



THE LISBON TREATY'S IMPACT ON  
U.S.-EU TRADE, INVESTMENT AND  
FINANCE

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# **THE LISBON TREATY'S IMPACT ON U.S.-EU TRADE, INVESTMENT AND FINANCE**

## **INTRODUCTION**

The Treaty of Lisbon (Lisbon Treaty), which took effect on December 1, 2009, brought the European Union (EU) into a new era. The Lisbon Treaty aimed to accomplish two major objectives: (1) enhancing the EU's ability to deal with difficult challenges of the 21st Century multipolar world, and (2) providing democratic legitimacy to the EU and its decision-making.

The Lisbon Treaty gives a once-in-a-generation opportunity to fundamentally revise the basic assumptions and the legal framework of the transatlantic relationship. The increased capability of the EU to handle complex global challenges means that the U.S. can rely on the EU as an equal partner to develop global strategies in the new multipolar global order. The broadened scope of the EU competence means that the U.S. authority can talk to a single authority of the EU, instead of 27 separate European nations' governments to resolve various transatlantic economic and security issues. However, the European Parliament's emerging power and influence, which gives democratic legitimacy to the EU decision making, means that the U.S. policy makers must now carefully analyze the diversified interests within Europe and the different positions of 736 Members of the European Parliament (MEPs) who are elected from 500 million European citizens from 27 different countries and who speak over 20 different languages.

Today, the U.S. and EU together generate more than half of global GDP and the U.S.-EU economic relationship is by far the largest and the most complex bilateral economic relationship in the world. Therefore, achieving an even higher level of economic integration between the U.S. and EU by eliminating all the non-tariff barriers will bring tremendous economic benefits not only to the U.S. and EU but also all across the world. However, the removal of non-tariff barriers requires delicate and complex legal and regulatory coordination. The current transatlantic institutional framework between the U.S. and EU administrations for regulatory coordination, the Transatlantic Economic Council (TEC), is not properly equipped to handle this ambitious goal. We therefore propose forming an officially sanctioned bilateral institute to promote this goal: The U.S.-EU Legal Coordination Center for Trade, Investment and Finance.

## **Part 1 Background**

### **1. European Integration in Historical Context**

For over a half century, European nations have worked together to create a unified economic community. Initially they agreed to pool sovereignty on steel and coal; then they formed a customs union and common internal market; and developed a unique monetary union mechanism and common space of security. The number of countries increased from six western European countries to 27 EU Member States, including 500 million citizens on both sides of the former Iron Curtain. The Lisbon Treaty was a culmination of this long-lasting and still progressing historical movement of European integration that originated from the ashes of the World War II.<sup>1</sup>

The European integration movement brought about the stability of Europe and economic benefits to both European citizens and the entire global economy. In conjunction with the Bretton Woods Institutions (IMF and World Bank) and the global free trade regime (GATT, later WTO), both the European integration under the EU and stable transatlantic trade have been the main pillars of global economic prosperity and stability during the second half of the 20th Century and beyond.

### **2. The New EU Decision-making Arrangement under the Lisbon Treaty and its Impact**

The EU's outdated legal framework was substantially revised under the Lisbon Treaty in a way to streamline the EU's internal institutional arrangement and to strengthen its ability to deal with the new complex issues of the changing global order. With the newly acquired legal personality, the EU can now speak with one voice externally on the global stage. The EU can sign external treaties and other international agreements in its own name in a broad range of subject matters within its competence, and these treaties and agreements are binding on all its 27 Member States.<sup>2</sup>

The Treaty expanded the scope of subject matters (competences) that the EU is allowed to handle. Under the new arrangement, the EU is now capable of handling a broader range of internal and external issues, from the traditional trade and internal market matters to the global financial crisis, cyber securities, antiterrorism measures, environment, and other important issues that affect the lives of 500 million citizens of the EU and the rest of the world. In the area of external trade and investment relations, the Lisbon Treaty's expansion of the scope of Common Commercial Policy is notable.<sup>3</sup>

The Lisbon Treaty tries to achieve a delicate balance between the two often conflicting objectives: efficiency and democratic control. For this purpose, the EU's powers are carefully and clearly defined as against the reserved powers of the Member State under the EU Treaties, and the European Parliament's control over the legislative and budgetary

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<sup>1</sup> See Part 2.1 *infra*.

<sup>2</sup> See Part 2.2 *infra*.

<sup>3</sup> See Parts 2.2 through 2.4 *infra*.

oversight has been substantially increased. The European Parliament has a veto power over almost all EU legislations and external treaties and international agreements, and through its budgetary control it can affect virtually all aspects of EU decision making.<sup>4</sup> In practice, the text of an important legislation is now negotiated prior to formal introduction to the Parliamentary voting and a sensitive international agreement is negotiated under close coordination with the European Parliament.<sup>5</sup> Also, the European Parliament has published a number of its own important policy proposals, for instance its own proposal to create an EU-U.S. Legislative Assembly for coordination of legislative agenda.<sup>6</sup>

Within six months since the Lisbon Treaty went into effect, there were two significant real life major political events that demonstrated the impact of the new power structure of the Lisbon Treaty on the EU:

1. European Financial Crisis and European Stabilization Measure: The European financial crisis of 2010 that started with the sovereign debt risk of Greece was the most profound event that tested the fundamental strength of the Lisbon Treaty arrangement of the EU. In this crisis, the permanent President of the European Council (Herman Van Rompuy), a new office created under the Lisbon Treaty, played a critical role.<sup>7</sup>
2. The European Parliament's Emerging Influence and Power: The European Parliament exercised its new veto power to reject a critical international agreement with the U.S. (SWIFT Agreement) in February 2010. This demonstrated the new emerging power of the European Parliament, and it has affected the ways that the various stakeholders within and outside the EU view the EU decision-making process.<sup>8</sup>

### **3. European Legal Integration under the Primacy of EU Law**

The European integration of the last 60 years under the EU (including its predecessor, the European Economic Community (EEC)) was achieved through two important mechanisms (i) legal coordination and harmonization and (ii) the expansion of EU jurisdictions and competences. Throughout the history, the development of EU laws on these two fronts was possible because it was implicitly supported by European leaders' political will. It was a gradual process that took approximately 60 years from the time that Schuman Plan was first announced in 1950.<sup>9</sup>

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<sup>4</sup> See Parts 2.2 & 2.4 *infra*.

<sup>5</sup> See Parts 3.7 & 3.8 *infra*.

<sup>6</sup> See Part 4.8 *infra*.

<sup>7</sup> See Parts 1.6 & 2.6 *infra*.

<sup>8</sup> See "European Parliament Wields a Wider Influence", New York Times, March 4, 2010, available at [http://www.nytimes.com/2010/03/05/world/europe/05iht-parliament.html?ref=european\\_parliament&pagewanted=all](http://www.nytimes.com/2010/03/05/world/europe/05iht-parliament.html?ref=european_parliament&pagewanted=all) (last accessed June 26, 2010). Also See Parts 2.2, 3.7 & Part 3.8 *infra*.

<sup>9</sup> See, for instance, U.S. Ambassador to the EU William E. Kennard, "The EU After Lisbon: Strengthening the Transatlantic Bond", Remarks by Ambassador William E. Kennard Before the American European Community Association/ PA Europe Event (February 26, 2010), available at [http://useu.usmission.gov/speech\\_030210.html](http://useu.usmission.gov/speech_030210.html) (last accessed July 5, 2010).

