrorism initiatives more likely.

The High Level Policy Dialogue for Border and Transport Security (PDBTS), first established in 2004, has also provided a regular forum for pragmatic transatlantic cooperation and discussion on cross-border security issues such as "passenger data sharing, cargo security, biometrics, visa policy, and sky marshals."[156] The dialogue has been positively rated.

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[154] Op. cit., ECORYS (2009).

[155] Ibid.

[156] Kristin Archick, "US-EU Cooperation Against Terrorism," US Congressional Research Service, July 18, 2011, p. 4, http://www.fas.org/sgp/crs/row/RS22030.pdf (Nov. 22, 2011).

Concerning the movement of people, the increased time and costs involved in acquiring business visas have become significant transatlantic barriers. The acquisition of visas simply takes too much time and this translates into increased costs for both companies and citizens. The problem of mobility in the transatlantic marketplace has become especially acute for business staff. The EU and US could urgently reduce the time and costs of acquiring business visas by introducing electronic ID systems with biometric parameters. These systems could be implemented in EU Member States and the US on a voluntary basis.

Professional Services

The divergent qualifications standards required by colleges and professional associations on either side of the Atlantic often function as powerful barriers to the free flow of professional services and the free movement of professional service providers within the transatlantic community. By "professional services" we mean those services that can only be legally provided by those holding an official certification (e.g., a diploma) qualifying them to do so. Examples of professional services include those provided by doctors, lawyers, architects, and engineers.

Because of this transatlantic divergence in certification standards, people unavoidably tie themselves to a country or region of residence in choosing to study a particular profession. US and EU Member State citizens would be able to add greater value to the transatlantic economy if they were able to exercise their chosen profession anywhere within the transatlantic community. As transatlantic regulatory harmonization is neither feasible nor desirable in this case, we advocate the mutual recognition of professional qualifications as an initial step. Such an arrangement will generate market signals compelling professional service providers to opt for one market or another.

The mutual recognition of professional certifications won't solve the problem entirely, however. The mutual recognition of certifications is a necessary condition to achieve open markets for services, but it is not a sufficient condition. The mutual recognition of professional certifications is of little use if the entry of foreign professionals remains restricted by immigration law. Mutual recognition helps to remove "pure" regulatory barriers, i.e. qualitative barriers. Beyond that, the mutual recognition of certifications cannot be truly effective until the EU and US remove quantitative barriers, such as entry or establishment restrictions on foreign nationals. Additionally, the EU and US should strive to uphold the national treatment rule, which is one of the foundational principles of the multilateral trading system.[157] In order to erect a truly transatlantic market for professional services, therefore, EU and US policymakers must establish the mutual recognition of qualifications and ensure market access and national treatment for foreign professionals.

The EU Single Market Program may serve as a limited guide in showing how the liberalization of the professional services sectors may be carried out at a transatlantic level. However, as

[157] In this particular case, the application of the national treatment rule concerns professional service providers.

the EU Single Market has not yet been completed,[158] it cannot serve as a *complete* guide for advancing transatlantic convergence regarding professional service standards. The EU Member States should therefore urgently fulfill their often-declared objectives of removing barriers in the services industry and in this way provide a complete and compelling model for a barrier-free transatlantic professional services agreement.

The European Commission's 2005 "Recognition of Professional Qualifications Directive,"[159] marked a significant step forward in the direction of a barrier-free professional services market. The Directive, which has been amended as recently as 2009, stipulates the rules according to which EU Member States "recognize professional qualifications obtained in one or more other Member States [...] and which allow the holder of the said qualifications to pursue the same profession there, for access to and pursuit of that profession."[160]

In early 2011, the European Commission's Directorate-General for Internal Market and Services presented its consultation paper on the 2005 Professional Qualifications Directive.[161] The

[158] Information on the development of the European Single Market is available at http://ec.europa.eu/internal_market/top_layer/index_3_en.htm (Nov. 22, 2011).

[159] European Council directive 2005/36/EC, "on the recognition of professional qualifications," http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2005L0036:20090427:EN:PDF (Nov. 22, 2011).

[160] Ibid., p. 10.

[161] European Commission, Directorate-General for Internal Market and Services, "Consultation Paper by DG Internal Market and Services on the Professional Qualifications Directive," January 7, 2011, http://ec.europa.eu/internal_market/consultations/docs/2011/professional_qualifications/consultation_paper_en.pdf (Nov. 22, 2011).

paper, based on a public consultation that gathered "stakeholders' views on a modernization of the Professional Qualifications Directive, highlighted three general areas in which Directive rules could be improved so as to better serve the professional mobility needs of the citizens of EU Member States:

- The **simplification** of the framework for the mutual recognition of qualifications between EU Member States is the first concrete step toward modernizing the Professional Qualifications Directive and establishing a barrier-free movement of professionals and services. Currently, professional service providers in the EU who wish to practice their profession outside their country of origin face an overly complex and burdensome set of procedures. This may be a significant part of the reason why intra-European professional mobility remains low, with "only 2.4% of the European Union's population (12.5 million out of nearly 500 million) liv[ing] in a Member State other than that of their nationality."[162]

- In order to **integrate professionals** into the Single Market, initiatives such as the European Professional Card and common platforms, originally devised for the Professional Qualifications Directive, need to be rethought and further developed. A professional card that certifies "that a professional is lawfully established in a [EU] Member State and has certain professional qualification or experience" is likely to have beneficial and "considerable simplification

[162] Ibid.

effects for all stakeholders."[163] In this way, "the migrating professional, the competent authorities" in both the home and host country, and the "clients or employers of such professionals" would all benefit. The card would "further simplify the recognition procedure in the context of [professional] establishment" and could "speed up the automatic recognition process for certain professions." The current qualifications assessment system, which typically takes up to three months per individual professional, could be brought down to one month or a couple of weeks. In lieu of establishing common platforms for professionals, a European curriculum should be developed alongside national Member State curricula. This "European curriculum" would exist "in parallel to national training programs rather than replace them."

- **Injecting confidence** into the European professional services regime is an absolute necessity, particularly given how much the structure and composition of the EU has changed–growing from nine to 27 Member States, for instance–since professional qualification standards were first devised. Educational reforms such as the Bologna process demand a review of existing EU law concerning the relevant professions. The system of automatic recognition, which currently involves the harmonization of qualification standards for seven professions, has been a qualified success according to the national authorities in charge of overseeing these professions in their respective countries; the seven professions are medicine, nursing, dentistry, midwif-

[163] Ibid.

ing, veterinary surgery, pharmaceutics, and architecture. Certain problems persist, however. There is a felt need to refine the scope of the automatic recognition program, update the minimum training requirements, improve the transparency of the training contents, and reinforce the automatic recognition program for new diplomas.

In summary, the removal of transatlantic barriers to trade in professional services necessarily requires the EU and US to mutually recognize one another's professional certification requirements. In addition, a barrier-free transatlantic market would require the liberalization of regulations that severely limit the access of foreign services providers to the market of their choice.

Investment Protection

Market access liberalization–and subsequent liberalization of foreign investment in certain industries–cannot be mixed up with the issue of investment protection.

Though this is not a major source of concern in both the EU and the US–expropriation or nationalization are not common public policies either in the EU and the US–, the TAFTA should include an investment protection scheme for both US investments in the EU and EU investments in the US.

The HLWG June 2011 report mixes up investment protection and market access, a mistake to be corrected. With that approach, investment protection only applies to liberalized industries. The TAFTA should aim to protect all kind of investments, both in liberalized and not liberalized industries.

E-Commerce

Joint EU-US strategies and policy guidelines are needed to address problems related to privacy and data protection, software interoperability, digital rights management, cyber fraud, and anti-spam legislation. Criminal activities carried out by means of electronic commerce, including child pornography and the spread of malicious viruses, have also become serious problems for both transatlantic partners. In order to address these issues effectively and unleash the full potential of the online consumer economy, the EU and US must enhance their cooperation initiatives and develop a coherent transatlantic policy framework for e-commerce.

During the 2010 EU-US summit, the leaders of both sides took a step in the right direction by agreeing to establish a Working Group on Cyber-security and Cyber-crime, which is to "address a number of specific priority areas" and "report progress within a year."[164] And during a 2010 ministerial meeting, EU and US justice and interior ministers announced a plan to establish a joint action program to combat online child pornography.[165]

Concerning online commerce, much is yet to be done to empower the online consumer and increase their ability to

[164] The text of the "EU-US Summit Joint Statement" is available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/117897.pdf (Nov. 22, 2011).

[165] *EU Business*, "US, EU to launch programme against Internet child pornography," April 11, 2010, http://www.independent.co.uk/news/media/us-eu-to-launch-programme-against-internet-child-pornography-1941748.html.

purchase goods across national boundaries. The OECD's summary of its 2009 "Conference on Empowering E-Consumers," for instance, offers a sobering reminder of the persistent obstacles to cross-border online commerce:

> International approaches to e-commerce regulation differ […] across jurisdictions. The differences were recognized as a possible barrier for consumers and businesses to engage in online transactions across borders. The various approaches to choice of law and rules on jurisdiction complicate the matter. Consumer rights and obligations may vary considerably from one jurisdiction to another. Instruments developed to address the issues may be e-commerce specific or generic by nature. As a result, in the European Union, for example, only 7% of the transactions are concluded across jurisdictions. Small business was described as being particularly affected by the diversity of frameworks.[166]

In this manner, national boundaries lead to regulatory obstacles to online commerce. In addition, the OECD summary points out that 60% of attempted cross-border transactions involving the purchase of digital products (such as music and e-books) in the EU fail because sellers refuse to sell in the prospective buyer's country. The OECD also calculates that approximately "40% of Internet users are reluctant to buy online for fear of identity theft and other malicious activities."[167]

In its 2008 Recommendations Report, the Transatlantic Consumer Dialogue (TACD) proposed the establishment of a "Charter of Consumer Rights in the Digital World," which included the right to privacy and data protection, the right to software inter-

[166] Organization for Economic Co-operation and Development, "OECD Conference on Empowering E-Consumers: Strengthening Consumer Protection in the Internet Economy," April 23, 2010, http://www.oecd.org/dataoecd/32/10/45061590.pdf (Nov. 22, 2011).

[167] Ibid.

operability, the right to secure networks, and the right to barrier-free online access, among others.[168] The TACD regards these rights as "indispensable to meeting the challenges presented by the digital world and the utilization of its potentials."

To fulfill the right to privacy and data protection, the TACD has recommended a series of measures, among which are that businesses "ensure that data about consumers is collected, processed, and used only with their expressed and voluntary permission" and that "organizations that collect and use personal data" incur definite responsibilities for safeguarding such data. Recent discussions between EU and US officials concerning a future data protection agreement point to the establishment, in the near of future, of what the European Commission has termed "coherent and harmonized"[169] transatlantic data protection standards. The data protection agreement would aim to enhance transatlantic cooperation in the fight against international crime and terrorism while respecting individuals' personal data and right to privacy. EU Justice Commissioner Viviane Reding has stated, regarding EU-US data protection agreement talks, that "a future legally binding agreement on data protection rules will reinforce legal certainty for operators and provide strong per-

[168] Transatlantic Consumer Dialogue, "Charter of Consumer Rights in the Digital World," http://tacd.org/index2.php?option=com_docman&task=doc_view&gid=43&Itemid=40 (Nov. 22, 2011); Transatlantic Consumer Dialogue, "2008 Recommendations Report," http://tacd.org/index2.php?option=com_docman&task=doc_view&gid=237& Itemid=40 (Nov. 22, 2011).

[169] Juliana Gruenwald, "EU-US Launch Talks on Protecting Data in Terrorism, Crime Probes," *National Journal*, December 9, 2010, http://www.nationaljournal.com/blogs/techdaily-dose/2010/12/eu-us-launch-talks-on-protecting-data-in-terrorism-crime-probes-09?mrefid=site_search.

sonal data protection for individuals."[170] Such an agreement would undoubtedly enhance the long-existing EU-US Safe Harbor Framework, which is the current transatlantic program by means of which US organizations are able to comply with the European Commission's 1998 Directive on Data Protection.[171] Under the Safe Harbor Framework, US organizations must adhere to seven basic privacy principles when engaging in business with European organizations. These principles involve issues such as notice, choice, transfer of information to third parties, access, security, data integrity, and enforcement.

To achieve software interoperability, the TACB has recommended the adoption of "traditional *ex ante* regulatory approaches" and the "creation and adoption of non-proprietary software and hardware interfaces." The TACB has also recommended "clos[ing] gaps in the legal framework that hinder the promotion of [software] interoperability." In this regard, recent advances made by the EU and the US in the field of electronic health records interoperability represent auspicious steps in the direction of transatlantic interoperability. During the 2010 TEC meeting, European Commission Vice President Neelie Kroes and US Health and Human Services Secretary Kathleen Sebelius signed a "Memorandum of Understanding (MoU) in which they agreed to cooperate on the interoperability of electronic health records'

[170] European Commission, Directorate-General for Justice, "Viviane Reding on the EU-US Ministerial in Madrid," April 8-9, 2010, http://ec.europa.eu/commission_2010-2014/reding/pdf/20100409_en.pdf (Nov. 22, 2011) Further information on EU-US data protection agreement talks is available at http://ec.europa.eu/commission_2010-2014/reding/multimedia/news/2010/12/20101208_en.htm (Nov. 22, 2011).

[171] Information on the EU-US Safe Harbor Framework and the seven privacy principles is available at http://export.gov/safeharbor/eu/eg_main_018476.asp (Nov. 22, 2011).

technologies."[172] According the TEC's 2010 sector specific statements, the ultimate goal of such initiatives "is the establishment and implementation of globally interoperable IT standards."

As important as all of these developments are, the establishment of the TAFTA requires that both EU and US officials take a more active role in promoting transatlantic e-commerce cooperation during EU-US summits and TEC meetings. Police and judicial cooperation in dealing with online crimes, and in giving consumers redress, should also continue to be reinforced. We advocate the progressive development of common regulatory standards for online commerce between the EU and US (as well as the further standardization of regulations within the EU) and, in this regard, believe the TACB could play an essential role in advancing transatlantic relations. The EU and US must also continue to launch joint policy initiatives and share best practices. Removing barriers to online trade is the surest way to secure and enhance the transatlantic area's position as the world's leading knowledge-based economic bloc. Simply put, the enormous economic potential of a barrier free transatlantic online economy cannot be overstated.

Intellectual Property Rights

The controversy over intellectual property rights (IPRS) continues unabated. As technology progresses, IPRS extend to new areas. For example, there is now growing controversy over the

[172] US State Department, "Annex 2: Transatlantic Economic Council – Sector Specific Statements," http://www.state.gov/p/eur/rls/or/153297.htm (Nov. 22, 2011).

importance of software interoperability on the one hand and intellectual property issues raised by proprietary formats on the other.[173] As the most affluent and advanced knowledge-based economies in human history, both the EU and the US, and in particular small and medium-sized enterprises (SMEs), are particularly vulnerable to persistent violations and novel controversies having to do with the applicability of IPRS.

In line with establishing the TAFTA, we believe the EU and US should make joint efforts to tackle the scourge of international counterfeiting and piracy, which damage the interests of businesses, consumers, and governments alike.[174] The OECD, which has carried out numerous studies on the economic impact of counterfeiting and piracy, estimates in a 2008 report that "international trade in counterfeit and pirated products could have been up to USD 200 billion in 2005" and possibly $250 billion in 2007.[175]

Besides the direct losses they cause to IPR owners, counterfeiting and piracy lower the incentive of entrepreneurs to

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[173] The complex relationship between intellectual property rights and IT applications is a case in point.

[174] Council of the European Union, "EU-US Declaration on Working Together to Fight against Global Piracy and Counterfeiting," June 20, 2005, http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/er/85381.pdf (Nov. 22, 2011).

[175] Organization for Economic Co-operation and Development, *The Economic Impact of Counterfeiting and Privacy*, June of 2008, http://www.oecd.org/document/4/0,3746,en_2649_34173_40876868_1_1_1_1,00.html (Nov. 22, 2011). A November 2009 update on the "magnitude of counterfeiting and piracy of tangible products" is available at http://www.oecd.org/document/23/0,3746,en_2649_34173_44088983_1_1_1_1,00.html (Nov. 22, 2011).

be creative and in so doing reduce the rate of technological innovation. Violations of IPRS are especially harmful in cultural and leisure sectors, like the music and software industry, where the EU and US, in particular, excel. Because the EU and US economies are particularly vulnerable to IPR violations in third countries, the transatlantic economy as a whole is also affected. Unless a coherent transatlantic legal framework that define and protects IPRS is developed, such problems will persist and perhaps even grow.

Fortunately, important progress has indeed been made towards establishing transatlantic, end even international, IPR enforcement standards. In June 2010, the EU-US Intellectual Property Rights (IPR) Working Group[176] held a meeting between EU and US trade representatives and industry leaders to discuss global IPR issues. In line with the aims of the EU-US IPR Action Strategy, the Working Group, which meets annually, focuses its efforts on fostering transatlantic convergence and joint action on issues related to respect for IPRS in third countries, customs cooperation, and public-private partnerships.[177] Since its inception in 2005, the Working Group has focused on "joint enforcement efforts at the WTO and in third countries efforts" as well as "closer customs co-

[176] Office of the United States Trade Representative, "US-EU Intellectual Property Rights Working Group," http://www.ustr.gov/about-us/press-office/press-releases/2009/september/us-eu-intellectual-property-rights-working-group (Nov. 22, 2011); European Commission, Directorate-General for Trade, "Resumption of the EU-US Intellectual Property working group," http://trade.ec.europa.eu/doclib/press/index.cfm?id=435&serie=268&langId=en (Nov. 22, 2011).

[177] US State Department, "Annex 2: Transatlantic Economic Council – Sector Specific Statements," http://www.state.gov/p/eur/rls/or/153297.htm (Nov. 22, 2011).

operation, including joint border enforcement actions." Operation infrastructure, for example, was the first EU-US customs cooperation project and a complete success. By means of the operation, EU and US customs authorities managed to seize "360,000 counterfeit semiconductors and computer network hardware components."[178]

Since 2010, the Working Group has made progress with regard to IPRS issues in the BRIC countries (Brazil, Russia, China, and India) as well as in Turkey. The Working Group has also coordinated joint EU-US enforcement operations at both European and US ports and has also developed "Web toolkit guidelines." Under the direction of the Working Group, EU and US customs authorities have also released a brochure that functions as a guide for transatlantic IPR holders. The material is entitled "Protecting Intellectual Property at Our Borders" (the "Our" refers to the EU and US). The material is designed to give IPR holders information about how to "work with customs officials to obtain enforcement of intellectual property rights in both markets."[179]

Concerning public-private partnerships, EU-US cooperation has produced important results.[180] In 2010, the European Commission's Directorate-General for Enterprise and Industry and the US Department of Commerce developed the Transat-

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[178] US State Department, "Framework for Promoting Transatlantic Economic Integration, Annex 3: Intellectual Property Rights," http://www.state.gov/p/eur/rt/eu/tec/131913.htm (Nov. 22, 2011).

