

Conference Report

CREATING A
TRANSATLANTIC MARKETPLACE:
GOVERNMENT POLICIES AND
BUSINESS STRATEGIES

Washington, DC
November 1999

American Institute for
Contemporary German Studies
The Johns Hopkins University

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FOREWORD

The transatlantic relationship has become increasingly intertwined in the last decade. Both trade and investment have seen dramatic increases. However, governing these new relationships has emerged as a new challenge for the transatlantic partnership. In an age where domestic issues have taken on a bilateral and often multilateral character, economic cooperation, coordination and competition are often hampered by differences in approach.

In light of these issues and challenges, AICGS organized a conference to examine this partnership and its importance to Europe and the U.S. The conference, titled, “Creating a Transatlantic Marketplace: Government Policies and Business Strategies,” assembled leading scholars to engage in an exchange on four main topics: competition policy, mutual recognition agreements, airlines, and biotechnology. This report offers a synthesis of the papers presented at the conference as well as an analysis of the most recent developments.

One of the most successful fields of transatlantic cooperation, competition (or antitrust) policy has seen a gradual convergence between the European Union and the United States. A major step in this direction was the Competition Cooperation Agreement, which obliges both sides to exchange non-confidential information and requires the coordination of enforcement activities, approaches to the definition of relevant markets, and the application of foreign law. A working group established in 1999 to enhance cooperation in transatlantic mergers, is an important example of cooperation the bilateral level. There is much work to be done the multilateral level, particularly on the side of the U.S., who has been reluctant to support the creation of a multilateral framework to settle competition disputes.

Transatlantic negotiations have resulted in a set of high profile mutual recognition agreements. However, issues surrounding standards, testing and certification within the European single market have shown that regulatory cooperation is a difficult issue. The disputes between the U.S. and the EU demonstrate differing philosophies. While the Europeans prefer to create standards through institutionalized industry cooperation, the U.S. preference is for standards that are set by the market following the competition between different technologies. Although agreement on these issues will continue to be difficult, efforts on the part of business—as expressed by the Transatlantic

Business Dialogue, will ensure that international standardization remains on the transatlantic agenda.

The problems of chronic oversupply and deficit spending resulting from protection for reasons of security or national prestige have plagued airlines for decades. Years of bilateral air service agreements were followed by deregulation and the formation of alliances between airlines. While pressure for liberalization has been increasing, there is concern that competition may be further stifled by international mergers without adequate regulatory controls.

The biotechnology sector has been the major source of tension in the transatlantic partnership. Considerable debate has been generated by the controversy over the labeling of genetically modified products. Public reaction in the EU against genetically modified foods has been extremely negative and has led to a ban on corn imported from the U.S. Divergent approaches on the regulation of genetically modified products have led to trade conflicts, prompting the TABD to establish a special group on agri-food biotechnology, a group that seeks to promote the importance of regulatory cooperation for jobs and investment. I would like to express my appreciation to Michelle Egan, who organized the conference, and to the presenters, whose contributions helped us gain insights into the many challenges that lie ahead for the transatlantic marketplace.

The Institute would also like to express its appreciation to the German Marshall Fund of the United States for its generous support of this event.

Jackson Janes
Executive Director

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INTRODUCTION

This conference report assesses the current state and future prospects of the transatlantic economic relationship. The American Institute for Contemporary German Studies hosted the November 1999 conference, *Creating a Transatlantic Marketplace: Government Policies and Business Strategies*, organized by Professor Michelle Egan, American University, and Professor Dieter Wolf, Bremen University. With funding from the German Marshall Fund of the United States, the conference focused on regulatory issues in examining recent public and private initiatives to shape the pace and direction of transatlantic relations.

The U.S. and EU account for about two-fifths of world GDP and trade. Transatlantic trade is relatively balanced and transatlantic investment, perhaps the most significant indicator of the degree to which the EU and U.S. economies are intertwined, has accelerated at breakneck speed, far surpassing U.S. and EU investment in other areas of the world. Cumulative EU direct investment in the U.S. grew to \$624 billion in 1999, or 63 percent of all FDI in the U.S., with comparable investment flows to Europe from the U.S.

As the transatlantic economic relationship has matured, however, traditional trade liberalization via tariff reductions and other measures is no longer the focus of transatlantic trade negotiations. Increasingly, issues related to market governance and the role of government in regulating the economy dominate EU-U.S. trade discussions. Progress or conflict on these issues varies by sector.

Building on the conference proceedings, this report assesses the dynamics of transatlantic economic collaboration, coordination and competition through a series of case studies of competition policy, mutual recognition agreements, biotechnology, airlines and other trade related issues. The primary conclusion is that transatlantic trade and regulatory cultures are increasingly intertwined. Because issues that were once considered domestic in nature are now the subject of bilateral and multilateral negotiations, the U.S. and the EU are grappling with a double challenge: the proliferation of regulatory obstacles that hamper cross-border trade and the need to find more efficient ways to protect and promote important policy goals. Although concerns such as cheap labor and

inadequate environmental standards are not problematic issues in the transatlantic context, deep seated differences in the nature, method and scope of regulation can still lead to trade distortions and increased friction.¹ Market access is typically limited by different approaches to regulation in the EU and U.S. rather than by the existence of regulation per se, widening the potential range of issues potentially subject to trade disputes.

The U.S. and EU are increasingly looking for ways to manage the political consequences of different methods of regulating market operations. The two avenues of international cooperation—trade liberalization and regulatory coordination—have traditionally been associated with separate institutions and agencies, and above all two very different negotiating cultures.² As issues that encompass both external trade policy and domestic regulatory policy become a larger part of the transatlantic economic agenda, these different institutions and cultures are joined. European and American negotiators, legislators, business leaders, and other groups representative of European and American civil society are engaged in new kinds of **economic diplomacy** as trade and regulatory agencies work together, and sometimes compete, to determine policy outcomes. Particularly as the transatlantic trade agenda focuses on ‘behind the border’ regulatory issues, “EU” and “U.S.” policy positions are the result of competition between domestic institutions and constituencies that may have substantial impacts on the course of bilateral negotiations.

The experience of the European Union and United States may also provide examples of “policy learning” applicable to other bilateral and regional trade arrangements seeking to simultaneously promote trade liberalization and preserve regulatory best practices. EU and U.S. trade negotiations can also have substantial impact at the international level, both because of the weight of their respective economies and the influence they wield within the WTO and other international fora. Regulatory strategies developed in the context of the EU’s single market program and transferred to the transatlantic level have also furthered EU interests at the international level.

The report proceeds in three parts. First, an overview of the development of the transatlantic economic relationship demonstrates that, while transatlantic trade has grown rapidly, recent efforts to address regulatory differences have been only partially successful, demonstrating

clear institutional and political constraints on the possibility of enhanced cooperation. The demise of the proposed “New Transatlantic Marketplace” and the substitution of the less ambitious “Transatlantic Economic Partnership” underscore these limitations.

Second, four sectoral or issue-specific case studies are developed, based on papers presented at the conference. The case studies, mutual recognition agreements, competition policy, civil aviation policy, and biotechnology policy, detail the institutional and political dynamics within the U.S. and EU that shape the course of bilateral negotiations.

The conclusion draws on the case studies, participant conference discussions, and other materials to summarize recent trends in the transatlantic economic relationship. Several policy suggestions are offered for improving governance of potentially conflictual issues, and for providing greater predictability and strategic direction to the course of transatlantic negotiations.

Transatlantic Relations in Historical Perspective

Since the end of World War II and the beginnings of West European integration, both the United States and the European Union have emphasized the importance of close bilateral relations. This has taken the form of public and private interactions since the early days of the Marshall Plan when U.S. government strategies and West European government responses fostered the provision of private goods in the form of investment and consumption. Support for European economic integration, despite some initial concerns about trade diversion, was framed within the security concerns of the emerging cold war, but also aimed at boosting demand for American products and promoting a liberal trade policy for a unified European economy.

As the 1956 Spaak Report made clear, the European Community envisaged a common market along the lines of the United States. This blueprint suggested that such a market would require three main approaches: establishment of formal standards of competition through elimination of protective barriers; curtailment of the effects of state interventions and monopolistic conditions; and countermeasures against distortions including possible harmonization of state legislation. In addition, the size of the

American market fostered the development of large-scale production technologies that were partially responsible for American productivity being the highest in the world. Seeking to emulate the American experience, the Community initially lowered traditional tariffs with the elimination of customs duties and quantitative restrictions leading to the introduction of a common external tariff by 1968. The U.S. relied on the mechanism of the General Agreement on Trade and Tariffs—the GATT—to foster an outward looking orientation for the newly created Community.³

Although regulated trade in Europe had long protected certain sectors, the curbing of competition through voluntary export restraints, quotas and health and sanitary regulations increased. Trade regulations to support or improve the sales base, profitability and jobs were rooted in the policies identified with the welfare state. The attempts to maintain overall levels of economic activity floundered in Europe. Rather than continue to use domestic remedies in the form of denying equivalent access to national markets, attention focused on European solutions, in particular, the completion of the European market and strengthening of European preferences in such areas as technical standards and public procurement.

For the United States, the widening trade deficit of the early 1970s led to a push for market access overseas. The U.S. thus adopted a variety of market-opening strategies towards the EU. Firstly, the GATT Customs Union Procedures necessitated that the formation of free trade areas and customs unions be subject to multilateral scrutiny. Compensatory adjustments for third parties resulting from changes in tariffs have meant that each enlargement of the Community has provided an opportunity for the United States to pursue concessions.⁴ Secondly, the GATT (later WTO) Dispute Settlement Mechanism has been used to pursue trade disputes over issues included in the GATT/WTO multilateral framework. Thirdly, the U.S. adopted a bilateral approach with regard to the single market. The internal market program was not subject to scrutiny under the GATT customs unions procedure, so the United States set up its own inter-agency early warning and negotiating mechanisms to examine all aspects of the program and their effect on American exports. While this initially provided the U.S. with a forum to exercise its voice and some influence over the EU proposals—especially crucial to forestall images of “fortress Europe” and to settle some problems stemming from reciprocity clauses—the bilateral

mechanisms provided an important avenue to stem escalating trade conflicts.

The end of the cold war increased uncertainties about the Atlantic relationship and elicited fears about Atlantic drift. The erosion of the relationship seemed increasingly plausible in Europe given the absence of a collective challenge.

REVITALIZED TIES AND INSTITUTIONALIZED COOPERATION: FROM NTA TO TEP

Anxiety about transatlantic drift led policy makers on both sides of the Atlantic to advocate greater institutional ties and strengthened relations.⁵ The growing levels of ad hoc transatlantic consultations, usually at the margins of NATO and UN meetings throughout the 1980s, were soon deemed insufficient for Europe's growing and perceived capabilities. Transformation within Europe as the result of institutional changes and commitment to the single market, along with the geopolitical changes after the collapse of the Berlin Wall led to a call for greater transatlantic cooperation.⁶ The first Bush administration viewed the Community as playing a greater role in political and economic stabilization in the changing world order, and promoted the idea of a new policy framework to address the issue of burden sharing.

The Transatlantic Declaration adopted in 1990 laid the groundwork for ways in which the transatlantic relationship could be transformed to meet the changing demands of the post cold war global economy. Though the Transatlantic Declaration was later viewed as lacking in focus, it went beyond simply restating existing institutional cooperative efforts, providing a political, non-security dialogue and a flexible set of institutional contacts between the U.S. and EU, rather than its individual member states.

By late 1994, political leaders in Europe and the U.S. began to ask whether a stronger transatlantic vision was necessary.⁷ Proponents such as British foreign minister Malcolm Rifkind and German foreign minister Klaus Kinkel articulated the idea of a Transatlantic Free Trade Area (TAFTA). The prospect of further negotiations received little support within the United States, and although the Commission had adopted a strategy paper on U.S.-EU relations proposing a "Transatlantic Economic Space,"

the proposed TAFTA would have faced a number of problems including conformity to WTO rules, the perception of exclusion among many developing countries, and the prospect that it would not cover “substantially all trade.”⁸

Although the TAFTA was shelved, a tangible outcome of the debate was the signing of the New Transatlantic Agenda (NTA) and joint EU-U.S. Action Plan in December 1995, establishing a framework for cooperation in areas including organized crime, terrorism, human trafficking, and environmental degradation. The aim was to raise the visibility of the European Union for U.S. policymakers across agencies and directorates, and inject greater substance and coherence to the principles laid out in the 1990 Transatlantic Declaration. The EU was treated not simply as a trade and economic organization, but as a political force able to join with the United States as a partner in a wide array of foreign policy and diplomatic initiatives.⁹

The NTA operates on the basis of biannual summits of EU and U.S. leaders, coinciding with the rotation of EU Council presidencies, which are supplemented by meetings of a Senior Level Group (SLG) composed of senior officials on both sides. The SLG and a more junior NTA Task Force make preparations for the summits, planning “deliverables” in areas of policy cooperation and allowing each side to air matters of concern before they become major grievances.¹⁰ The SLG reports following each summit provide a sanitized but still useful overview of issues on the transatlantic agenda, including areas of disagreement and agreement in diplomatic cooperation, global issues, economic issues and people to people initiatives. Principles for early warning and problem prevention were further clarified at the EU-U.S. Summit in June 1999.¹¹ During the discussions on early warning, the U.S. had advocated a range of processes for resolving issues including those in the economic sphere. The EU preferred to establish separate economic and foreign policy mechanisms to ensure that the early warning system did not become a bilateral dispute mechanism. This was done under the guise of the Transatlantic Economic Partnership described below.

The parties invited the various transatlantic dialogues to contribute to the early warning system by identifying problems and offering proposals for resolution.¹² This has resulted in some notable achievements, including

the Article 31 Decision on the European side, the acceptance of Safe Harbour Principles by U.S. industry in the area of data privacy, and the TABD brokered agreement on third generation mobile phones and the settlement of intellectual property issues and standards issues.

The breadth of issues and joint actions covered by the NTA process led to criticisms that, though it represented an advance beyond the Transatlantic Declaration, it lacked focus and failed to promote more significant transatlantic economic cooperation. The bilateral economic elements of the NTA were subsequently given more coherent expression by the European Commission in March 1998.¹³ Spearheaded by European Commissioner Leon Brittan, the ambitious proposal for a “New Transatlantic Marketplace” or NTM aimed at overcoming the negative political impact of recent trade disputes such as the Helms-Burton and D’Amato Acts, moving beyond the modest “step by step approach” to resolving individual problems and promoting liberalization in particular sectors. This approach would have replaced the ad hoc sectoral approach to bilateral trade negotiations with a binding and comprehensive package, in essence adapting the EU’s single market trading principles to the transatlantic context.

The NTM proposal covered both bilateral and multilateral issues: the removal of technical barriers to trade through extensive harmonization and mutual recognition, zero tariffs on industrial goods by 2010 at the multilateral level, a free trade area in services, and liberalization in public procurement, intellectual property and investment. It also included proposals for a bilateral dispute mechanism system, attracting opposition from the Transatlantic Business Dialogue. The TABD supported bilateral liberalization efforts, but feared that a bilateral mechanism might undermine the multilateral dispute settlement mechanism of the World Trade Organization.