The European common market and the Single Market would not have been possible without harmonization of different Member States' legal and regulatory rules throughout the EU. And this was accomplished through the development of EU case law that established the primacy of EU law under the jurisprudence of the European Court of Justice (ECJ).<sup>10 11</sup> This process was mainly achieved by the expansion of the protections of EU citizens' essential rights under the EU Treaties to conduct EU-wide economic activities without hindrance (so called "the Four Freedoms" of EU citizens, i.e., the freedom of movement of persons, goods, services and capital). The ECJ has been enforcing EU laws, including the EU Treaties, EU legislations and regulations, over Member States to achieve the EU-wide harmonization of economic regulations.<sup>12</sup>

In addition, the European integration was achieved through gradual expansion of the subject matters that the EU is able to handle under the EU Treaties (i.e. increasing scope of EU competence) as a direct consequence of several EU Treaty amendments.<sup>13</sup> As the Lisbon Treaty further expanded the definition of Common Commercial Policy to include services, external investment and certain intellectual property issues, it also expanded the power of the EU and the scope of EU law, and this will trigger another round of development of EU law in the covered areas.<sup>14</sup>

#### **4. Unique Significance of the U.S.-EU Transatlantic Economic Relationship**

In today's global economy, the U.S. and EU are both the largest economies and trade partners. This transatlantic economic relationship is also a mature, complex relationship that touches virtually all aspects of daily life of over 800 million people on both sides of the Atlantic Ocean. Direct investments with each other far exceed their respective inbound direct investment from other countries. As a result, many jobs in the U.S. and EU are dependent upon transatlantic investments. The U.S. and EU together occupy more than half of the global domestic product (GDP); and the transatlantic economy accounts for 40% of world trade and generates more than \$4 trillion in annual commercial sales.<sup>15</sup>

These transatlantic economic relationships are not merely about trade of goods or services; instead, they also concern close and intensive financial and investment relationships as well as the exchange of ideas and people.<sup>16</sup> Because the U.S. and EU share the same basic principles of free economies, including democratic values and the rule of law, many

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<sup>10</sup> See Declaration 17 annexed to the Lisbon Treaty. See "Declarations Annexed to the Final Act of the Intergovernmental Conference Which Adopted the Treaty of Lisbon", signed on 13 December 2007", OJ C 115 of 9.5.2008 at p.344.

<sup>11</sup> The Court of Justice of the European Union, which was renamed from "European Court of Justice" under the Lisbon Treaty, is also referred to as "ECJ" in this paper for the simplicity.

<sup>12</sup> See Parts 2.5, 3.2, 3.5 & 3.6 *infra*. See also Ambassador Kennard, "The EU After Lisbon: Strengthening the Transatlantic Bond", *supra*.

<sup>13</sup> See Part 2.3 *infra*.

<sup>14</sup> See Part 2.4 *infra*.

<sup>15</sup> See José Manuel Durão Barroso, President of the European Commission, "A New Atlanticism for the 21st Century" Brussels Forum 2010, Brussels, March 26, 2010. Available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/135&format=HTML&aged=0&language=EN&guiLanguage=en> (last accessed May 17, 2010). See also Ambassador William E. Kennard, U.S. Ambassador to the EU, "U.S.-EU Relations: A New Page or a New Script?", European Policy Center, Brussels, January 13, 2010, available at [http://useu.usmission.gov/011310\\_speech.html](http://useu.usmission.gov/011310_speech.html) (last accessed July 5, 2010).

<sup>16</sup> See Parts 4.6 through 4.9 *infra*.

believe that both the U.S. and EU can further increase the level of economic integration through legal and regulatory coordination to create a genuine transatlantic community. A number of EU leaders have pointed out that the U.S. and EU together can lead the global economy to integration if they work together to set global standards and avoid the fragmentation of global markets in a multipolar 21st Century world.<sup>17</sup>

## 5. Global Financial Crisis of 2008 and Aftermath

The 2008 global financial crises pushed the global economy to the verge of a Depression and a total meltdown of the global financial system. Although the worst nightmare scenario was avoided due to a quick global coordination of world leaders at G-20, this crisis revealed the weakness of the global financial regulations. During the London G-20 summit, global leaders agreed on the Global Plan for Recovery and Reform, and published it in the London Communiqué on April 2, 2009.<sup>18</sup> They agreed to coordinate the effort to retrieve the global economy from the serious recession and to achieve a sustainable recovery. The coordinated approach is necessary because the global economy is now inextricably interconnected, and the lack of coordination in global financial regulations will damage fair competitions among nations and allow the market players' regulatory arbitrage. The G-20 leaders designated the Financial Stability Board (FSB) to monitor and coordinate the development of coherent global financial regulations across the board. The world leaders reaffirmed their commitment to resist the protectionism and the importance of free trade in their G-20 Toronto Summit Declaration on June 27, 2010.<sup>19</sup>

## 6. European Financial Crisis of 2010 and the European Stabilization Mechanism

The European financial crisis of 2010 that started with the sovereign risk of Greece tested the strength of the entire EU framework, including the foundation of the European monetary union and its common currency, the euro. In response to this crisis, the EU leaders ultimately invoked the Solidarity Clause to establish European Stabilization Mechanism in order to calm the market's uneasiness and to stem speculative attacks that might have plunged other EU member states into crisis and devastated the European monetary union.<sup>20</sup> The timeline during the first half of May 2010 is as follows:

1. On Sunday, May 2, the IMF and the euro zone countries agreed to offer a €10 billion assistance package to Greece.<sup>21</sup>

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<sup>17</sup> *Id.*

<sup>18</sup> G-20 Summit London Communiqué, "The Global Plan for Recovery and Reform", 2 April 2009. Available at <http://www.g20.org/Documents/final-communication.pdf> (last accessed May 18, 2010).

<sup>19</sup> The G-20 Toronto Summit Declaration, June 27, 2010, ¶¶ 35-39, available at [http://g20.gc.ca/wp-content/uploads/2010/06/g20\\_declaration\\_en.pdf](http://g20.gc.ca/wp-content/uploads/2010/06/g20_declaration_en.pdf) (last accessed June 30, 2010). See also European Council President and European Commission President's joint letter to G20 Colleagues, June 22, 2010, available at [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/115454.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/115454.pdf) (last accessed June 28, 2010).

<sup>20</sup> Herman van Rompuy, President of the European Council, "Pioneering on Unknown Territory", Europe Lecture & Sicco Mansholt Lecture, Nieuwe Kerk, The Hague, Netherlands, Tuesday, June 22, 2010, available at [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/115485.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/115485.pdf) (last visited July 3, 2010).

<sup>21</sup> See IMF Survey Magazine (electronic version), "Europe and IMF Agree €10 Billion Financing Plan With Greece", May 2, 2010, available at <http://www.imf.org/external/pubs/ft/survey/so/2010/car050210a.htm> (last visited June 1, 2010); See also Herman van Rompuy, "Pioneering on Unknown Territory", *supra*.

2. This May 2 Greece rescue package failed to dispel the global financial market's concerns about the future viability of the European monetary union, and global market speculators continued to attack the euro throughout the week, and the U.S. President Obama called the EU leaders expressing concerns.<sup>22</sup>
3. During the following weekend ended Sunday, May 9, the European leaders and the IMF finally agreed on a €750 billion European financial stability measure for any EU Member State in economic crisis. It was reported that President Obama personally involved in the crisis management through a phone call to the European leaders, urging them to take the “overwhelming force” strategy to avoid destabilization of global economy.<sup>23</sup>

This “shock and awe” strategy, with an unprecedented massive €750 billion package, surprised but also calmed the global capital market, and the EU was able to avoid the imminent catastrophe.<sup>24</sup> Based on Herman Van Rompuy, the European Council President, the European leaders must “invent a financial mechanism on the spot” because they realized that they “had to build a life boat at sea”<sup>25</sup>, facing an “existential threat” to the very foundation of the European single market and the risk of a serious damage to the historic achievement of the European integration over the past 60 years.<sup>26</sup>

This €750 billion European rescue package has a monumental historical significance. Exactly 60 years earlier, on May 9, 1950, Robert Schuman announced a bold plan for a unified, peaceful Europe, and today's historians recognize that day as the birthday of the European Union.<sup>27</sup> Future historians will likely view May 9, 2010 as a historical turning point, the actual birthday of a United Europe, or a United States of Europe, as a New York Times Op-ed Contributor from Berlin, Gabor Steingart, has suggested.<sup>28</sup> Future measures relating to financial stability may go even further.<sup>29</sup>

<sup>22</sup> Herman van Rompuy, “Pioneering on Unknown Territory”, *supra*.