[179] Op. cit., US State Department.

[180] Ibid.

lantic IPR Resource Portal, a website designed to educate businesses, particularly SMEs, on the ways in which they can protect their IPRS when exporting to a foreign market. The Resource Portal is divided into six sections, offering IPR holders information concerning the definition of IPRS, country-specific toolkits on IPR enforcement, IPR management, training, how to contact enforcement authorities, and how to seek expert advice. The Resource Portal's objective is to furnish businesses that operate on a transatlantic level, particularly SMEs, with the information necessary for them to maximize the full commercial potential of their IPRS. For this reason, the Resource Portal "encourages SMEs on both sides of the Atlantic to access a wide range of resources on intellectual property rights."[181]

The EU and US have also made progress of a more formal and plurilateral nature in IPR enforcement. In October 2011, EU Member States and the US, in conjunction with several other nations, signed the final text of the Anti-Counterfeiting Trade Agreement (ACTA).[182] The ACTA provides its signatories with a legal framework that allows them to combat and counteract violations of IPRS, particularly violations resulting from counterfeiting and piracy, more efficiently. The ACTA includes IPR enforcement measures for the civil, criminal, border, and digital arenas, and the agreement also includes detailed cooperation mechanisms and calls for the sharing of best

[181] The Transatlantic IPR Portal is available at http://ec.europa.eu/enterprise/initiatives/ipr/index_en.htm (Nov. 22, 2011).

[182] The full text of the plurilateral "Anti-Counterfeiting Trade Agreement" is available at http://www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf (Nov. 22, 2011).

practices. By means of the ACTA, signatory nations seek chiefly to prevent the establishment of unnecessary barriers to international trade. Chapter II of the ACTA, entitled “Legal Framework for Enforcement of Intellectual Copy Rights,” states the following:

> Each Party shall ensure that enforcement procedures are available under its law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.[183]

The preceding ACTA statement makes clear the signatory nations’ intention to avoid putting a stranglehold on trade in their pursuit of the international enforcement of IPRS. An appropriate balance between protecting intellectual property rights and promoting the dissemination and use of new technologies must undoubtedly be found, and the best way to develop such a mean would seem to be on a case-by-case basis.

While obviously recommending the establishment of a transatlantic legal framework for the protection and enforcement of IPRS, we would also recommend avoiding the *excessive* protection of intellectual property. Excessive protection may result when patents are granted for simply any procedure or idea, regardless of its lack of definitiveness, or, more commonly, when the terms of IPR protection for a given idea or product are unreasonably long in duration. Excessive protection can hinder

[183] Ibid., Chapter II, p. 4-5.

technological progress and innovation, when the point of IPRS is, precisely, to spur technological progress and innovation. Laws establishing new taxes on electronic digital equipment (to compensate for alleged losses of authors' rights), for instance, would be a complete mistake, as such laws would limit the extension of the information society.

In a 2009 policy statement, the TACD advised policymakers to "reject excessive terms of protection for copyright and related rights, and consider measures to mitigate or overcome harm from long terms of protection."[184] To accomplish this, the TACD exhorted the EU and US to avoid implementing terms of protection for IPRS that exceeded, in terms of duration, what was required by the WTO Trade Related Intellectual Property Rights (TRIPS) Agreement. Additionally, jurisprudence based on the US Constitution is of interest as a possible conceptual reference on the question of how to protect intellectual property in a manner that is most conducive to innovation and growth.

In any case, the EU and US should continue to pursue joint dialogues with one another, as well as with third-party governments, if they are to improve the level of protection for intellectual property rights holders. The launching of public awareness campaigns concerning the dangers and unacceptability of counterfeiting and piracy for both transatlantic partners is an additional and very formidable tool in fighting this problem.

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[184] Transatlantic Consumer Dialogue, "Resolution on the Terms of Protection for Copyright and Related Rights, and Measures to Expand Access to Works not Exploited by Copyright Owners," July 1, 2009, http://tacd.org/index2.php?option=com_docman&task=doc_view&gid=236&Itemid=40 (Nov. 22, 2011).

In addition, the US Strategy for Targeting Organized Piracy (STOP), implemented in 2004, is an ambitious policy strategy that might serve as a conceptual guide to the EU and to future transatlantic initiatives.[185] A 2007 assessment report prepared by the Office of the US IPR Coordinator describes STOP as "the most comprehensive initiative ever advanced to fight global piracy." STOP intends to combat global violations of IPRS by "systematically dismantling piracy networks, blocking counterfeits at [US] borders, helping [US] businesses secure and enforce their rights around the world, and collaborating with [US] trading partners."

The European Commission's 2010 report on the enforcement of intellectual property rights–in addition to the various EU legislative initiatives already adopted or under discussion to combat the problem at a local level in critical geographical areas–is a welcome addition to the accruing body of official literature concerned with finding multilateral solutions to the problem of IPR enforcement in a globalized world.[186] As the report makes clear, the enforcement of IPRS within the context of an increasingly ubiquitous online global economy is particularly problematic:

> Despite an overall improvement of enforcement procedures, the sheer volume and financial value of intellectual property rights infringements

[185] Office of the US IPR Coordinator, "Strategy for Targeting Organized Piracy: Accomplishments and Initiatives," September of 2007, https://www.eff.org/sites/default/files/filenode/EFF_PK_v_USTR/foia-ustr-acta-response1-doc13.pdf

[186] European Commission report, "on the enforcement of intellectual property rights," December 22, 2010, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52010DC0779:EN:NOT (Nov. 22, 2011).

> are alarming. One reason is the unprecedented increase in opportunities to infringe intellectual property rights offered by the Internet.[187]

There is also the importance of differentiating among different forms of intellectual property in devising and enforcing international IPR policy. In its evaluation of the European Commission's 2010 report on the effectiveness of international IPR enforcement, the TACD points out the following:

> The European Commission text does not distinguish between "counterfeiting" or "piracy" of physical goods and copyright infringements online. This generalized consideration of patent, copyright and trademark infringements of material and intangible products with IPR protection with the same criteria is a serious methodological flaw that obscures the major differences between goods of a very different nature.[188]

In addition, the EU and US have made substantial progress toward international patent law harmonization. According to the TEC, the EU and US "continue to meet within the 'Group B+' to advance discussions on patent law harmonization in the World Intellectual Property Organization (WIPO)."[189] It should be highlighted, however, that any EU-US agreement that advances transatlantic IPR enforcement should not jeopardize negotiations taking place in relation to the WTO's Government Procurement Agreement (GPA).

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[187] Ibid.

[188] Transatlantic Consumer Dialogue, IP Policy Committee, "Comments on EC [European Commission] report on IPR enforcement," http://tacd-ip.org/archives/351 (Nov. 22, 2011).

[189] Op. cit., US State Department, "Framework for Promoting Transatlantic Economic Integration, Annex 3: Intellectual Property Rights."

Geographical Indications

A good use of geographical indications is, in fact, part of the IPR chapter. Abuse of GIs is equivalent to violations of IPRs.

The TAFTA should ensure an effective protection of GIs, both for US and US producers.

Corporate Governance and Accounting Standards

High-profile corporate scandals such as those affecting Parmalat SpA, Enron Corporation, and Andersen have shown the degree of interconnection and interdependence within the transatlantic economy and how much EU and US regulators need to cooperate in order to improve and streamline transatlantic auditing and corporate governance rules. Such scandals involved questionable dealings (including special purpose entities, improper swap arrangements, and flaws in financial disclosure) that quickly took on a global dimension. These episodes led to a variety of uncoordinated responses from EU and US regulators and brought the issue of transatlantic corporate governance and accountability to the attention of national lawmakers and the public at large.

In response to these corporate scandals, EU policy-makers quickly accelerated their own modernization of company law. The US Congress, for its part, approved the Sarbanes-Oxley Act (SOxA) in 2002. The SOxA was designed to improve the corporate governance and accountability of boards, managers, and gatekeepers by increasing the surveillance and monitoring of all public company auditors, including non-US firms, registered with the US exchange. For instance, Section 404 of the SOxA required public accounting firms to produce annual "internal control reports" capable of validating the adequacy of the accounting firm's financial reporting method and structure.[190] Critics argue that the demands of Section 404 of the SOxA impose unjustifiable costs and time-consuming transitions on all US-listed European companies.

In addition to US-listed companies, the SOxA also affects non-US-listed auditors working for US-listed companies. According to Hamilton and Quinlan, the SOxA "puts significant emphasis on the regulation of not only accounting and auditing practices of a registered public accounting firm, but also that of any Certified Public Accountant (CPA) associated therewith, and any CPA working as an auditor of a publicly traded company."[191]

The SOxA also established the Public Company Accounting Oversight Board (PCAOB) in order to enforce compliance with its standards, thus ending a period of auditor self-regulation.[192] Because of the US Securities and Exchange Commission's (SEC) burdensome regulations concerning registration, many European firms have been required, despite their relatively small size, to register with the PCAOB–a costly procedure that has given

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[190] US Securities and Exchange Commission, *Final Rule: Management's Report on Internal Control over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports*, http://www.sec.gov/rules/final/33-8238.htm (Nov. 23, 2011).

[191] Op. cit., Hamilton and Quinlan, *Deep Integration*.

[192] Information on the Public Company Accounting Oversight Board is available at http://pcaobus.org/Registration/Pages/default.aspx (Nov. 23, 2011).

non-US firms a strong incentive to de-list from major US markets and has consequently generated widespread criticism in Europe. The SEC's 500-shareholder registration threshold requires firms who reach it to register with the PCAOB, regardless of their size, and the SEC's 300-shareholder deregistration threshold means firms must reach it before being eligible to de-register from the PCAOB. These overly demanding thresholds impose high regulatory costs on US-listed European firms.

> In general, the SOxA has become one of the major points of contention between the EU and US; it has been criticized in the EU as a new barrier creating unnecessary and cumbersome procedures that divide the economies of both Atlantic partners–a European accounting firm working for a US-listed company would be required to supply the PCAOB with its work papers, for instance. The TAFTA project advises both EU and US policymakers to make a special effort to find solutions to the barriers resulting from Section 404 of the Sarbanes-Oxley Act as well as from the SEC's deregistration threshold, which has had a negative effect on European companies seeking to de-register from the PCAOB.

More recently, in March 2011, the US Congress introduced a very promising bill, whose objective is "to amend the securities laws to establish certain thresholds for shareholder registration."[193] If adopted, the bill will raise the SEC registration

[193] 112th US Congress, "S.556 – a bill to amend the securities laws to establish certain thresholds for shareholder registration, and for other purposes," March 10, 2011, http://www.opencongress.org/bill/112-s556/text (Nov. 23, 2011).

threshold from 500 to 2,000 and also raise the SEC deregistration threshold from 300 to 1,200. These threshold reforms would only affect banks and bank-holding companies, however.

Such regulatory divergences between the EU and US point to the need for both transatlantic partners to achieve the mutual recognition of standards with regard to corporate governance and accounting norms. Now more than ever, the top priority for EU and US policymakers in this field is to adapt their respective regulatory norms to the demands of the global environment in which their firms operate. To achieve regulatory convergence, EU and US policymakers must seek to enhance the existing international and/or influential accounting standards institutions and build upon their progress. The most significant of these is the International Accounting Standards Board (IASB). The IASB, established in 2001, is a non-profit, standard-setting body whose aim is "to develop a single set of high quality, understandable, enforceable and globally accepted international financial reporting standards."[194] As the name would suggest, the IASB is responsible for developing the International Financial Reporting Standards (IFRS), which are currently used throughout the EU. The US, for its part, uses the Financial Accounting Standards Board (FASB). The FASB is a private, US-based, standard-setting organization established in 2001. Its aim is to develop the Generally Accepted Accounting Principles (GAAP), which are recognized as authoritative by the US Securities and Exchange Commission (SEC).

[194] Information on the International Accounting Standards Board and the International Financial Reporting Standards is available at http://www.ifrs.org/The+organisation/IASCF+and+IASB.htm (Nov. 23, 2011).

In April of 2005, the European Commission and US Securities and Exchange Commission (SEC) moved the EU and US toward greater transatlantic convergence on accounting standards by adopting a formal Roadmap toward the mutual recognition of accounting standards. This planned convergence between International Financial Reporting Standards (IFRS)–the system used by European companies since 2005–and US Generally Accepted Accounting Principles (GAAP) will, after it is fully implemented, allow firms in both the EU and US to use a common accounting reporting standard.[195] In 2006, the EU and US reaffirmed their commitment to achieve standards convergence by signing a Memorandum of Understanding (MoU) detailing their joint work program.

In November 2007, the SEC approved a new set of rules eliminating reconciliation requirements for US-listed companies that adhered to the IFRS, meaning such companies were no longer required to issue their financial statements using US GAAP. The new rules were in line with the goals that had been laid out in the 2005 EU-US roadmap and the 2006 EU-US MoU, and they were also in line with what FAES Foundation had advised in its previous report on the transatlantic relationship, *A Case for an Open Atlantic Prosperity Area*. In a press release announcing the new rules, the SEC stated the following:

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[195] Delegation of the European Commission to the USA, "Accounting Standards: EU Commissioner McCreevy Sees Agreement with [US] SEC as Progress toward Equivalence," April 21, 2005, http://www.eurunion.org/news/press/2005/2005041.htm (Nov. 23, 2011). Additionally, it should be noted that the 2005 roadmap was reached under the auspices of the EU-US Financial Markets Regulatory Dialogue.

> The [Securities and Exchange] Commission today approved rule amendments under which financial statements from foreign private issuers in the US will be accepted without reconciliation to US Generally Accepted Accounting Principles only if they are prepared using International Financial Reporting Standards (IFRS) as issued by the International Accounting Standards Board.[196]

In April 2008, the European Commission's Directorate-General for Internal Market and Services issued a progress report on convergence between IFRS and third-country generally accepted accounting principles, including the US GAAP.[197] The report noted that significant progress toward standards convergence had been made by the EU and US. In addition, the report highlighted that both the IASB (which issues standards for the EU) and the FASB (which issues standards for the US) had (1) publicly committed to converge IFRS and US GAAP, had (2) agreed to establish a cooperative mechanism that would allow them to issue their respective rules without unintentionally creating new barriers to accounting standards convergence, and had (3) agreed to issue new standards in a joint manner in the future. The report also noted that the IASB and the FASB did not intend to converge on every technical detail, which would

[196] US Securities and Exchange Commission, "SEC Takes Action to Improve Consistency of Disclosure to US Investors in Foreign Companies," November 15, 2007, http://www.sec.gov/news/press/2007/2007-235.htm (Nov. 23, 2011).

[197] European Commission, Directorate-General for Internal Market and Services, "*Report on convergence between International Financial Reporting Standards (IFRS) and third country national Generally Accepted Accounting Principles (GAAPs) and on the progress towards the elimination of reconciliation requirements that apply to Community issuers under the rules of these third countries*," April 22, 2008, http://ec.europa.eu/internal_market/accounting/docs/equivalence_report_en.pdf (Nov. 23, 2011).

have proven impractical, but rather to converge in principle. This flexible approach to convergence would seem to be the most practical, given that the IFRS are more principles-based and the US GAAP are more rules-based.

In November 2008, the SEC proposed the implementation of a Roadmap that would allow US companies to prepare their financial statements in accordance with IFRS rather than US GAAP.[198] Simply put, the 2008 Roadmap established the conditions under which the US would be able to effectively adopt IFRS. These conditions would serve as “milestones that, if achieved, could lead to the required use of IFRS by US issuers [beginning] in 2014.” The SEC described the need for considering the mandatory use of IFRS by US issuers in the following way:

> As capital markets have become increasingly global, US investors have a corresponding increase in international investment opportunities. In this environment, we believe that US investors would benefit from an enhanced ability to compare financial information of US companies with that of non-US companies. The [Securities and Exchange] Commission has long expressed its support for a single set of high-quality global accounting standards as an important means of enhancing this comparability. We believe that IFRS has the potential to best provide the common platform on which companies can report and investors can compare financial information.[199]

The seven milestones the SEC set forth in its proposed 2008 Roadmap relate to the following areas:

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[198] US Federal Register, *Securities and Exchange Commission: Roadmap for the Potential Use of Financial Statements Prepared in Accordance With International Financial Reporting Standards by US Issuers; Proposed Rule*, November 21, 2008, http://www.sec.gov/rules/proposed/2008/33-8982fr.pdf (Nov. 23, 2011).

[199] Ibid., “I. Overview.”

- Improvements in accounting standards.
- Limited early use of IFRS where this would enhance comparability for US investors.
- Education and training relating to IFRS.
- The improvement in the ability to use interactive data for IFRS reporting.
- The gradual implementation of IFRS as mandatory for US issuers, i.e., by means of a staged transition rather than all at once. Larger firms would begin to file their financial statements using IFRS for fiscal years ending on or after December 15, 2014; these would be followed by firms that would begin filing under IFRS for years ending on or after December 15, 2015; and smaller firms would begin filing using IFRS for years ending on or after December 15, 2016.
- The funding of the International Accounting Standards Committee (IASC) Foundation.
- The anticipated timing of future rulemaking by the SEC.

The SEC had in the past remained reluctant to consider adopting International Financial Reporting Standards (IFRS) as equivalent to the US GAAP. The SEC's former reluctance may be partly explained by the fact that the enforcement of accounting rules in the EU had until recently been conducted predominantly at the national level: there had been no EU enforcement body for financial reporting standards and therefore no EU equivalent of the SEC.

The recently created European Securities and Markets Authority (ESMA), which is one of the three new European Supervisory Authorities, *is* that essential European counterpart to the SEC. The ESMA is an EU financial regulatory institution charged with supervising and regulating the EU securities markets. As such, the ESMA has "adequate supervisory powers" and "appropriate powers of investigation and enforcement."[200] The creation of the ESMA is essential to the continued progress of EU-US cooperation on accounting standards, given that it "contributes to the creation of a single rulebook in Europe" and given that it has the capacity to offer equivalence to a foreign accounting system on behalf of the EU.[201] In January 2011, the ESMA replaced what since 2001 had been the Committee of European Securities Regulators.

In March 2010, the SEC released an official statement in which it reaffirmed its belief "that a single set of high-quality globally accepted accounting standards will benefit US investors" and "facilitate[e] capital formation."[202] In the state-

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[200] EU Council Regulation No 1095/2010, "establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC," http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:331:0084:0119:EN:PDF (Nov. 23, 2011).

[201] Information on the European Securities and Markets Authority is available at http://www.esma.europa.eu/index.php?page=cesrinshort&mac=0&id (Nov. 23, 2011).