Recognizing that some of the proposals would necessitate domestic legislative changes, the Commission clearly expected concessions on the American side. Not only did the proposal deliberately exclude agriculture, but also reflected the “exporting” of regulatory practices and policies of the single market. Approximation or harmonization, mutual recognition and home country control were envisaged, which would have far reaching implications on the U.S. Coupled with efforts to include both state and

federal activities within the agreement, as well as introducing controls on state aids to avoid distortions to competition, the EU was essentially transposing its own trading principles based on treaty obligations and legal enforcement mechanisms onto the transatlantic agenda.¹⁴

These issues were soon made moot as the proposal was effectively vetoed by France in April 1998, before formal American reaction to the proposal could be presented. Sir Leon's proposal languished under French criticism that the Commission lacked the mandate to generate such an ambitious agenda. French memories of the Blair House Agreement on Agriculture in 1993 and fears that the audio-visual and media industries would be included in any resulting services agreement meant that serious discussion of the proposal was terminated.

Following this setback, the European Commission proposed a less ambitious initiative in September 1998, based in part on the "Transatlantic Economic Partnership" statement issued at the U.S.- EU Summit in May 1998. Unlike its predecessor, the TEP proposal did not call for bilateral commitments to zero industrial tariffs, a free trade area for services, an investment agreement, or a bilateral dispute settlement mechanism. Instead, it contained general commitments to multilateral free trade in the area of agriculture, industrial tariffs, investment, competition and procurement, without concrete objectives or timetables.¹⁵ Much of the proposal reflected work underway at the multilateral level, including improvements in enforcement and implementation in intellectual property and trademarks and customs cooperation.

Though not as far reaching as the proposed NTM, dubbed by some commentators as 'tepid' by comparison, bilateral commitments in the Transatlantic Economic Partnership are much more substantive than had previously existed, with most objectives focusing on regulatory cooperation. The TEP builds on the prior round of successful mutual recognition agreements, since the same approach was envisioned for an increasing number of goods and service sectors. The launch of the TEP coincided with a "mutual understanding" over the long-running dispute on U.S. sanctions policy, to use political dialogue to resolve disputes over commercial foreign policy actions and to refrain from issuing further economic sanctions based on foreign policy grounds.

By abandoning the broader framework of the proposed NTM, focusing instead on technical issues surrounding regulatory harmonization, the TEP provides important economic benefits that can be touted by both business and policy makers. These include advances in technical barriers to trade, sanitary and phytosanitary standards, regulatory cooperation and transparency as well as an early warning system. Such negotiations are potentially well suited to a bilateral, transatlantic framework because they require mutual trust in each sides' specific facilities and procedures, and also involve intense discussions on verification that testing, conformity assessment and licensing are equivalent.

Though they could not support the politically ambitious proposals of the TAFTA or NTM, the effectiveness of the transatlantic network of institutionalized relationships should not be underestimated. Policymakers and business groups have successfully promoted trade and business facilitation in several transatlantic contexts, resulting in a number of important agreements including: Mutual Recognition Agreement (1997); Competition Policy Agreement (1991, 1998); Customs Cooperation (1997); Science and Technology Cooperation Agreement; and Veterinary Agreement (1997); and Agreement on Metrology and Measurements Standards (1999).

Some observers have argued that these negotiations have been protracted and produced limited results. This masks important differences across sectors and industries. The following cases illustrate the institutional and political dynamics of competition, collaboration and cooperation that have emerged. Although trade and regulation are now increasingly intertwined, their effects on both U.S. and EU commercial and regulatory environments have yet to be considered across a number of issue areas.

CASE STUDY NO. 1 COMPETITION POLICY

Competition or antitrust policy is generally considered one of the most successful areas of transatlantic cooperation. Despite the high degree of media attention given to the conflict over the Boeing/McDonnell Douglas merger, there has been a significant amount of cooperation in over two hundred and fifty cases.¹⁶ The agencies responsible for enforcement—including the European Commission Competition Directorate General,

the Department of Justice Antitrust Division, and the Federal Trade Commission—have experienced a convergence of rules and practices resulting from their cooperative learning experience.¹⁷

Before assessing the institutional framework and dynamics of transatlantic cooperation, it is helpful to briefly compare the rationale and objectives of competition policy in the U.S. and EU. American antitrust law, through the Sherman Act of 1890 which still forms the basic legal rationale, prohibits agreements in restraint of trade and monopolization, and attempted monopolization. Further developments in the Clayton Act of 1914 prohibited price discrimination and exclusive dealing contracts. The Clayton Act also prohibits acquisitions, mergers or joint ventures that reduce competition substantially. Two major amendments, the Robinson-Patman Act of 1936 and the Celler-Kefauver Act of 1950, provide further restrictions on price discrimination to protect small business, and strengthen merger control by declaring illegal mergers or joint ventures that lessen competition or create a monopoly.¹⁸

In a similar vein, the antitrust principles in the EC Treaty prohibit agreements and concerted practices between companies that may affect trade between member states and effectively restrict or distort competition in the internal market, including price fixing, limiting production, markets or investment. The Treaty also restricts abuse of a dominant position by companies, which can include unfair prices, limiting production or markets, and applying supplementary contractual obligations. Since the original Treaty provided no guidance on mergers and acquisitions, specific procedures were established by the Merger Regulation of 1989.¹⁹ This allowed firms to have a “one stop shop” rather than seek permission from multiple national authorities that could cause considerable duplication and delay mergers. Companies with aggregate worldwide turnover of five billion euro, with at least two of the firms involved having a turnover of 250 million euros, must give prior notification to the European Commission, which has a specific set of procedures and timetables to assess the impact on the internal market. If the Commission considers that a proposed merger is incompatible with the single market, it may request remedies or changes such as the sale of certain assets, or, on occasion, block the merger. Further amendments in 1997 increased the European Commission’s jurisdiction

in cases that required multiple notifications to national competition authorities.²⁰

During the 1990s, the Commission also succeeded, after a protracted struggle, in expanding its application of antitrust rules to telecommunications and later new media, energy, transport and sport.²¹ The final element in the EU competition field is control of state aids, subsidies, and other public support such as tax reductions, social security contribution breaks, and loan guarantees that distort economic competition. Though broad latitude is allowed to provide aid to poorer regions, the problem is ubiquitous. The vast majority of aid schemes are allowed since they have broad environmental or social objectives, and redress the effects of market failures.²² Due to their political sensitivity they are often approved with certain conditions.²³ It is the latter role of state aid watchdog that differs substantially from U.S. competition practices. Despite the existence of similar federal and state level economic incentives, American law has no control and authorization procedures over state subsidies or state aids an issue raised by the European Commission in the New Transatlantic Marketplace proposal as necessitating some action to prevent distortions of competition. However, the framework for transatlantic cooperation has developed in the anti-trust sphere and does not encompass state aid.²⁴

Origins and background of transatlantic cooperation

The development of transatlantic competition dialogue accelerated in the 1990s when both Presidents Bush and Clinton resumed stricter enforcement of antitrust laws, a trend which may shift again if the new incoming Bush administration, as many predict, is less aggressive in targeting monopolization practices. The formal framework at the transatlantic level has intensified through the establishment of a Competition Cooperation Agreement in 1991 and a “Positive Comity” Agreement in 1998. After signing of the former agreement in 1991, a complaint by France was upheld by the European Court of Justice that the agreement was invalid on procedural grounds since it was the Council that should conclude such an agreement. This was remedied by a joint decision by the European Council and Commission in 1995 approving the existing U.S.-EU agreement.²⁵ The Competition Cooperation Agreement has helped to

categorize the relationship in this area, taking into account the new commercial reality of global mergers and acquisitions. Moreover, bilateral cooperation is designed to avoid the problems related to extra territorial use of anti-trust legislation in transatlantic relations, which has always been highly controversial.

The basic obligation of the Agreement is the exchange of non-confidential information.²⁶ The parties agree to notify each other when they evaluate cases that may have important transatlantic implications. The agreement also provides for coordination of enforcement activities, which is clearly in each side's interest since it streamlines the process and reduces the burden on any third party interests involved. The two sides coordinate their respective approaches to the definition of relevant markets, and the applicability of points of foreign law in the case.²⁷ The agreement also distinguishes between positive and traditional comity. A traditional comity is one in which each party takes account of the important interest of the other party in enforcing its competition rules to avoid creating any harmful effects. Positive comity allows one side to take advantage of the other side's legislation, by asking them to take appropriate enforcement measures regarding anti-competitive behavior affecting their interest. This does not mean that they have given up jurisdiction over a case, but rather choose to delegate responsibility for antitrust action in some circumstances.

The positive comity principle was further clarified in 1998 in terms of the mechanism and instruments used for requests, referrals and restrictions on extra-territorial action in transatlantic cases. The agreement assumes that under certain circumstances one side will defer or suspend its actions. The application of positive comity is aimed at facilitating cooperation and preventing conflicting decisions. Mergers are explicitly excluded from the agreement since both the U.S. and EU have strict deadlines and procedural rules that do not allow for a deferral or suspension of action.

The close daily contact in this area has promoted a movement towards best practices on both sides. Administrative arrangements were adopted in 1999 that provided opportunities for mutual attendance in individual cases at certain stages in the review procedure.²⁸ Aimed at improved mutual understanding, the administrative arrangements on attendance outlined in an exchange of letters between the U.S. and EU do not constitute a binding agreement. This reciprocal effort at transatlantic cooperation (at so-called

pitch meetings) require confidentiality assurances. There were invoked for the first time in December 1999 when the U.S. FTC attended Commission meetings on the BOC/Air Liquid merger case.²⁹

The efforts in this sphere have been carried out without regard for developments in other parts of the transatlantic relationship, and the Transatlantic Economic Partnership added little to on-going efforts in competition policy. However, a new U.S.-EU working group was established in October 1999 to enhance cooperation with regard to global mergers. Though activity involving mergers has generated intense transatlantic cooperation on a daily basis, there is still room to improve coordination. The Working Group was mandated to focus on: a) an in-depth study of the identification and implementation of remedies, especially divestitures; and post-merger compliance monitoring; and b) the scope for further convergence in merger cases, especially given the difference in analysis towards monopolization and collective dominance between the U.S. and EU. Though the group has almost finalized its work on remedies during 2000, it will subsequently focus on oligopolistic dominance.

The purpose was to follow-up the work of the independent advisory committee, International Competition Policy Advisory Committee (ICPAC), and to consider more long term structural aspects which are not considered in individual case cooperation, given the time frame involved. With the growth of multi-jurisdictional merger review, both the U.S. and EU realize that they although they share a basically similar analytical framework, and bilateral efforts have promoted coherence, non-discrimination and transparency, this is not a substitute for multilateral efforts.

Evaluation and Assessment

Notifications of mergers have increased dramatically, both in terms of the mergers that are truly transnational or global and those that involve separate national markets, with cooperation focusing on making the merger acceptable from an antitrust perspective. This is especially important in newly emerging sectors such as internet services where the U.S. and EU have cooperated on basic market definition, since structure of the market presented a competition problem with regard to so-called universal

interconnectivity—the ability to offer access to all points of the internet without having to pay others for the connection, and hence entry barriers were significant because of the so-called network effect of a small number of dominant carriers.³⁰

Much of the discussions between the U.S. and EU focus on three areas: definition of markets, assessment of the likely competitive effects, and appropriateness of remedies proposed to meet any competition concerns expressed by competition authorities. The process also involves member states, since the notification by U.S. antitrust authorities to the Commission then results in notification to the member state(s) whose interests are affected.

Transatlantic cooperation on antitrust cases has avoided duplication of work, allowing one partner to take the lead (for example, the U.S. in the Microsoft case). By contrast, mergers require both authorities to act simultaneously so they need to cooperate on the outcome to avoid potential conflict (for example the Boeing/McDonnell case).³¹ Though there has been a high degree of institutionalized cooperation in this area, positive comity is often viewed as a panacea.³² While still a good idea, it has been oversold. There have been relatively few cases where it has been used. It was invoked by the U.S. to request that the Commission investigate the Computer Reservation System, Amadeus, owned by SAS, Iberia, Air France, Lufthansa and Continental in 1997. The case is still ongoing. The process has had very limited use since American companies that have problems with unfair practices within the EU can go directly to the Competition Directorate in the European Commission, request positive comity and not need the intervention of the FTC, with the reverse true for European companies.

While antitrust principles are similar in substance, they are not identical in procedure.³³ Because there are differences in underlying legal requirements and standards, especially concerning the role of government subsidies and funding, this can cause disagreement over the role and exemption for state aids and subsidies (e.g., Airbus vs. Boeing). However, the main problem that confronts transatlantic cooperation in this area is the inability to exchange confidential information.³⁴ This seriously hampers effective cooperation in combating cartels.³⁵ It means that investigations are often conducted individually rather than in parallel, and as a result the

agencies on both sides are not able to keep each other informed about the investigation. Companies are obviously unwilling to grant a waiver that would allow the exchange of confidential information in cartel cases, since they face the prospect of criminal penalties (in the U.S.) and substantial fines (in the EU) if they have violated antitrust rules. The situation is less problematic in merger cases where companies need clearance from competition authorities, and thus are willing to forego their rights of confidentiality to ensure timely and coordinated action. Domestic legal constraints can also act as a barrier to further cooperation since any new agreement designed to foster the exchange of confidential information would require domestic legal changes. Moreover, "the business community, insisting on its right to have information given to either competition agency duly protected, seems to remain opposed to the idea of U.S.-EU negotiations for an agreement making it possible to share confidential information."³⁶ Although confidentiality guarantees would be one measure to overcome such obstacles, there are few indications a new agreement will be agreed upon.

The convergence evident in transatlantic competition issues is not replicated with regard to the international arena. There is a certain degree of confusion between competition and trade policy principles, since the former does not have a dispute settlement mechanism akin to that covering trade in goods and services within the WTO. This is one of the reasons that a dense network of bilateral agreements among advanced industrial states has emerged over the past decade.³⁷ While the EU has been a strong advocate for a multilateral framework to settle competition disputes, the U.S., by contrast, is lukewarm towards any such multilateral agreement.³⁸ The EU proposed in June 1996 a working group within the WTO to study the interaction of trade and competition issues, although there is already recommendations adopted by the OECD on anti-competitive practices affecting international trade, as well as restrictive business practices within the United Nations Conference on Trade and Development (UNCTAD).³⁹ The OECD Recommendation in May 1998 on hard-core cartels signifies important cooperation taking place with regard to member state enforcement mechanisms, eliminating or reducing statutory exemptions on coverage of competition law and providing foreign investigative assistance. Yet

agreement within the WTO would be more inclusive given its near universal membership and its track record of binding commitments.

The EU has proposed that negotiations should focus on the introduction of basic rules on competition and enforcement among all WTO members, the establishment of a set of core principles and guidelines, and the creation of a multilateral instrument to enhance cooperation among competition agencies. The EU stresses that the WTO principles of transparency and non-discrimination would provide the foundation for a multilateral competition framework.⁴⁰ In response, the U.S. has expressed concern about a lowest common denominator agreement within the framework of the WTO, the impact that such an agreement would have on the exercise of prosecutorial discretion and decision-making within a participating state, and the thorny issue of ensuring confidentiality of business information on a global scale.⁴¹ Choosing between positive comity and dispute resolution means quite distinct procedures and practices with regard to competition policy governance.

Disagreement at the multilateral level between the U.S. and EU may reflect the different negotiating dynamics between trade and competition issues. In competition issues, cooperation is aimed at achieving a common regulatory result in terms of enforcement whereas trade negotiations are designed to protect, defend and maximize the benefits for domestic interests. In essence, competition policy focuses on public goods provision and trade negotiations on private goods provision. While trade negotiations can operate through issue linkage across sectors, aiming to balance benefits and losses for domestic producers, competition is guided by case law, administrative discretion and leaves little or no margin for political bargaining.⁴² Any agreement is likely to be difficult, especially since many anti-competitive practices are the actions of private producers, rather than governments who are the signatories to the WTO.