<sup>23</sup> On Sunday, May 9, 2010, European leaders agreed on a €500 billion emergency financial rescue package, the European Stabilization Mechanism. In addition to this €500 billion, the IMF also pledged an additional €250 billion facility. See Economist, “Europe’s 750 Billion Euro Bazooka”, May 10, 2010 (electronic version), available at [http://www.economist.com/blogs/charlemagne/2010/05/euro\\_crisis\\_2?source=features\\_box\\_main](http://www.economist.com/blogs/charlemagne/2010/05/euro_crisis_2?source=features_box_main) (last visited June 1, 2010); “Debt Aid Package for Europe Took Nudge From Washington”, New York Times, May 10, 2010, available at [http://www.nytimes.com/2010/05/11/business/global/11reconstruct.html?\\_r=1&pagewanted=all](http://www.nytimes.com/2010/05/11/business/global/11reconstruct.html?_r=1&pagewanted=all) (last accessed July 5, 2010); Herman van Rompuy, “Pioneering on Unknown Territory”, *supra*.

<sup>24</sup> Herman van Rompuy, President of the European Council, “Is Europe Still on the Map”, key note dinner speech at the Bruegel Annual meeting (Bibliothèque Solvay), June 23, 2010, available at [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/115476.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/115476.pdf) (last accessed July 3, 2010); see also Herman van Rompuy, “Pioneering on Unknown Territory”, *supra*.

<sup>25</sup> Herman van Rompuy, “Pioneering on Unknown Territory”, and “Is Europe Still on the Map”, *supra*.

<sup>26</sup> *Id.* See also Financial Times, “Focus moves to ECB in quest to end turmoil”, printed version in the U.S. on May 10, 2010. Available on web, May 9, 2010, at <http://www.ft.com/cms/s/0/b36d011c-5b85-11df-85a3-00144feab49a.html> (last accessed May 18, 2010); “Debt Aid Package for Europe Took Nudge From Washington”, New York Times, May 10, 2010, *supra*.

<sup>27</sup> See Part 2.1 *infra*.

<sup>28</sup> New York Times Op-ed contributor, “It Takes a Crisis to Make a Continent”, by Gabor Steingart, published May 21, 2010. Available at

<http://www.nytimes.com/2010/05/22/opinion/22Steingart.html?scp=1&sq=750%20billion%20euros&st=cse> (last visited June 1, 2010). Gabor Steingart is the editor in chief of the German financial newspaper Handelsblatt.

<sup>29</sup> On December 17, 2010 the European Council proposed to amend the Treaty on the Functioning of the European Union, Article 136, to provide a permanent financial stability mechanism to deal with the persistent crisis concerning the euro. The developments of the events after July 2010 proved that the €750 billion stabilization mechanism was not sufficient to calm the global capital markets' concern about the future stability and viability of the euro. See European Council 16-17



## Part 2 European Union's Legal Framework under the Lisbon Treaty

### 1. Brief History of European Integration toward the Lisbon Treaty

European integration that has developed in the EU has its roots in the ashes of the post-World War II Europe. As discussed above, on May 9, 1950, Robert Schuman announced a Schuman Plan, proposing the creation of a peacefully united Europe to avoid future world wars like the ones that devastated Europe during the first half of the 20th Century.<sup>30</sup> Historians today consider this day as the birthday of the EU and May 9 is now celebrated as Europe Day.<sup>31</sup> Based on this plan, in 1952, the European Coal and Steel Community (ECSC) was formed by six western European nations, France, (West) Germany, Italy, the Netherlands, Belgium and Luxembourg.<sup>32</sup> In 1957, the same six nations formed the European Economic Community (EEC) under the Treaty of Rome<sup>33</sup>, and the EEC became a major force to promote European economic integration, first through establishment of a customs union and common market, and later through the formation of a Single Market.<sup>34</sup> The EEC added three new members in 1973 (the UK, Denmark, and Ireland), one in 1981 (Greece), and two more in 1986 (Spain and Portugal), totaling 12 members by 1986.<sup>35</sup>

The end of the Cold War opened the door for expansion of the EEC to the former Soviet Block eastern European countries. In 1990, the former territory of East Germany was integrated into the unified Germany and became a part of the EEC.<sup>36</sup> In 1992, the 12 EEC member countries signed Maastricht Treaty, forming a European Union (EU) (effective 1993); the EEC was renamed the European Community and was placed under the EU framework.<sup>37</sup> The Maastricht Treaty also created a system of monetary union that would eventually launch a single currency, the euro.<sup>38</sup> The EU further added three new members

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December 2010 Conclusions, available at

[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/118578.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/118578.pdf) (last accessed December 19, 2010).

<sup>30</sup> EUROPA – History of European Union, Robert Schuman. Available at

[http://europa.eu/abc/history/foundingfathers/schuman/index\\_en.htm](http://europa.eu/abc/history/foundingfathers/schuman/index_en.htm) (last accessed May 18, 2010).

<sup>31</sup> *Id.*

<sup>32</sup> European Union information web site: [http://europa.eu/abc/history/1945-1959/1951/index\\_en.htm](http://europa.eu/abc/history/1945-1959/1951/index_en.htm) ;

[http://europa.eu/abc/history/1945-1959/1952/index\\_en.htm](http://europa.eu/abc/history/1945-1959/1952/index_en.htm) (last accessed May 18, 2010).

<sup>33</sup> European Union information web site: [http://europa.eu/abc/history/1945-1959/1957/index\\_en.htm](http://europa.eu/abc/history/1945-1959/1957/index_en.htm) (last accessed May 18, 2010).

<sup>34</sup> The original Treaty Establishing European Economic Community (The Treaty of Rome (1957)) aimed at formation of a customs union and a common market. Later in 1986, the Single Europe Act, the Luxembourg Treaty of 17 February 1986 which came into force on July 1, 1987, made a first substantial amendment to the above treaty and it set a new goal to create a “Single Market” (that goes beyond the “common market” of the original treaty). See information in the EU’s web site EUROPA, “The EU at a glance” ([http://europa.eu/abc/12lessons/key\\_dates/index\\_en.htm](http://europa.eu/abc/12lessons/key_dates/index_en.htm)), [http://europa.eu/abc/12lessons/lesson\\_6/index\\_en.htm](http://europa.eu/abc/12lessons/lesson_6/index_en.htm)), “Internal Market” ([http://europa.eu/pol/singl/index\\_en.htm](http://europa.eu/pol/singl/index_en.htm)), and “Building Europe through Treaties” ([http://europa.eu/legislation\\_summaries/institutional\\_affairs/treaties/treaties\\_singleact\\_en.htm](http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_singleact_en.htm)), last accessed June 26, 2010.

<sup>35</sup> European Union information web site: [http://europa.eu/abc/history/1970-1979/index\\_en.htm](http://europa.eu/abc/history/1970-1979/index_en.htm) ;

[http://europa.eu/abc/history/1980-1989/index\\_en.htm](http://europa.eu/abc/history/1980-1989/index_en.htm) (last accessed May 18, 2010).

<sup>36</sup> European Union information web site: [http://europa.eu/abc/history/1990-1999/1990/index\\_en.htm](http://europa.eu/abc/history/1990-1999/1990/index_en.htm) (last accessed May 18, 2010).

<sup>37</sup> European Union information web site:

[http://europa.eu/legislation\\_summaries/economic\\_and\\_monetary\\_affairs/institutional\\_and\\_economic\\_framework/treaties\\_maastricht\\_en.htm](http://europa.eu/legislation_summaries/economic_and_monetary_affairs/institutional_and_economic_framework/treaties_maastricht_en.htm) (last accessed May 18, 2010). See also OJ C 191 of 29.7.1992.