[202] US Federal Register, *Securities and Exchange Commission: Commission Statement in Support of Convergence and Global Standards; Notice*, March 2, 2010, http://www.sec.gov/rules/other/2010/33-9109fr.pdf (Nov. 23, 2011).

ment, the SEC also expressed its hope that the differences between the IFRS and US GAAP would "become fewer and narrower, over time, as a result of the convergence project." Later that same year, the US-based National Association of Insurance Commissioners, a non-profit organization of US state insurance regulators, published a brief commentary on the SEC's 2008 Roadmap in which it stated the following:

> Though much remains uncertain, the SEC [has] made clear that it envisions 2015 as the earliest possible date for the required use of IFRS by US public companies. The SEC action calls for more study of IFRS and a 2011 vote on whether to move ahead with a mandate to use IFRS. And perhaps most importantly for issuers, auditors and other stakeholders hungry for signs of which way the [Securities and Exchange] Commission might be leaning, the SEC [has] directed its staff to publish periodic progress reports, starting no later than October, which will be available to the public.[203]

Accordingly, in October 2010, the SEC issued a progress report on a previous "Work Plan" for the incorporation of the IFRS into the US financial reporting system.[204] The purpose of the Work Plan, which had been published in February 2010, was to determine the chief issues the SEC needed to consider before it decided whether and in what way to incorporate the mandated use of IFRS into the US financial reporting system. Some of the

[203] National Association of Insurance Commissioners, "Primary Considerations of a Policy Decision Regarding the Future of Statutory Accounting & Financial Reporting," http://www.naic.org/documents/committees_smi_future_statutory_accounting.pdf (Nov. 23, 2011).

[204] Office of the Chief Accountant, Division of Corporation Finance, US Securities and Exchange Commission, *Work Plan for the Consideration of Incorporating International Financial Reporting Standards [IFRS] into the Financial Reporting System for US Issuers*, October 29, 2010, http://www.sec.gov/spotlight/globalaccountingstandards/workplanprogress102910.pdf (Nov. 23, 2011).

issues addressed in the progress report, which relate to the character of the IFRS as well as to transition concerns relevant to US issuers, include: (1) the ways in which the US regulatory environment would be affected by the incorporation of IFRS, (2) the ways in which both large and small issuers would be affected by the incorporation of IFRS, (3) the level of understanding and education that investors have concerning IFRS, (4) the SEC's concerns over the funding and governance structure of the IASB, which must function as an independent body capable of consistently producing a «single set of high-quality globally accepted accounting standards for US issuers."[205]

In April 2011, the US-based FASB and the IASB released "a progress report on their joint work to improve International Financial Reporting Standards (IFRS) and US generally accepted accounting principles (GAAP), and to bring about their *convergence*."[206] [Emphasis added]. In the report, the FASB and IASB announced that they had managed to converge, or nearly converge, their standards concerning "fair value measurement, consolidated financial statements (including disclosure of interests in other entities), joint arrangements," and "other comprehensive income and post-employment benefits."[207] The report also

[205] Ibid., p.15.

[206] FASB press release, "IASB and FASB Report Substantial Progress towards Completion of Convergence Program," April 21, 2011, http://www.fasb.org/cs/ContentServer?site=FASB&c=FASBContent_C&pagename=FASB%2FFASBContent_C%2FNewsPage&cid=1176158460171 (Nov. 23, 2011).

[207] Financial Accounting Standards Board, "Progress report on IASB-FASB convergence work," April 21, 2011, http://www.fasb.org/cs/ContentServer?site=FASB&c=Document_C&pagename=FASB%2FDocument_C%2FDocumentPage&cid=1176158460551 (Nov. 23, 2011).

announced substantial progress on convergence concerning three unfinished priority projects: “financial instruments, revenue recognition and leases.” The alignment of US and international accounting standards was also highlighted as an area where significant progress was being made.

In line with this progress report, the FASB and IASB issued new and harmonized fair value measurements and disclosure requirements in May 2011.[208] Both requirements are now practically identical under both IFRS and US GAAP. IASB chairman, Sir David Tweedie, described the newly issued requirements as signaling “the completion of a major convergence project.” FASB chairman, Leslie F. Seidman, described the new requirements as representing “another positive step toward the shared goal of globally converged accounting standards.”

In July 2011, the SEC held a formal roundtable on “the benefits and challenges in potentially incorporating IFRS into the financial reporting [system] for US domestic issuers.”[209] The roundtable talks touched upon various US concerns, such as how well US investors understand IFRS and on the effect IFRS might have on small public companies and on the US regulatory environment in general.

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[208] IFRS press release, “IASB and FASB issue common fair value measurement and disclosure requirements,” May 12, 2011, http://www.ifrs.org/News/Press+Releases/IFRS+13+FVM+May+2011.htm (Nov. 23, 2011).

[209] US Securities and Exchange Commission, *Roundtable on International Financial Reporting Standards in the United* States, July 7, 2011, http://www.sec.gov/spotlight/ifrsroadmap/ifrsroundtable070711-transcript.pdf (Nov. 23, 2011). A webcast of the event is available at http://www.sec.gov/news/otherwebcasts/2011/ifrsroundtable070711.shtml (Nov. 23, 2011).

Recent efforts by the FASB and the IASB on transatlantic regulatory convergence will likely lead to an increase in EU-US cooperation regarding capital mobility, which will precipitate product and labor market reforms, leading, in turn, to lower capital costs. As Hamilton and Quinlan remark, “the increasing trend toward [the] adoption of similar techniques and institutions, accompanied by extensive interest group pressures, may create additional incentives for directors and managers to adopt internal organizational forms that are more efficient.” A set of fully converged, globally accepted transatlantic accounting standards will induce analysts on both sides of the Atlantic to trust the financial statements of foreign firms, leading to higher levels of transatlantic investment and a decrease in the cost–previously caused by a combination of confusion and a lack of credibility–of having to convert accounts from one standard to the other.

Despite such progress toward the development of what one might call a “transatlantic practice,” there are still several areas in need of reform. Corporate law, for instance, remains a predominantly domestic matter. The case of the EU is particularly striking: a low level of coordination between Member States has made it difficult for the EU to establish consistent minimum standards. In formulating a new regulatory framework for corporate law, EU and US policymakers must take care to make them flexible enough to accommodate the wide range of firms and national corporate law regimes. The EU’s role should be to consistently provide minimum standards and ensure a certain level of coordination between Member States. In addition, corporate governance regulatory reforms should be designed with a view to reducing any of the potentially negative effects they might have on the transatlantic economy.

The goal of eliminating corporate governance and accounting standards divergence between the EU and US is as ambitious as it is necessary. The removal of such transatlantic barriers by means of the mutual recognition of standards and, ultimately, the adoption of common transatlantic standards, is essential to the future establishment of a truly integrated and barrier-free economic relationship between the EU and US, i.e., the TAFTA. Policymakers on both sides of the Atlantic must therefore continue to work in favor of greater regulatory convergence in corporate governance and accounting standards, consistently keeping transatlantic cooperation at the top of their agendas.

Removing Vertical Barriers, Sector by Sector

The analysis of horizontal barriers to trade must be complemented by a sectoral (i.e., vertical) analysis.

Moreover, horizontal principles on regulation should be complemented with additional sectorial commitments. These commitments should aim to promote regulatory compatibility along time.

The list of sectors to be analyzed is, of course, extensive. A large number of the most relevant ones are services industries·

Some of the most relevant industries concerned by barriers to transatlantic trade are, according to the WTO "mode of provision":

- Industries concerned by obstacles to establishment ("mode 3" of service provision): financial services, electricity provision, insurance, retail commerce.
- Industries concerned by obstacles to trans-border trade ("modes 1, 2 and 42 of service provision): entrepreneurial services, computing, information, transport, insurance, telecommunications, royalties, patent rights and–again–financial services.

Of crucial importance is the need to solve the problem of licenses and professional qualifications issue.

Though many industries could be analyzed–an agreement is needed in the difficult chapters of «*long standing market access barriers*« regarding sea transport and audiovisual services–, in the present chapter, we will limit ourselves to four sectors, chosen for their importance to transatlantic trade relations.

The Automotive Industry

Europe and the US were the original centers of the automotive industry and remained the dominant powers in this respect until the 1960's.[210] (The emergence of the Japanese automotive industry during the 1960's and 1970's, and of the Korean in-

[210] Op. cit., Garel Rhys, "The Transatlantic Automotive Sector," in Hamilton and Quinlan, *Deep Integration*.

dustry in the 1990's, changed the picture entirely). Because of its larger market and the absence of divergent national regulations, US manufacturers were able to become much more efficient than European manufacturers, and automobiles in the US were at one time 50% cheaper, on average, than those in Europe. It is not surprising, therefore, that Europeans have long imposed high tariffs on foreign automakers. These European tariffs have been partially eliminated under successive GATT agreements (the Dillon and Kennedy Rounds, in particular), but even today they remain at approximately 10%. At present, European tariffs on passenger automobiles are much higher than US tariffs. European automobiles face a 2.5% import duty at the US border, whereas US automobiles encounter a 10% tariff in Europe. A new and sharp cut in automotive tariffs would do much to mitigate this transatlantic disparity.

Although there are no quotas or voluntary export restraints between European nations and the US, their safety standards are different, and this divergence in standards generates certain trade barriers. European and US technical regulations on gas emissions are also different. Despite these divergences, however, there are no significant barriers to transatlantic trade in the automotive sector. Rather, the industry is a good example of how multilateral negotiations in conjunction with WTO-plus cooperation can result in substantial market integration. At present, US automakers operating in Europe are generally treated as if they were European manufacturers, provided their automobiles are designed and manufactured in Europe and provided they use European suppliers. And although automobile models remain different on both sides of the Atlantic, the components and materials used to assemble them enjoy a common transatlantic platform and engineering design that makes the resulting product more globally competitive.

The most important transatlantic regulatory issues are those concerning technical specifications. Automotive regulatory divergence between the EU and US is significant in terms of emissions, power, consumption, and safety issues. Mutual recognition of standards, rather than harmonization, would be the most effective way to address such divergences. Mutual recognition of standards would allow all automotive products–including components, accessories, and sub-assemblies such as engines–to be used in both markets. Mutual recognition of automotive standards would also result in a dramatic reduction of the indirect costs related to the production of automotive products.

It is inevitable to wonder whether the automobile markets in the EU and US are tending towards greater convergence or if, on the contrary, they will remain as they are for the long term. There are no easy answers to this question. A larger market would lead to gains in efficiency from which both customers and manufacturers would benefit, but the demands of fuel users on both sides of the Atlantic are still very different and so are fuel costs. Indeed, such costs have led to a disparity in the proportion of diesel cars found in Europe and the US: diesel models still represent a very small proportion of automobiles sold in the US, whereas diesel models led the European market for the first time in 2005. In Europe, furthermore, 80% of automobiles have less than a two-liter engine, whereas 80% of automobiles have *more* than a two-liter engine in the US.

Recently, however, the EU and US have engaged in important cooperative initiatives aimed at further mitigating regulatory divergence in the automotive industry. In 2008, the US National Highway Transportation Safety Authority (NHTSA) and the European Commission's Directorate-General for Enterprise and Industry (DG ENT) concluded a Memorandum of Cooperation on motor vehicle safety and emission standards.[211] The EU and US have also been cooperating under the auspices of the World Forum for Harmonization of Motor Vehicle Regulations–a working party of the United Nations Economic Commission for Europe–in order to achieve the international recognition of electronic stability control (ESC) for motor vehicles.[212] The World Forum has also adopted provisions for the mandatory implementation of Brake Assist Systems (BAS) and Tire Pressure Monitoring Systems (TPMS).[213] In 2009, the NHTSA and DG ENT initiated talks on the adoption of "a work plan for compatible approaches to key automotive standards, including possibly for global diesel engine standards."[214]

[211] EU-US High-Level Regulatory Cooperation Forum, "Joint Progress Report to the Transatlantic Council Fall Meeting," December 12, 2008, http://www.eurunion.org/TECRegForumImportSafetyRept-12-08.pdf (Nov. 23, 2011).

[212] ESC is a computerized safety mechanism for automobiles that automatically applies the brakes and reduces engine power when it detects that the automobile has begun to skid.

[213] United Nations Economic Commission for Europe, "Work in Support of Sustainable Development of Transport," May 2010, http://www.unece.org/fileadmin/DAM/trans/publications/Transport_for_sustainable_development_in_the_ECE_region.pdf.

[214] US State Department, "Framework for Promoting Transatlantic Economic Integration, Annex I: Fostering Cooperation and Reducing Regulatory Barriers, B. Sectoral Cooperation–Automotive Sector," http://www.state.gov/p/eur/rt/eu/tec/131806.htm (Nov. 23, 2011).

Since 2010, the TEC has strongly advocated that the EU and US work together to design an institutional framework that supports the deployment of electric vehicle (EV) technologies and the development of EV markets. Needless to say, the advantages that such a framework would bring to the EU and US would not be limited to transatlantic economic growth: "Cooperation that facilitates the development and market penetration of clean and energy-efficient vehicles, in particular rechargeable electric vehicles, deserves thorough attention as it offers the possibility of ultra low-carbon mobility and reduced oil import dependency."[215]

In this regard, the Transatlantic Workshop on Electric Vehicles and Grid Connectivity has pointed out that harmonization of electrical vehicle charging technology and equipment would be beneficial to both the EU and US.[216] Harmonization in this area would result in lower equipment costs, lower electricity costs, more efficient and streamlined systems integration, and a more reliable electric supply for automobiles. Smart Charging–a system that prevents users from charging their vehicles during peak hours by means of a communication interface between the vehicle, the consumer, and the electrical power grid utility–is part of a new generation of innovative electric vehicle technology in which the harmonization of standards must undoubtedly be implemented.[217] The cost-saving potential of

[215] US State Department, "Annex 2: Transatlantic Economic Council (TEC) – Sector Specific Statements," http://www.state.gov/p/eur/rls/or/153297.htm (Nov. 23, 2011).

[216] Ibid.

[217] Information on Smart Charging is available at http://www.transportation.anl.gov/pdfs/HV/617.PDF (Nov. 23, 2011).

smart charging for the transatlantic area would be difficult to overstate. In addition, as electrical vehicles will likely play an ever-increasing role in the future of the transatlantic automotive industry, the establishment of the TAFTA requires that the EU and US continue to work "on the joint development of compatible standards for electric vehicles' charging interfaces"[218] as well as on transatlantic harmonization through the World Forum for Harmonization of Motor Vehicle Regulations.

Telecommunication Services

The liberalization of old public monopolies carried out by individual nation states, in conjunction with the adoption of multilateral agreements under the auspices of the WTO, has made the establishment of a transatlantic market for telecommunication services possible. In the US, a series of landmark decisions paved the way for a competitive telecommunications industry. First, the US Court of Appeals ruled against the FCC's Execunet Decision of 1976, effectively ending AT&T's long distance telephoning monopoly.[219] In 1984, Judge Greene issued the modified final judgment requiring the breakup and restructuring of AT&T. Throughout these years, the FCC and the courts continually took pro-competitive decisions that gradually opened up the US telecommunications market to more competition.[220]

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[218] Op. cit., US State Department, Sector Specific Statements.

[219] Zarkin, K. and Zarkin M., *The Federal Communications Commission: Front Line in the Culture and Regulation Wars* (Westport, CT: Greenwood Press, 2006) p. 64-65.

[220] Op. cit., Tyler, M. and Dixon, M., "Transatlantic Telecommunications: Markets, Policies, Issues," in Hamilton and Quinlan, *Deep Integration*; op. cit., Renda, Andrea, "Telecommunications Services: A Transatlantic Perspective," in Hamilton and Quinlan, *Deep Integration*.

In Europe, the UK was the first European country to head for a multi-competitor industry structure as a result of the 1984 Telecommunications Act, which led to British Telecom's privatization and the licensing of competitors. Sweden soon followed along this path. By the end of the 1980s, both countries had moved to a more radically pro-competitive approach and had established open entry into the domestic fixed-service market. In time, the success of the Anglo-Saxon model led the European Commission to implement deep reforms so as to remove public monopolies and ensure a single market for telecoms services beginning in 2002.

At the international level, liberalizing telecommunications markets involves issues of both a technical and a commercial nature. Issues of a purely technical and operational sort are addressed by the International Telecommunications Union (ITU), the Internet Engineering Task Force (IETF) and ICANN (Internet domains).[221] In addition to productivity gains, the resolution of technical divergences over the years has also resulted in successive crises that have underlined the need for still greater technical reform within the telecoms industry.[222]

Issues that are commercial in character are addressed during WTO negotiations, particularly issues related to cross-border market access and participation. The 1997 WTO Basic Telecom-

[221] Technical issues include problems having to do with compatibility, numbering, and the use of radio frequencies.

[222] Jorgenson, D., "Information Technology and the US Economy," *American Economic Review*, Vol. 91, No. 1, March, 2001.

munications Agreement (BTA) is a complex set of bilateral and multilateral agreements.[223] Under it, US and European governments have made the most far-reaching and market-driven commitments concerning rights of entry for foreign competitors in domestic and international fixed markets, rights of entry for foreign operators in established networks, and non-discriminatory interconnection at cost-based prices. In this way, the BTA has successfully been able to extend unrestricted licensing rights and incumbent networks to the telecommunication operators of WTO signatory countries on a non-discriminatory basis.

Throughout the 1990's and the first years of the 21st Century, a series of technological breakthroughs brought about profound reforms within the telecommunications industry. Such breakthroughs included, among others, the universalization of services related to the Internet and mobile telephony, the implementation of new satellite services, the achievement of greater interconnection between telecommunication operators, and the emergence of the IT and audiovisual industry. Today, the most important advances driving the telecommunications industry include the ongoing transition from wired to wireless telephony (the so-called fixed-mobile substitution); the convergence of voice and data communications services with the emergence of Internet voice teleph-

[223] The BTA is part of the Fourth Protocol of the General Agreement on Trade in Services (GATS) and was adopted as part of the WTO Treaty (the Marrakech Agreement). The BTA was concluded in 1997 and came into force in 1998 with defined "schedules of commitments." The EU acts on behalf of all Member States in WTO negotiations, including negotiations related to telecoms services. Information on the BTA is available at http://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_results_e.htm (Nov. 24, 2011).

ony (VoIP); the mobile sector's rapid movement towards broadband, making it a substitute for fixed voice and data services; and the increased convergence between end-to-end communication technologies and broadcasting services.

In spite of these technological and regulatory advances, a barrier-free transatlantic market in telecommunication services has yet to emerge. Undoubtedly, the aforementioned levels of technological and regulatory convergence have favored the rise of globally dominant European and US telecommunications operators. With the exception of China Mobile, Japan's NTT, and Mexico's America Móvil, the largest global telecommunications operators in terms of value–AT&T, Verizon, Deutsche Telekom, Spain's Telefónica, Vodafone, France Telecom–are based in either Europe or the US.[224] In addition, Europe and the US together account for over 50% of the world market in services related to digital technologies, which include telecommunications services, computer software and services, television services, and consumer electronics, among others.[225] Despite these facts, no European or US telecommunications company is operating on both continents to a significant extent, with the possible exception of Vodafone. Moreover, there are no Euro-American telecommu-

[224] Organization for Economic Co-operation and Development, *OECD Communications Outlook: 2011*, p 38, http://www.oecd.org/document/44/0,3746,en_2649_34225_43435308_1_1_1_1,00.html (Nov. 24, 2011).