This has not deterred the EU from pursuing such a course.⁴³ Trade Commissioner Pascal Lamy supported the development of a multilateral framework for competition in Seattle although American objections carried considerable weight. EU Competition Commissioner Monti has recently proposed the creation of a broadly based International Competition Forum.⁴⁴ This would meet demands for putting in place a forum for discussion between those responsible for the development and management of

competition policy worldwide.⁴⁵ There are now over eighty countries that have a competition regime in place, many of which have been introduced in the last decade, and others are expected to follow suit. The Commission believes that there is a clear need for a global forum to deal with a range of competition policy issues from substantive and systemic to enforcement-related concerns. The objective is to achieve maximum consensus and convergence through a dialogue about experiences that would focus on enforcement policy and practices. This would then promote best practices to substantive economic problems as well as enforcement issues.

Commissioner Monti indicated that he would promote this initiative as a response to the proposals from Assistant Attorney-General Klein and Acting Assistant Attorney General Melemed for the creation of a Global Competition Forum.⁴⁶ However, replicating the trust and convergence that the U.S. and EU have demonstrated in their antitrust enforcement at the multilateral level will prove difficult. Many new competition authorities have been created in the past decade and enforcement mechanisms vary. Both the U.S. and EU should not ignore other forums for cooperation and learning such as the Competition Law and Policy Committee of the OECD, since it promotes exchange of views and experiences about market definition, predatory conduct, cartels and vertical restraints.⁴⁷ Although it appears that U.S. and EU discussions have shifted away from a competition policy agreement that replicates trade agreements to a somewhat more cautious set of initiatives, this is not surprising since it reflects the same approach taken at the transatlantic level, where competition has proceeded concurrently and somewhat separately from trade related issues, even though trade and competition overlap.

CASE STUDY NO. 2 MUTUAL RECOGNITION AGREEMENTS

Mutual recognition agreements have been widely touted as providing the most significant economic benefits for business on both sides of the Atlantic. The negotiations for mutual recognition have generated lengthy and complex discussions about technical issues with regard to testing, certification and conformity assessment practices. Mutual recognition is one of the core principles of the single market program. Although gaining

visibility in the 1980s and 1990s, provisions for mutual recognition were originally established in the Rome Treaty to ensure the mutual equivalence of professions. The idea underscoring mutual recognition is that of equivalence, compatibility or at least acceptability of the regulatory system of another trade partner. Mutual recognition can be defined as a contractual norm between governments whereby they agree to the transfer of regulatory authority from the host country—or jurisdiction—from which a product, person, service or firm originate.⁴⁸ Mutual recognition assumes a degree of prior regulatory convergence or harmonization.

Regulatory compatibility within the EU was ensured in the absence of sufficient convergence, albeit based on an approach that innovatively reorganized the responsibilities and roles between public and private authorities. In the case of products, this was outlined in the “New Approach” to standardization⁴⁹ and “Global Approach” to testing and certification in 1984 and 1990, respectively. The New Approach restricted EU regulations to defining the “essential requirements” for product safety, with responsibility given to private bodies to develop specific standards that would conform to these requirements.⁵⁰ Through a contractual agreement with the European standards bodies, CEN and CENELEC (and later ETSI) in 1984, these private standards bodies were delegated the responsibility for negotiating the technical details to enable goods to meet the essential requirements.⁵¹ While European standards retain their voluntary, non-binding status, conformity to the standards developed by these private standardization bodies is often the easiest way for firms to prove that they meet the relevant mandatory “essential requirements.” Moreover, public authorities were obligated to accept that products manufactured in accordance with European standards met the essential requirements of European directives or laws.

But even where standards or regulations have been mutually recognized and/or harmonized, exporters must often comply with national level certification requirements since there was a widespread reluctance to accept test results and certificates issued by a partner country, due to lack of confidence in a partner country’s conformity assessment procedures, which meant that many technical barriers remained in place. The adoption of the Global Approach sought to address the problem by providing common ground rules or “compatibility” among testing and certification bodies, if

third party (independent) assessment was required by EU directives. The EU gave some scope for regulatory flexibility by allowing different mechanism or “modules” for testing and certification, depending on levels of risk involved, the characteristics of the product, and the nature of the production process. However, member states had the right to choose, on their own, the bodies under their jurisdiction that were technically competent to provide product approval and apply the “CE Mark” to signify that products should then be allowed to be marketed freely across Europe. Responsibility for monitoring these bodies (testing labs, certification agencies, verification and inspection bodies) rests with the member states, who must “notify” these public or private entities to the EU. The notified bodies were expected to be equivalent, and in order to promote such regulatory compatibility, the EU proposed harmonization of accreditation rules or standards (on which “notification” is based) aimed at providing assurances across member states.

The Global Approach is thus a coordinated system for mutual recognition of conformity assessment within Europe. Nonetheless, there remained a multitude of testing and certification systems not covered by EU regulations that were the result of private business preferences or practices. The absence of mutual recognition would continue to fragment the market as the acceptability of testing, certification and licensing marks among the private sector also needed to be coordinated. To promote quality assurance in the private sector, build confidence, enhance cooperation and promote equivalence, the EU proposed the European Organization for Testing and Certification in 1990. The main tasks of EOTC are to coordinate tests and certificates so that exporters avoid unnecessary duplication in the importing member state, and promote general recognition of technical competence between conformity assessment bodies. EOTC is not a means of Euro-accreditation but rather a forum to promote mutual recognition based on common rules, standards and criteria.

New Community-wide directives rely on European standards to ensure that the essential regulatory requirements are met. Even though compliance with standards is not obligatory, it provides the easiest route to meet the presumptive requirements of European legislation under the new approach. The issue of market access for third country products and services was often treated as an afterthought, leading third countries to demand that the

European standards process should be open and transparent.⁵² Though the EU sought to assure their trading partners about the benefits of mutual recognition and standard-setting, and stressed the principle of non-discrimination that “any product, which is introduced into the Community, as long as it satisfies the legislation of the importing country, and is admitted on its markets, will be entitled as a matter of principle to the benefits of free circulation in the Community,” the United States has continued to express concerns.

American companies were concerned about the lack of openness and transparency within European standard setting, which made it difficult to be informed about necessary adaptations to meet new market entry requirements. This led to pressure for improved dialogue, although American demands for a seat at the table in European standardization were resolutely refused. Instead, through an exchange of information with their American counterpart, the American National Standards Institute (ANSI), American companies are allowed to exchange information and comment on draft standards, although many companies still complained that this did not provide them with sufficient access to strongly influence the negotiations. Responding to these criticisms, the European standards bodies have confirmed that they would base their work on international standards where available, and that this will provide ample opportunity for American companies to provide indirect input into the work being undertaken at the European level. And yet while transatlantic tensions on standards has not produce any further cooperative initiatives, the major focus of enhanced negotiations has been in the area of conformity assessment.

The EU practice of independent third party (non-governmental) testing and certification meant that only bodies notified by member states to the European Commission had the authority to grant the CE Mark. Because these bodies had to be located in Europe, it placed an additional burden on firms exporting to the EU to meet the necessary requirements for market access. Though the procedures did not result in formal discrimination between domestically and externally produced products, this requirement placed American exporters at a disadvantage since they would be required to obtain EU-based certification, and may also entail a duplication of tests that had been already carried out in the U.S. market. The Global Approach to Testing and Certification addressed the issue of market access for third

countries, by proposing the negotiation of mutual recognition agreements (known as MRAs).

Origins and background of mutual recognition agreements

Transatlantic negotiations on mutual recognition agreements began in 1992. While conformity assessment appeared to be non-discriminatory, the U.S. government sought to obtain less cumbersome procedures for its exporters, through its requests that notified bodies also be located in the U.S., as well as increased use of self-certification, and the possibility of subcontracting testing responsibilities to American laboratories. Though the latter had been in place through bilateral agreements, questions about the validity of these agreements under the new European regulatory system meant the issue needed to be clarified. Early directives under the New Approach did not address how notified bodies should proceed with regard to foreign companies, and the surveillance mechanisms necessary to ensure mutual recognition or equivalence. The U.S. proposed in the framework of the Uruguay Round negotiations an amendment to the Standards Code that would allow the rule of national treatment to be applied with respect to the appointment of notified bodies. This would mean that foreign test laboratories would be on equal terms with domestic laboratories. Such a rule did not become part of the Standards Code that provides for non-discrimination of foreign products, and not foreign laboratories.

Without such assurances, mutual recognition agreements are the only means to ensure regulatory equivalence between trading partners.⁵³ The Community agreed to conclude mutual recognition agreements with third countries, with a formal mandate given in September 1992 to start negotiations with the United States. This provided in greater detail the conditions for entering into negotiations, including the fact that negotiations could only be opened with countries that had technical and industrial competence comparable to the EU. Though other mutual recognition agreements with Canada, Australia, Japan were also initiated, the negotiations with the United States were viewed as critical in setting a precedent for other bilateral efforts in this area. Mutual recognition agreements are not, however, the same as mutual recognition in the single market since they are limited to certification and testing, and not the

underlying regulations and standards.⁵⁴ The difference between equivalence in testing and certification competence and equivalence of regulations is an important distinction.⁵⁵

Six sectors, namely pharmaceuticals, medical devices, electromagnetic compatibility, telecommunications equipment, and recreational crafts, were finally selected for initial negotiations based on political compromise and economic importance. Business estimated that the costs of heterogeneous standards and duplicative regulatory burdens were high: approximately half of the \$110 billion exports to the EU required some form of EU certification.⁵⁶ Several sectors—such as aviation—were excluded from the negotiations after strong protest about the intersection of safety and trade objectives, raising questions about the legal and technical competency of the Commission to address this issue.⁵⁷ Others were dropped after indications that the expected returns were marginal, as in the case of road safety equipment. Pressure equipment and construction products subject to recently adopted European legislation were also excluded.⁵⁸

European negotiators were unable to appreciate the extent of regulatory autonomy prevailing in the United States, as opposition came from several federal agencies unwilling to place their regulatory procedures into a trade agreement and allow foreign regulators to determine domestic safety issues.⁵⁹ The final six sectors became linked since the negotiations about the relative benefits of trade and market gains in one sector were linked to relative market gains and trade in another sector to ensure a balanced and reciprocal agreement.⁶⁰ Thus, while progress was rapid in one area (such as recreation), it was held up by disagreements in others (such as pharmaceuticals).

While both parties required confidence in the technical competence of conformity assessment systems, they disagreed on how to determine such competence. Part of the problem reflected differences in surveillance and conformity approaches. Although third-party assessment, as opposed to self-certification in the United States, had grown over the years with the demand for health and safety as well as environmental impact assessment, it was much less significant in the U.S.. The EU demanded some degree of convergence with regards to government involvement in the regulatory system. The multiplicity of private testing and certification agencies in the U.S., as well as government agencies such as FCC, FDA and DOD

engaged in such activity, did not ensure consistent standards. The EU argued that the lack of a standardized system in the United States meant that European companies encountered far more obstacles in accessing American markets than their counterparts in accessing European markets.⁶¹ Though the U.S. disagreed with this assessment, if U.S. bodies were to be granted the status of notified bodies, the U.S. government would have to guarantee the competence of its conformity assessment bodies and thus provide formal assurances to its partner that U.S. bodies were equivalent. Shifting towards a more centrally regulated system, the National Institute of Standards and Technology responded by creating the National Voluntary Conformity Assessment Program (NVCASE) as a mechanism to accredit conformity assessment bodies.⁶² NVCASE will officially recognize the competence of U.S. accreditation bodies to check the capacity of certifiers to work with EU requirements, and enable the U.S. to streamline its fragmented system.

Negotiations reached a dramatic and publicized stalemate in fall of 1996. Problems over the scope of mutual recognition agreements were coupled with disagreements over confidence building measures. The U.S. insisted on prior harmonization of detailed conformity assessment procedures rather than merely accepting the results of such assessment, as preferred by the EU. The dispute, stemmed from different experiences with the EU operating under the trade principles that governed the single market, such as mutual recognition and legal surveillance mechanisms (ex post), whereas the U.S. wanted clearly specified procedures from the outset (ex ante) rather than general principles.⁶³ The Food and Drug Administration (FDA) had been delaying the MRA for medical devices for nearly a year, arguing that they needed more time to evaluate data from a third party device review program before recognizing device approvals issued by European certification bodies.⁶⁴

These disagreements were resolved when negotiators agreed to confidence-building measures and exchange of inspectors to cope with potential friction from regulatory differences in testing and certification practices. This was largely the result of hard bargaining from American regulatory agencies (notably the FDA) concerned about the regulatory capabilities of certain EU member states (including pending applicant

countries). Joint committees were set up to deal with problems and discuss any market access problems.

A deal was finally struck in June 1997. Although mutual recognition agreements have been lauded as an important trade liberalization strategy that can be replicated in other sectors, the implementation stage, which is likely to take eighteen months to three years, is a better indication of the impact of regulatory cooperation. Despite ongoing dialogue about the expertise and equivalence of notified bodies (conformity assessment bodies-CAB), there are some concerns about the effects of any domestic regulatory changes on equivalence. Market surveillance is likely to come from business as much as regulators.

Successful negotiations have resulted in other industries clamoring for mutual recognition agreements. Negotiations have progressed well in the areas of marine safety equipment and elevators, and telecommunications equipment although cosmetics was originally taken off the table in 1998 after both the FDA and Enterprise Directorate General opposed its inclusion. By December 1999, agreement was reached on opening initial MRA negotiations in the area of services, specifically in insurance, architecture and engineering. Some disagreement over the inclusion of services has come from the reluctance of the U.S. federal government to negotiate for states and regulatory professions.

As the December 2000 U.S.-EU summit concluded, the working groups are still at the very early stages of negotiating MRAs in the engineering, architecture and insurance sectors. However, the transatlantic relationship has begun moving beyond specific mutual recognition agreements to consider broader efforts at regulatory cooperation and transparency. A joint draft text on regulatory cooperation and transparency was issued at the Summit, although this so far involves general pronouncements rather than specific initiatives.

Evaluation and Assessment

Transatlantic negotiations have resulted in a set of high profile mutual recognition agreements. The real test for transatlantic relations will be in terms of implementation. The problems associated with standards, testing and certification within the European single market should provide some

indication that regulatory cooperation remains a difficult issue.⁶⁵ While initial concerns within the single market program focused on the absence or slow pace of European standards development to meet the regulatory needs of the new approach directives, political attention has increasingly turned towards the application of mutual recognition in the single market. Although it is the foundation for trade liberalization in Europe, and is designed to avoid creation of detailed rules, problems arise in the practical application of mutual recognition.⁶⁶ Complaints by firms in the food, engineering, and automobile sectors in Europe that they still face administrative and bureaucratic delays in marketing products are matched by a growing number of complaints in the service sector from the business communications, construction and security services industries. The difficulties experienced in the financial sector have rarely been notified to the European level. A number of problems have been associated with exemptions provided under “general interest” to prevent the marketing of financial services, even though mutual recognition should operate under terms that provide member states of origin the right to approve and regulate transactions without any further requirement imposed upon them (i.e., home country control).⁶⁷

The European Commission has a number of tools including legal mechanisms to address problems of implementation. These includes sectoral round tables, training schemes and specific initiatives to foster transnational networks and information, notably in the telecommunications and aviation sector, to avoid conflicts over regulation in the future. The notification mechanism (Directive 98/34) to gauge national initiatives to regulate products and services has taken on increased importance in ensuring that further obstacles are not created by new regulations and standards, and that the principle of mutual recognition is actually guaranteed in practice. Improving mutual recognition will be further aided by the insistence of the European Court of Justice that member state have an obligation to include mutual recognition clauses in national legislation. This formalizes the legal commitment towards mutual acceptance of regulation, ensuring it will receive better attention among public authorities in member states. These mechanisms provide important indications of the degree to which market surveillance to ensure the operation of the single market in overcoming constraints on trade.