<sup>38</sup> *Id.*

in 1995 (Austria, Sweden and Finland)<sup>39</sup>, ten in 2004 (Estonia, Latvia, Lithuania, Poland, Czech Republic, Slovakia, Slovenia, Hungary, Malta and Cyprus)<sup>40</sup>, and two in 2007 (Bulgaria and Romania)<sup>41</sup>, increasing its membership to 27 European countries. In the meantime, EU treaties were updated twice (1999 and 2003) by the Amsterdam and Nice Treaties respectively.<sup>42</sup> The Nice Treaty concerned anticipated eastern expansion; however, EU leaders were also aware that the EU would face increased difficulties based upon the growth in number of its members under the Nice Treaty framework. The 2004 European Constitutional Convention was adopted to resolve this difficulty, but failed in the ratification process.<sup>43</sup>

The Lisbon Treaty followed in 2007 to salvage much of the provisions agreed on in the draft Constitution.<sup>44</sup> This Lisbon Treaty amended the two preexisting treaties rather than creating a brand-new “constitutional” treaty.<sup>45</sup> The Lisbon Treaty amended the preexisting Treaty on European Union (TEU) and the Treaty Establishing the European Community (TEC), and TEC was renamed to become the current Treaty on the Functioning of the European Union (TFEU).<sup>46</sup> The Lisbon Treaty took effect on December 1, 2009 after all the 27 Member States had ratified it.<sup>47 48</sup>

## 2. Institutional Changes under the Lisbon Treaty

Under the Lisbon Treaty, the EU’s institutional arrangement was streamlined and the previous European Community was officially absorbed into the new EU, which now has a

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<sup>39</sup> *Id.* See also OJ C 241 of 29.8.1994.

<sup>40</sup> *Id.* See also OJ L 236 of 23.9.2003.

<sup>41</sup> *Id.* See also OJ L 157 of 21.6.2005.

<sup>42</sup> *Id.* See also OJ C 340 of 10.11.1997; OJ C 80 of 10.3.2001.

<sup>43</sup> See the European Convention, Draft Treaty establishing a Constitution for Europe, Brussels, 18 July 2003, CONV 850/03, text available at <http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf> (last accessed May 18, 2010); EUROPA - Information on 2003-2004 IGC, available at [http://europa.eu/scadplus/cig2004/index\\_en.htm](http://europa.eu/scadplus/cig2004/index_en.htm) (last accessed May 18, 2010); BBC web, “EU constitution: Where member states stand”, last updated March 25, 2007, available at <http://news.bbc.co.uk/2/hi/europe/3954327.stm> (last accessed May 18, 2010).

<sup>44</sup> See “Brussels European Council 21/22 June 2007” (revised version of the Presidency Conclusions of the Brussels European Council (21/22 June 2007)), Council of the European Union, Brussels, July 20, 2007, 11177/1/08 REV1. Available at [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/94932.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/94932.pdf) (last accessed May 18, 2010).

<sup>45</sup> *Id.*

<sup>46</sup> TEU and TFEU have the same legal authority, and they together describe the matters concerning the functioning and the competence of the European Union after the Lisbon Treaty. TEU and TFEU are together described as “the EU Treaties.”

<sup>47</sup> The text of the Lisbon Treaty was published on Official Journal of the European Union (OJ) 2007/C 306/01, 17.12.2007. Its official languages are 23 languages. The English version of this Official Journal is available at <http://eur-lex.europa.eu/JOhtml.do?uri=OJ:C:2008:115:SOM:EN:HTML> (last accessed May 18, 2010). For practical purposes, Official Journal published the “consolidated version”, i.e. the text of the EU Treaties (TEU and TEC, which was renamed to TFEU) that incorporated the modification by the Lisbon Treaty. It was published as: OJ 2010/C 83/01. Available at <http://eur-lex.europa.eu/JOhtml.do?uri=OJ:C:2010:083:SOM:EN:HTML> (last accessed May 18, 2010).

<sup>48</sup> See European Council’s information on December 1, 2009, “General Secretariat of the Council of the EU, Information Notice – Treaty of Lisbon.” Available at [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/111652.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/111652.pdf); European Commission Information on December 1, 2009 at [http://ec.europa.eu/news/eu\\_explained/091201\\_en.htm](http://ec.europa.eu/news/eu_explained/091201_en.htm) (last accessed May 18, 2010); information at Swedish Presidency of the European Union, “Final Piece of the Puzzle in Place” November 3, 2009, available at [http://www.se2009.eu/en/meetings\\_news/2009/11/3/final\\_piece\\_of\\_the\\_puzzle\\_in\\_place](http://www.se2009.eu/en/meetings_news/2009/11/3/final_piece_of_the_puzzle_in_place) (last accessed May 18, 2010).

legal personality.<sup>49</sup> All the previous legal rights and liabilities of the European Community, including international treaties and agreements, were therefore succeeded to by the EU.

The EU now has a permanent European Council President who has two and a half year term and represents the EU externally (prior to the Lisbon Treaty, the head of the state or the government of the Member State that assumed the 6-month rotating EU presidency assumed the office of the President of the European Council).<sup>50</sup> The European Council is now officially a separate institution from the Council<sup>51</sup>, and it is made up of the heads of the state or the government of all the Member States.<sup>52</sup> The European Council makes high level political decisions affecting the political direction and priorities of the EU, rather than making daily decisions on specific issues or assuming the legislative function borne by the Council.<sup>53</sup>

In addition to the President of the European Council, in the foreign affairs, security policies and diplomatic relationship, the High Representative of the Union for Foreign Affairs and Security Policy (High Representative) acts on behalf of the EU.<sup>54</sup>

The Council is made up of Member States' representatives at ministerial level.<sup>55</sup> The Council is the main decision-making body of the EU and the Council exercises legislative and budgetary functions jointly with the European Parliament.<sup>56</sup> Therefore, the EU Member States governments participate in the EU decision-making through the Council. The Council's decision making is based on a qualified majority under specific formula except for a number of issues that require unanimity under the EU Treaties.<sup>57</sup>

The European Parliament is the only directly-elected body of the EU.<sup>58</sup> The 736 Members of the European Parliament (MEP) represent the citizens of the European Union, and they are elected once every five years by voters across the 27 Member States of the EU on behalf of its 500 million citizens.<sup>59</sup> The European Parliament now has the role of a co-legislature with the Council.<sup>60</sup> Although it does not have the power to propose EU legislation of its own initiative and it can only vote up or down the proposed legislative text that is proposed by the European Commission,<sup>61</sup> in practice, the text of important legislation is negotiated prior to the formal introduction for Parliamentary voting.<sup>62</sup> It also

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<sup>49</sup> TEU Article 47.

<sup>50</sup> TEU Articles 13 & 15. See also the European Council's information on December 1, 2009, "General Secretariat of the Council of the EU, Information Notice – Treaty of Lisbon.", *supra*.

<sup>51</sup> TEU Article 13(1).

<sup>52</sup> TEU Article 15(2).

<sup>53</sup> TEU Article 15(1).

<sup>54</sup> TEU Article 18(2).

<sup>55</sup> TEU Article 16(2).

<sup>56</sup> TEU Article 16(1).

<sup>57</sup> TEU Article 16(3).

<sup>58</sup> See overview of the European Parliament provided on its own web site,

<http://www.europarl.europa.eu/parliament/public/staticDisplay.do?id=146&language=en> (last accessed June 27, 2010)

<sup>59</sup> *Id.*

<sup>60</sup> TEU Articles 14(1) & 16(1).

<sup>61</sup> See TEU Article 17(2). In general, the European Commission has the sole power to propose EU legislation.