[225] IDATE Consulting and Research, *DigiWorld Yearbook 2009: the Digital World's Challenges*, p. 57, http://www.idate.org/en/Digiworld/DigiWorld-Yearbook/2009-s-edition/2009-s-edition_43_.html (Nov. 24, 2011). Europe accounts for 33% and the US for 30% of the global market in services related to digital technologies.

nications operators currently in existence, despite voice and data traffic being mainly a commodities service. There is clearly room for improvement, and further regulatory convergence, in the transatlantic telecommunications market.

In addition, the growing surge in mobile telecommunications and fixed-to-mobile substitution represents an important challenge to the future establishment of a barrier-free transatlantic economy, as national markets for mobile services effectively resemble oligopolies: they have few operators (three being the most common number) and are protected by insurmountable regulatory barriers. The reason such barriers are often very well entrenched has to do with the fact that the radio-electric spectrum, a very scarce mass communications resource, is generally under the monopolistic control of the State.

The context has been further complicated by the existence of different mobile telecommunications standards: GSM and CDMA for 2G platforms; UMTS and CDMA-2000 for 3G platforms. 3G, in fact, represents a missed opportunity for the EU and US to eliminate the transatlantic divergence in mobile communications standards. The EU, in line with its traditional committee-driven regulatory approach to the standardization of technologies, adopted UMTS as its 3G standard. EU markets subsequently benefited from the establishment of a single standard and took the lead over US markets. Unlike the EU, and in line with its traditional regulatory approach, the US adopted a market-driven strategy to standardization. This strategy led to the emergence of two incompatible 3G standards: UMTS and CDMA-2000. The US market-driven approach seems to generate better outcomes in terms of letting consumers choose the best performing standard. The market segmentation generated by this approach, however, translates into slower market growth overall. For its part, the China Academy of Telecommunication Technology has made the strategic decision to implement a third standard for 3G platforms: the TD-SCDMA. The current state of affairs is thus one in which the EU and US use divergent 3G mobile telecommunications standards and also continue to face increased competition from China, which has benefited substantially from its implementation of a third standard.

Long Term Evolution (LTE)-Advanced, expected to be released in 2012, is currently among the most prominent candidates to become the most widely used mobile telecommunications standard for the 4G platform.[226] Experts have stated that the release of 4G platforms will set the stage for the global integration of different mobile telecommunications standards into a single open wireless structure. In the absence of such an outcome, the EU and US must continue to promote further cooperation concerning the development of common or interoperable mobile telecommunications standards.

In terms of regulatory barriers in the telecommunications industry, the most significant cause for concern is the refusal by some EU Member States to privatize their incumbent operators. In the absence of such privatization, conflicts of interests may

[226] Information on Long Term Evolution (LTE) – Advanced is available at http://www.ericsson.com/res/thecompany/docs/journal_conference_papers/wireless_access/VTC08F_jading.pdf (Nov 16, 2011). Other prominent candidates to become the conventional mobile telecommunications standard for 4G platforms include WiMax and HSPA+.

arise. For example, a telecommunications regulatory body whose leading decision makers have been appointed by the government is likely, when carrying out oversight activities, to favor publicly-owned incumbents over privately-owned operators. In addition, such regulators are unlikely to be neutral with regard to market entry by foreign competitors. The result of such regulatory frameworks is often protectionism, as in the case of a state-owned incumbent operator refusing to offer foreign competitors access to private circuits and ISDN lines. Such protectionism, in turn, leads to higher costs for foreign rival operators and, finally, higher costs for consumers in general.

Moreover, states occasionally use regulatory safeguards against the "anti-competitive behavior" of foreign operators as a means of protecting incumbent operators. National regulatory bodies can also adjudicate the licensing of the radio spectrum in a way that discriminates unfairly against foreign telecommunications operators. The "effective competitive opportunities test" (ECO-test) has also led to restrictions to foreign entry and ownership. In 1995, for instance, the US FCC introduced the ECO-test as a way to limit the entry of foreign affiliated carriers into the US market. Following the adoption of the BTA, the US replaced the test with a more neutral principle. Despite this modest reform, however, the US retained a "public-interest" criterion that granted the FCC the legal authority to deny licenses to foreign operators that represented a potential "risk to competition" as well as because of "trade or foreign policy concerns." And in spite of US commitments under the BTA, the foreign ownership share of US companies that hold common-carrier radio licenses is limited to 20%, with a similar rule applying in the broadcast sector. In addition, the US has kept market access restrictions for satellite-based services, meaning foreign satellite operators face substantial entry barriers. The US has also kept MFN exemptions for the one-way satellite transmission of direct-to-home, direct-broadcast-satellite, and digital audio services. In practical terms, these types of regulatory safeguards and licensing barriers deter competitive market entry and hinder investment by creating an atmosphere of legal uncertainty.

Over the years, however, certain modest steps have been taken in the right direction. The 1998 EU-US Mutual Recognition Agreement (MRA) on communications equipment enhanced transatlantic cooperation in the telecommunication services. And the 2004 EU-US agreement on cooperation between Europe's Galileo spaced-based navigation system and the US Global Positioning System (GPS) has opened the way for wide-ranging commercial opportunities in the field of satellite-based telecommunications services. In July 2010, the EU and US released studies confirming the enhanced interoperability and performance of both systems.[227]

In addition, European and US firms have increasingly been requesting their respective governments to remove regulatory obstacles to the development of liberalized ICT net-

[227] European Commission, Directorate-General for Enterprise and Industry, "joint statement on cooperation between the US Global Positioning System (GPS) and Europe's planned Galileo space-based navigation system," July 30, 2010, http://ec.europa.eu/enterprise/policies/satnav/galileo/files/2010_08_02_joint_statement_en.pdf (Nov. 30, 2011).

works as well as to take a more active role in promoting innovative IT infrastructures globally.[228] In its 2010 report, "Accelerating the Transatlantic Innovation Economy," the TransAtlantic Business Dialogue (TABD) specifically advised the European Commission and the US government to "advocat[e] the elimination of investment restrictions" and "promot[e] private investment in competitive networks and services."[229]

In the 2006 edition of the present work, we advocated the establishment of an EU-US Telecommunications Regulatory Framework, which would have been designed to promote greater EU-US cooperation as new telecommunication services regulations were developed. In this vein, the April 2011 EU-US agreement on a set of 10 non-binding, trade-related telecommunication principles, achieved under the auspices of the TEC, is an important step in the right direction.[230] The agreement brings the EU and US closer to the establishment of a transatlantic telecommunication services framework. In agreeing to these principles, moreover, the EU and US also "intend to cooperate with third countries to enhance national regulatory capacity and support the expansion of ICT

[228] US State Department, "Annex 2: Transatlantic Economic Council – Sector Specific Statements," http://www.state.gov/p/eur/rls/or/153297.htm (Nov. 30, 2011).

[229] Op. cit., TransAtlantic Business Council, "10 Innovation Policy Principles," policy principle 9.

[230] Office of the United States Trade Representative, "United States-European Union Trade Principles for Information and Communications Technology Services," http://www.ustr.gov/about-us/press-office/press-releases/2011/april/united-states-european-union-trade-principles-inform (Nov. 30, 2011).

networks and services."[231] The 10 principles touch upon the following areas:[232]

- In order to achieve **transparency** in the ICT sector, the parties to the agreement must "ensure that all laws, regulations, procedures, and administrative rulings of general application affecting ICT and trade in ICT services are published or otherwise made available."

- To ensure the existence of **open networks**, the parties to the agreement must not "restrict the ability of suppliers to supply services over the Internet on a cross-border and technologically neutral basis." To this end, the agreement also exhorts the EU and US to promote ICT interoperability.

- Both the customers and service providers of other countries should, in accordance with the agreement, be able to enjoy the benefits of **cross-border information flows**, which includes "electronically transferring information internally or across borders, accessing publicly available information, or accessing their own information stored in other countries."

- ICT service suppliers should not be required to use **local infrastructure** in order to operate in a given location. Furthermore, national ICT service suppliers should not be

[231] The text of the EU-US "Trade Principles for Information and Communication Technology Services" is available at http://ec.europa.eu/information_society/activities/internationalrel/docs/eu-us-tradeprinciples.pdf (Nov. 30, 2011).

[232] Ibid.

given preferential treatment by their government, e.g., having access to "local infrastructure, national spectrum, or orbital resources."

- In order to avoid creating a regulatory climate hostile to **foreign ownership**, the parties to the agreement must aim to remove barriers to "full foreign participation in their ICT services sectors."

- In order to maximize the **use of spectrum**, its commercial allocation by government "should be carried out in an objective, timely, transparent, and non-discriminatory manner, with the aim of fostering competition and innovation." When feasible, spectrum should be managed according to the guidelines set forth by the International Telecommunication Union Radiocommunication Sector (ITU-R). The assignment of terrestrial spectrum should be carried out through auctions.

- To avoid glaring conflicts of interest, **regulatory authorities** that oversee ICT service sectors must be legally distinct from service providers. Regulatory decisions concerning domestic and foreign ICT service providers should be made impartially and all legal appeals made against such decisions should be made public.

- In order to obtain **authorizations and licenses** needed to provide telecommunications services, a service provider should only be required to give notification, not gain legal establishment. There should be no general limit to the number of licenses that can be granted to service providers, other than those imposed by the finite range of spectrum frequency or those having to do with very specific regulatory concerns.

- Governments must guarantee that public ICT service providers "have the right and the obligation to negotiate and to provide **interconnection** on commercial terms with other providers for access to publicly available telecommunications networks and services." This principle is in accordance with the GATS Telecommunications Annex provisions on access and use.

- By means of **international cooperation**, the parties to the agreement aim to increase global digital literacy and mitigate the global digital divide.

The EU and US have also sought to incorporate these basic principles into their agreements with other nations. The broad adoption of the aforementioned principles would be likely to increase the global spread of ICT technologies and enhance the competitiveness of the telecommunications sectors in both the EU and US.[233] EU Vice-President for the Digital Agenda, Neelie Kroes, has predicted that the EU-US ICT trade principles "will help to ensure that trade rules are used as an effective tool to open up ICT markets worldwide to the benefit of all businesses and consumers." And EU Trade Commissioner Karl De Gucht described the principles as demonstrative of "the important role the TEC can play in

[233] Op. cit., US State Department, TEC sector specific statements.

bringing transatlantic convergence activities to a higher political level."[234]

On April 13, 2011, the TABD sent a congratulatory letter to Commissioner De Gucht and US Deputy National Security Advisor for International Economic Affairs, Michael Froman, concerning the significance and commercial implications of the EU-US trade principles for ICT services. According to the TABD letter, the adoption of these principles served "as evidence of [the EU and US'] intention to provide transatlantic leadership capable of integrating [the EU and US] economies bilaterally." By establishing a cooperation framework "on an innovation-intensive sector of the transatlantic economy," the EU and US would be able to "deliver a series of benefits to the companies who compete in that sector [and] to companies in the broader economy who can take advantage of the multiplier productivity effects delivered by ICT products and services."[235]

The development of the 10 EU-US trade principles for ICT services has clearly meant progress, but the EU and US must continue to reform their telecommunications regulatory frameworks with a view to removing all unnecessary barriers to transatlantic trade. In the absence of such reforms, the establishment of a fully integrated, barrier-free transatlantic market in telecommunication services will remain hindered on

[234] European Commission, Directorate-General for Trade, "EU and US agree trade-related information and communication technology principles to be promoted worldwide," http://trade.ec.europa.eu/doclib/press/index.cfm?id=697 (Nov. 30, 2011).

[235] The text of the TABD letter is available at http://www.tabd.com/images/stories/Letters/TABD_ICT_Principles_Letter_De_Gucht_Froman.pdf (Nov. 30, 2011).

both sides of the Atlantic by divergent regulatory norms, incompatible technical standards, and a variety of opaque domestic barriers to market entry.[236]

Financial Services

The Transatlantic Financial Market

First of all, it must be admitted that a single, fully integrated and seamless transatlantic financial market is not feasible in the short-to-medium term.[237] Different barriers within the transatlantic financial services regime prevent the integration of EU and US capital markets.[238] Most of these financial regulatory obstacles are the result of an absence of mutual recognition *between* EU and US financial institutions as well as a lack of regulatory convergence *among* EU Member States. Such barriers include:

- Registration requirements for foreign banks operating within the US and which provide global custody and related services directly to US investors.

- Tax code reporting requirements for foreign-owned corporations that operate within the US.

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[236] European Commission, *2004 Report on US Barriers to Trade and Investment*, http://trade.ec.europa.eu/doclib/docs/2006/february/tradoc_121929.pdf (Nov. 25, 2011); ECORYS, *Non-Tariff Measures in EU-US Trade and Investment – An Economic Analysis*, December 11, 2009, http://trade.ec.europa.eu/doclib/docs/2009/december/tradoc_145613.pdf (Nov. 25, 2011).

[237] Op. cit., Karel Lannoo, "A Transatlantic Financial Market?," in Hamilton and Quinlan, *Deep Integration*.

[238] Op. cit., ECORYS, *Non-Tariff Measures in EU-US Trade and Investment*.

- EU Member State regulations for non-European financial service institutions operating within the EU.

- US Patriot Act requirements for US correspondent banks that maintain certain records pertaining to foreign banks with US correspondent accounts.

As Daniel S. Hamilton and Joseph P. Quinlan have pointed out,[239] there are structural differences between the EU and US financial systems: a bank-based system is predominant in the EU while a market-based system is predominant in the US. The two systems differ fundamentally. The EU system is characterized by a highly developed banking market and a much less developed bond and equity market,[240] while the opposite is true for the US.[241]

[239] Op. cit., Hamilton and Quinlan, *Deep Integration*.

[240] The universal banking system has remained dominant in the EU. The EU's 1992 financial market liberalization program did not foster debt securitization, leaving financial markets underdeveloped. In addition, the regulatory framework differed from one country to another. In order to secure the benefits of economic and monetary union, the EU adopted a new system of financial law-making and supervisory cooperation in accordance with the principles of the 1999 Financial Services Action Plan (FSAP) and, subsequently, the recommendations of the 2002 Lamfalussy Report. By mid-2004, a new regulatory framework was in place for issuing securities on capital markets (the Prospectus Directive), for rules on market disclosure (the Transparency Directive), for tackling insider trading and market manipulation (the Market Abuse Directive), and for executing securities transactions (the Markets in Financial Instruments Directive). These directives have gradually led to the development of a more market-based financial system in the EU.

[241] In the US, the 1933 Glass-Steagall Act separated commercial banking from investment banking. Additionally, the 1933 Securities Act laid the basis for the US market-based financial system as it is known today. Such legislation fostered competition between intermediaries, leading to the creation of the most competitive financial industry in the world. Competition in the US between commercial banks, investment banks, and brokers favored a process of disintermediation and securitization.

While the differences between the EU and US financial systems are mainly the result of regulatory divergences, it is important not to overlook other causes. The comparative advantage principle may be operating in certain regulatory environments, which are always different from one country to another. Different structures are perfectly compatible within an integrated market, however. What should concern policymakers, then, is the prospect of market barriers and market disintegration.

The present level of capital market fragmentation has an adverse effect on debt and equity markets, hinders competitiveness in the financial services industry, diminishes credit rating transparency, and limits access to finance across markets.

European financial markets, for their part, are *still* largely fragmented: consolidation exists at the national level only; there is a need for the European Commission, the European Securities and Market Authority (ESMA) and the various national financial services authorities to communicate and negotiate with one voice. Moreover, consistent and reliable application and enforcement of securities-market legislation and regulation in all 27 EU Member States is a necessary condition for the regulatory convergence of the EU and US financial systems. On the US side, similar consistency between regulatory and supervisory authorities is required.

The benefits of an integrated transatlantic financial market, which certainly *can* be established in the long run, would be substantial.[242] Studies have estimated that full transatlantic integration of financial markets could lead to a 9% reduction in capital costs for listed companies. Furthermore, greater competition between the more efficient and automated trading structures on the EU side, and the more competitive brokerage industry in the US, would reduce transaction costs by 60% and increase trade volume by nearly 50%. Higher levels of transatlantic cooperation and integration would also foster greater competitiveness within the EU financial services industry, which lags far behind that of the US.

Reducing Financial Regulatory Divergence

In February 2008, former Chairman of the US Securities and Exchange Commission (SEC), Christopher Cox, and former European Commissioner for Internal Market and Services, Charlie McCreevy, met to discuss a framework for future EU-US financial regulatory cooperation. In their joint declaration on the meeting, Chairman Cox and Commissioner McCreevy highlighted the importance of mutual recognition as the cornerstone of transatlantic financial cooperation:

> The US and EU, which comprise 70% of the world's capital markets have a common interest in developing a cooperative approach to reducing regulatory friction and increasing investor access to investment diversifica-

[242] Benn Steil, *Building a Transatlantic Securities Market*, International Securities Market Association, 2002, pp. 15-34, http://www.cfr.org/world/building-transatlantic-securities-market/p8282 (Nov. 30, 2011).

> tion opportunities and enhancing investor protections. The concept of mutual recognition offers significant promise as a means of better protecting investors, fostering capital formation and maintaining fair, orderly, and efficient transatlantic securities markets.[243]

In December 2008, June 2009, and October 2009, the EU-US Financial Markets Regulatory Dialogue (FMRD)[244] met to identify the most urgent financial regulatory problems facing both Atlantic partners and to discuss strategies for the implementation of new financial regulatory policies.[245] The topics discussed during the FMRD meeting currently represent the most relevant obstacles to the establishment of a barrier-free transatlantic financial market:

- **Supervision / Capital / Stress Test** – there is a particular need to address systemic risk and minimum capital requirements for banks. Both the EU and US have agreed to collaborate on reforming their financial regulations in accord with Basel II[246] recommendations concerning capital, liquidity management, risk management, and leverage. Both the EU

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[243] US Securities and Exchange Commission press release, "Statement of the European Commission and the US Securities and Exchange Commission on Mutual Recognition in Securities Markets," February 1, 2008, http://www.sec.gov/news/press/2008/2008-9.htm (Dec. 2, 2011).

[244] The general objectives of the EU-US Financial Markets Regulatory Dialogue are available at http://ec.europa.eu/internal_market/finances/docs/general/eu-us-dialogue-report-state-of-play_en.pdf (Nov. 30, 2011).

[245] US State Department, "Framework for Promoting Transatlantic Economic Integration, Annex VI: Financial Markets," http://www.state.gov/p/eur/rt/eu/tec/131908.htm (Nov. 30, 2011).