The main problem for transatlantic cooperation, however, is generating mutual trust and confidence in the respective EU and U.S. conformity assessment systems. This has resulted in substantial transition periods to assess the equivalence of notified bodies. In some cases, getting the MRAs operational has led to deadlock, as differences in regulatory approaches have hampered agreement. The FDA has requested, for example, that European inspectors or assessors go through an FDA training program, which will allow them to become FDA approved inspectors.⁶⁸ Concern that some sectors will be held up due to disagreements in other sectors raises the prospect that implementation deadlines will be missed.

Negotiations at the transatlantic level concerning conformity assessment should not mask the degree of disagreement and tension that exists over standardization activities. The signatories of the Uruguay Round called for bilateral and multilateral negotiations of MRAs both in the agreement on Technical Barriers to Trade and in the General Agreement on Trade in Services, as well as the use of international standards and good manufacturing practices where possible to prevent trade barriers emerging from domestic regulatory requirements. Though the U.S. and EU have pushed for international standards across a range of issues, from bribery to pharmaceuticals, in organizations including the International Conference on Harmonization of Technical Requirements for Registration of Pharmaceuticals (ICH) and the Organization for Economic Cooperation and Development (OECD), there is increased discord over international standardization.

Complaints that the EU is using standards as a quasi-industrial policy has caused conflict with the more market driven approach of the U.S.⁶⁹ Industry representatives contend that in the process of developing European standards to harmonize disparate national practices, some European countries are using the practice to stall or bar entirely foreign competition. Many in the U.S. business community believe that increased use of standards by the EU as a competitive weapon has not elicited a sustained and effective response by U.S. government negotiators.⁷⁰ Although the European Union has advocated increased use of international standardization, in part to deflect criticism from the United States, that their own system lacks transparency and openness, there has been a

reluctance on the part of many American companies to participate in the international process, which has weakened their global position.⁷¹

Complaints that the international situation is stacked against their participation has led many American companies to criticize the international standards bodies. The negotiation of a “fast track” procedure, known as the Vienna and Dresden Agreements, between the European standards bodies and their International counterparts, the ISO and IEC, has drawn the most criticism.⁷² In some cases, the U.S. has been reluctant to play a major role in international standardization due to the perception that it is dominated by European interests, either because of the organization of voting rights that gives the European Union standards bodies a greater weight in the process, or because of close links between international and European standards bodies.⁷³ The problem is reinforced by the resources and funding available to the European standards bodies that enables them to engage in trade promotion and outreach activities in developing economies. Efforts to establish standards infrastructure and promote the adoption of European standards have possibly given European companies a market edge in Asia, Africa and Latin America.⁷⁴

American companies have complained that their own system is the only one that receives no direct government support. While American industry traditionally has kept government at arm’s length, that approach may not be realistic in a global economy where economic blocs such as the EU are imposing their standards globally. Though there are active American participants such as medical devices and heavy equipment at the international level, the lack of sustained support for international standardization in the U.S. has pushed many companies into participating in consortia as alternative forums to the formal standards development process.⁷⁵

These disputes reflect different philosophies. The U.S. preference is for standards set by the market after competition between different technologies, and the European preference is for standards created through institutionalized industry cooperation. This difference is indicative of the difficulties for transatlantic cooperation. More Vienna or Dresden-like agreements for the U.S. which will open up the possibility of closer coordination between American and international standards, and allow domestic standards to be considered quickly at the international level will

likely ease American complaints about the institutional bias towards European standards. The effort by the International Standards Organizations to address concerns of the U.S. standards development organizations (ASTM, ASME, API and IEEE) over the past two years, is in part an effort to ensure that more American technology-driven standards are adopted at the international level.⁷⁶ However, business efforts—as expressed by the Transatlantic Business Dialogue—to increase the role of international standardization does carry risks since the diversity of preferences and interests in international standards negotiations often makes agreement by consensus difficult or protracted.

CASE STUDY NO 3 AIRLINES⁷⁷

From the perspective of international trade, the airline sector is a crucial service sector.⁷⁸ However, the exceptionally high cost associated with it, its long history of protection for national security reasons and prestige has created chronic oversupply and deficit spending. The world scheduled air transport industry has grown from an estimated 9 million passenger journeys in 1945 to about 1.5 billion in 1999, and the volume of freight transported by the world's airlines has risen from a few thousand tons in 1945 to 25 million tons today. The development of the transatlantic market is much more recent than routes between Europe and Asia and Africa, which developed as part of imperial strategy, and those within the western hemisphere developed by Pan American and other U.S. carriers.⁷⁹ Expansion of the transatlantic market with the introduction of jet airliners has resulted in a dramatic increase in passenger traffic since 1957. Today, passengers carried on transatlantic flights amount to 14 percent of worldwide passengers, partly because transatlantic flights connect the world's two largest domestic air markets—the U.S. and EU. Revenue from transatlantic routes is substantial—amounting to \$20 billion in services between the U.S. and EU in 1998, \$10 billion coming from routes between the U.S. and UK alone. The revenue and profits of several EU airlines depend substantially on transatlantic services, with KLM Royal Dutch Airlines deriving 33.9 percent and British Airways 24.9 percent of revenue from transatlantic routes.⁸⁰ However, the European airline industry differs radically from its American counterpart in its historical development.

Consequently, many European airlines still have a larger stake in international (including long-distance) markets than American airlines in part due to a legacy of the earlier role of national airlines in imperial communications and also because longer distances in the U.S. have favored the development of a strong domestic airline industry with a separate and specialized international sector dominated initially by one airline, Pan American.

Despite such an impressive growth of traffic and revenues, commercial air transport remains notorious for nationalism and protectionism. Air transport was the one sector excluded from the original negotiations surrounding the General Agreement on Trade in Services. The industry is subject to an archaic regulatory regime, the so-called Chicago regime.⁸¹ The 1944 Chicago Convention and the 3000 plus bilateral Air Service Agreements (such as Bermuda II) within the Convention stipulate routes and frequency and frequently contain limits on capacity and fare authorization.⁸² More importantly, the Convention and resulting law stipulate strict provisions on nationality, so that airlines must be “substantially owned and effectively controlled” by country nationals, thereby precluding international liberalization and thwarting efforts at consolidation of the airline industry.⁸³

For many years, the bilateral Air Service Agreements allowed comfortable duopolies between the respective state airlines of contracting states, even allowing for a pooling of revenue on shared routes.⁸⁴ Since the advent of deregulation in 1978, the United States has been seeking to liberalize bilateral agreements, arguing that this will result in greater competition and lower fares. The U.S. has consistently favored greater competition on international routes, though ironically the U.S. itself had only two or three carriers seriously committed to serving such routes. By contrast, many European states and most developing countries have favored continued or modified bilateral regulation, partly out of fear of the commercial power of the U.S. in this field. Liberalization will almost certainly result in the demise of a number of non-competitive airlines, and will put pressure on the more mercantilist countries (such as the UK and France). American policy has, during the past twenty years, envisaged extending deregulation to international flights, following its domestic deregulatory strategy through a series of “open skies” agreements that

permit airlines registered in those signatory countries to fly between any points in their own and other countries without restriction. The fact that the U.S. has secured liberalization of fewer than forty bilaterals is testimony to the strength of protectionism and nationalism in this sector. The EU has been fighting within itself since 1991 about whether the Commission should exercise authority that it claims under Article 113 (now article 133) of the Treaty to negotiate with “third countries” over international air services. In doing so, the Commission would supplant national negotiators who are responsible for maintaining and modifying bilateral Air Service Agreements (ASAs) and would become the sole negotiator for all Member States in any kind of multilateral agreement concerning market access and commercial operation.⁸⁵

Origins and Background of U.S.-EU Airline Strategies

The transatlantic market has for many years been troubled by over-capacity with chronic and widespread losses, and constant airfare wars that have undermined profits. While this threatened American airlines, partly because of the revival of European airlines, the trend was reversed after American deregulation in the 1970s led to the consolidation and aggressive expansion of the three major airlines—American, Delta and United. After American carriers began capturing a large percentage of the market through aggressive international expansion, European airlines clamored for protection and sought to renegotiate the many bilaterals (negotiated in the post war period) that allowed unrestricted capacity increases and route expansion. European airlines, and particularly Air France and Lufthansa, wanted to resist pressures for liberalization until they had undergone massive restructuring in preparation for privatization and the pressures created for service liberalization in the single market.⁸⁶

In response to over-capacity, airlines may appeal to governments to enforce or impose regulatory controls—as Sabena and Air France tried to do in the early 1990s. But such an appeal is only effective where airlines are state owned, and even before the current wave of privatization, such a strategy is usually a weak or ineffectual response. Without strong regulatory controls on capacity, airlines have the choice of withdrawal from unprofitable routes or engaging in periodic fare wars to increase market

shares while also reducing costs. The pressures to engage in such a race to the bottom can push revenue to the point where it barely covers the cost of service. A more radical route followed recently by British Airways is to reduce capacity and eliminate routes while focusing on high yield business passengers and appeasing shareholders. This was made possible by BA dominant position, outside of Europe, protected by a web of restrictive bilateral agreements (including the Bermuda II agreement) not available to its competitors under open skies agreements.⁸⁷ Such protectionism allows BA to pick and chose customers—which is not a viable option for its competitors operating under open skies agreements.

The more typical strategy for U.S. and EU carriers to deal with over-capacity is enterprise alliances. Alliances seemed a reasoned response to an antiquated regulatory system by permitting indirect access to restricted markets. Europeans were particularly anxious that the U.S. hub and spokes system, with hubs often located away from traditional east and west coast ports of entry for international traffic, required that they form alliances with U.S. carriers who controlled hubs to arrange connecting flights.⁸⁸ Because international airlines—both American and European—had concentrated on west and east coast cities, the increasingly rationalized hubs and spokes system meant that European airlines could not establish their own hub and spokes system in the U.S., but must form alliances with those carriers who controlled the hubs to arrange connecting flights. This practice known as code-sharing, provided apparent continuous service for European and American airlines throughout the U.S. and Europe. Access to a European network was reciprocal, in part due to the same restrictions on allowing only Community carriers to fly within Europe as stipulated by the Chicago Convention about nationality and effective control.⁸⁹

While BA with the now defunct alliance with U.S. Air and KLM with Northwest have encountered U.S. restrictions in their separate alliances with U.S. carriers, due to remaining restrictions on ownership in the Chicago Convention—rather than simply requiring establishment—airlines have sought enterprise alliances—with equity purchases typically being small.⁹⁰ This makes sense since any takeover of an airline with routes outside Europe would be commercially self-defeating as it would “denationalize” an airline that would probably find its bilateral agreements renounced. Enterprise alliances are the alternative option to traditional

investment, equity and takeovers since they permit indirect access to restricted markets. This has resulted in Europe in a regional system that is structurally different from the U.S. A multi-tiered set of alliances between major and minor airlines rather than mega-consolidation has emerged, with smaller carriers acting as clients for larger hubs (not unlike exclusive dealership arrangements or outsourcing). This makes it easier to exclude rival alliances and up start, no frills companies such as EasyJet and Virgin Express from competing on certain regional routes.

This intense tactical alignment and realignment of airlines continues at the international and regional levels,⁹¹ with the issue of regulatory approval raising questions about the continuation of alliance structures. The concentration or cooperation between airlines has generated intense scrutiny from competition authorities. British Airways, whose proposed alliance with American Airlines failed to win approval after two years of negotiations with anti-trust authorities, gave the first indication that some of these alliances would be considered anti-competitive. Sustained opposition from DG Competition and Department of Justice on grounds that alliances are anti-competitive may signal growing doubts about the benefits of such alliances. The Commission's main concern is that the agreements between airlines could lead to "fortress hubs" creating barriers to new entrants. The U.S. Department of Transportation, initially realizing that the Commission did not have authority to reach a binding deal on core issues such as routes and capacity, sought to use antitrust immunity to pressure foreign governments (through the national airlines which are parties in the alliances) to accept "open skies" agreements.⁹² While such immunity creates the conditions for a new, protected oligopoly, in many cases, denial or withdrawal of anti-trust immunity may be sufficient to cause strategic defection or collapse of alliances. By contrast, European Commissioner Miert saw bilateral open skies agreements, as stifling liberalization, raising entry barriers, making the Commission's approval of these alliances more problematic.⁹³ Nevertheless, the power of the alliances, and the problems they pose, are likely to grow, raising again the question of whether some form of international competition policy is required.

Evaluation and Assessment

While liberalization or “open skies” as part of the EU single market program has resulted in cabotage restrictions being removed and increased competition in the regional airline market, there was uncertainty about the external ramifications of liberalization and what effect that deregulation will have on the international stakes of EU carriers. Few observers anywhere doubt that some liberalization of international aviation is imperative and, indeed, long overdue. Currently there are a number of possible proposals to liberalize the airline sector.⁹⁴ The first possibility is that an open skies agreement, the consistent objective of U.S. international aviation policy since 1978, would prevail. Though this has met resistance from the larger EU member states, namely Britain, France and Germany (until 1996), the U.S. pursued a divide and conquer tactic that led American negotiators to seek agreements with smaller EU member states. Progress has been uneven, with an agreement reached with the Netherlands in 1992, with Germany in 1996, and some market openings though not an open skies agreement with France in 1998. The European Commission has strongly opposed such a divisive tactic, although indicators suggest that liberalization through open skies agreements typically result in fare reductions and thus substantial consumer gains.⁹⁵

Open skies agreements also have a number of limitations.⁹⁶ They are essentially liberalized Chicago-regime bilaterals and, as such, open up access for airlines registered in the two signatory states.⁹⁷ But this still does not overcome the problem that competition is restricted to those airlines “substantially owned and effectively controlled” by those two signatories, and a potential for cartel-like behavior remains. Nationality restrictions for international services also forbid services by foreign carriers within domestic markets (i.e., cabotage, which is expressly prohibited under U.S. law). This latter issue has been complicated in Europe by the single market.

Before the single market was established, foreign airlines had so-called “fifth freedom” rights to carry traffic between national capitals as extensions of transatlantic services. In the single market, these flights became domestic rather than international services. Though non-EU carriers have a small proportion of intra-EU traffic and their significance has been diminished by the creation of transatlantic alliances, European negotiators, especially

from the UK, have used this issue to demonstrate inequity and lack of reciprocal access to the American domestic market. Both sides have expressed concerns about the unequal benefits that pertain from such an agreement. U.S. negotiators contend that an agreement with a small European state allows smaller airlines access to the large U.S. domestic market, while the access of U.S. airlines is limited to a small market in Europe. However, some European member states fear the competition of U.S. airline carriers as many of their national airlines have until recently been weak, state owned enterprises. Bilateral agreements also violate the spirit and principles of the EU treaties since they are exclusive in character and undermine the single aviation market in Europe.