<sup>62</sup> See Part 3.7 *infra*.

assumes a significant role in the EU's budgetary matters.<sup>63</sup> In general, when the Commission negotiates an international agreement, the European Parliament needs to be regularly informed of negotiations, and its final approval is required to conclude an international agreement.<sup>64</sup>

The European Commission ("Commission") is the executive body of the EU. Under TEU, the Commission "shall promote the general interest of the Union and take appropriate initiative to that end ... It shall oversee the application of Union law under the control of the Court of Justice of the European Union. It shall execute budget and manage programmes."<sup>65</sup>

### **3. The EU's Competences Under the EU Treaties as Amended by the Lisbon Treaty**

The Lisbon Treaty clarified the allocation of powers between the Member States and the Union (i.e. the EU). Under the general principle of conferral, the EU is only able to handle a matter within its competence in accordance with the EU Treaties.<sup>66</sup> The powers (competences) that are not conferred to the EU are reserved for Member States.<sup>67</sup>

Title 1 of TFEU lists three types of EU's competences: (1) exclusive; (2) shared; and (3) complementary competences.<sup>68</sup> In the areas of EU's exclusive competence, only the EU can adopt legally binding acts, and the Member States cannot intervene unless authorized by the EU or to implement measures taken by the EU.<sup>69</sup> Under the principle of proportionality, the content and form of the EU action cannot exceed what is necessary to achieve the objectives of the EU Treaties.<sup>70</sup> In the area in which the EU shares the competence with the Member State, under the principle of subsidiarity, the EU can act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member State but rather be achieved by the EU by reason of the scale of the proposed action.<sup>71</sup>

### **4. Expansion of the Scope of Common Commercial Policy**

Common Commercial Policy is one of the exclusive competences of the EU and the Lisbon Treaty substantially enhanced its scope.<sup>72</sup> Now, Common Commercial Policy includes external investments, commercial aspects of intellectual property protection, and trade in services, as well as the previous trade in goods. Common Commercial Policy also includes conclusion of international agreements with a third country or an international organization concerning the subject matters covered under this provision.<sup>73</sup> Before the Lisbon Treaty,

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<sup>63</sup> TEU Article 14(1).

<sup>64</sup> TFEU Articles 207(3) & 218(6).

<sup>65</sup> TEU Article 17(1).

<sup>66</sup> TEU Articles 3(6), 5(2).

<sup>67</sup> TEU Article 4(1).

<sup>68</sup> TFEU Articles 3, 4, & 6 respectively.

<sup>69</sup> TFEU Article 2(1).

<sup>70</sup> TEU Article 5(1), (4).

<sup>71</sup> TEU Article 5(1), (3).

<sup>72</sup> TFEU Article 3(1)(e). Compare TFEU Article 207(1) against its predecessor, TEC Article 133(1).

<sup>73</sup> See TFEU Articles 207(2), (3) & 218.

Common Commercial Policy only covered common tariff rates and other trade-related matters, including conclusion of a trade agreement with third countries.<sup>74</sup>

## **5. Expansion of EU Law under EU Case Law based on Freedom of Establishment**

Under the principle of the primacy of EU law that was established by the case law of the ECJ and confirmed in Declaration 17 to the Lisbon Treaty, EU law is binding on the Member States and any Member State's national law that contradicts EU law is void.<sup>75</sup> The ECJ adjudicated many EU law issues, including those concerning EU Treaty's Freedom of Establishment, over several decades, establishing sophisticated binding EU case law that substantially expanded EU law protections and achieved harmonization of law that provided a groundwork for European integration.<sup>76</sup>

Under the EU Treaties, the principle of Freedom of Establishment requires that a Member State treat a subsidiary or branch operation of a company of another Member State (foreign company) the same as a company organized under its own law (domestic company).<sup>77</sup> This national treatment under the Freedom of Establishment principle is strongly enforced under the case law of the ECJ. When the national government has the competence to deal with the subject matter at dispute within the EU framework, it still must use that power consistently with the overall EU law principles, and if it uses its competence in a *manner* that violates the Freedom of Establishment or other EU law principles, the subject matter within Member State's competence (that is outside the EU's competence under normal circumstances) falls under the ECJ's jurisdiction and its judicial review.<sup>78</sup>

## **6. The Lisbon Treaty's Solidarity Clause and the European Stabilization Mechanism**

The European Stabilization Mechanism agreed on May 9, 2010 takes the form of loan or of a credit line granted to a Member State under severe economic distress. Under this Mechanism: (i) the new facility created under Article 122 of TFEU, the Solidarity Clause, will borrow, if necessary, on behalf of the EU up to €60 billion from private financial institutions or the global capital market to loan the funds to an EU Member State in emergency; in addition, (ii) the euro zone member states set up, under their intergovernmental agreement, a separate facility, a special purpose vehicle (SPV), that will guarantee the euro zone sovereign debt up to €440 billion.<sup>79</sup> In their May 7, 2010 statement, the eurozone heads of state and government specifically announced that this

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<sup>74</sup> Compare TFEU Article 207(1) against its predecessor, TEC Article 133(1).

<sup>75</sup> See Declaration 17 to the Lisbon Treaty, *supra*.

<sup>76</sup> See, Ambassador Kennard, "The EU After Lisbon: Strengthening the Transatlantic Bond", *supra*.

<sup>77</sup> TFEU Article 49 (prior to Lisbon Treaty, TEC Article 43; original Article number under Maastricht Treaty was Article 52 EC).

<sup>78</sup> See *Saint-Gobain v Finanzamt Aachen-Innenstadt*, Case C-307/97, Judgment of the Court, September 21, 1999; *Commission v Austria*, Case C-475/98, Judgment of the Court, November 5, 2002.; *Lankhorst-Hohorst v Finanzamt Steinfurt*, Case C-324/00, Judgment of the Court (Fifth Chamber), December 12, 2002; *Metallgesellschaft v Commissioner of Inland Revenue*, Case C-397/89 and C-41/98, Judgment of the Court (Fifth Chamber), March 8, 2001; *Überseering v Nordic Construction Company Baumanagement GmbH*, Case C-208/00, Judgment of the Court, November 5, 2002.

<sup>79</sup> See Council memo, "The European Stabilization Mechanism", MEMO/10/173, Brussels, 10 May 2010, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/173> (last accessed May 18, 2010).

resolution was based on the principle of solidarity under the Lisbon Treaty,<sup>80</sup> and the Council on May 9 reiterated that this European Stabilization Mechanism is based on the Article 122(2) of TFEU, the solidarity clause, in order to clarify the extraordinary nature of these decisions.<sup>81 82</sup>

As discussed above, this emergency measure was adopted to deal with the serious conditions that could have fatally damaged the foundation of the EU while the Lisbon Treaty's legal framework gave little guidance to deal with this type of crisis. Therefore, the EU leaders were forced to adopt a solution under the principle of justification for self-defense or necessity (borrowing Van Rompuy's word, "building a life boat" to someone who is drowning even if there is no clear legal text to support this action).<sup>83</sup> The following narratives of a financial reporter, Tony Barber of the Financial Times, best describes the most extraordinary atmosphere that forced the development of EU law for crisis management:

As turmoil engulfs the eurozone, threatening the most ambitious project of Europe's post-1945 reconstruction, the EU's working methods are proving a weakness as much as a strength. Efforts to stabilize the eurozone have been dangerously slowed by the need for unanimity among the area's 16 governments and recognition that whatever actions are taken must be consistent with EU treaty law. ... [N]ow, at last, there is a consensus on the legal basis on which the EU can take its next steps to calm financial markets and stabilise the euro area. It is Article 122 of the block's Lisbon treaty [i.e. Article 122(2) of TFEU], which says financial assistance can be granted if a country is 'threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control'.<sup>84</sup>

After the crisis was over, a month later, the European Parliament President Buzek severely criticized the way the crisis was handled without consultation with the European Parliament, when he had a chance to give an address to the European Council in June 2010<sup>85</sup>: the European Parliament insists that the European economic governance includes proper democratic accountability and safeguards in order to reinforce democratic legitimacy of EU governance and that it is committed to this issue.<sup>86</sup>

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<sup>80</sup> Statement of the Heads of State or Government of the Euro Area, Brussels, 7 May 2010. Available at [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/114295.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/114295.pdf) (last accessed May 18, 2010). The language it used is: "The decisions we are taking reflect the principles of responsibility and solidarity, enshrined in the Lisbon Treaty."

<sup>81</sup> Council memo, "The European Stabilization Mechanism", *supra*. It stated as follows: "On 9 May, the Council has adopted a European Stabilisation Mechanism to preserve financial stability in Europe. The mechanism is based on Art. 122.2 of the Treaty and an intergovernmental agreement of euro area Member States." See also Herman van Rompuy, "Pioneering on Unknown Territory", and "Is Europe Still on the Map", *supra*

<sup>82</sup> Note that TFEU has another Solidarity Clause, Article 222. Article 122 Solidarity Clause is used for serious difficulty in economic policy matters caused by natural and man-made causes, and Article 222 for general difficulties caused by natural and man-made causes or terrorist attacks. However both articles use the similar language and both provide the same principle of solidarity.