[246] The Revised International Capital Framework, commonly known as Basel II, is a set of provisions related to capital requirements for banks. The EU's Capital Requirements Directives, adopted in 2006, made the Basel II provisions part of EU law.

and US have also shared information on stress testing. In September 2010, the Basel Committee on Banking Supervision agreed to adopt "higher global minimum capital standards" in response to the 2008 global financial crisis. The new agreement effectively established Basel III.[247]

- **Credit Rating Agencies** – since credit rating agencies play an essential role in global securities and banking markets, reforming the way in which credit rating agencies are regulated and supervised is of paramount importance. Both the EU and US have agreed that mutual recognition and endorsement determinations for credit rating agencies (including the credit rating agencies of third countries) should follow an outcomes-based approach rather than an approach based on the exact duplication of rules.

- **Derivatives** – In order to reduce the risk of global financial instability, three specific reforms are necessary: reporting all over-the-counter derivates to trade repositories, using central counterparties to clear all standardized contracts, and using electronic platforms to trade standardized contracts whenever possible. In this vein, the EU and US should also undertake to adopt a mutual recognition agreement for listing rules. This would allow the EU and US to treat one another's respective listing and de-listing rules as equivalent to their own. After such mutual recognition is firmly estab-

[247] The Bank for International Settlements, "Group of Governors and Heads of Supervision announces higher global minimum capital standards," September 12, 2010, http://www.bis.org/press/p100912.pdf (Nov. 30, 2011).

lished, the EU and US should seek to reach a final agreement on the convergence of their listing rules. The EU has already made some progress in this direction through its Prospectus and Transparency Directives.[248]

- **Hedge Funds / Alternative Investment Fund Managers** – increasing the supervision and operating requirements for hedge funds and alternative investment funds appears to be the most feasible way to improve the risk management practices of these substantial funds. In this regard, registration, reporting, and disclosure requirements for hedge fund managers have been proposed as necessary reforms.

- **Accounting** – the goal is to finish implementing a set of globally valid accounting standards (see earlier section on "Corporate Governance and Accounting Standards"). To this end, the International Accounting Standards Board (IASB) and the US-based Financial Accounting Standards Board (FASB) have been developing common standards and are now close to achieving the convergence of the International Financial Reporting Standards (IFRS)–used by the European Union and several other countries–and the Generally Accepted Accounting Principles (GAAP)–used by the US. In April 2011, the IASB and the FASB published a report detailing their progress to-

[248] EU "Amending" Directive, "amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading [the Prospectus Directive] and 2004/109/EC on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market [the Transparency Directive]," November 24, 2010, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:327:0001:0012:EN:PDF (Nov. 30, 2011).

wards full convergence of standards, with a particular focus on completing work on financial instruments accounting, revenue recognition, and the alignment of US and international insurance accounting standards.[249] Convergence work is expected to be completed between the second half of 2011 and the first half 2012.

- **Auditing** – the aim is to establish mutual reliance between EU and US auditing oversight bodies, thus allowing them to share information and rely on each other's inspections and findings. This would, in effect, establish a mutual recognition of auditing oversight standards between the EU and US. In line with this goal, policymakers in both the EU and US have been taking the right steps over the years. In 2007, the US-based Public Company Accounting Oversight Board (PCAOB) issued a policy proposal articulating "the essential criteria that, if met," would allow it to "increase its level of reliance on non-US oversight systems where possible" and in this way "move toward full reliance on the inspections systems of qualified non-US oversight entities."[250] During the second half of 2009, the European Commission held public consultations on the adoption of

[249] FASB press release, "IASB and FASB Report Substantial Progress towards Completion of Convergence Program," April 21, 2011, http://www.fasb.org/cs/ContentServer?site=FASB&c=FASBContent_C&pagename=FASB%2FFASBContent_C%2FNewsPage&cid=1176158460171 (Dec. 1, 2011).

[250] Public Accounting Oversight Board, "Request for Public Comment on Proposed Policy Statement: Guidance Regarding Implementation of PCAOB Rule 4012," Dec 5, 2007, http://pcaobus.org/Inspections/Documents/2007_12-05_release_2007-011.pdf (Dec. 1, 2011); PCAOB press release, "PCAOB Announces Roundtable Discussion Regarding Reliance Proposal," May 14, 2008, http://pcaobus.org/News/Releases/Pages/05142008_PCAOBAnnouncesRoundtable.aspx (Dec. 1, 2011).

international auditing standards.[251] In January 2011, the European Commission adopted a decision which recognized mutual equivalence between the audit oversight systems of EU Member States and those of ten other countries, including the US.[252] The mutual recognition of EU and US auditor oversight standards would also help to standardize and improve corporate governance principles across the Atlantic, thereby increasing the level of trust for transatlantic corporations.

- **Insurance** – Positive steps have been taken towards the convergence of the European insurance industry. In November 2009, the EU adopted the Solvency II Directive,[253] which, according to the UK-based Financial Services Authority, established "stronger EU-wide requirements on risk management and capital adequacy for insurers with the aim of increasing protection for policyholders."[254] Through such reforms, Solvency II is expected to "make it easier for firms and groups to do business across the European Union," since it replaces "the current disparate local solvency requirements [...] with

[251] European Commission, "Consultation on the adoption of International Standards on Auditing," http://ec.europa.eu/internal_market/consultations/2009/isa_en.htm (Dec 1, 2011).

[252] European Commission Decision "on the equivalence of certain third country public oversight, quality assurance, investigation and penalty systems for auditors and audit entities," January 19, 2011, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32011D0030:EN:NOT (Dec. 1, 2011).

[253] EU Directive, "on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)," November 25, 2009, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:335:0001:0155:en:PDF (Dec. 1, 2011).

[254] Financial Services Authority, *Delivering Solvency II*, April, 2011, http://www.fsa.gov.uk/pubs/international/conference_document_solvency.pdf (Dec. 1, 2011).

more consistent requirements." The EU and US have also held talks on Solvency II provisions concerning third countries, such as Article 172, which stipulates that the European Commission will specify "the criteria to assess whether the solvency regime of a third country applied to reinsurance activities of undertakings with their head office in that third country is equivalent" to EU requirements established under Solvency II.[255] All EU Member States are expected to have fully implemented the Solvency II Directive by 2013. Since 2008, the US has also been modernizing its insurance solvency regulatory framework by means of the Solvency Modernization Initiative (SMI), implemented by the US National Association of Insurance Commissioners (NAIC). In March 2011, the US NAIC and the European Insurance and Occupational Pensions Authority (EIOPA) held formal talks to discuss international insurance regulation.[256] Previously, in July 2010, The US adopted the "Dodd-Frank Wall Street Reform and Consumer Protection Act." Title V of the Act establishes the Federal Insurance Office (FIO), whose function is to «advise the Secretary [of the Treasury] on major domestic and prudential international insurance policy issues."[257] The FIO

[255] Op. cit., EU Directive "Solvency II," Article 172.

[256] NAIC press release, "State Insurance Regulators Engage in Transatlantic Dialogue," Mach 4, 2011, http://www.naic.org/Releases/2011_docs/state_regulators_engage_in_transatlantic_dialogue.htm (Dec. 1, 2011).

[257] 111th US Congress, "H.R.4173, Dodd-Frank Wall Street Reform and Consumer Protection Act," signed into law on July 20, 2010, http://www.opencongress.org/bill/111-h4173/show, (Dec. 1, 2011); the text of Title V of the Dodd-Frank Act is available at http://www.sec.gov/about/laws/wallstreetreform-cpa.pdf (Dec. 1, 2011); information on the US Federal Insurance Office is available at http://www.treasury.gov/initiatives/wsr/Documents/FAQs%20-%20Federal%20Insurance%20Office%20-%20December%202010.pdf (Dec. 1, 2011).

is also responsible for "coordinate[ing] Federal efforts and develop[ing] Federal policy on prudential aspects of international insurance matters, including representing the United States, as appropriate, in the International Association of Insurance Supervisors." Domestically, the FIO is responsible for ensuring that the insurance laws of individual US states are consistent with US federal policy regarding international trade agreements.

- **Protectionism** – the commitment to oppose protectionist trade policies on both a bilateral and multilateral basis was reaffirmed by both the EU and US during the FMRD talks. Previously, during a Financial Services Round Table meeting in April 2009, the then Director-General of Internal Market and Services for the European Commission, Jorgen Holmquist, described the FMRD as "an essential tool to tackle the most dangerous by-product of the [financial] crisis, namely the rising risk of protectionism."[258] At the EU-US Summit held in November 2010, the leaders of both sides underlined their "commitment to reject protectionism as a response to the challenges [their] economies face."[259]

As is evident, the cornerstone of any project to enhance transatlantic financial cooperation must be "mutual recognition

[258] A transcript of Holmquist's remarks is available at http://ec.europa.eu/internal_market/speeches/docs/2009/090401-jh-financial-services-roundtable-speech.pdf (Dec. 1, 2011).

[259] The text of the joint statement of the 2010 EU-US Summit is available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/117897.pdf (Dec. 1, 2011).

of equivalence."[260] The FMRD should increase its current activity in order to promote a deeper and more open transatlantic capital market. An essential item in the agenda of the FMRD should be increasing cooperation mechanisms between the European Securities and Market Authority (ESMA) and the US Securities and Exchange Commission (SEC). Blurred competences and incoherent policy positions among EU and US regulatory and supervisory authorities must disappear. Tighter EU-US coordination of securities and banking regulation and supervision is essential. In this vein, the high-level meeting held in November 2010 between the (now defunct) Committee of European Securities Regulators (CESR) and the SEC represented a step in the right direction. During the 2010 meeting, the SEC and CESR discussed "the cross-border implications of European and US efforts" to craft "new and wide-ranging rules designed to address regulatory concerns that arose during the recent financial crisis."[261] The SEC and CESR also announced their intention to continue to conduct periodic discussions and cooperate on issues related to regulatory conflicts and the implementation of new fi-

[260] During a conference on "the integration of Europe's financial markets and international cooperation," which was held in New York on May 20, 2005, former European Commissioner for Internal Market and Services, Charlie McGreevy, made the following concluding remarks: "The goal must be mutual recognition of equivalence. You can also call it the home-country principle. If you agree to accept each other's system as equivalent then duplicative requirements disappear. You can then operate in the other country under the rules of your home country." There is, as of yet, no consensus regarding the terminology: EU authorities use the term "mutual recognition" while US authorities prefer the term "equivalence."

[261] US SEC press release, "SEC and CESR Members Announce Efforts to Continue Close Cooperation as National Securities Regulators Implement New Regulatory Reform Initiatives," November 16, 2010, http://www.sec.gov/news/press/2010/2010-222.htm (Nov. 30, 2011).

nancial regulations. Because the newly created ESMA replaced the CESR in January 2011, it is logical to think that the ESMA will also inherit and continue to develop many of the cooperation initiatives that formerly fell under the purview of the CESR.

In addition, the FMRD should continue to work in coordination with the TEC to pre-empt excessive divergences in the post-financial crisis regulatory regime and thus prevent the increase of financial regulatory barriers in general.[262] Because of the interconnectedness of transatlantic financial markets, and the concomitant fact that regulatory changes on one side of the Atlantic tend to have a significant effect on the other side, the newly emerging international financial regulatory regime requires a deeper level of transatlantic coordination.

The TEC, in particular, is in an ideal position to guide policymakers on both sides as they push for the removal of unnecessary financial regulatory barriers between the EU and US. The TEC can credibly conduct impact assessments and study potential areas where mutual recognition agreements could be adopted; these areas include securities regulation, hedge fund and private equity regulation, insurance underwriting solvency margins, insurance registration requirements, auditing standards, capital requirements enforcement, and rating agency regulation.[263] The TEC also enjoys the institutional legitimacy and

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[262] The Atlantic Council and the Bertelsmann Foundation, *Resetting the Trans-Atlantic Economic Council: A Blueprint*, October of 2009, http://www.acus.org/publication/resetting-transatlantic-economic-council (Dec. 1, 2011).

[263] Ibid.

leverage necessary to forge enduring cooperative relationships between the US President, the European Commission, the US Congress, and the European Parliament.

Concerning bilateral investment barriers, the EU and US should seek to coordinate their efforts in order to reduce existing regulatory barriers to transatlantic investment. To this end, the Transatlantic Economic Framework established the EU-US Investment Dialogue in April 2007.[264] The Open Investment Statement, which was drafted by the Investment Dialogue and adopted by the TEC in May 2008, affirms the commitment by the EU and US to "promot[e] the free flow of investment and the critical role it plays in strengthening both the transatlantic and the world economy."[265] The Investment Dialogue has also produced useful information for both transatlantic partners concerning engagement with third countries; for example, the Dialogue has prepared a matrix of foreign direct investment barriers in China.[266]

In a 2010 policy report, the TransAtlantic Business Dialogue (TABD) advised "the US government and European Commission" to "focus on resolving all remaining investment barriers through the Transatlantic Investment Dialogue."[267] According

[264] US State Department, "Framework for Promoting Transatlantic Economic Integration, Annex IV: Investment," http://www.state.gov/p/eur/rt/eu/tec/131911.htm (Dec. 1, 2011).

[265] The text of the Open Investment Statement is available at http://trade.ec.europa.eu/doclib/docs/2008/may/tradoc_138822.pdf (Dec. 1, 2011).

[266] Op. cit., *Resetting the Trans-Atlantic Economic Council*, p. 8.

[267] Op. cit., TransAtlantic Business Dialogue, "10 Innovation Policy Principles," policy principle 1.

to the TABD, the goal of EU-US cooperation in this area should ultimately be "to eliminate all investment barriers," including foreign direct investment restrictions, "and agree on a joint transatlantic protocol for a narrow national security exemption." In order to continue to "provid[e] needed assurance to investors," EU and US policymakers must continue to express a "commitment to maintain nondiscriminatory investment policies, avoid new restrictions, and strive to eliminate existing barriers."

Financial cooperation dialogues should thus become a permanent feature of the transatlantic relationship. EU-US cooperation dialogues on financial regulation are essential to the development of a barrier-free transatlantic financial market because, as the chief executive of the Centre for European Policy Studies, Karel Lannoo, has pointed out, they serve to "identify potential conflicts in regulatory approaches on both sides of the Atlantic and to discuss issues of mutual interest."[268] In addition, Lannoo has written that regular dialogue between the EU and US on financial regulatory cooperation could, if successful, serve as "a model for other areas of transatlantic or bilateral trade cooperation." For this reason, among others, EU-US dialogues should continue to focus on a broad set of financial market issues and gradually deepen cooperation and mutual recognition between institutions like the European Securities and Markets Authority (ESMA), the European Banking Authority (EBA), and the European Insurance and Occupational Pensions Authority (EIOPA),[269] on the one side, and the US Federal Re-

[268] Karel Lannoo, "A Transatlantic Financial Market?"

[269] The ESMA, EBA, and EIOPA together make up the three European Supervisory Authorities.

serve Board, the US Treasury Federal Insurance Office, and the US Securities and Exchange Commission (SEC), on the other.

The TEC, for its part, should aim to play a more crucial role during the legislative process of the EU and US by communicating vital information on the impact of planned regulations to the EU Parliament, EU Member State parliaments, and the US Congress. Such information exchanges would help to prevent the adoption of regulations that could hinder the flow of capital within the transatlantic area–with the general exception of regulations related to national security. It should be remarked, however, that *even* regulations related to national security can, if handled correctly, lead to deeper transatlantic cooperation. The individuated and denationalized character of terrorist threats, for example, means that smart and concretely defined financial cooperation between the EU and US is likely to be among the most effective ways for both sides to enhance their security. In June 2010, the EU and US formally advanced toward deeper anti-terrorist financial cooperation by signing an "agreement on the processing and transfer of financial messaging data" obtained through the US Terrorist Finance Tracking Program (TFTP)."[270] While the TFTP has allowed the US Treasury Department to "identify, track, and pursue suspected terrorists and their providers of fi-

[270] European Council, "Declarations to be adopted upon the adoption of the Council Decision on signature of the TFTP Agreement," http://register.consilium.europa.eu/pdf/en/10/st11/st11350-re02.en10.pdf (Dec. 1, 2011); European Council press release, "Signature of EU-US agreement on financial messaging data for purposes of the US Terrorist Finance Tracking Programme," June 28, 2010, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/115518.pdf (Dec. 1, 2011).

nance" since 2001,[271] the new EU-US agreement authorizes the US Treasury Department "to receive financial messaging data stored in the EU in order to allow targeted searches for counter-terrorism investigations, while ensuring an adequate level of data protection." Rather than drive a wedge between both sides, therefore, national security priorities should provide the EU and US with a clear opportunity for *closer* financial cooperation.

Ultimately, if EU and US policymakers are to eliminate most transatlantic regulatory barriers in the financial services sector, they must come to understand the existing financial regulatory regimes of both sides as the constitutive parts of a larger and interdependent whole, i.e., EU and US policymakers must consistently bear in mind that regulatory reform in *one* area on *either* side of the Atlantic will likely precipitate the need for regulatory reform in *other* areas on *both* sides of the Atlantic. The planned convergence of the European IFRS and the US GAAP, for instance, will eventually lead to the adoption of a single set of transatlantic financial reporting standards and therefore likely result in an increase in investment flows between the EU and US. Higher investment flows would then further increase the need for financial operators on both sides of the Atlantic to have equal access to one another's electronic trading platforms and capital markets. This increased need for equal access would, in turn, induce

[271] Information on the Terrorist Finance Tracking Programme is available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/111559.pdf (Dec. 1, 2011).

the EU and US to move closer to the full liberalization of the transatlantic financial market.

The Financial Crisis

In addressing the fallout from the recent financial crisis, policymakers risk implementing excessive regulatory measures in the banking sector and hindering its potential to stimulate growth.[272] An excessive regulatory response to the crisis would almost certainly lead to the creation of new and unforeseen regulatory arbitrage opportunities and, in addition, create more incentives to elude such regulations. Financial regulatory reform must be adopted on the basis of a modern and results-based approach that avoids promoting a blind "regulatory race" against the markets.

To begin with, regulatory reform should focus on devising smarter ways to control systemic risk. Current financial regulation focuses almost exclusively on the specific solvency status of particular financial institutions but does not adequately address interrelations *among* financial institutions or assess the externalities to which such institutions expose the financial system *as a whole*. As a result, excessive systemic risk can accumulate unnoticed.

To address this issue effectively, the EU and US should seek to establish a new *macro-prudential pillar* for minimum

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[272] Foundation for Social Studies and Analysis (FAES), *The Reform of the International Financial System: A Proposal with Lessons from the Crisis*, 2009, http://www.fundacionfaes.org/record_file/filename/3054/THE_REFORM_OF_THE_INTERNATIONAL_FINANCIAL_SYSTEM.pdf (Dec. 1, 2011).

capital requirements within the currently existing solvency status regime. The capital requirements of such a macro-prudential pillar would be established in proportion to a given financial institution's marginal contribution to global systemic risk. A given financial institution's contribution to systemic risk would be the basis upon which the institution's systemic importance would be established.

Under such a regulatory regime, all financial institutions engaging in activities that contribute significantly to an increase in financial systemic risk, meaning those with a high level of systemic importance, would, in accordance with their contribution to risk, be subject to the new macro-prudential pillar. Establishing the systemic importance of a particular financial institution would also be important in terms of designing contingent bailout plans and assigning supervisory resources. The coordinated international implementation of a guarantee mechanism against systematic crises would be of particular importance to the EU; such a mechanism would help the EU move resolutely toward the creation of a single financial market that would increase the economic advantages of having a single currency.