As an alternative to bilateral agreements, the European Commission has asserted that it should negotiate on behalf of all member states with third countries. In 1990, the Commission presented a proposal to the Council to begin negotiations concerning commercial aviation relations with third countries.⁹⁸ Legally, the Commission has argued that its authority as negotiator of external trade agreements under Article 113 (now Article 133) should be upheld. Concerned about the effect of bilateral agreements on the single market, the Commission did not seek to annul agreements but held that the nationality clauses are contrary to Community law and undermine the right of establishment. The Commission has challenged the legality of the open skies agreement signed by many member states in the European Court of Justice.⁹⁹ Arguing that negotiations en bloc would strengthen their negotiating arm, and provide a parity of markets and benefits through the creation of a transatlantic aviation area, the European Commission has advocated an aviation free trade zone—that is the possibility of a single transatlantic aviation area. The prospect of the abolition of nationality and cabotage restrictions is aimed at increasing the attractiveness of a single transatlantic aviation zone for European industry.

The Commission was given a limited negotiating mandate in 1996 for a “common aviation area” with the U.S., driven by the creation of two large alliances between Lufthansa-United Airlines and American Airlines-British Airways. However, the exclusion of traffic rights from the mandate authorized the Commission to discuss only those issues related to competition, state aids, code sharing, and ownership rights. The exclusion

of traffic rights consequently led the U.S. to break off talks and continue to pursue open skies bilaterals.

Though the Commission was unable to gain a broader negotiating mandate, in 1998 it pressed ahead with legal action against member states that signed new bilaterals with the U.S. (Spain, Italy and France). Yet with the prospect of a new GATT Round and recent U.S. DOT initiatives, the idea of a U.S.-EU common aviation area was revived. With support from business groups, the Association of European Airlines,¹⁰⁰ and eight member states, there were increased signs that a Transatlantic Common Aviation Area was gaining ground, with continuing support for bilaterals until a U.S.-EU agreement was reached.

The new EU Transport Commissioner, Loyola de Palacio, has argued that the Transatlantic Common Aviation Area combines the concept of the U.S. open skies and the European concept of the open internal market in a framework of harmonization and convergence.¹⁰¹ Because the antiquated Chicago regulations do not take into account the need for close, multinational cooperation among all the players in the air transport sector, de Palacio proposed the simultaneous removal of cabotage and nationality restrictions on both sides of the Atlantic. A single aviation market would then prevail, and reduce the divisive impact for Europeans of the Open Skies Agreements. However, strong opposition in the U.S. to removing restrictions on cabotage and nationality will likely result in a less ambitious deal than would in effect be an EU-U.S. bilateral deal (but without rights to operate connecting flights within their respective domestic markets). Such an agreement would nevertheless entail substantial liberalization and increase competition.

A possible alternative to transatlantic liberalization would be inclusion in the General Agreement on Trade in Services. Air transport was specifically excluded from the GATS when it came into force in 1995.¹⁰² This exclusion affecting traffic rights covered by the Chicago convention, including the five freedoms of the air, and bilateral air agreements was supported by all the members of the WTO and included in a specific annex.¹⁰³ Should GATT-like rules and disciplines be applied to civil aviation, the entire system of bilateral exchanges would fall apart since it is patently inconsistent with the most favored nation rule.

Though sufficient support for subjecting aviation to such free trade rules does not yet exist, it remains to be seen whether this will change in the future. The WTO's Council for Trade is required to review developments in the air transportation sector every five years, as pertaining to the Annex, with a view to possible extension of the GATS agreement to this sector. While there is some support from advocates of air transport liberalization to include the industry within GATS, which would effectively end the Chicago system, objections to the two central principles of the GATT system, namely most favored nation (MFN) and national treatment, remain. MFN would require the opening of the markets of more liberal states to protectionist states without assurances of reciprocity. This would allow the latter to enter the larger and lucrative markets such as the U.S. and EU. Not surprisingly, this has garnered opposition from large aviation markets such as the U.S. and Japan for the inclusion of aviation in GATS. National treatment requires that foreign companies established in a country be treated the same as domestic companies. This would clash with current rules on nationality in the airline sector and also with regard to cabotage. The prospect of allowing foreign-owned airlines the right to compete on equal terms with national airlines has also generated intense opposition from labor unions, especially in the United States. The International Air Transport Association (IATA), which represents most of the world's carriers, has also expressed strong reservations about an expanded WTO role.

Other parties, and most notably the Director-General of the WTO, have argued for the inclusion of air transport in the GATS.¹⁰⁴ Australia and New Zealand have suggested revisiting the international rules on airline ownership and control on which bilateral agreements on traffic rights are now based. The European Commission is also supportive of multilateral negotiations on air transport, which follows on from its earlier preparatory documents for Seattle seeking further liberalization and assessment of the Annex on Air Transport.¹⁰⁵

Like mutual recognition agreements, the economic impact and demonstration effect of an U.S.-EU agreement would perhaps form the building block for a multilateral liberalized zone.¹⁰⁶ Expansion might occur through adherence by individual states or through a linkage between liberalized zones such as that recently created in Central America. While the market potential of such an agreement would be greatly enhanced by

U.S. and EU participation, it would enable those airlines able to withstand domestic competition to benefit from access to a larger external market. While the U.S. has expressed interest in such a multilateral or plurilateral arrangement, which it sees as an aggregation of the various open skies bilateral that it has signed, the prospect that such an agreement would be perceived in positive terms by countries of different sizes would also diminish complaints about U.S. hegemony and pressure. The demonstrated benefits from joining such a voluntary liberalized regime would be felt by both large and small airlines, given their existing network and alliance strategies.

However, the questions of ownership and control of air carriers and of the allocation of traffic rights remain fundamental. A multilateral agreement may leave intact the survival of bilaterals between third countries outside the zone of liberalization, and between these countries and those that have signed the agreement. The nationality restrictions in bilaterals would inhibit the purchase of equity of airlines by non-nationals for fear that “denationalization” might suspend traffic rights by third countries, as is now the case when airlines take minority stakes in other airlines. Although a multilateral liberalized framework would cease to operate with nationality restrictions, an airline that is no longer under “substantial ownership and control” by a national would need to gain plurilateral nationality to enable it to continue to operate on routes covered by bilaterals with third countries.

Any efforts to reform the current regulatory regime will have substantial implications on the airline system. Though attention in the Transatlantic Business Dialogue has been on regulatory harmonization on equivalent safety and certification issues, as well as the dispute over airline noise regulations (so-called “hush kits”), such a focus misses an opportunity to discuss substantial change to the increasingly obsolete Chicago system. Currently the pressures for alliances, in lieu of mergers, are shaping and reshaping the transatlantic market. While pressures for liberalization are increasing from a number of quarters, there are concerns that without some form of regulatory controls, international mergers may stifle competition more than the current alliance structure. Those airlines in smaller states and developing countries fear being overwhelmed by the sheer dominance of U.S. and EU carriers. Yet whatever route to liberalization is taken, airlines will still face problems of over-capacity, fare wars, and upstart low fare

carriers, as well as scrutiny arising from closer transatlantic competition relations between the U.S. and EU.

CASE STUDY NO. 4 BIOTECHNOLOGY

The approach to biotechnology in Europe stands in marked contrast to that of the United States. Tensions have risen high over genetically modified foods, with public outcry in Europe over the effects of “Frankenstein Foods” receiving considerable attention within the United States.¹⁰⁷ Trade tensions over genetically modified crops illustrate the differences in regulatory strategies and policies that have resulted in profoundly different technology trajectories, and the ensuing differential effects this has created on biotechnology development and investment.¹⁰⁸

Biotechnology entered the policy agendas of the U.S. and EU in the 1970s,¹⁰⁹ when the regulation of products produced by biotechnology began on a similar footing but subsequently took different paths.¹¹⁰ Efforts by scientists to review the potential biohazards and risks of recombinant DNA resulted in a self-generated moratorium.¹¹¹ As governmental awareness of the potential benefits and risks of biotechnology grew, the EU and U.S. considered whether regulation was needed, whether it should govern the process or production of biotechnology, and whether governments had sufficient legal basis to regulate biotechnology.

Origins and Background of U.S.-EU Biotechnology Regulations

EU biotechnology regulation began in the 1970s with a proposal by the European Commission Science, Research and Development Directorate on safety measures that would require notification and authorization by national authorities of work involving biotechnology. After indications that initial fears about recombinant DNA (biotechnology) had subsided, the Commission replaced the proposed directive with a non-binding Council Resolution adopted in 1982.¹¹²

This initial regulatory approach mirrored that being developed in the United States. Guidelines for research introduced by the National Institutes of Health Advisory Committee¹¹³ in 1976 covered physical and biological containment procedures. The guidelines provided an opportunity for

revision, which required public consultation and discussion from a variety of quarters including scientists, federal agencies and activists.¹¹⁴ Many companies chose to voluntarily comply to avoid further regulation. Despite the initial period of policy convergence where both sides opted for non-statutory guidelines, by the mid-1980s biotechnology policy in the U.S. and EU had moved in different directions, laying much of the groundwork for current trade disputes.

The European Commission and Parliament began pushing for a Community-wide framework to be adopted to enhance their global competitiveness in biotechnology. The resulting 1983 Commission Communication outlined a set of objectives including clear regulatory regimes from initial laboratory testing to post-market monitoring; greater coordination of activities at the member state, regional and international level, and providing protection for intellectual property. This was accompanied by the need for increased attention to the social implications of biotechnology, although it did not specify whether the result would be process or product based legislation.¹¹⁵ The need for such a Community-framework was driven in part by the range of emerging national regulations, creating a highly fragmented system with potential implications for the single market. Further pressure came from the work at the international level within the OECD's Group of National Experts. The proposed guidelines published in 1986 stressed that there was no scientific rationale for regulating the process by which a product was produced. The debate about whether regulations should govern the process of producing genetically engineered products rather than the products of biotechnology was an important one for transatlantic relations. Since regulation based on safety quality, and efficacy of product could modify existing sectoral regulations whereas regulation based on process required new regulation to insure a basic level of human and environmental safety, conflicting positions could result in trade conflict.

Within Europe, the resulting directives (90/219)¹¹⁶ and (90/222)¹¹⁷ on genetically modified organisms provided for a process-based approach to biotechnology regulation. This approach derived from Germany had gained rapid acceptance in environmental laws in the 1970s. The precautionary principle is a conservative approach to risk with a strict set of regulations. While arguing that this is necessary to allay public fears about new

technologies and exercise control over industry, the policy choice led the EU in a much different direction from that chosen by the U.S. Policy responsibility was divided across different Directorate-Generals, resulting in a lack of consistent approach within the European Commission itself.¹¹⁸ A Biotechnology Steering Committee was created to facilitate coordination in 1984, with assistance from a Biotechnology Regulation Interservice Committee (BRIC), a technical committee composed of representatives of concerned Directorates General including Internal Market, Environment, Consumer Protection and Nuclear Safety, Science Research and Development, Agriculture and Employment, Social Affairs and Education.¹¹⁹ BRIC became the center of biotechnology regulations within the Commission, as the Commission stated its intention to introduce proposals for regulation of biotechnology by 1987.

The Directorate-General for the Environment was given chief responsibility for drafting a directive on regulating the deliberate release of GMOs into the environment, and significantly chose a process rather than product approach.¹²⁰ This was opposed by other Directorate-Generals within the European Commission who argued that biotechnology was simply a new and improved technology for producing products, at least in part to win jurisdiction over future regulatory actions.¹²¹ Because the proposals were evaluated within the Environment Council of Ministers, the Directives 90/219 and 90/220 were to be administered by the Environment Directorate and their recognized Competent Authorities. Directive 90/220 requires applicants to submit an environmental impact assessment to competent authorities and requires another application in the member state to market a genetically modified product. Upon approval other member states may object to the permission to market—in essence a rejection of mutual recognition.¹²² All products produced via genetic modifications were covered under these same regulations, whether they were plants, drugs, food or pesticides.¹²³

An application made by a British company in 1994 to market the first genetically modified canola (oilseed rape) resulted in the approval from a British Competent Authority and recommended approval EU-wide. Opposed by Finland, Denmark and Sweden, the application was supported by qualified majority voting in 1995. Continued controversies over the labeling of GMOs delayed approval until 1997 when the company

announced it would voluntarily label the product as genetically modified.¹²⁴ A further controversy erupted over the decision in December 1996 to allow the marketing of genetically modified corn from Switzerland. Besides opposition from different consumer groups, Austria, Luxembourg and Italy imposed various restrictions and bans on the genetically modified corn. The European Parliament added its voice to the debate by calling on the Commission to suspend its approval pending further investigation.

While there was significant pressure from European companies to market genetically modified crops, greater pressure was coming from the United States where firms planned to export modified soybeans and corn to the EU. The increasing applications for internal marketing of GMOs and the increasing U.S. production and export of genetically-modified crops pushed the European Parliament and Council into a compromise on “novel foods” which would so be labeled if there were substantial change in their “characteristic or food property.” The Novel Food Regulation came into effect in May 1997, although it did not cover foods such as genetically modified corn and soybean that had already been approved. A second directive, adopted in September 1997 required the labeling of genetically modified soybeans but left the actual wording of that labeling unclear.¹²⁵

The controversy over the content of the labels—and whether foodstuffs derived from genetically modified products should be labeled—generated considerable debate. Confusion over labeling resulted in the rejection of such a proposal in December 1997.¹²⁶ By this time, the European food industry announced that it would begin voluntarily labeling to assuage consumer concerns.¹²⁷ A May 1998 proposal on mandatory food labeling containing genetically modified corn and soybeans was finally adopted, with some member state objections. The resulting new regulations that came in force in September 1998 led to a barrage of criticism from consumer and environmental groups, and organic producers.¹²⁸ The proposal did not specify the threshold level below which labeling is not required for genetically modified food, nor did it determine which products containing only limited amounts of genetically modified material would be excluded.