<sup>83</sup> Herman van Rompuy, "Pioneering on Unknown Territory", and "Is Europe Still on the Map", *supra*.

<sup>84</sup> Financial Times, "Focus moves to ECB in quest to end turmoil", May 10, 2010, *supra*.

<sup>85</sup> Speech by Jerzy Buzek, President of the European Parliament, to the 'June European Council', Brussels, Thursday, June 17, 2010, available at <http://www.europarl.europa.eu/president/view/en/press/speeches/sp-2010/sp-2010-June/speeches-2010-June-6.html> (last accessed June 28, 2010).

<sup>86</sup> *Id.*

## Part 3 Selected Legal Issues on U.S.-EU Economic Relationships

### 1. Asymmetric Legal Relationship between the U.S. and the 27 Separate European Nations

Even though the EU has achieved a single market within its borders and built a sophisticated and coherent system of internal EU law, the U.S. government and the U.S. legal system have instead predominantly treated the EU as a group of 27 different nation states; further, a majority of U.S. treaties and agreements with Europe are based on classical bilateral agreements between the nation states.<sup>87</sup> As a result, there is a legal asymmetry between the U.S. law's treatment of Europe and Europe's own self image under EU law.

Under this asymmetric legal framework, investors from different EU Member States to the U.S. market are treated more or less favorably under those divergent bilateral treaties. Therefore, U.S. law effectively creates a Class A citizens and Class B citizens within the EU based on the history of bilateral relationships between the U.S. and various EU Member States. This treatment by the U.S. squarely contravenes the EU's own fundamental principle of treating every EU citizen equally under the law.

In contrast, U.S. investors can choose the most advantageous point of entry into the EU market and structure their intra-EU investment in the most favorable ways to take full advantage of the EU's Single Market and the Freedom of Establishment principle under the bilateral treaty structure. For this reason, practically speaking, the U.S. investor can relatively easily avoid the application of a disadvantageous bilateral treaty through certain structuring, and such a treaty tends to harm the Europeans more often than the U.S. counterpart.<sup>88</sup> In addition, U.S. investors from various US states receive the same legal rights and protections under the various U.S. bilateral treaties, and the EU and EU Member States cannot discriminate investors from different U.S. states against each other (for example, the EU cannot give preference to a New York company over a California company).

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<sup>87</sup> See in general U.S. State Department publication, "Treaty in Force - A List of Treaties and Other International Agreements of the United States in Force on January 1, 2010." Available at <http://www.state.gov/documents/organization/123747.pdf> (last accessed May 18, 2010).

<sup>88</sup> A U.S. company's European subsidiary in an EU Member State (EU holding corporation) receives a full protection of the EU Freedom of Establishment principle when it owns a subsidiary in other EU Member States. Within the EU, the intercompany dividends between two EU Member State companies are protected under the Parent-Subsidiary Directive (i.e. a withholding-tax-free dividend distribution from a subsidiary in another EU Member State), and several EU Member States' tax law allows a "participation exemption" (dividend income from another domestic corporation avoids a second-level of taxation, and this exemption is extended to dividends from a subsidiary in another EU Member State to follow the EU Freedom of Establishment rule). Therefore, the U.S. investor can choose, for the location of an EU holding company, a jurisdiction that does not impose withholding tax on dividends payment to the U.S. investors and that does not tax dividend income from EU subsidiary companies. As for the Europeans, they are not able to structure their U.S. investment through a favorable European country due to the "limitation on benefits" article in the bilateral tax treaties as explained in Part 3.3 *infra*. For the Parent-Subsidiary Directive, see Council Directive 2003/123/EC of 22 December 2003 amending Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJ L 007, 13/01/2004 P. 0041 – 0044; OJ L 225, 20/08/1990 P. 0006 – 0009 (original Directive 90/435/EEC). For the Freedom of Establishment, see Part 2.5 *supra* and Part 3.2 *infra*.

## 2. Impact of the EU Freedom of Establishment on Bilateral Treaties under EU Case Law

As discussed earlier, the principle of Freedom of Establishment demands national treatment of a branch operation or a subsidiary of a company of another Member State. Further, the ECJ case law requires *unilateral* expansion of a Member State's obligation under a bilateral treaty with a third country under the same principle.<sup>89</sup> For instance, the ECJ held that the German government should give a treaty benefit under the U.S.-German bilateral tax treaty to a German branch operation of a French company even though the treaty itself limits the eligibility exclusively to residents of the U.S. or Germany.<sup>90</sup> According to the ECJ, this unilateral expansion of the scope of a bilateral treaty does not affect the third country's obligation and is strictly a matter of EU law.<sup>91</sup>

## 3. Cross-Atlantic Investment and Taxation Legal Issues

The U.S. government imposes highly complex compliance requirements to assure that the bilateral income tax treaty benefits (such as the lower withholding tax rates) intended for the residents of one state will not become available for another country's residents.<sup>92</sup> For instance, if (1) a European financial institution tries to establish an investment fund using a Luxembourg investment vehicle and solicits investments from corporate and individual investors from 27 EU Member States and (2) this fund makes various investments in the U.S., the investment fund must analyze whether or not "fiscal transparency" applies to the investment vehicle under the Luxembourg tax law as well as under the investor jurisdiction's tax rules, and must certify which percentages of investment qualify for tax treaty benefits under a specific treaty based on the complex U.S. domestic regulations and

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<sup>89</sup> *Saint-Gobain*, Case C-307/97, *supra*. Also note that, under the same logic, the ECJ used the EU Treaty Article for Freedom of Movement of Workers (now TFEU Article 45; prior to Lisbon Treaty, TEC Article 39) in *Gottardo v Istituto nazionale della previdenza sociale (INPS)*, Case C-55/00, Judgment of the Court, January 15, 2002, to expand a benefit under a social security agreement between Italy and Switzerland (non-EU Member) to Mrs. Gottardo, an Italian-born naturalized French national who worked in France, Italy and Switzerland successfully, and allowed her Italian old-age pension rights. The length of time that she worked in France and Italy was not sufficient to earn her the pension rights even using the right of aggregation under applicable EU Directive, so she needed to add her period of work in Switzerland to qualify for the pension eligibility, and a treaty between Italy and Switzerland allowed adding the Swiss working period to the basis of calculating Italian pension eligibility. The ECJ allowed the expansion of a Swiss-Italy treaty benefit to a French national who, under the letter of the treaty, was not otherwise eligible for that benefit by invoking the right under the EU Treaty's Freedom of Movement.

<sup>90</sup> *Saint-Gobain*, Case C-307/97, *supra*.

<sup>91</sup> *Id.*

<sup>92</sup> Based on the provisions under U.S. Internal Revenue Code §894 (26 USC §894) and Treasury Regulations underneath this statute, the treaty benefit is limited when U.S. source income is paid to a foreign person (e.g. an investment vehicle like a special purpose vehicle of an investment fund) who may be treated as fiscally transparent under the tax law of the recipient's jurisdiction. In such a case, under complex rules, the ultimate foreign investor behind the cash recipient may be allowed to show that it is the "beneficial owner" of the income and can claim its own tax benefit, not the intermediary's resident country's tax treaty benefit. All recent U.S. tax treaties include a "limitation on benefits" article that further limits the tax benefit eligibility. If the "beneficial owner" is a private company, it must further prove that its majority owners are ultimately a combination of qualified residents, i.e. one of the following classes of residents: the natural persons who are residents of the same country as the company's residence; public corporation which is treated as resident of the same country; or the government, charity or pension funds that are treated as residents of the same country. In answering the concerns of various EU member states, in a number of bilateral tax treaties, the U.S. government made a limited degree of concessions for a private company that is a resident in one EU Member State and is owned by residents of other EU member states. However, in many cases, that is not sufficient to master the strict standard of EU Treaties' Freedom of Establishment under the ECJ's case law such as *Commission v Austria*, Case C-475/98, *supra*.



under stringent rules of various bilateral treaties' limitation on benefits articles (or no benefits at all).<sup>93</sup>

This three-country legal question poses serious practical difficulties since local attorneys must consider the interaction of three different legal systems with clear understanding of the American law, including the subtle nuances of American case law and applicable legal principles and theories, as applied to the results of the interaction of the two European countries' different laws within the context of a complex investment vehicle arrangement.