Improving the quality and the regulatory capacity of credit rating agencies is also essential to reducing and managing systemic risk. The current agency rating methods were never designed to detect increases in systemic risk. Reforming credit rating agencies by providing them with the tools and methodology needed to address financial systemic risk would vastly improve the global financial regulatory regime as well as debunk the argument in favor of excessive regulation. For example, credit agencies could be reformed so as to be able to calculate the minimum capital requirements of specific financial institutions in accordance with the aforementioned macro-prudential pillar. *Mutatis mutandis*, the same principle could apply to the management and risk-monitoring models of public supervisors and even of financial institutions themselves.

In reforming the global financial system, EU and US policymakers should also seek to reduce the pro-cyclical effects of capital regulation. This entails reinforcing the informative value of accounting figures by keeping valuation standards uniform and consistent throughout a given cycle. In 2000, Spain instituted a pioneering anti-cyclical regulation program that successfully ameliorated the impact of the financial crisis in said country. Spain's program clearly suggests the need for international regulatory programs that impose stringent minimum capital requirements during periods of economic boom and lenient minimum capital requirements during periods of economic bust. In this regard, the establishment of internationally valid standards for capital requirements would be a move in the right direction. The regulations devised by the Basel Committee on Banking Supervision concerning minimum capital requirements (Basel II and III) currently represent the best model for adopting such standards.

Policymakers should also strive to design more effective corporate governance norms and introduce long-term incentives in senior management compensation schemes. In this vein, policymakers should keep in mind that excessive regulations and quantitative limits in compensation packages can create incentives for executives to attempt to bypass them or, alternatively, move to sectors that offer more opaque compensation packages. The imposition of excessive regulations and quantitative limits in compensation packages, therefore, would likely diminish, rather than enhance, transparency in corporate governance.

An increase in transatlantic protectionism and regulatory divergence, and therewith of barriers that obstruct trade and investment flows between the EU and US, need not be the logical or inevitable outcome of the current financial crisis. Rather, the financial crisis can serve as a uniquely compelling reason for the EU and US to establish common principles and standards in the financial services industry. Provided the right kind of political leadership emerges, and sound regulatory reforms are implemented, the financial crisis may yet come to be regarded as the most influential catalyst for transatlantic financial convergence in recent history.

Aviation Services

The air transport industry is a key component of transatlantic market integration and international trade.[273] Together with maritime transport, the aviation sector is of the greatest strategic importance for both the EU and US, whose combined aviation markets together constitute nearly 60% of global civil aviation traffic. Arcane rules and arrangements, however, such as restrictive domestic controls on cross-border competition and for-

[273] Op. cit., Dorothy Robyn, James Reitzes, and Boaz Moselle, “Beyond Open Skies: The Economic Impact of a US-EU Open Aviation Area,” in Hamilton and Quinlan, *Deep Integration*.

eign investment, still hinder the transatlantic aviation industry's wealth-generating and trade-enhancing potential. Nonetheless, both Europe and the US have come a long way since the inception of their respective aviation industries.

The US began to liberalize its domestic airline industry in 1978, allowing airlines to set their own fares and routes and allowing the market entry of new competitors. As a result, new low-cost airlines that flew passengers at market rates were able to proliferate. Europe did not deregulate its airline industry until 1997. The results were similar: a large number of low-cost airlines began flying customers cheaply throughout Europe and some 50 no-frills airlines emerged. A recent *Economist* editorial summed up the results of airline deregulation in the following way: "The unleashing of market forces has produced far more flights, to far more destinations, at considerably lower fares than would have otherwise been the case."[274] Given that the progressive liberalization of the airline industry in Europe and the US has resulted in more efficient travel and lower passenger fares, it is difficult to understand why policymakers on either side have not carried out a more aggressive campaign to expose transatlantic skies to the full force of barrier-free competition. The European Commission currently estimates that the full liberalization of the European and US aviation industries could boost transatlantic passenger numbers by up to 11 million a year, a 24% increase on routes with annual revenues of $18 billion.

[274] *The Economist*, "The Misery of Flying: is more regulatory reform the answer?," January 6, 2011, http://www.economist.com/node/17857391 (Dec. 2, 2011).

The US has expressed its commitment to continue building a more flexible and dynamic airline industry through a series of bilateral deals with a host of countries and destinations. To date, the US has reached bilateral “Open Skies” agreements with over 100 countries.[275] These bilateral arrangements allow US carriers to fly from anywhere in the US to destinations in the other country in return for allowing that country’s carriers direct flights to more US airports. Larger European carriers have also been permitted to forge close flight- and revenue-pooling alliances with US partners.

In our previous report, *A Case for an Open Atlantic Prosperity Area,* we argued that bilateral agreements between EU Member States and the US should be superseded by a new EU-US regulatory arrangement that would put both Atlantic partners on the path to an “Open Aviation Area.” Under such an arrangement, only the logic of the market and the rights of the consumers would determine how airline carriers on both sides of the Atlantic designed and implemented their corporate strategies.

In April 2007, the EU and US demonstrated an unprecedented willingness to establish such an open aviation area by signing the “Open Skies” Air Transport Agreement, which entered into force in March 2008.[276] The Air Transport Agreement called upon

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[275] Information on the nature of “Open Skies” agreements is available at http://www.state.gov/e/eb/tra/ata/ (Dec. 2, 2011). A complete list of the countries that are “Open Skies Partners” with the US is available at http://www.state.gov/e/eb/rls/othr/ata/114805.htm (Dec. 2, 2011).

[276] The EU-US Air Transport Agreement is available at http://www.state.gov/e/eb/rls/othr/ata/e/eu/114768.htm (Dec. 2, 2011).

both sides to implement innovative regulatory convergence mechanisms, particularly in the areas of competition policy, state aid, aviation security, air traffic management, and environmental protection. For the first time, European airlines were able to fly without restrictions from any point in Europe to any point in the US, increasing aviation services in those parts of the transatlantic market that had been previously subject to considerable restrictions.[277]

Concerning aviation security, the Air Transport Agreement introduced a working arrangement between the European Commission and the US Transportation Security Administration (TSA) on reciprocal recognition of airport fitness. Such an arrangement brings both sides closer to the compatibility of security standards (i.e., mutual recognition) and the so-called one-stop security system, whereby passengers travelling between airports within the transatlantic area would not need to be re-screened after having gone through one security checkpoint within the system.[278] In line with such an initiative, the US TSA and the EU Directorate-General for Energy and Transport signed a joint statement of purpose in September 2008 concerning the development of "compatible practices and standards to enhance civil aviation security and minimize regulatory diver-

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[277] Eugene Alford and Richard Champley, "The Impact of the 2007 US-EU Open Skies Air Transport Agreement," US Department of Commerce, International Trade Administration, May 2007, http://trade.gov/media/publications/pdf/openskies_2007.pdf (Dec. 2, 2011).

[278] Further information on the Air Transport Agreement, including its provisions on aviation security, is available at http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/185&type=HTML (Dec. 2, 2011).

gence between [the EU and US]."[279] In this way, EU-US cooperation on aviation security can lead to deeper EU-US regulatory cooperation in the aviation industry in general.[280]

Under the Air Transport Agreement, the European Commission and the US Federal Aviation Authority also established the Atlantic Interoperability Initiative to Reduce Emissions (AIRE) Partnership. The object of the partnership is to devise ways to reduce the aviation footprint of the European and US aviation industries. The Air Transport Agreement also directed the European Commission and the US Department of Transportation to begin work on the design and implementation of a set of compatible regulatory strategies to maximize the potential of the transatlantic aviation market (which amounts to a total of roughly 50 million passengers, according to 2007 figures) while preventing the advent of new regulatory obstacles.[281]

The ultimate goal of the Air Transport Agreement, the implementation of which has been overseen by the EU-US Joint Committee, is the minimization of air transport regulatory divergence between the EU and US. To this end, the Agreement aims to reconcile and subsume the pre-existing elements of

[279] The text of the "Joint Statement of Purpose on Coordination of Efforts to Enhance Air Cargo Security" between the EU and US is available at http://www.tsa.gov/sites/default/files/assets/pdf/eu_us_enhancing_air_cargo_security.pdf (Dec. 2, 2011).

[280] Op. cit., Dorothy Robyn, James Reitzes, and Boaz Moselle, "Beyond Open Skies: the Economic Impact of a US-EU Open Aviation Area," in Hamilton and Quinlan, *Deep Integration*.

[281] Op. cit., EU-US Air Transport Agreement.

different bilateral agreements (between individual EU Member States and the US) under the larger umbrella of an EU-level arrangement that applies to all European airline carriers equally, independently of their European country of origin.[282] The Agreement also paves the way for the future establishment of a barrier-free EU-US aviation market, *sans* investment or service restrictions.[283]

The second stage of the "Open Skies" Air Transport Agreement, which was signed in March 2010, built on the progress of the previous stage by increasing regulatory cooperation, mutual recognition, and market access.[284] The second stage Agreement called on the aeronautical authorities of both parties to recognize the regulatory determinations of the other concerning airline fitness and citizenship. According to an official EU press release, the second stage Agreement also made substantial progress with regard to "the environment, social protection, competition and security." Provisions in the second stage Agreement call for

[282] Ibid.

[283] Op. cit., ECORYS, *Non-Tariff Measures in EU-US Trade and Investment*.

[284] US State Department media note, "US-EU Sign 'Second Stage' Air Transport Agreement," http://www.state.gov/r/pa/prs/ps/2010/06/143593.htm (Dec. 5, 2011). The text of the second stage EU-US Open Skies Agreement is available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:223:0003:0019:EN:PDF (Dec. 5, 2011). *Europa* press release, "Breakthrough in EU–US second-stage Open Skies negotiations: Vice-President Kallas welcomes draft agreement," http:// europa.eu/rapid/pressReleasesAction.do?reference=IP/10/371 (Dec. 5, 2011); "Siim Kallas welcomes the signature of the Second Stage EU–US 'Open Skies' agreement," http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/818&format=HTML&aged=0&language=EN&guiLanguage=en (Dec. 5, 2011). The European Parliament formally adopted the second stage Open Skies Agreement in March 2011.

the compatibility of emission trading schemes, the preservation of the "legal rights of airline employees," the promotion of "maximum mutual reliance on each other's security measures," and an expansion of the role played by the EU-US Joint Committee. In addition, the second stage Agreement mitigates some of the negative effects of the Fly America Act, which requires the use of "United States air carrier service for all air travel and cargo transportation services funded by the United States government."[285] Under the provisions of the second stage Agreement, EU airlines gain greater access to the Fly America program.

In terms of eventually building a transatlantic open aviation area, the most important feature of the second stage Agreement, according to an official EU press release, is the fact that it established the *possibility* of mutual "additional investment and market access opportunities in the future" and will, *pending* US legislative reform, lead to "reciprocal liberalization of airline ownership and control" regulations.[286] With regard to this issue, the second stage Agreement stipulates the following:

> The European Union and its Member States shall allow majority ownership and effective control of their airlines by the United States or its nationals, on the basis of reciprocity, upon confirmation by the [EU-US] Joint Committee that the laws and regulations of the United States per-

[285] US General Services Administration, federal travel regulation concerning the relationship between the EU-US Air Transport Agreement and US "Fly America" requirements, http://www.gsa.gov/graphics/ogp/FTRBulletin11-02USEUOpenSkies.PDF (Dec. 5, 2011).

[286] Op. cit., *Europa* press release, "Siim Kallas welcomes the signature of the Second Stage EU-US 'Open Skies' agreement."

> mit majority ownership and effective control of its airlines by the Member States or their nationals.[287]

Such regulatory reform would be of unprecedented importance, given that statutory limits on the foreign ownership of airlines–a restriction often exacerbated by national security concerns–have been among the most persistent obstacles to the establishment of an open aviation area between the EU and US. Such restrictions have prevented successful airlines from making cross-border acquisitions and generating economies of scale and have also starved struggling US airlines of much-needed foreign capital. Under current US law, foreign ownership of a US airline cannot exceed 25% of voting stock, while EU foreign ownership laws set the limit to a little under 50%.[288] In putting the onus on the US to be the first to change its laws, the wording of the preceding provision clearly indicates that intransigence on this particular issue has come predominantly from the US.

The second stage Agreement also addresses cabotage rights i.e., the transportation of goods or passengers between two points within a given country by a foreign carrier. The second stage Agreement stipulates that if the US modifies its laws so as to "permit majority ownership and effective control of its airlines by the other Party," then US airlines will gain "the right to provide scheduled passenger combination services between points in the European Union [...] without serving a point in the

[287] Op. cit., EU-US Open Skies Agreement, Article 6, Paragraph 2.

[288] Joshua Chaffin, Jeremy Lemer, and Pilita Clark, "Open skies deal leaves US rules intact," *Financial Times*, March 25, 2010, http://www.ft.com/cms/s/0/a1b7088c-383a-11df-8420-00144feabdc0.html#axzz1LrA6pzyF (Dec. 5, 2011).

territory of the United States." Similarly, the agreement gives the EU the same cabotage rights within the US on the condition that the EU reform its regulations concerning "the imposition of noise-based operating restrictions at airports" so as to give the European Commission "the authority to review the process prior to the imposition of such measures."

In addition, the second stage Agreement mitigates the so-called "nationality clause," a provision of most bilateral air transport agreements that stipulates that only airlines that are substantially owned and effectively controlled by nationals of one of the two signatory states are eligible to operate international air service between the signatory states.[289] This provision has served to undermine internal European liberalization and integration, acting as a barrier to airline consolidation in the EU and consequently preventing the emergence of an efficient airline network design in Europe. With regard to this issue, the second stage Agreement stipulates the following:

> Neither Party shall exercise any available rights under air services arrangements with a third country to refuse, revoke, suspend or limit authorizations or permissions for any airlines of that third country on the grounds that substantial ownership of that airline is vested in the other Party, its nationals, or both.[290]

The "Open Skies" Air Transport Agreement evidently puts the EU and US on the track to greater air service liberalization and

[289] David Knibb, "Liberalisation: breaking the bilateral web," *Airline Business*, April 23, 2010, http://www.flightglobal.com/articles/2010/04/22/340857/liberalisation-breaking-the-bilateral-web.html (Dec. 5, 2011).

[290] Op. cit., EU-US Open Skies Agreement, Annex 6.

regulatory convergence. According to an official EU press release, the ultimate goal of the second stage Agreement is to commit both the EU and US to “removing [the] remaining access barriers” and “review[ing] progress toward this objective on an annual basis.”[291] It is estimated that the benefits of the EU-US Air Transport Agreement would be roughly equal to the transatlantic benefits that would accrue from the successful completion of the Doha trade talks. Previously, a 2006 study on the economic impact of air services liberalization had found that it would likely generate “significant additional opportunities for consumers [and] shippers,” and that “restrictive bilateral air services agreements between countries” would only “stifle air travel, tourism and business, and, consequently, economic growth and job creation.”[292] And according to a 2007 study on the economic impact of establishing a transatlantic open aviation area, the removal of regulatory barriers and investment restrictions between the EU and US would, during its first five-year period, result in consumer surplus gains of between $9.2 and $17.2 billion, increase the number of passengers by 26 million, and create nearly 80 thousand new jobs.[293] Clearly, the establishment of a transatlantic open aviation area would increase

[291] Op. cit., *Europa* press release, “Siim Kallas welcomes the signature of the Second Stage EU–US ‘Open Skies’ agreement.”

[292] Inter*VISTAS* Consulting Group, *The Economic Impact of Air Service Liberalization*, June 7, 2006, http://www.intervistas.com/downloads/Economic_Impact_of_Air_Service_Liberalization_Final_Report.pdf (Dec. 5, 2011).

[293] Booz Allen Hamilton: A Strategy and Technology Consulting Firm, *The Economic Impacts of an Open Aviation Area between the EU and the US: Final Report*, January 2007, http://ec.europa.eu/transport/air/international_aviation/country_index/doc/final_report_us_bah.pdf (Dec. 5, 2011). The Final Report was prepared for the European Commission Directorate-General for Energy and Transport.

regulatory convergence between European and US airlines while also enhancing market competition between them; would reduce consumer costs while increasing consumer demand; would remove operating restrictions resulting from previous bilateral air service agreements; and would remove domestic investment restrictions, generate new and more direct routes, and increase employment on both sides of the Atlantic.

But although the second stage Agreement has allowed for greater transatlantic regulatory convergence in aviation services, it has not gone far enough in mitigating the most powerful obstacles to transatlantic commerce in aviation services. To begin with, the second stage Agreement did not call for the elimination of majority ownership restrictions on foreign investment; rather, it merely established a reciprocity mechanism–a "basis of reciprocity"–whereby the elimination of such restrictions by the US would lead to the elimination of the same restrictions by the EU.[294] The Deputy Assistant Secretary for Transportation Affairs and chief negotiator for the US on the agreement, John Byerly, described the lack of a provision on investment restrictions succinctly: "There is no requirement. There is no timetable. There's a process for cooperation."[295] Only the US Congress has the authority to add a provision to a future agreement calling for the elimination or reduction of majority ownership restrictions on foreign investment. But US lawmakers have long appeared re-

[294] Op. cit., EU-US Open Skies Agreement, Article 6, Paragraph 2.

[295] Op. cit., Joshua Chaffin, Jeremy Lemer, and Pilita Clark, "Open skies deal leaves US rules intact," *Financial Times*, March 25, 2010.

luctant to contemplate the foreign takeover of a leading US carrier, particularly, and understandably, since the 9/11 terrorist attacks.

In addition, the so-called “suspension clause,” which had been inserted in the first stage Agreement at the insistence of the UK, was eliminated from the second stage Agreement. The suspension clause had given EU Member States the right to suspend certain international traffic rights provided by the EU-US Open Skies Agreement *if* certain issues, such as US majority ownership restrictions on foreign investment, were not resolved in successive agreements.[296] In the absence of the suspension clause, the EU has substantially less leverage going forward in its attempt to compel the US to eliminate its majority ownership restrictions. In light of this, it could be argued that the second stage Agreement is tilted in favor of US interests.

In March 2010, the International Air Transport Association (IATA), an international trade organization representing 230 airlines throughout the world, gave what may be described as the most sobering assessment of the second stage Agreement. In response to a Memorandum of Consultation that was sent to the IATA, IATA’s Director General and CEO, Giovanni Bisignani, released the following statement:

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[296] European Council decision, “on the signature and provisional application of the Air Transport Agreement between the European Community and its Member States, on the one hand, and the United States of America, on the other hand,” Article 2, April 25, 2007, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:134:0001:0003:EN:PDF (Dec. 5, 2011).