The U.S. regulatory approach has differed significantly from that of the EU. Beginning in the 1980s, the U.S. convened two working groups: the White House Cabinet on Natural Resources (CNNRE) and the Environment Science Coordinating Committee (BSCC).¹²⁹ As in the EU,

division existed within the U.S. federal agencies over the choice between process and product regulation.¹³⁰ The FDA, USDA Food Inspection Service (FSIS) and American Plant Inspection Service (APHIS), EPA and White House Office of Science and Technology Policy were all involved, the consensus was to regulate the actual product and not the process of biotechnology. Though the EPA insisted on the need for further risk assessment procedures, indicating its preference for process regulation, their draft proposal to regulate biotechnology under the Federal Insecticide, Fungicide and Rodenticide and the Toxic Substance Control Act generated stiff opposition. The CCNRE along with sixteen other departments and agencies issued a Coordinated framework for the Regulation of Biotechnology in 1984, which became the final policy statement on biotechnology, published on in the Federal Register in June 1986.¹³¹

This specified three primary agencies, FDA, EPA and USDA, for regulating biotechnology and thus provided a regulatory framework that included a variety of existing federal laws including the USDA's Federal Plant Pest Act, EPA's Toxic Substance Control Act, and Federal Insecticide and the Fungicide and Rodenticide Act among others.¹³² This coordinated framework was in marked contrast to the EU, since the U.S. policy was premised on the fact that genetic engineering cut across many product areas regulated by different agencies, and in the case of overlap a lead agency would be designated. The U.S. also differed with regard to regulatory reform, since the EU required new proposals to amend the existing directives while the U.S. would make modifications based on administrative or legislative action.¹³³ The BSCC provided two important principles that simplified regulation: agencies should seek to adopt consistent definitions of those genetically engineered organisms subject to review and agencies should use scientific reviews of comparable rigor.¹³⁴

While the stated goal was to balance regulation of health and environmental safety with sufficient regulatory flexibility to facilitate growth of the industry,¹³⁵ disagreement emerged regarding the scope of biotechnology regulation in the U.S. Because of statutory differences in the laws that individual agencies administered, the Coordinated Framework under BSCC allowed them to adopt different approaches to regulating biotechnology products. Thus, the FDA and OSHA did not adopt new regulations, preferring to proceed on a case by case basis and evaluate for

efficacy, safety and quality on the basis of existing requirements or procedures such as new drugs or new breeds. By contrast, EPA and APHIS announced their intention of modifying existing legislation to take account of any new characteristics.¹³⁶ EPA, for example, revised the Toxic Control and Substance Act to apply differently to GMOs, issuing consent orders for new substances or new uses of substances. Though this does seem to parallel the precautionary principle of the EU, with initial differentiation between genetic and genetically engineered plants, EPA has published exemptions to TCSA based on new scientific information, so that broad categories of “low risk” plants are exempted from regulated status and differentiated from “high risk” plant categories.¹³⁷

In general, the U.S. has continued to refine its regulatory framework. Both the FDA and USDA have actively worked to ease regulations of GMOs. In 1997, the USDA APHIS simplified notification procedures for importing, releasing into the environment through field tests, and moving GMOs across state lines. The FDA adopted a similar approach for approving bio-engineered food when it determined that the Calgene Inc. “FLAVRSAVR” tomato was safe, with the outcome that subsequent applications for genetically modified foods do not have to go through the scientific review process simply because they are produced through the **process** of genetic engineering. Thus, genetically modified products are in some instances shifting from regulation to notification, making the process less administratively burdensome in the U.S.¹³⁸

Evaluation and Assessment

Public reaction in the EU to genetically modified foods has attracted considerable attention. Negative public opinion and demonstrations, government bans and moratoriums on genetically modified food across different member states has forced many food companies in Europe to take public concerns seriously.¹³⁹ With the EU debating and formulating its approach to GMOs, researchers presented evidence, which while fragmented, attracted considerable media attention and increased public fears.¹⁴⁰ A number of supermarkets and frozen food retailers, most notably in the United Kingdom, have revoked their use and sales of genetically modified foods. Monsanto, subject to legal action that did not help its

public image with a fine for safety lapses, has borne the brunt of consumer opposition.¹⁴¹ Continuing public outcry has spread across Europe with Austria and Luxembourg threatening to take the Commission to Court over its pressure to lift their ban on genetically modified corn, and Germany introducing legislation to ban the use of genetically modified yeast in brewing beer.

In June 1999, EU Environment ministers indicated their strong support for a moratorium on biotechnology products and limiting the period of authorization for a genetically modified product.¹⁴² The European Union has stopped all imports of U.S. corn because of refusals to separate genetically engineered from traditional crops, and the U.S. is threatening to file a complaint with the WTO. In testimony before the Subcommittee on Trade of the House Ways and Means Committee, Under-Secretary of Commerce for International Trade David Aaron asserted that “the EU approval process for the products of biotechnology is non-transparent and overly political. We need to work closely with the EU to finalize approval, and develop for future biotech crops a workable, timely and transparent approval process.” As of June 1999, the EU had issued eighteen licenses for biotechnology products, nine of which were for genetically modified crops. Although eleven others were in the pipeline, it appears unlikely that any new approvals will be granted in the interim.¹⁴³ Approximately in the same time frame, the USDA has approved fifty genetically modified crops and the EPA has approved eight. The economic impact is clear: three quarters of all genetically modified crops are now grown in the U.S. and hardly any are grown within Europe.¹⁴⁴

The impact of the differences in regulatory approach between the U.S. and EU on bio-industries growth and investment has been startling. American biotechnology companies have benefited from a variety of funding sources including venture capital, strategic alliance, private equity, and public offerings. In 1994, the U.S. spent approximately \$4.3 billion on biotechnology, substantially more than any other country.¹⁴⁵ The majority of U.S. biotechnology companies are relatively new, and in many cases these venture capital start-up face tremendous pressure for immediate tangible success, whereas European biotechnology is driven by major pharmaceutical companies that tend to expect long term investment in research and development activities. However, the different regulatory

policies enacted by member states—typified by the 1990 Gene Technology Act in Germany—and the subsequent EU directives—have produced a net outflow of capital investment from the EU to the U.S.¹⁴⁶ Companies such as Bayer (Germany), Rhone Poulenc (France) and Glaxo (United Kingdom) had made substantial investments, often in American start-ups. The European Commission estimated that EU companies invested at least ECU 2.7 billion in the U.S. in area of biotechnology by 1994.¹⁴⁷ By 1990, the U.S. was filing 50 percent more patents than the EU, and the rapid increase in field tests for genetically modified crops provided strong indications that the U.S. had an indisputable global advantage in this field.¹⁴⁸ The same picture continues in terms of employment, with European biotechnology companies employing 39, 000 people in 1997, compared to 153, 000 in the U.S. in 1998.¹⁴⁹

These divergent regulatory approaches are long-standing and have frequently caused trade conflict. From the U.S. perspective, the EU's stance on GMOs is indicative of long standing restrictive regulatory practices. A similar conflict in growth hormones in cattle, resulting in a ban on imports of American beef resulted that in a highly divisive trade dispute. Although the WTO dispute settlement procedure found in favor of the United States, arguing that the EU had violated the SPS agreement, the EU appealed the decision which was confirmed by the Appellate Body in 1998. Given that the EU has refused to comply, and the U.S. has imposed punitive tariffs, the potential for other transatlantic trade disputes is clear. Bio-engineered foods have raised the temperature even higher.¹⁵⁰ There are several reasons for this. First, Europeans, through experience with mad cow disease (BSE crisis) have become increasingly distrustful of scientific findings and wary of efforts of politicians and regulators to assure them.¹⁵¹ The British government's mishandling of the BSE crisis and subsequent revelations of contaminated livestock in other member states have altered attitudes towards European regulation. The pressures have also resulted in the European Parliament pushing for Commission action with regard to food safety. At the same time, the strengthening of consumer policy has led to the separation of inspection and implementation from policy-making, with the former assigned to the Food and Veterinary Office and the latter to the Agricultural Directorate. within the Commission.¹⁵² The lack of an EU-

wide agency to coordinate scientific reviews is viewed as contributing to the coordination problems in Europe.

The degree to which regulatory bodies have been able to coordinate and adapt to scientific evidence has also influenced transatlantic efforts to cooperate on biotechnology policy. While some conflict exists as to how each agency will regulate the biotech products under their supervision in the U.S., coordinating interagency mechanisms have worked effectively. By contrast, the lead taken by the Environment Directorate in Europe meant that biotechnology products and processes were defined broadly, and there were limited efforts to establish internal policy coordination mechanisms.¹⁵³ Unlike the United States, where the Administrative Procedure Act requires agencies to consult widely through proposals announced in the Federal register (notice and comment), the lack of such an administrative process in the EU provides different avenues of access for non-governmental or pressure groups. Many of these groups gravitated towards political fora in the European Parliament and domestic arenas, where hearings were held on biotechnology legislation, in part because the European regulatory process left them marginalized, while the American regulatory process channeled opinions and debate through the regulatory process.

The differential regulatory effect is most clearly visible with regard to regulatory adjustment in light of new scientific evidence. In the U.S. case, this means decreasing administrative procedures for both research and development of genetically modified products. In the European case, adequate review mechanisms are less flexible, although some would argue more stringent, since amendments require either new legislation or secondary legislation provided by committee of Competent Authorities composed of member state representatives (the “comitology” process).¹⁵⁴

Investor pressure may have also pushed for a more positive assessment of biotechnology’s economic potential in the U.S., whereas in Europe the negative assessment has come from a variety of sources including environmentalists and farmers. American farmers have been more willing to adopt new technologies, as indicated by their use of growth hormones in beef, while European farmers were strongly opposed.¹⁵⁵ Whether this could be attributed to differences in culture is perhaps summed up by the remarks of one observer: “the transatlantic difference may be that Americans are accustomed to a steady stream of novel products from a highly

competitive industry, whereas Europeans tend to be more traditional about what they eat.”¹⁵⁶ Though this reflects a greater confidence in regulatory agencies, the differences may be diminishing—as recent indications that manufacturers of baby food such as Gerber have responded to growing public concerns about genetically modified foods. Consumers are increasingly interested in labeling in the U.S., and while this may indicate a growing awareness in the U.S. about genetically modified foods, the U.S. is unlikely to withdraw its approval from foods already made from genetically altered seeds.

With the prospect of producing and marketing different products on both sides of the Atlantic, and concerned about the economic implications of strong public reaction to biotechnology, the Transatlantic Business Dialogue set up a special group in November 1996 on agri-food biotechnology. Aimed at providing recommendations and strategy for transatlantic liberalization, the initial focus was on the possibility of an MRA on safety assessment of biotechnology. The Agricultural Biotechnology Issue group initially sought greater industry-government dialogue and shifted their focus from an MRA to the broader objective of regulatory cooperation. Seeking to consign the discussion of regulation of biotechnological products to the technical sphere, the Transatlantic Business Dialogue has sought to shift the focus and promote the importance of regulatory cooperation for jobs and investment.

The prospect of increased trade disputes between the two different principles of preventive and precautionary regulation has promoted both sides to establish an EU-U.S. Biotechnology Consultative Forum. Launched in May 2000, the forum presented a report to the U.S.-EU Summit in December 2000.¹⁵⁷ Focusing on the use of biotechnology and not restricted to genetically modified crops or foods, the recommendations regarding regulation simply provide for risk assessment and regulatory authorization without indicating how the bridge between the two approaches will be made. The deeply divisive issue of the precautionary principle is framed as meeting both sides half-way with both anticipation of potential risks and hazards (precautionary) and monitoring of outcomes until concerns prove unfounded (preventive).¹⁵⁸ Tensions between the U.S. and EU in this area will likely continue despite current efforts due to deeply divided approaches to risk management that reflect different technical and political

rationales. These differences have stalled parallel attempts to reach an international accord on a safety system for trade in genetically modified products. While growing opposition has come from developing countries which favor controls on international trade in genetically modified crops, even though they have previously opposed efforts to link trade measures to enforce environmental measures, the continued disagreement between the U.S. and EU will hinder any efforts to reach an international accord.

CONCLUSION

The U.S. and EU agree on the importance of liberalizing trade and investment to provide momentum for the global trading system and bilateral transatlantic economic relations. These efforts have involved both government policies and business strategies in addressing some of the most prominent obstacles to trade. In recent years the relationship has been complicated by the growth of domestic regulations in areas that have traditionally not been subject to trade negotiations. Disagreement over the purpose and structure of regulation is highly predictable as the U.S. and EU economies become increasingly intertwined. While traditional disputes involving large commercial interests will continue, as will disagreements over the use of economic sanctions as a foreign policy tool, these behind-the-border issues will likely become an even more prominent aspect of the transatlantic disputes.

Dealing with these will require new models of economic diplomacy, or market governance, in accommodating both trade and regulatory cultures. The four case studies present very different pictures of the nexus of regulation and trade, making general categorizations very difficult. Some issues, such as those related to biotechnology, may prove intractable because they involve core societal beliefs about whether and how governments should intervene in market activities. In those cases, the U.S. and EU may have to agree to disagree, while taking steps to better understand their respective positions and contain the impact of any fallout. Some issues, such as airline policy, may be characterized by intense discord, divide and conquer strategies, and outright protectionism. In others, such as competition policy, substantial cooperation and increasing convergence

around best practices may be achieved. The development of the several mutual recognition agreements described above demonstrates that reaching agreement on governance structures is only a first step, and that actual implementation also presents many challenges.

While the cases differ greatly in their details, and in the potential for conflict or cooperation, they share the common theme of market governance and the improved but still limited ability of U.S. and EU policymakers to develop working solutions to interrelated regulatory and trade issues. Though the achievements of the TEP and other negotiated agreements are commendable, there is a danger of measuring the transatlantic relationship by its production of acronyms, rather than by the expansion of regulatory cooperation. More attention should be focused on governance outcomes and the management of potentially conflictual issues than on the status of negotiations.

Attention in the EU's single market program has turned from the completion of a regulatory framework to issues of market management and enforcement. Although this type of activity has few political rewards, the U.S. and the EU will need to do the same in the context of the transatlantic economic relationship to enhance policy learning and mutual trust, with a view to replicating the achievements in the competition policy field. Other measures could also be helpful. Efforts to institutionalize dialogues between different civil society groups engage policy and advocacy groups beyond the traditional constituencies concerned with trade, enhancing openness and transparency in the governance of transatlantic relations. This approach is gaining ground in the case of biotechnology, as described above, and in other consumer issues. Institutional symmetry also facilitates discussion and consultation. Efforts to foster institutional convergence through the adoption of a European administrative procedure act would be a helpful step forward on the EU side, also serving to deflect criticism about what American policymakers perceive as the opaque EU decision-making process.

More attention should also be paid to the dense networks of public-private cooperation that have developed on both sides of the Atlantic. The TABD is perhaps the best "institutionalized" example of such transatlantic cooperation. In many cases, however, such cooperation is held hostage by domestic political or legal constraints. While there may be general support

in Washington for trade liberalization, sharp disagreements exist over the terms of trade. Congress has become extremely reluctant to grant fast track authority, in part due to the bruising battles over NAFTA and the Uruguay Round, which also highlighted fears over losing sovereign regulatory control. Different domestic constituencies, and particularly those within the Democratic Party, have also clashed over the issues of environmental and labor standards in developing countries. It remains to be seen whether fast track efforts under the Bush Administration will apply solely to the FTAA and other regional arrangements or simultaneously to a new WTO round.

A similar inward-focus often prevails in Europe, and may only increase as the European Union faces the twin challenges of enlargement and institutional reform. Much of the discussion concerning these developments, leading most recently to the December 2000 Treaty of Nice, has given little consideration to their impact on third countries. Yet the negotiating authority of the EU in the trade area—like that of the U.S.—is legally and politically constrained. Though the EU has had a common commercial policy since 1957, when the member states mandated negotiating authority to the Commission, EU competence has been challenged, as services have become more prominent on the international agenda. At Nice, the Commission proposed that services, intellectual property and investment be brought into line with goods, and to provide for qualified majority voting for the results of any agreement. The resulting compromise aligned the decision-making externally with that of the single market. This will make it more difficult to reach agreement as in certain controversial areas EU member states will continue to exercise a national veto. In some sectors, it will also allow third countries to continue to play the game of divide and rule. From the U.S. perspective, it will complicate efforts to secure agreement with the EU on certain issues and constrain the EU in ways that parallel the absence of fast track in the U.S.

The negotiating postures of the U.S. and EU also have obvious global implications given their roles as key players in any multilateral liberalization effort. The post-Seattle international trade environment requires greater awareness of new and shifting coalitions within the WTO and in regional fora. New or resurgent instances of regionalism, such as FTAA and Mercosur, the ITA agreement brokered by APEC, and the financial services

interim agreement rescued by an EU-Japan-ASEAN coalition indicate that the playing field is shifting. The “new issues” such as competition, investment, and environment that were tackled in Seattle and may be addressed in the next multilateral negotiations are gaining increased visibility and contention, engaging communities well beyond the trade arena. While the EU may choose to promote other coalitions in WTO in the hope that the U.S. will eventually accept a broader agenda, the process of coalition building will be complicated by the larger number of actors, issues, and interests represented.