#### **4. Possibility of EU-wide Single External Treaty under Common Commercial Policy**

For the first time, the Lisbon Treaty extended the EU's competence to the external investment issues and trade in services based upon the expansion of the scope of Common Commercial Policy.<sup>94</sup> In theory, the EU can (through appropriate decision-making of the Council and European Parliament) declare that bilateral tax treaty issue is a part of Common Commercial Policy because those divergent bilateral treaties with the U.S. and other third countries negatively impact the uniform single market and EU citizens' fundamental freedoms in that regard. It is possible that the EU may be able to successfully renegotiate a new single treaty with the U.S. or another third country depending on the political environment and a relationship with the counterparty.

#### **5. ECJ's Case Law to Invalidate Bilateral Treaties under EU Law**

As discussed above, the Freedom of Establishment is a freedom that is enshrined by the EU Treaties which has been repeatedly protected by a series of ECJ case law. The ECJ invalidated almost all measures that violated the Freedom of Establishment with very narrow exceptions. In *Commission v Austria*,<sup>95</sup> the ECJ invalidated the bilateral air transport agreement between Austria and the U.S. based on two EU law grounds: (i) the subject matter was already regulated by the EU under internal market regulation, and (ii) a conclusion of the external agreement violated the Freedom of Establishment.<sup>96</sup>

Based on the ECJ, this bilateral air transport agreement violated the Freedom of Establishment because, among other reasons, that agreement restricted free transfer of ownership of Austrian airlines to nationals of other Member States: if an Austrian airline company's majority ownership had been transferred to nationals of other EU Member States, the U.S. would have revoked the air transportation right of that Austrian airline to

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<sup>93</sup> See U.S. Internal Revenue Code §§894 & 1441 (26 USC §§894 & 1441) and Treasury Regulations under section 894 and 1441.

<sup>94</sup> See TFEU Article 207(1) (as contrast to TEC Article 133 before Lisbon Treaty). The language of TFEU 207(1) is as follows:

The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.

<sup>95</sup> *Commission v Austria*, Case C-475/98, *supra*, ¶¶17-20 & 64-69.

<sup>96</sup> *Id.* ¶¶78-79, 92-99, 113-114, 124-126, 132-143, & 145.

fly in the U.S. air space. According to the ECJ, although the revocation of U.S. landing license in such a case is the act of the U.S. government, it is not the fault of the U.S. government but it is rather the Austrian government's fault because it entered into such an international agreement that violated the Freedom of Establishment, prohibiting, for example, the transfer of ownership from Austrian nationals to German nationals.<sup>97</sup> The ECJ therefore held that the agreement was void because the state action to enter into that agreement violated the Freedom of Establishment principle. This judgment therefore appears to focus on the Member State action (signing the agreement) as a basis of voiding the external agreement in violation of the Freedom of Establishment article.<sup>98</sup>

## 6. EU-U.S. Open Skies Agreement (Phases 1 & 2)

After the ECJ invalidated several existing bilateral air transportation agreements between a EU Member State and the U.S. in 2001 (in the so-called "open skies cases" in November 2001 including *Commission v Austria* case as discussed above) because the provisions of these agreements violated EU laws,<sup>99</sup> there were serious negotiations to resolve attendant legal uncertainty. Finally, the EU and U.S. agreed on a single EU-U.S. air transportation agreement in 2007 (2007 First Phase Open Skies Agreement).<sup>100</sup> This agreement was signed by the U.S. government on the one side, and the governments of all the 27 EU Member States and the EU Commission on the other.<sup>101</sup> This First Phase Open Skies Agreement for the first time treats the EU as one single market for purposes of trans-Atlantic air transportation services and abolished the narrow national flag concept.<sup>102</sup> This agreement established a Joint Committee between the U.S. and EU authorities to deal with various practical issues, including regulatory coordination issues such as mutual recognition of each other's standards and certificates.<sup>103</sup> It also provides for a mandatory arbitration mechanism to resolve unresolved issues.<sup>104</sup>

After the Lisbon Treaty was entered into force, the U.S. and EU signed a Second Phase Open Skies Agreement (provisional agreement) in March 2010 to further liberalize capital investment in the EU-U.S. air transportation market.<sup>105</sup> Once this agreement becomes

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<sup>97</sup> *Commission v Austria*, Case C-475/98, *supra* ¶¶135-139

<sup>98</sup> *Commission v Austria*, Case C-475/98, *supra*, ¶132 & 137, citing *Saint-Gobain*, Case C-307/97, *supra*, a tax treaty case.

<sup>99</sup> The ECJ gave its ruling in a number of cases known as "the open skies cases" on November 5, 2002 by judgments in Case C 466/98 *Commission v United Kingdom* [2002] ECR I 9427, Case C 467/98 *Commission v Denmark* [2002] ECR I 9519, Case C 468/98 *Commission v Sweden* [2002] ECR I 9575, Case C 469/98 *Commission v Finland* [2002] ECR I 9627, Case C 471/98 *Commission v Belgium* [2002] ECR I 9681, Case C 472/98 *Commission v Luxembourg* [2002] ECR I 9741, Case C 475/98 *Commission v Austria* [2002] ECR I 9797, and Case C 476/98 *Commission v Germany* [2002] ECR I 9855. See *Commission v Netherlands*, Case C 523/04, ¶15.

<sup>100</sup> Air Transport Agreement between the European Community and its Member States, of the one part, and the United States of America, of the other part, Signed on April 25 and 30, 2007 ("2007 First Phase Open Skies Agreement"). Text available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:134:0004:0041:EN:PDF> (last accessed May 18, 2010).

<sup>101</sup> *Id.*

<sup>102</sup> Articles 4(b) and 5(1)(b) of the 2007 First Phase Open Skies Agreement.

<sup>103</sup> Article 18 of the 2007 First Phase Open Skies Agreement.

<sup>104</sup> Article 19 of the 2007 First Phase Open Skies Agreement.

<sup>105</sup> "Memorandum of Consultations" signed by Daniel Calleja for the delegation of the European Union and its Member States, and by John Byerly for the delegation of the United States of America on March 25, 2010 together with Protocol to Amend the Air Transport Agreement between the United States of America and the European Community and its

effective, on the condition that the U.S. enacts a law that allows majority EU ownership of U.S. airlines, the EU will also allow U.S. majority ownership of EU air carriers.<sup>106</sup> This new agreement also stresses the importance of EU-U.S. bilateral cooperation and regulatory coordination, and substantially enhances the power and authority of the Joint Committee.<sup>107</sup>

This 2010 Second Phase Open Skies Agreement may offer a useful future model for a transatlantic legal and regulatory framework for a specific industry because of its expansive scope of detailed regulatory coordination through the Joint Committee and the mandatory arbitration procedures for the issues that cannot be resolved by the Joint Committee.

## 7. Global Financial Regulations and Hedge Funds Regulation Controversy

Global coordination of financial regulations (global financial regulations) is the most urgent topic in today's global economy.<sup>108</sup> They include a regulation of hedge funds and derivatives (including credit default swaps), which is a highly divisive and controversial issue between the U.S. and EU. There is a strong reason that regulations across the world must be consistent, because divergent regulations will distort and fragment global markets and allow the regulatory arbitrage by the market players.<sup>109</sup> Nevertheless, the EU and U.S. are taking their own separate courses and approaches in the financial industry regulations, especially the hedge funds regulations.

Under the proposed EU Hedge Funds Directive, the new rule will require a "passport" (a single authorization to market the funds within the EU) for those hedge funds managers who will work within the EU borders, and the conditions for obtaining the "passport" are more stringent for non-EU hedge funds.<sup>110</sup> Therefore, the proposal has triggered severe

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Member States, Signed on April 25 and 30, 2007, Joint Statement on Environmental Cooperation and Joint Declaration (to be referred as "2010 Second Phase Open Skies Agreement" or "Protocol"). Available at <http://www.state.gov/documents/organization/139411.pdf> (last accessed May 18, 2010). This document was formally signed by all the 29 parties (the U.S., the 27 European country governments and the EU) on June 24, 2010. See the U.S. State Department release on signing the formal document, see <http://www.state.gov/r/pa/prs/ps/2010/06/143593.htm>; and a copy of the signed document, <http://www.state.gov/documents/organization/143930.pdf> (last accessed July 4, 2010).