> It is disappointing that, at this critical time, we did not make significant progress on the issue of [majority] ownership [restrictions]. The agreement was not a step backwards, but it did not move us forward. The long-term financial sustainability of the industry is dependent on normal commercial freedoms. I urge both [European and US] governments to keep this on the radar screen for urgent follow-up.[297]

In June 2010, the European Parliament approved a resolution concerning the second stage Agreement in which it regretted "the absence of substantive progress in removing outdated regulatory constraints in the area of foreign investment" and recalled "that the final goal of the EU-US Air Transport Agreement is the complete opening of the market without any restrictions from either side."[298] In line with this goal, the resolution encouraged the EU-US Joint Committee "to develop additional proposals for the mutual recognition of regulatory decisions" and also recommended, among other measures, an increase in aviation safety cooperation between EU and US authorities at all levels. The resolution also asked the European Commission to initiate negotiations with the US in order to achieve a third stage Air Transport Agreement by December 2013. In the opinion of the European Parliament, the third stage Agreement would need to (1) deepen the "liberalization of traffic rights," (2) secure "additional foreign investment opportunities," (3) address "the effect of environmental measures and infrastructure constraints on the exercise of traffic rights," and (4) improve the

[297] International Air Transport Association, "IATA Statement on US-EU Agreement," March 25, 2010, http://www.iata.org/pressroom/pr/Pages/2010-03-25-01.aspx (Dec. 5, 2011).

[298] European Parliament resolution "on the EU-US air agreement," June 15, 2010, http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=P7-RC-2010-0370&language=EN (Dec. 5, 2011).

"coordination of passenger rights policies in order to ensure the highest possible level of protection for passengers."

Concerning the important matter of aviation security and anti-terrorism policy, the EU and US have continued to pursue cooperation initiatives. In November 2011, the EU and US agreed on a draft version of a new Passenger Name Records (PNR) Agreement, which requires, among other measures, that airlines operating US-bound flights send US authorities the PNR of passengers prior to departure.[299] If approved by the European Parliament and the Council of Ministers, the 2011 PNR draft Agreement will replace the older 2007 PNR Agreement.[300] Because of long-standing concerns over the 2007 Agreement's incompatibility with EU privacy and data protection rights, the European Parliament had so far refused to adopt it. As a result, the provisions of the 2007 PNR Agreement had only been provisionally, rather than formally, enforced. The 2011 PNR draft Agreement, however, has been presented as an attempt to reconcile US security demands with EU privacy concerns; it includes, for example, provisions determining the length of time that PNR data may be legitimately stored and the purposes for which PNR data may be legitimately used.

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[299] *Europa* press release, "New EU-US agreement on PNR improves data protection and fights crime and terrorism," November 17, 2011, http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1368 (Dec. 5, 2011). The text of the 2011 EU-US Passenger Name Records Draft Agreement is not yet available.

[300] The text of the 2007 EU-US Passenger Name Records Agreement is available at http://eur–lex.europa.eu/LexUriServ/site/en/oj/2007/l_204/l_20420070804en00180025.pdf (Dec. 5, 2011).

The most significant reform of the transatlantic aviation relationship, however, came in March 2011, when both partners signed a landmark cooperation agreement on the regulation of civil aviation safety. The Air Safety Agreement, which entered into force in May of the same year, aims to “enable the reciprocal acceptance […] of findings of compliance and approvals issued” by the US Federal Aviation Administration and the European Aviation Safety Agency. Through the Agreement, EU and US policymakers also seek to “ensure the continuation of the high level of regulatory cooperation and harmonization between the United States and the European Community.”[301] Moreover, the Agreement is as unprecedented as it is promising, since it includes a provision that allows the EU and US to gradually broaden its scope through future amendments. In this way, the EU and US can continually establish “additional areas of cooperation and [reciprocal] acceptance.” It is thought that one such additional area could be flight crew licensing.

Together, the 2010 Air Transport Agreement and the 2011 Air Safety Agreement constitute the twin peaks of transatlantic aviation cooperation. As a result, deeper transatlantic regulatory convergence in aviation services will most likely come about through the amendment and enhancement of these agreements. During an April 2011 meeting of the EU Forum on Transatlantic Aviation Competitiveness, European Commissioner for Transport, Siim Kallas, underlined the long-term importance of both agreements. Commissioner

[301] The text of the 2011 EU-US Air Safety Agreement is available at http://register.consilium.europa.eu/pdf/en/09/st08/st08312.en09.pdf, (Dec. 5, 2011).

Kallas cited the Air Transport Agreement and the Air Safety Agreement as examples of different tools that policymakers on both sides of the Atlantic should continue to use in order to forge a competitive transatlantic environment.[302] It is thus particularly important for EU and US policymakers to continue to develop the efficacy of the Air Transport Agreement and Air Safety Agreement. In addition, it is equally important for EU and US policymakers to keep in mind that, while transatlantic regulatory cooperation in aviation services has increased dramatically in recent years, important regulatory barriers, such as restrictions on foreign investment, remain. Such unnecessary barriers will, for as long as they exist, continue to impede the complete liberalization of the aviation services industry and prevent the advent of a barrier-free transatlantic open aviation area.

The Cultural and Audiovisual Sectors

These sectors are likely to become one of the most difficult parts of the negotiation.

While being and open and competitive market in the US, it is basically a closed, protected and heavily subsidized industry in most of the EU Member States.

[302] *Europa* press release, "EU Forum on Transatlantic Aviation Competitiveness confirms strong cooperation between the US and the EU," April 12, 2011, http://ec.europa.eu/transport/international/bilateral_cooperation/doc/2011_04_12_press-release-eu-us-aviation.pdf (Dec. 5, 2011).

The difficulty becomes even larger since the liberalization would require unanimity among all EU Member States (art. 207.4 of the EUFT).

However, the reasonable approach to this industry is that it should gradually open to competition, just as the rest of markets for services.

5

THE BENEFITS OF ESTABLISHING THE TAFTA

Assessing the Potential Benefits of Greater Transatlantic Integration

In addition to re-energizing the transatlantic economy, the adoption of the TAFTA would generate substantial long-term welfare gains for both the EU and US. Higher employment and income levels, for instance, would increase the solvency and enhance the sustainability of both the EU and US welfare systems. And although estimates on the exact welfare gains resulting from greater EU-US liberalization and regulatory convergence differ depending on the scope of the study, all predict substantial gains for both Atlantic partners: increased transatlantic trade, higher transatlantic investment rates, and greater transatlantic information flows combine to generate substantial economic growth. At present, however, unnecessary transatlantic barriers still prevent both sides from reaping these enormous gains.

The broader global community would undoubtedly also reap substantial economic benefits from the adoption of the TAFTA.

The increased economic growth of the two largest economies in the world would generate a strong "spill-over" effect that would benefit the rest of the global community. According to the OECD, for example, trade linkages would spread the benefits of the TAFTA and potentially increase GDP per capita by up to 1.5% in various OECD countries. EU and US policymakers could use such auspicious estimates in order to help generate broad-based support among political leaders and the general public in favor of greater transatlantic economic integration.[303]

Throughout the last decade, interest in renewing the transatlantic initiative has resulted in the publication of several reports detailing the potential economic benefits of full or greater transatlantic cooperation. In recent years, the most revealing work in this field has been published by the Organization for Economic Co-operation and Development (OECD), the European consultancy firm ECORYS, the European Centre for International Political Economy (ECIPE), and the Center for Transatlantic Relations (CTR) at Johns Hopkins University's School of Advanced International Studies. Two distinguished papers focusing on the issue of EU-US economic cooperation, published by the *Instituto Universitario Europeo*[304] and the Centre for Economic Policy Research (CEPR),[305] respectively, are also manda-

[303] Center for Strategic and International Studies, *Test of Will, Tests of Efficacy: Initiative for a Renewed Transatlantic Partnership 2005 Report*, p. 37, http://csis.org/files/media/csis/pubs/05_testofwills_report.pdf (Dec. 7, 2011).

[304] Instituto Universitario Europeo, *The Economic Policy of the Transatlantic Association*, March 2002.

[305] Centre for Economic Policy Research, "*Enhancing Economic Cooperation between the European Union and the Americas: An Economic Assessment*, May of 2002, http://www.cepr.org/pubs/Other_Reports/final_report_from_HMT.pdf (Dec. 7, 2011).

tory reading for anyone interested in the future of the transatlantic economic relationship.

The *Instituto Universitario Europeo* Study (2002)

In 2002, the *Instituto Universitario Europeo* published a detailed study describing the various bilateral initiatives and institutional frameworks that that had been launched by the EU and US up to that time, including those in the area of business and consumer interests, environmental policy, and the legislative process. In addition to recommending further and more robust studies of the effects of greater EU-US regulatory cooperation, the report set out three general objectives in order to enhance cooperation:

1. Completing a detailed study of all forms of regulatory cooperation existing between the EU and US.

2. Drawing up an inventory of regulations that have the potential to restrict trade and investment at all levels of government.

3. Carrying out a systematic analysis of all possible forms of conflict resolution in trade, particularly conflicts caused by regulatory divergences.

The Centre for Economic Policy Research (CEPR) Study (2002)

Also in 2002, the CEPR published a study in which it identified and analyzed the potential benefits of increased economic liberalization and integration between the EU and the

Americas i.e., the US, Canada, Mexico, and the rest of Latin America. By taking into account the barriers to trade and investment between the various economies that existed at the time, the CEPR was able to produce concrete estimates of the potential benefits that would result from the elimination of these barriers.

In its estimates, the CEPR study predicted that static gains resulting from EU liberalization with respect to the Americas would range between 0.7% and 0.9% of EU GDP in 1990. These benefits would be annual gains accruing in perpetuity. In addition, the CEPR study predicted that the elimination of trade barriers would result in the creation of approximately one million extra jobs within Europe.[306] It is important to keep in mind, however, that static benefit gains are often an underestimation of true gains.[307] If one takes other aspects into account, gains for Europe rise to a range of between 1% and 2% of GDP.

With regard to static gains for the US resulting from EU-US tariff liberalization, the CEPR study estimated an annual increase of 0.2% of US GDP in 1990. At the time that this estimation was

306 These figures correspond very closely with those reported by the European Commission in its 1998 report, *The New Transatlantic Market Place: An Analysis of Economic Impact*. In this report, the European Commission predicted that gains from the liberalization of MFN tariffs on industrial goods would result in a 0.7% annual increase of European GDP.

307 First, the Messerlin (2001) study only includes a limited number of service sectors, due to a lack of available data. Highly protected sectors, such as maritime services and financial services, are left out. Furthermore, the analysis is based on data for 1990. During the nineties, trade flows between the EU and US increased substantially.

made, such an increase would have translated approximately into an additional 0.3 million US jobs.[308] In addition, later studies gave reason to believe that such static gains had been, once again, an underestimation of real potential.[309] According to the CEPR, taking other aspects into account leads to tentative estimates of EU-US trade liberalization gains of between 0.5% and 1% of US GDP on an annual basis.

The predominant reason why the CEPR's estimation of potential US gains were lower than its estimation of potential EU gains was the higher level of market segmentation prevalent in the EU. According to the CEPR, the pro-competitive effects of trade liberalization within the EU marketplace would add additional gains.

It is important to keep in mind, however, that the CEPR report was not a detailed study of the economic relationship between the EU and the US, nor did it include proposals on how to implement transatlantic liberalization policies.

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[308] Again, this figure corresponds with the European Commission's 1998 estimate, which calculated that US gains from the liberalization of MFN tariffs on industrial goods would amount to 0.5% of US GDP on an annual basis. According to this same study, the gains from industrial tariff reduction for other North and South American countries were also substantial: 0.03% of GDP for Canada, 1.78% of GDP for Mexico, and 3.32% of GDP for Latin America.

[309] First, such studies only include tariff barriers for trade in goods. Since we know that services constitute the largest part of the US economy, including them in the analysis would surely increase the estimated gains. Secondly, non-tariff barriers and dynamic gains are not covered by the studies. And finally, the studies used constant returns to scale and 1990 data. Studies that were to use increasing returns to scale and current EU-US trade flow figures would be likely to generate higher estimates.

The Organization for Economic Co-operation and Development (OECD) Study (2005)

In 2005, the OECD completed a comprehensive study on the opportunity costs of insufficient product market liberalization, limited trade, and lack of investment integration between both Atlantic partners.[310] By using the most up-to-date data then available on the potential benefits of product market liberalization, trade opening, and FDI barrier removal, the OECD report was able to estimate the potential long-term trade and output gains that would result if the EU and US implemented a series of specific structural reforms.[311] The gains estimated by the study concern the OECD area in its entirety, the US, the EU, and the OECD area outside of the EU or US:

- In the OECD area as a whole, exports were expected to increase by 25% while GDP per capita levels were expected to increase by between 1.25% and 3%, depending on the

[310] Organization for Economic Co-operation and Development, The Benefits of Liberalising Product Markets and Reducing Barriers to International Trade and Investment: The Case of the United States and the European Union, May 26, 2005, http://www.oecd.org/officialdocuments/displaydocumentpdf/?cote=ECO/WKP(2005)19&doclanguage=en (Dec. 7, 2011).

[311] In the OECD study, "European Union" refers to the 15 Member States that formed the EU prior to the 2004 enlargement. The specific structural reforms envisaged by the OECD study were inferred from estimates concerning the gaps (at the time) between EU and US structural policy settings, on the one hand, and the best-practice policy measures of various OECD countries, on the other. The OECD study determined the impact of these reforms on transatlantic trade and output by using earlier regression results. These regression results were in turn supplemented by general equilibrium analysis, in accordance with the Global Trade Analysis Project (GTAP) model. Since it is assumed that a substantial reduction in transatlantic trade and investment barriers would generate benefits on a global level, the OECD study spread the estimated benefits of its proposed reforms across all OECD countries, as well as to the rest of the world.

analytical approach used to estimate such gains.[312] These potential gains, furthermore, were estimated to become permanent. As the study argued, an individual's earnings throughout an average 40-year working life would increase by between one-half and over one year's worth of earnings.

- In the US, per capita income was expected to increase by between 1% and 3%. Such gains would mainly be the result of a reduction of US barriers to trade and investment in conjunction with the liberalization of the US domestic product market.

- In the EU, per capita income was expected to increase by between 2% and 3.5%, with the majority of EU countries achieving growth levels fairly close to this average.[313]

- In the OECD area outside of the EU and US, per capita income was expected to increase by between 0.5% and 2%.[314] Positive spillover effects taking place outside of the EU and US were thus estimated to be quite large: a 2% increase in per capita income for Canada and Mexico, and a 1.5% increase in per capita income for Turkey and Japan.

[312] This increase in GDP per capita is equivalent to the economic expansion that would be expected over one to two years if OECD economies were to grow at their potential growth rates.

[313] The EU's estimated economic gains are greater than those of the US because structural policy settings in many EU countries tend to be further removed from best practices, particularly policies governing domestic product-market regulation.

[314] As the OECD study only considers structural policy reform in the EU and US, gains in other OECD countries were estimated on the basis of such policy reforms: as the EU and US reduce their external trade barriers, the trade levels of the other OECD countries, along with various countries throughout the world, would logically increase.

In addition, the OECD study estimated that further transatlantic liberalization could lead to permanent per capita income gains for the EU and US of between 3% and 3.5%. The size of the estimated gains should be understood in light of the scope of the reforms considered, however. The envisaged scope of such reforms with respect to anti-competitive regulations in product markets, FDI restrictions, and external tariff barriers was very profound. Indeed, a shift to the *best practices* advocated by the study would involve a more liberal overall policy stance than any that has so far been adopted by an OECD country.

On the other hand, the reform package envisioned was relatively narrow insofar as it excluded labor markets, financial markets, agricultural subsidies, and taxation levels. The reforms presented in the OECD study were geared exclusively toward addressing obstacles to transatlantic *competition*. Such obstacles included regulations establishing state control over companies as well as state involvement in business operations, i.e., administrative barriers to start-ups and administrative opacity in general. Regulations governing health, safety, and environmental standards, among others, were not included in the study nor were they envisaged as areas in need of reform.

In addition, it should be highlighted that product market competition and investment liberalization were considered separately in the OECD study. But are they really separate areas? To a certain extent, they mean the same thing, given the deep level of economic integration that exists between the EU and US. Whereas some types of structural reforms would most likely only affect the domestic sphere of either the EU or US, particularly in markets for non-tradable or not easily tradable services, other types of structural reforms would lead to both supply-side domestic reforms *and* investment liberalization.

Interpreting the OECD and CEPR studies

It is important to keep in mind that both the OECD and CEPR described their estimates as conservative and recognized that their results should be interpreted cautiously. The OECD, for example, stated the following:

> The magnitude of estimated output gains may seem modest to some observers. However, estimations of the gains of liberalization are quite prudent, as only "one-shot" or "static gains," coming from greater international trade specialization and better allocation of resources, are assessed.

There are several auspicious reasons for accepting the view that the OECD and CEPR estimates actually understate the true economic potential of greater transatlantic integration:

- To a large extent the EU and US are service economies, and figures on *trade barriers in services* are not as readily available as figures in other areas. Some highly protected sectors, such as maritime services and financial services, have been left out of both studies.[315] For this rea-

[315] Liberalization of the financial sector is very likely to increase welfare gains and economic growth substantially. In 2001, Aaditya Mattoo constructed a measure of openness for the financial and telecommunications sectors. The measure indicated that developing countries that fully liberalized these sectors during the 1990's tended to have annual GNP growth rates that were 1.5% higher than those of developing countries that did not undergo liberalization. Of course, the EU and US, which have long had relatively open financial sectors, would experience smaller gains if they further liberalized their financial sectors. Joseph F. Francois and Ludger Schuknecht, who are experts in financial services trade, have also confirmed this link between financial sector openness and overall economic growth.

son, it is difficult to quantify the gains that would result from carrying out a liberalization policy in this area.

- *Non-tariff barriers* were not covered very well in the studies.
- *Increasing returns to scale* were not properly considered in the studies.[316]
- Estimates need to be recalculated using *the most recent data*, which takes the ever-increasing trade flows between the EU and US into account.
- Most importantly, *dynamic gains were not taken into account*. The studies only looked at the first-order direct effects of trade liberalization and therefore only estimated static gains. But an enlarged transatlantic marketplace with substantially less non-tariff barriers would *also* give rise to *dynamic gains*. For example, transatlantic trade liberalization would likely increase incentives for firms on both sides of the Atlantic to undertake research and development; this would, in turn, accelerate productivity growth in both the EU and US. Dynamic gains such as these were not considered by the studies in their calculation of potential gains. This is unfortunate, given that empirical research has suggested that greater trade liberalization and a more comprehensive reduction of non-tariff barriers could generate substantial economic

[316] The CEPR estimates for the US were produced using *constant returns to scale*. Using *increasing returns to scale* would likely push up US estimates. In a study assessing NAFTA through computed general equilibrium (CGE) models, for example, US gains went up by almost 1%, from 1.67% to 2.55%, with even higher increases for Canada and Mexico.

gains, although the magnitude of such estimated gains remains uncertain. Other studies have looked at the long-term dynamic gains that increased R&D activity and technological progress could generate as a consequence of trade liberalization. Another example of a dynamic gain would be an increase in labor productivity. Although this type of dynamic gain is more difficult to quantify,[317] it has the potential to yield long-term benefits that dwarf short-term static gains.[318]

All of this means that the estimates for gains listed above are modest when compared to what would likely be the real effects of transatlantic trade liberalization and non-tariff barrier reduction. Adding up the previously mentioned gains, the CEPR estimates of EU GDP gains rise to between 1% and 2 percent.[319] Overall, one should simply keep in mind that the

[317] Richard E. Baldwin and Anthony J. Venables, "Regional Economic Integration," in *Handbook of International Economics*, edited by G. M. Grossman and Kenneth Rogoff, 1995.