Focusing on the transatlantic relationship can have the effect of downplaying developments in Asia and other regions, and at the international level. Transatlantic efforts at regulatory cooperation are not exclusive since the EU and U.S. have additional “spokes” to add to their hubs. In competition policy, the U.S. has similar bilateral agreements with Canada, Brazil, Japan, Australia, Germany and Israel. Both the Free Trade Area of the Americas (FTAA) and NAFTA have recognized the importance of anti-trust cooperation. The EU has only recently taken this track with bilateral agreements with Canada and Japan (under negotiation). More important, however, is the spread of European competition rules that will provide the EU with leverage during international negotiations. Rules similar to those in the Treaty of Rome have been adopted by the European Economic Area, Central and East European applicants for EU membership, and through the Euro-Mediterranean Agreements. A number of other important regulatory cooperation arrangements have developed outside the U.S.-EU sphere, with mutual recognition and competition policy agreements between New Zealand and Australia as one example. This suggests that there are both multilateral and plurilateral options available for regulatory cooperation.

The United States negotiated over 270 new trade agreements under the Clinton Administration, and there are indications that the new Bush Administration will prioritize FTAA at the March 2001 Summit of the Americas. Similarly, the European Union has engaged in extensive bilateral and regional cooperative efforts resulting in twenty-five free trade agreements in the 1990s. With increased political and economic resources directed towards bilateral and regional groupings in central and eastern Europe, Latin America and North Africa, the EU has not only become an

economic hegemon in Europe, it has also become far more adept in using its own regulatory strategies as an instrument of foreign economic policy.¹⁵⁹

Whether the U.S. and EU are able to design an effective framework for governing transatlantic economic relations will help to determine whether their individual efforts at the regional and international levels will be cooperative or conflictual. The transatlantic relationship has great influence both because the U.S. and EU have such economic heft and negotiating influence at the multilateral level, and because strategies developed at the transatlantic level, such as regulatory cooperation, are often transferred to other regions and international fora. The TEP and other areas of substantial transatlantic cooperation provide strong evidence that the U.S. and EU can develop effective governing frameworks and strategies when their economic interests are compatible and related social values are, at the least, not directly at odds. The real test will be whether more effective mechanisms can be designed to address those areas, such as aviation policy, where economic interests are not complementary, and other areas, such as biotechnology, where social values are in strong disagreement. The early warning mechanism and promotion of social dialogue through means such as the biotechnology consultative forum are helpful steps in the right direction, but they have not demonstrated the capacity to truly limit potential trade conflicts. Efforts to refine the early warning system should continue with a view to creating a more institutionalized arrangement.

Ideally, the identification of potential problems will trigger governmental response within a specific time frame and provide for a standstill period for more discussions among different constituencies on both sides of the Atlantic. It is unlikely, however, that legislators on either side will be willing to freeze their activities indefinitely, particularly when they are subject pressure from their own constituencies and may not always feel that their European or American counterparts are acting in good faith. A more likely outcome is more frequent use of the early warning mechanism, joined by increased use of private actors as good-faith brokers, as in the case of biotechnology, to gauge the political limits of regulatory cooperation.

ENDNOTES

¹ Kahler, Miles. Regional Futures and Transatlantic Relations (New York: ECSA/Council of Foreign Relations, 1995); The Economist, May 8, 1999

² See Youri Devuyt “Transatlantic Competition Relations.” Paper presented at the New Transatlantic Conference, University of Wisconsin, 31 May-June 2, 1999 p. 2; Kalypso Nicolaidis, “Mutual recognition of regulatory regimes: some lessons and prospects” (Cambridge MA: Harvard Law School, 1997 Harvard Jean Monnet working paper series; 97/7).

³ Devuyt, Youri. “Transatlantic Trade Policy—U.S. Market Opening Strategies.” Center for West European Studies, European Policy paper Series, University of Pittsburgh, 1994. p. 3.

⁴ Devuyt, Youri. “Transatlantic Trade Policy—U.S. Market Opening Strategies.” Center for West European Studies, European Policy paper Series, University of Pittsburgh, 1994. P. 6ff

⁵ For an overview of transatlantic relations in the post cold war era, see Michael Calingaert, European Integration Revisited: Progress, Prospects, and U.S. Interests (Boulder: Westview, 1996); John Peterson, Europe and America: The Prospects for Partnership (London: Routledge, 1996).

⁶ Baker, James. “A New Europe, A New Atlanticism: Architecture for a New Era.” Berlin, 12 December 1989; for a general overview of the New Transatlantic Agenda, see Anthony Gardner, A New Era I U.S.-EU relations? the Clinton Administration and the New Transatlantic Agenda (Ashgate, 1997)

⁷ See generally, Horst Siebert “TAFTA: Fueling Trade Discrimination or Global Liberalization?” AICGS Economics Working Paper No 19, March 1996.

⁸ Devuyt, Youri. “Transatlantic Trade Policy—U.S. Market Opening Strategies.” Center for West European Studies, European Policy paper Series, University of Pittsburgh, 1994

⁹ Farewell Remarks to the EU Committee of the American Chamber of Commerce, Ambassador Stuart Eizenstat, U.S. Representative to the European Union, Brussels; February 8, 1996

¹⁰ Devuyt, Youri. “European Unity in Transatlantic Relations.” in Eric Phillippart and Pascaline Winand eds., Ever Closer Partnership: Policy Making in U.S.-EU Relations (Brussels: P.I.E.-Peter Lang, 2001)

¹¹ The Early Warning System functions through existing structures whereby government agencies or business can file warnings of impending trade conflicts to the TEP Steering group, which then forwards this warning to the Senior High Level Group, which embarks on corrective action.

¹² Declaration on EU-U.S. Early Warning and Problem Prevention: Principles and Mechanisms, Bonn 21, June 1999.

¹³ European Commission, The New Transatlantic Marketplace, Brussels, COM 125 Final 11 March, 1998.

¹⁴ See Jacques Pelkmans, “Pragmatism and Leadership: the EU’s Atlantic trade strategy”

Paper presented at the AICGS Conference, Creating a Transatlantic Marketplace: Government Policies and Business Strategies, November 1999; Michelle Egan, "Mutual Recognition and Standards Setting: Public and Private Strategies for Regulating Transatlantic Markets," AICGS Policy Paper No 10, 1998.

¹⁵ Frost, Ellen. "The Transatlantic Economic Partnership." International Economic Policy brief, IIE Washington, September 1998.

¹⁶ The European Commission notified the U.S. authorities about 59 merger cases in 1999 alone, and the U.S. notified the EU about 39 merger cases in 1999.

¹⁷ Comments at the Workshop, "Creating a Transatlantic Marketplace."

¹⁸ Devuyt, Yuri. "Transatlantic Competition Policy," op cit p. 2

¹⁹ Official Journal 1989 L 395/1.

²⁰ Four criteria: the combined world wide turnover of all companies concerned must be more than ECU 2.5 billion; combined turnover of all companies must be more than ECU 100 million in at least three member states; the turnover of each of at least two companies concerned must be more than ECU 25 million in each of those three member states, and the Community wide turnover of at least two of the companies concerned must be more than ECU 100 million.

²¹ This was not a formal extension of competence with the exception of telecoms and energy under article 90.

²² Types of aid instruments include grants, interest rate subsidies and tax exemptions which are the most frequent source of intervention, along with tax deferrals, soft loans and ad hoc aid for restructuring purposes.

²³ Eighth Survey on State Aid in the European Union. COM (2000) 205 final 11.4.2000

²⁴ For a comparison of government subsidies, see Kenneth Thomas, Competing for Capital: Europe and North American in a Global Era (Georgetown University Press, 2000).

²⁵ See Official Journal L95 27.4.95

²⁶ See Devuyt, "Transatlantic Competition Policy," op cit p. 7-8; Comments at the "Creating a Transatlantic Marketplace" Workshop.

²⁷ Devuyt, "Transatlantic Competition Policy," op cit.p. 8.

²⁸ Bulletin EU 3-1999-Competition (18/43).

²⁹ COM (2000) 01.10.2000

³⁰ World Com MCI case, Case No IV/M 1069, resulted in divestment of MCI's internet activities to new entrant which was the largest ever divestment to result from antitrust action. The World Com/MCI merger involved intense U.S. and EU cooperation, and was approved in July 1998.

³¹ The main problem for the European Commission concerned Boeing's refusal to abandon exclusivity agreements, and the Commission prepared a negative decision. This was rescinded when Boeing committed itself to certain concessions (remedies).

³² Haagsma, Auke. "Competition Policy" Paper presented at the Workshop, "Creating a Transatlantic Marketplace: Government Policies and Business Strategies," November 1999.

³³ Van Miert, Karel. "Transatlantic Relations and Competition Policy." Competition

Policy Newsletter, vol 3 no 2, 1996; Ellen Fox, "U.S. and EU Competition Law: A Comparison," in Global Competition Policy. E.Graham and J. Richardson, eds. Washington: Institute for International Economics, 1997.

³⁴ Haagsma, Auke. "Competition Policy." Paper presented at the "Creating a Transatlantic Marketplace" Workshop, November 1999.

³⁵ There are currently 11 non-merger cases being investigated by the EU, and 10 by the United States that are subject to confidentiality requirements.

³⁶ Schaub 1998 as quoted in Devuyt, "Transatlantic Competition Policy," op cit p. 17.

³⁷ Devuyt, "Toward a Multilateral Competition Policy Regime?" Global Governance, vol 6 2000 pp 319-338.

³⁸ See Karel Van Miert, "The WTO and Competition Policy: the Need to Consider Negotiations."

Address before Ambassadors to the WTO, Geneva - 21 April 1998; Karel Van Miert, "Globalization of Competition: The Need for Global Governance." Speech at the VLB Brussels March 25, 1998;

³⁹ The UNCTAD Intergovernmental Group of Experts on Competition Law and Policy have also been examining the merits of multilateral competition rules for developing countries.

⁴⁰ XXIXth Report on Competition Policy SEC (2000) 720 Final 05.05.2000

⁴¹ Klein, Joel. "No Monopoly on anti-trust." Financial Times, February 13, 1998.

⁴² See Youri Devuyt, "Transatlantic Competition Policy," op cit.

⁴³ In 1996, the EU proposed the negotiation of a Multilateral Framework Agreement on Competition Policy in the WTO.

⁴⁴ Monti, Mario. "EU Competition Commissioner outlines ideas for an international forum to discuss competition policy issues." European University Institute DN: IP/00/1230 October 27, 2000

⁴⁵ The Commission has outlined its proposed elements for a multilateral framework agreement on competition policy: Communication from the Commission to the Council and to the European Parliament, the EU's Approach to the Millennium Round (published at <http://europe.eu.int/comm/trade/pdf/0807nr.pdf>); Elements for a multilateral framework agreement on Competition, Regional Seminar on New Issues, Chile, December 2000 (published at http://europe.eu.int/comm/trade/2000_round/cons WTOag_comp.htm). .

⁴⁶ See speech of Joel Klein, EC Merger Control 10th Anniversary Conference Brussels, Belgium. September 14, 2000

⁴⁷ Devuyt, Youri. "Towards a Multilateral Competition Policy Regime." Global Governance, vol 6 2000 pp 319-338.

⁴⁸ There is no single definition of mutual recognition. See Kalypso Nicolaidis, "Mutual Recognition of Regulatory Regimes: Some Lessons and Prospects." Regulatory Reform and International Market Openness OECD Publications, December 1996.

⁴⁹ Council resolution of 7 June 1985 on the New Approach to Technical Harmonization and Standards, OJ C 136/1 was supplemented by the Council Resolution of 21 December 1989 on a Global Approach to Conformity Assessment, OJ C 10/1 and by Council Decision 96/683/EC, 13 December 1990 which outlined the various modules or

“approaches” that could be used to assume conformity with European regulatory requirements.

⁵⁰ Similar efforts to “refer to standards” had been tried before at the Community level beginning in 1973 with limited success. The Low Voltage Directive of 1973 is the precursor of the EU’s attempt in the 1980’s to shift the onus for regulatory convergence onto private sector bodies. See Michelle Egan, Constructing a European Market: Standards, Regulation and Governance (Oxford University Press, 2001)

⁵¹ CEN/CENELEC Memorandum NO 4. Brussels, No Date

⁵² See Michelle Egan, Constructing a European Market: Standards, Regulation and Governance (Oxford University Press, 2001).

⁵³ OJ C 276/26 19 October 1989; Sebastian Farr, Harmonization of Technical Standards in the EU (Chichester : John Wiley & Sons, 1996).

⁵⁴ It is important to stress that consideration of external mutual recognition by the EU was limited from the start to recognition of conformity assessment in the field of goods whereby bodies accredited in the country of origin are to be allowed to certify to rules of the country of destination.

⁵⁵ Pelkmans, Jacques. “Between Pragmatism and Leadership,” op cit

⁵⁶ See statement of Paula Stern, Testimony Before the House Committee on Ways and Means, Subcommittee on Trade, 23 July, 1997.

⁵⁷ Nicolaidis, Kalypso. “Mutual recognition of regulatory regimes: some lessons and prospects.” (Cambridge MA: Harvard Law School, 1997 Harvard Jean Monnet working paper series 97/7) p. 28

⁵⁸ Nicolaidis, “Mutual Recognition of regulatory regimes,” ibid p. 28

⁵⁹ See Nicolaidis, “Mutual Recognition of Regulatory Regimes,” ibid

⁶⁰ Nicolaidis, “Mutual Recognition of Regulatory Regimes,” ibid

⁶¹ Nicolas, Florence. StandardView, 1996

⁶² See Kalypso Nicolaidis and Michelle Egan, Special Issue “Governance and International Standardization.” Journal of European Public Policy, March 2001.

⁶³ Nicolaidis, “Mutual Recognition of Regulatory Regimes,” op cit

⁶⁴ The conformity assessment and issuance of national marks remains exclusively with the certification bodies authorized by the respective national authority.

⁶⁵ Egan, Michelle. “Mutual Recognition and Standards Setting: Public and Private Strategies for Regulating Transatlantic Markets.” AICGS Policy Paper No 10, 1998.

⁶⁶ COM 1999 299 Final

⁶⁷ COM 1999 232 Final

⁶⁸ “Complaints About Europe Increase.” Journal of Commerce, 1 September 1999.

⁶⁹ See Michelle Egan, “Mutual Recognition and Standard Setting,” op cit; Nicolaidis and Egan, Special Issue, Standards and International Governance, op cit; John Jay Tate “Varieties of Standardization” in Peter Hall and David Soskice, Varieties of Capitalism, Forthcoming.

⁷⁰ See Office of Technology Assessment, Global Standards (Washington: OTA, 1992); National Research Council, Standards, Conformity Assessment and Trade, Washington, 1995; Henry Line, Divisional Vice President, Global Product Standards, AMP,

Presentation at the NIST/ANSI Conference, Towards a National Standards Strategy, 1998.

⁷¹ Robert Mallet, Deputy Secretary of Commerce noted present U.S. approach in international standards activities is too ad hoc, and U.S. is now confronted by the fact that the Europeans have adopted an effective standards strategy. Keynote Speech at NIST/ANSI Conference, Towards a National Standards Strategy, November 1998.

⁷² The Vienna and Dresden Agreement allows CEN and CENELEC to decide, case by case and according to precise conditions, to transfer the development and adoption of European standards to ISO and IEC.

⁷³ U.S.: EU uses standards as trade weapon, Journal of Commerce, 2 November 1998; House Subcommittee Hearings, Technology Subcommittee, International Standards 4-5 June 1998; Walter G. Leight and Krista J. Johnsen Leuteritz ed., Toward A National Standards Strategy Conference Summary Report. NIST IR 6259, November 1998.

⁷⁴ For example, the Germans have invested more than \$40 million to build a Latin American standards infrastructure.

⁷⁵ In fact, United States involvement in standards committees in International Electrotechnical Commission ranks sixth behind UK, France, Germany, Japan and China.

⁷⁶ Although a significant number of U.S. standards are technically equivalent to international ones, and many are widely used internationally, European complaints focus on the fact that few international standards are adopted directly into the American standards process (transposition).

⁷⁷ Staniland, Martin. "Transatlantic Air Transport: Routes to Liberalization." Paper presented at the AICGS Conference, Creating a Transatlantic Marketplace: Government Policies and Business Strategies, November 1999; for an analysis of government involvement in the European airline industry, see Martin Staniland, For Prestige or Profit? Governments and Air Transport in Western Europe (Rowan and Littlefield, Forthcoming).

⁷⁸ For a discussion of air transport as a service industry, see Martin Staniland, "Transatlantic Air transportation: Routes to Liberalization." Paper presented at the AICGS Workshop, Creating a Transatlantic Marketplace: Government Policies and Business Strategies, November 1999.

⁷⁹ Staniland, "Transatlantic Air Transport," op cit.

⁸⁰ Lehman Brothers, "European Airlines: A Turbulent Decade." 14 September 1993 as cited in Staniland "Transatlantic Air Transport" op cit.

⁸¹ Oddly enough, the Chicago Convention introduces a most favored nation principle in a field characterized by bilateralism rather than free trade.

⁸² Although all the members are parties to the Convention, the Community is not. While it seems plausible to argue that the Community is not bound by the Chicago Convention, there is substantial case-law that indicates that the Community is bound by a multilateral agreement concluded before entry into force of the EU Treaty. In International Fruit Company, Case 21-24/72, 1972 ECR 1219, the Court rules on the status of the GATT which is perhaps comparable in circumstance to the Chicago Convention.

⁸³ Staniland, "Transatlantic Air Transport," op cit p. 8

⁸⁴ Staniland, "Transatlantic Air Transport," p. op cit 8

⁸⁵ Staniland, "Open Skies, Fewer Planes? Public policy and corporate strategy in EU-U.S. aviation relations." CWES Working Paper, University of Pittsburgh 1996.

⁸⁶ Staniland, "Transatlantic Air Transport," op cit

⁸⁷ Staniland, "Transatlantic Air Transport," op cit p. 11

⁸⁸ There is competition on east coast airports in terms of landing slots but airlines have dominant hubs outside of both coasts (e.g., Northwest in Minneapolis).

⁸⁹ The Community opens up cabotage for Community carriers even though the Chicago Convention Article 7 speaks of states See COM (90) Final. Other international cabotage areas provide precedents, such as the Arab countries.

⁹⁰ Mergers do occur but they are likely to be intra-national such as the recent announcement of American Airlines to buy Trans World Airlines, the United Airlines bid for U.S. Airways, and the approved Air Canada and Canadian Airlines which continue nationality constrained bilaterals.

⁹¹ The main alliances are: STAR—between Lufthansa, United Airlines, Air Canada, SAS, Thai Airways, Varig which was established in 1997, and expanded to include Air New Zealand, Ansett Australia, All Nippon Airways, British Midland, Austrian, Singapore Airlines with talks with China Airlines, Mexicana de Aviation and Emirates underway; and One World Alliance, which was formed in February 1999 led by American Airlines and British Airways and includes Canadian Airlines, Cathay Pacific, Qantas, Iberia and Finnair, J.A.L, Aer Lingus, Lanchile. The other smaller alliances include Global Alliance led by Delta, and includes Air France and Aeromexico, Qualifier includes Sabena, SwissAir, Tap Air Portugal and Thy Turkish, and Wings includes KLM, Alitalia, Braathens SAFE, Northwest, Continental, and Malaysia AS.

⁹² Staniland, Martin. "Open Skies—Fewer Planes? Public Policy and Corporate Strategy in EU-U.S. Aviation Relations." Center for West European Studies, Working Paper, 1996.

⁹³ Van Miert, "Competition Policy and Air Transport: the Transatlantic Challenge." Speech delivered at the American Bar Association Forum on Air and Space Law, 22 January 1999.

⁹⁴ Staniland, "Transatlantic Air Transport," op cit.

⁹⁵ See "Clearing the Air." *Financial Times*, 14 July 1999.

⁹⁶ See the discussion of Martin Staniland, "Transatlantic Air Transport," op cit.

⁹⁷ Since 1995, when the WTO's general agreement on trade in services came into effect, over seventy bilateral agreements have been negotiated.

⁹⁸ COM (90) 17 Final 23 February 1990

⁹⁹ E.U. Press Release, March 11, 1998, No. 16/1998: European Commission Takes Legal Action Against E.U. Member States' "Open Skies" Agreements With The United States.

¹⁰⁰ Speech by Karl-Heinz Neumeister, Secretary-General Association of European Airlines, "Towards a Transatlantic Common Aviation Area." www.aea.be/Publications/TCAA.htm.

¹⁰¹ Mrs. Loyola de Palacio Vice-President of the European Commission "Single

European sky and passenger protection.” Speech to the AEA Brussels, 12 May 2000; “Beyond Open Skies,” Chicago, 6 December 1999 www.eurunion.org/news/speeches/1999

¹⁰² The provision of GATS covers only a number of secondary services in aviation such as computer reservation, and the selling and marketing of air transport services.

¹⁰³ WTO Agreement does not apply to traffic rights and services directly related to the exercise of traffic rights.

¹⁰⁴ As cited in Staniland, “Transatlantic Air Transport,” op cit.

¹⁰⁵ See speech of Pascal Lamy, “For the EU Services are central” European Services Forum International Conference, Brussels, 27 November 2000.

¹⁰⁶ See Brian F. Havel, In Search of Open Skies: Law and Policy for a New Era of Aviation: A Comparative Study of Airline Deregulation in the United States and European Union (The Hague: Kluwer, 1997).

¹⁰⁷ Lynch, Diahanna and David Vogel, “The Regulation of Genetically Modified Food in the United States and Europe.” Paper presented at the AICSG Workshop, Created a Transatlantic Marketplace: Government Policies and Business Strategies, November 4-5, 1999.

¹⁰⁸ For an assessment of the relationship between regulation and capital investment, see Stephen J. Silvia, ed. Reversal of Fortune ? An Assessment of the German Biotechnology Sector in Comparative Perspective, Economic Studies Program Series, Volume 5, AICGS, 1999.

¹⁰⁹ A conference of scientists at Asilomar, CA in 1975 was crucial in focusing attention on the issue.

¹¹⁰ Lynch and Vogel, “The Regulation of Genetically Modified Food,” op cit p. 1.

¹¹¹ Patterson, Lee Ann. “A Comparison of Biotechnology Regulatory Policy in the United States and the European Union.” Paper presented at the Biennial ECSA Conference, Pittsburgh, PA, 2-6 June, 1999.

¹¹² Patterson, “ A Comparison of Biotechnology Regulatory Policy,” ibid p. 5

¹¹³ Recombinant DNA Molecule Advisory Committee

¹¹⁴ Cantley as cited in Lee Ann Patterson, “A Comparison of Biotechnology Regulatory Policy,” op cit.

¹¹⁵ Patterson, “ A Comparison of Biotechnology Policy,” op cit p. 8.

¹¹⁶ Contained Use of Genetically Modified Microorganisms.

¹¹⁷ Deliberate Release of Genetically Modified Organisms into the Environment

¹¹⁸ See Patterson, “EU Bioechnology Policy: Regulating Risks and Risking Regulation in Policy Making in the EU 4th ed., Helen Wallace and William Wallace eds. (Oxford: Oxford University Press, 2000)

¹¹⁹ Patterson, “Regulating Biotechnology in the European Union: Institutional Responses to Internal Conflict within the European Commission.” Paper presented at the European Community Studies Biennial Conference, Washington Seattle, 1997

¹²⁰ Lynch and Vogel, “The Regulation of Genetically Modified Food,” p.10

¹²¹ Patterson, “A Comparison of Biotechnology Regulatory Policy” p.19; also Lee Ann Patterson, “EU Bioechnology Policy: Regulating Risks and Risking Regulation in

Policy Making in the EU 4th ed., Helen Wallace and William Wallace eds. (Oxford: Oxford University Press, 2000)

¹²² Les Levidow et al cited in Lynch and Vogel “The Regulation of Genetically Modified Food,” p.11

¹²³ Patterson, “A Comparison of Biotechnology Regulatory Policy,” p. 19

¹²⁴ Lynch and Vogel, “The Regulation of Genetically Modified Food,” p. 12

¹²⁵ Lynch and Vogel, “The Regulation of Genetically Modified Food,” p. 14

¹²⁶ Financial Times, “Genetic Rules Not Approved.” December 19, 1997.

¹²⁷ Lynch and Vogel, “The Regulation of Genetically Modified Food” p.14

¹²⁸ Lynch and Vogel, “The Regulation of Genetically Modified Food,” p.15

¹²⁹ Patterson, “A Comparison of Biotechnology Regulatory Policy,” p.19

¹³⁰ Lynch and Vogel, “The Regulation of Genetically Modified Food,” pp. 2 ff

¹³¹ See Martine Kraus, “Technology and Legal Systems A Comparative Study of the Development and regulation of Biotechnology in Germany and the United States,” UC-Berkeley, 1996 pp 49-64 as cited in Lynch and Vogel.

¹³² Patterson, “A Comparison of Biotechnology Regulatory Policy,” p. 20; Lynch and Vogel, “The Regulation of Genetically Modified Food,” p. 3.

¹³³ Executive Office of The President, Office of Science and Technology Policy, “Coordinated Framework for Regulation of Biotechnology.”

¹³⁴ Patterson, op cit p. 23

¹³⁵ Executive Office of the President, Office of Science and Technology Policy, Coordinated framework for the regulation of biotechnology, Federal Register, 51 no 123, 26 June 1986 as cited in Patterson “A Comparison of Biotechnology Regulatory Policy,” p. 20.

¹³⁶ See Patterson, “A Comparison of Biotechnology Regulatory Policy” op cit; Lynch and Vogel “Regulation of Genetically Modified Food,” op cit.

¹³⁷ Lynch and Vogel, “Regulation of Genetically Modified Food,” p. 5

¹³⁸ See Animal Plant Health Protection Service, Federal Register, 58 no 60, 31 March 1993; Federal register 62 no 85 2 May 1997.

¹³⁹ See the detailed discussion in Lynch and Vogel, “Regulation of Genetically Modified Food,” pp.18 ff.

¹⁴⁰ See Lynch and Vogel, “Regulation of Genetically Modified Foods,” p. 15

¹⁴¹ Financial Times, “Monsanto may take its case to Brussels.” 18 February 1999; Journal of Commerce, “Monsanto pleads guilty to agricultural mishap in Britain.” 18 February 1999.

¹⁴² Lynch and Vogel, “The Regulation of Genetically Modified Food.” op cit.

¹⁴³ Lynch and Vogel, “The Regulation of Genetically Modified Food.” p. 20; The Economist, “Genetically Modified Food: Food for Thought” June 19, 1999.

¹⁴⁴ Other big farm exporting countries such as Argentina, Australia, Brazil, Canada and China are increasingly shifting to high productivity genetically modified production.

¹⁴⁵ Mary Ann Feldman et al. in S. Silvia ed., Reversal of Fortune ? An Assessment of the German Biotechnology Sector in Comparative Perspective, Economic Studies Program Series, Volume 5, AICGS, 1999.

¹⁴⁶ For a discussion of the German biotech sector and efforts at regulatory reform to

enhance German competitiveness and expansion in this sector, see Stephen J. Silvia ed., Reversal of Fortune ? An Assessment of the German Biotechnology Sector in Comparative Perspective, Economic Studies Program Series, Volume 5, AICGS, 1999.

¹⁴⁷ European Commission, DG III “Draft paper on the International Competitiveness of Biotechnology in the EU,” November 11, 1994 as quoted in Patterson p. 29.

¹⁴⁸ See also Arthur Dammerich in S. Silvia ed., Reversal of Fortune ? An Assessment of the German Biotechnology Sector in Comparative Perspective, Economic Studies Program Series, Volume 5, AICGS, 1999.

¹⁴⁹ Vogel and Lynch “Regulation of Genetically Modified Food,” p. 21

¹⁵⁰ Vogel, David. Barriers or benefits (Washington: Brookings, 1997)

¹⁵¹ Financial Times, “A Question of Trust.” 19 February 1999.

¹⁵² Keleman, Daniel. “Regulatory Federalism: The European Union in Comparative Perspective,” Paper presented at the APSA Annual Conference, September 1998.

¹⁵³ See Patterson, “Regulating Biotechnology in the European Union: Institutional Responses to Internal Conflict within the European Commission,” op cit

¹⁵⁴ Patterson, “A Comparison of Biotechnology Regulatory Policy.” p. 22; cf Domdey in Silvia ed., Reversal of Fortune ? An Assessment of the German Biotechnology Sector in Comparative Perspective, Economic Studies Program Series, Volume 5, AICGS, 1999.

¹⁵⁵ Lynch and Vogel, “The Regulation of Genetically Modified Food,” p. 25

¹⁵⁶ Greenberg, Daniel. “The right to know what we eat.” Washington Post Weekly Edition, July 7, 1999 as quoted in Lynch and Vogel, “The Regulation of Genetically Modified Food,” p. 26

¹⁵⁷ The EU-U.S. Biotechnology Forum, Final Report December 2000.

¹⁵⁸ Ibid p. 14

¹⁵⁹ Pelkmans, “Between Leadership and Pragmatism,” op cit.

Conference Program

Creating a Transatlantic Marketplace

November 4, 1999

11:45am – 12:45pm LUNCH

12:45pm – 1:00pm WELCOME – Carl Lankowski
INTRODUCTION – Michelle Egan and Dieter Wolf

1:00pm – 3:00pm **U.S. and EU Strategic Trade Agendas**

Chair: Amb. Hugo Paemen, Delegation of the European
Commission, Washington
Presenter: Dr. Jacques Pelkmans, Center for European Policy
Studies, Brussels and the University of
Maastricht
Discussants: Dr. Ellen Frost, Institute for International
Economics
Mr. Michael Calingaert, The Brookings Institution

3:20pm – 5:30pm **Competition Policy: U.S. and EU Perspectives**
Presenters: Dr. Simon Evenette, The World Bank and
Rutgers University
Dr. Auke Haagsma, Delegation of the European
Commission and Yale University
Discussant: Mr. Randy Tridell, Federal Trade Commission

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8:30am – 9:15am COFFEE AND PASTRIES

9:15pm – 11:30am **Regulatory Cooperation and Competition:
Strategic Case Studies**
“Biotechnology” – Ms. Diahanna Lynch, University of California-Berkeley
“E-Commerce” – Dr. William Drake, The Carnegie Endowment for International
Peace

“Mutual Recognition in Goods and Services” – Dr. Americo Zampetti, European Commission and Harvard University

11:45 am – 12:45pm LUNCH

12:45pm – 3:00pm **Transatlantic Financial Coordination**
Monetary Union – Transatlantic Impact” – Dr. Randall Henning, American University and Institute for International Economics (IIE)
“Tax Coordination” – Dr. Claudio Radaelli, Bradford University, United Kingdom
“Insurance” – Mr. Gordon Cloney, Institute for International Insurance Development

3:15pm – 5:15pm **Liberalization of Services**
“Telecommunications” – Dr. Ingo Vogelsang, Boston University and RAND Institute
“Airlines” – Dr. Martin Staniland, University of Pittsburgh

5:15 pm – 5:40 pm CONCLUDING REMARKS
Michelle Egan, Dieter Wolf and Carl Lankowski

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Egan, Michelle. *Creating a Transatlantic Marketplace: Government Policies and Business Strategies*. Washington, D.C.: AICGS, February 2001.