[318] In 2001, Daniel Trefler studied the impact of the Canada-US FTA on labor productivity and concluded that the tariff reductions had helped boost manufacturing productivity by a compounded rate of 0.6% to 2.1% per year. These gains were not achieved through scale effects or investment, but rather through plant turnover and rising technical efficiency. These findings suggest that, in terms of assessing the benefits of liberalization, productivity gains may actually be more important than standard gains. It is therefore reasonable to believe that the dynamic gains generated by the transatlantic liberalization of trade would have a multiplicative effect on the estimated static gains discussed above.

[319] In 1998, the European Commission completed a study on the potential gains that transatlantic trade liberalization would generate for the EU. The study, which took into account the potential gains that would be generated by non-tariff barrier elimination and service sector liberalization, estimated an increase in EU GDP of 1.1%. The study, however, did not account for the long-term and indirect effects of transatlantic trade liberalization; this led it to understate potential US gains. But once *increasing returns to scale* are incorporated into the study, estimated US gains following transatlantic trade liberalization rise. Furthermore, in 1994, Daniel Roland-Holst completed a study on the impact of NAFTA on US GDP that showed that estimates that took *increasing returns to scale* into account were

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gains generated by the reforms envisaged in these reports may actually be greater: increasing returns to scale in production, dynamic welfare gains, and gains from the liberalization of services are all important factors that should be included when discussing liberalization and non-tariff reduction gains.

Despite the relatively narrow scope of the reform packages envisaged in the OECD and CEPR reports, their conclusions suggest that succeeding editions of these reports might come to play the same role for the transatlantic community that the 1988 Cecchini Report once placed for the European Community concerning the implementation of the 1992 Single Market program. At the time, the Cecchini Report made the conservative estimation that a removal of internal barriers within the EU would increase GDP by between 3% and 4%. In this sense, the understated character of the CEPR and OECD estimates does not detract from their importance to future transatlantic reform projects.

The ECORYS Report (2009)

In 2009, ECORYS published a report commissioned by the European Commission's Directorate-General for Trade on non-tariff trade and investment barriers between the EU and US.[320] In

1% higher than estimates that took *constant returns to scale* into account. A proper estimate of potential US gains resulting from transatlantic trade liberalization, which takes both financial services liberalization and increased labor productivity into account, would range between 0.5% and 1% of annual GDP.

[320] ECORYS, *Non-Tariff Measures in EU-US Trade and Investment – An Economic Analysis*, December 11, 2009, http://trade.ec.europa.eu/doclib/docs/2009/december/tradoc_145613.pdf (Dec. 9, 2011).

studying the potential benefits of eliminating non-tariff barriers to transatlantic trade and investment, the report introduces the

TABLE 5.
Macroeconomic gains in the EU and US, following reforms

	Full Liberalization		Partial Liberalization	
	Short Run	**Long Run**	**Short Run**	**Long Run**
Real Income, Billion $				
United States	24.7	53	10.1	23.8
European Union	59.7	158	25.2	69.7
Real Income, % Change				
United States	0.13	0.28	0.05	0.13
European Union	0.27	0.72	0.11	0.32
Real Household Income, % Change				
United States	0.16	0.31	0.07	0.14
European Union	0.32	0.79	0.14	0.35
Real Wages % Change, Unskilled Workers				
United States	0.24	0.35	0.11	0.16
European Union	0.40	0.82	0.17	0.36
Real Wages % Change, Skilled Workers				
United States	0.26	0.38	0.11	0.17
European Union	0.36	0.78	0.16	0.34
Value of Exports, % Change				
United States	6.12	6.06	2.72	2.68
European Union	1.69	2.07	0.74	0.91
Value of Imports, % Change				
United States	3.97	3.93	1.76	1.74

Source: ECORYS, 2009

concept of "actionability" in order to distinguish between barriers that could plausibly be reduced or removed by 2018, and are therefore actionable, and barriers that could not plausibly be removed or even reduced by 2018 due to geographical, linguistic, or historical reasons, and are therefore unactionable. On this basis, the report estimates that roughly half of current non-tariff barriers between the EU and US are actionable.[321]

As the table 5 shows, the report predicts substantial economic gains–in terms of incomes, wages, and the value of exports and imports–for both the EU and US following greater regulatory convergence and a reduction of non-tariff trade barriers.

The main reason why regulatory convergence and the reduction of non-tariff barriers generate the kind of economic gains seen in the preceding table is because such reforms lower the cost substantially for firms operating in the transatlantic market. Increased competition brought about by such reform policies results in "lower levels of market concentration," which, in turn, leads to "higher trade and investment levels at lower prices for traded goods and services." The end result is that consumers on both sides of the Atlantic gain access to "higher quality goods and more variety at lower cost."[322]

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[321] For this reason, the report's general estimates concerning the benefits of greater transatlantic economic integration are themselves predicated on this initial *actionability estimate*. In order to arrive at its actionability estimate, which should of course be interpreted with caution, the authors of the report sought and cross-checked the opinions of regulators, legislators, and businesses; a business survey was also used.

[322] Op. cit., ECORYS, *Non-Tariff Measures in EU-US Trade and Investment*, p. xix.

The report also makes a very novel and important policy distinction, the implications of which could be decisive to the success of any future transatlantic initiative. The report contrasts two strategies for adopting regulatory convergence and reducing non-tariff barriers: a sector-specific strategy versus an economy-wide realignment strategy. Because of what the report terms “sector interlinkages”–a phrase which refers to the economic fact that “sectors in an economy are not independent from each other but influence each other heavily”–the adoption of regulatory convergence and the reduction of non-tariff barriers in one sector is likely to have a significant effect on other sectors whose economic activity is inextricably linked to the first.

For this reason, the report estimates that addressing non-tariff barriers and regulatory divergence on a systematic, “economy-wide” basis, rather than on a sector by sector basis, will lead to significantly greater economic gains and is “by far the most beneficial approach for the EU and US.” In terms of either national welfare gains, employment gains, or national income gains, the benefits “for the EU and the US are optimized when a broad economy-wide NTM [non-tariff measure] reduction strategy is pursued rather than one that only focuses on individual sectors.”[323]

Significantly, the report adds that “if an economy-wide focus […] is not possible,” then EU and US policymakers should attempt to address regulatory divergence and non-tariff barriers in those sectors that have the highest potential

[323] Ibid., pp. xv, xxi, 27.

for generating gains; these are the sectors for “motor vehicles, electrical machinery, chemicals, financial services, government procurement and intellectual property rights.”[324] It should be remarked that the report highlights the exceptional economic potential of removing all actionable non-tariff barriers related to intellectual property rights (IPR) and of converging, as far as possible, the IPR regulatory regimes of both the EU and US. Such a policy, according to the report, would result in annual national income gains of as much as $4.8 billion for the EU and $1.1 billion for the US.[325]

The European Centre for International Political Economy (ECIPE) Report (2010)

In 2010, the European Centre for International Political Economy (ECIPE) published a report estimating the potential gains of establishing transatlantic free trade in goods, i.e., “full transatlantic tariff elimination.”[326] The report, the purpose of which was “to examine if the potential gains from a transatlantic trade accord” would be “big enough to motivate such an initiative,” found that the expected benefits did indeed justify such an accord.

The report estimated that, in terms of merely static gains, a “transatlantic zero-tariff agreement” would increase EU GDP by

[324] Ibid., p. xv.

[325] Ibid., pp. xvi, 195-197.

[326] European Centre for International Political Economy, *A Transatlantic Zero Agreement: Estimating the Gains from Transatlantic Free Trade in Goods*, 2010, http://www.ecipe.org/media/publication_pdfs/a-transatlantic-zero-agreement-estimating-the-gains-from-transatlantic-free-trade-in-goods.pdf (Dec, 9, 2011).

only 0.01% and US GDP by 0.15%. The estimated GDP gains became considerably larger, however, once the range of "dynamic gains" generated by the elimination of tariffs, such as "improved productivity and reduced trade facilitation costs," are taken into account. After factoring in dynamic gains, the report estimated GDP gains of between 0.32% and 0.47% for the EU, which translates into annual gains of between $46 and $69 billion, and of between 0.99% and 1.33% for the US, which translates into annual gains of between $135 and $181 billion.[327]

In terms of potential welfare gains, which were "measured as national income effects," the report estimated static gains of $3 billion for the EU and $4.5 billion for the US, and dynamic gains of between $58 and $86 billion for the EU and between $59 and $82 billion for the US. In terms of EU exports to the US, the report estimated static gains of 7% and dynamic gains of 18%. For US exports to the EU, the report estimated static gains of 8% and dynamic gains of 17%. Furthermore, the estimates for dynamic gains suggest potential annual gains of $69 billion for the EU and $53 billion for the US.[328]

According to the report, the three most significant reasons why a transatlantic zero-tariff agreement would generate substantial benefits for both sides have to do with (1) the size of the EU and US, (2) EU-US intra-firm trade, and (3) EU-US intra-industry trade. To begin with, the level of economic gains generated by a free trade agreement will usually reflect

[327] Ibid., p. 2.

[328] Ibid., p. 2.

the size of the partnering economies. Since the EU and US constitute what "is easily the largest bilateral economic relationship in the world," and since the EU and US together continue to produce "more than forty per cent of total world GDP," the benefits of a zero-tariff agreement between them would logically reflect their substantial economic clout. Secondly, the current level of economic integration between the EU and US is, to a significant degree, the accrued result of "the thousands of affiliates that operate in each other's markets." The ECIPE report estimates that "a third of total transatlantic trade" is made up of "intra-firm trade." Existing tariffs act as an international tax of sorts, pushing up the administrative costs of intra-firm transfers by as much as "four or five per cent of the value of trade, if not more."[329] The reduction or elimination of such tariffs would therefore greatly increase the yield of EU-US intra-firm trade. And thirdly, EU-US levels of intra-industry trade (i.e., trade within the same sector) are very high, particularly in product categories such as turbojets, turbo-propellers, medical and surgical instruments, vaccines, orthopedic appliances, and printing machinery, to name only a few. Such a high level of transatlantic intra-industry trade means that a reduction or elimination of tariffs would boost the competitiveness and productivity levels of several European and US industries.

Interestingly, the ECIPE report also argued against the conventional notion that an EU-US accord on the free trade of goods would somehow challenge the relevance or even via-

[329] Ibid., p. 6.

bility of the Doha Round or the World Trade Organization. To the contrary, the report argues that "deeper transatlantic integration," in addition to moving bilateral trade forward, "could also be a good strategy to jolt the World Trade Organization and its Doha Round in the right direction."[330] Ultimately, however, the report looks beyond Doha and puts forward the argument that the active participation and preponderance of the EU and US in future trade initiatives matters more, ultimately, than the formal structure of any given trade initiative or organization: regardless of whether future trade initiatives are handled multilaterally through global trade organizations or bilaterally through large regional blocs, EU and US leadership will continue to be the indispensable ingredient to the success of all future trade liberalization projects:

> Regardless of the form that multilateral trade policy will take in a future post-Doha world–and it is probably safe to say that the era of big rounds is over–it will to a large extent be labored by Europe and the United States. It is leadership from them that will define future trade policy advancements. Such leadership could be organized in different ways: plurilateral sectoral agreements negotiated outside, but then brought into, the WTO (like the ITA [Information Technology Agreement]) and bilateral transatlantic negotiations, combined with an invitation to others to join the agreement, are two options. The point is that the second is not principally different from the first: leadership will be shouldered by the US and Europe, and regardless of the format for negotiations this leadership will inevitably encourage others–for reasons of profit or fear–to move ahead with much-needed liberalization.[331]

[330] Ibid., p. 3.

[331] Ibid., p. 4.

The Center for Transatlantic Relations (CTR) Report (2011)

In early 2011, the Center for Transatlantic Relations (CTR) at Johns Hopkins University published its annual report on the evolving state of the transatlantic economy.[332] The report includes the most comprehensive survey to date of US-sourced jobs, trade, and investment in every EU Member State as well as of EU-sourced jobs, trade, and investment in every US state.

In describing the EU-US economic relationship, the CTR report gives a clear picture of just how important the transatlantic economy still is to the health and continued prosperity of the global economy: "Despite the rise of rapidly developing economies, the economic ties between the EU and the US remain the core of the world economy." These transatlantic ties are still "bigger, more prosperous, more tightly linked, [and] more aligned in terms of free markets and open societies" than those of any other economic region. Specifically, some of the closest economic ties between the EU and US are in the areas of "foreign direct investment, portfolio investment, banking claims, trade in goods and services [...] patent cooperation; technology flows; and sales of knowledge-intensive services."[333] In addition to the current level of economic interdependence and integration, the CTR report also highlights the economic potential that remains to be tapped: the fact that the EU and US are "each other's most important

[332] Daniel S. Hamilton and Joseph P. Quinlan, *The Transatlantic Economy 2011: Annual Survey of Jobs, Trade and Investment between the United States and Europe*, SAIS Centre for Transatlantic Relations, Johns Hopkins University, http://transatlantic.sais-jhu.edu/bin/s/s/te_2011.pdf (Dec. 9, 2011).

[333] Ibid., pp. 10-13.

foreign commercial markets" has yet to be "fully appreciated by opinion leaders on both sides of the transatlantic."[334]

After establishing that "no other commercial artery in the world is as integrated and fused together as the transatlantic economy," the CTR report goes on to detail the economic gains that greater and deeper transatlantic integration could generate. According to the report, a "zero-tariff agreement on trade in goods" between the EU and US "could boost annual EU GDP by up to .48% and 1.48% for the US." In addition, such an agreement could result in "welfare gains of up to $89 billion for the EU and $87 billion for the US." EU exports to the US could increase by as much as 18% and US exports to the EU could increase by as much as 17%. Furthermore, "a 75% reduction of services tariffs" would result in gains of "almost $13.9 billion annually for the EU and $5.6 billion for the US."[335]

Perhaps most importantly, the report makes a very strong case in favor of greater and deeper regulatory convergence between the EU and US, arguing that an alignment of just "half of relevant non-tariff barriers and regulatory differences between the EU and US would push EU GDP .7% higher" and "boost US GDP .3% a year" by 2018. In addition, EU overall exports could increase by 2.1% and US overall exports could increase by 6.1%. Ultimately, such a regulatory alignment has the potential to generate annual gains for the EU and US of $171 billion and $57 billion, respectively. As a result of these policies, the average

334 Ibid., p. 10.

335 Ibid., pp. 10-11.

EU household would gain an additional $17,500 "over a working lifetime," while the average US household would gain an additional $8,300 during the same period.[336]

The report also describes "the transatlantic services economy" as "the sleeping giant of the transatlantic relationship." Earlier, in a 2007 report, the CTR had shown how the services industries generated the greatest share of GDP in almost all of the nations that make up the transatlantic economic area.[337] More importantly, the services sectors of the EU and US economies are intimately linked: the EU is the US's primary market for sales in services, and, in the same manner, the US is the EU's primary market for sales in services. Regulatory divergence and non-tariff barriers, however, continue to limit the full potential of transatlantic services trade. Reforming various services sectors–capital markets, airlines, health care, and telecom industries among them–could generate "an enormous economic boost to the transatlantic economy and enhance the global competitiveness of both sides of the Atlantic."

Ultimately, the central point of the CTR report is that "Eurmerica"–a term used describe the EU and US as a single economic whole–remains "the largest and most influential economic entity in the world," far outweighing all other rival economic entities, including the often talked about "Chimerica."[338] In other

336 Ibid., p. xvii.

337 Daniel S. Hamilton and Joseph P. Quinlan, *Sleeping Giant: Awakening the Transatlantic Services Economy*, SAIS Centre for Transatlantic Relations, Johns Hopkins University, 2007, http://www.brookings.edu/research/books/2007/sleepinggiant (Dec. 9, 2011).

338 Ibid., p. 12.

TABLE 6.
The Power Brokers of the Global Economy, Compared

	"Eurmerica"	Asia	"Chindia"	"Chimerica"
GDP, PPP	42.1%	30.3%	18.1%	33.1%
GDP, Nominal	54.3%	24.3%	10.8%	33.0%
Market Cap.*	$27.8 trillion	$17 trillion	$5 trillion	$19.3 trillion
Personal Consumption exp.*	58.4%	23.4%	7.4%	34.3%
M+A Sales	69.4%	24.3%	6.8%	20.4%
M+A Purchases	48.5%	25.7%	8.7%	18.1%
Inward FDI Stock	62.9%	19.7%	3.6%	20.3%
Outward FDI Stock	75.3%	16.0%	1.6%	23.9%
Inflows (2000-2009)	58.6%	21.6%	7.2%	21.5%
Outflows (2000-2009)	74.4%	15.4%	2.2%	19.1%
Exports** (Goods)	28.2%	30.6%	15.4%	25.4%
Imports** (Goods)	33.4%	27.6%	13.4%	27.7%
Military Spending***	$996 63.7%	$272.30 17.4%	$135.4 8.7%	$762.1 48.7%
Top 100 Global Brands (2010)	89 brands valued at $1.1 trillion	8 brands valued at $105 billion	None	50 brands (all American) valued at $761.6 billion

* Market Cap. figures as of 1/25/2011; Personal Consumption exp. figures as of 10/31/2010
** Total does not include intra-EU27 + Norway, Switzerland, and Iceland trade
*** US $ billions at constant 2008 prices
Source: The Transatlantic Economy 2011, prepared by the Center for Transatlantic Relations, SAIS

words, despite ongoing economic problems and financial concerns, Eurmerica's global economic significance and influence remains unparalleled. In light of this fact, the full potential of Eurmerica's economic might, which remains to be achieved, becomes all the more apparent. By describing the unprecedented benefits of establishing barrier-free transatlantic trade and achieving deeper economic integration, the CTR report makes a strong case in favor of achieving such potential.

The deep economic crisis that we are enduring on both sides of the Atlantic has demonstrated the importance of the transatlantic economy in the global context and has shown just how integrated European and American economies are, adding to the relevance of this relationship for our societies.

FAES Foundation already proposed an Atlantic Prosperity Area in 2006. This second edition expands and specifies the overall growth strategy, reinforcing everything that joins us together, at a time when it is more necessary than ever to work so that the 21st century does not diminish our collective ability to influence before the rise of new powers or coalitions. The Transatlantic Free Trade Area (TAFTA) is a historic opportunity to build the largest economic prosperity area in the world.

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