<sup>106</sup> Protocol Article 6, amending the 2007 First Phase Open Skies Agreement to replace the previous Article 21 with new language.

<sup>107</sup> Protocol Article 5, amending the 2007 First Phase Open Skies Agreement to replace previous Article 18(3)(4) and (5) with new language.

<sup>108</sup> G-20 Summit London Communiqué, "The Global Plan for Recovery and Reform", 2 April 2009, *supra*. at ¶¶8-16.

<sup>109</sup> *Id.* at ¶15; Financial Stability Board (FSB), Progress since the St Andrews meeting in Implementing the G20 Recommendations for Strengthening Financial Stability – Report of the Financial Stability Board to G20 Finance Ministers and Governors, April 19, 2010. Available at [http://www.financialstabilityboard.org/publications/r\\_100419.pdf](http://www.financialstabilityboard.org/publications/r_100419.pdf) (last accessed May 18, 2010).

<sup>110</sup> This measure was discussed both at the Council and the European Parliament during the week of May 17, 2010. See <http://news.bbc.co.uk/2/hi/business/10120801.stm> (last accessed May 18, 2010). For the text of the proposed Directive, see the Council of the European Union, "Proposal for a Directive of the European Parliament and of the Council on Alternative Investment Fund Managers and amending directives 2003/41/EC and 2009/65/EC", Brussels, 10 March 2010, Interinstitutional File: 2009/0064 (COD) 6795/3/10 REV 3, EF 17, ECOFIN 120, CODEC 144. Available at <http://register.consilium.europa.eu/pdf/en/10/st06/st06795-re03.en10.pdf> (last accessed July 15, 2010). Preamble (19) of this document establishes a general principle to exclude the alternative investment fund manager ("AIFM") of non-EU alternative investment funds ("AIF", which includes hedge funds) from the EU market as follows: "the right for an AIFM to market AIF to professional investors in the Union on the basis of a single authorisation (the European passport for AIFM) should only be granted where the AIF is established in a Member State." Then the same Paragraph (19) allows an

criticisms from the U.S. stakeholders, who believe that the proposal would discriminate against the U.S. hedge fund industry.<sup>111</sup> When the Council voted on the proposed Directive on May 18, 2010 to adopt the proposal against the UK and Czech oppositions,<sup>112</sup> it issued a statement that this regulation would be necessary for the EU to fulfill the commitments made within the G-20 and because the EU must regulate all players in the market that might pose a risk to financial stability.<sup>113</sup> However, the Council's negotiation with the European Parliament proved to be extremely difficult and the negotiation collapsed right before the G-20 Toronto Summit.<sup>114 115</sup>

Separately from the above, the European Parliament on July 7, 2010 approved the text of a broad-based bank capital regulations which include a new bank bonus rule, and this will impose much tougher rule on bank managers as compared to the U.S. counterpart that was approved by U.S. Congress on July 15, 2010.<sup>116</sup>

## 8. EU-U.S. Banking Data Transfer Agreement and the European Parliament's Power

The European Parliament objected to an EU-U.S. agreement on anti-terrorist measures involving cross-Atlantic banking data transfer (SWIFT agreement) because of the

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exception: "Member States may, however, allow or continue to allow AIFM to market AIF (...) established in third countries to professional investors on their territory subject to national law."

<sup>111</sup> See Europolitics.info, "Council to push through draft hedge funds plan", by Sarah Collins, May 17, 2010. Available at <http://www.europolitics.info/business-competitiveness/council-to-push-through-draft-hedge-funds-plan-art271933-8.html> (last accessed May 18, 2010); The Times, "Osborne set to give in on hedge fund law", May 17, 2010, available at [http://business.timesonline.co.uk/tol/business/industry\\_sectors/banking\\_and\\_finance/article7128206.ece](http://business.timesonline.co.uk/tol/business/industry_sectors/banking_and_finance/article7128206.ece) (last accessed July 15, 2010); New York Times, "Tighter Rules for Foreign Hedge Funds Advance in Europe", May 17, 2010, available at <http://www.nytimes.com/2010/05/18/business/global/18hedge.html> (last accessed July 15, 2010).

<sup>112</sup> Council of the European Union, Press Release, 3015th Council meeting, Economic and Financial Affairs, Brussels, 18 May 2010, 9804/10 (Presse 123), Provisional Version, available at [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ecofin/114524.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/114524.pdf) (last accessed May 18, 2010); Council of the European Union, "Council to negotiate with Parliament on draft EU rules for hedge fund managers", Brussels, 18 May 2010, 7500/10 (Presse 64), available at [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ecofin/114493.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/114493.pdf) (last accessed May 18, 2010)

<sup>113</sup> "Council to negotiate with Parliament on draft EU rules for hedge fund managers", *supra*.

<sup>114</sup> "Hedge Fund Regulations Stall in Europe", Reuters, June 24, 2010, available at [http://www.nytimes.com/2010/06/25/business/global/25iht-hedge.html?ref=european\\_parliament](http://www.nytimes.com/2010/06/25/business/global/25iht-hedge.html?ref=european_parliament) (last accessed June 25, 2010); "EU delays vote on hedge fund rule", Financial Times, June 25 2010, available at <http://www.ft.com/cms/s/0/ff5619cc-806c-11d1-be5a-00144feabdc0.html> (last accessed July 4, 2010). The European Parliament's scheduled voting on the proposal was postponed from July to at least until September 2010.

<sup>115</sup> Alternative Investment Fund Managers Directive (AIFM) was approved by the European Parliament on November 11, 2011. See European Parliament legislative resolution of 11 November 2010 on the proposal for a directive of the European Parliament and of the Council on Alternative Investment Fund Managers and amending Directives 2004/39/EC and 2009/.../EC (COM(2009)0207 – C7-0040/2009 – 2009/0064(COD)), European Parliament Document P7\_TA(2010)0393, available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2010-0393&format=XML&language=EN#BKMD-5> (last accessed December 16, 2010).

<sup>116</sup> "Europe Agrees to Limits on Bonuses Paid to Bankers", By Reuters (New York Times blog), June 29, 2010, available at [http://www.nytimes.com/2010/06/30/business/global/30bonus.html?\\_r=1&dbk](http://www.nytimes.com/2010/06/30/business/global/30bonus.html?_r=1&dbk) (last accessed July 4, 2010). See also European Parliament Document P7\_TA(2010)0274, European Parliament legislative resolution of 7 July 2010 on the proposal for a directive of the European Parliament and of the Council amending Directives 2006/48/EC and 2006/49/EC as regards capital requirements for the trading book and for re-securitisations, and the supervisory review of remuneration policies, available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2010-0274&language=EN&ring=A7-2010-0205> (last accessed July 10, 2010). U.S. Congress approved the financial industry overhaul bill on July 15, 2010: see New York Times "Financial Overhaul Signals Shift on Deregulation", available [http://www.nytimes.com/2010/07/16/business/16regulate.html?\\_r=1&hpw=&pagewanted=all](http://www.nytimes.com/2010/07/16/business/16regulate.html?_r=1&hpw=&pagewanted=all) (last accessed July 16, 2010).

persistent privacy concerns in the European public opinion. On February 11, 2010, the European Parliament voted down the SWIFT agreement.<sup>117</sup> After this unanticipated rejection that would have been unthinkable before the Lisbon Treaty, the EU and U.S. authorities started a discussion to salvage the agreement due to its critical importance, and the European Parliament eventually agreed to authorize the EU Commission to open a renegotiation on May 5, 2010.<sup>118</sup> On May 6, 2010 the U.S. Vice President Biden made a major address to the European Parliament, stressing that the people of the U.S. and EU share the same fundamental and inalienable rights, and that such rights include the right of privacy as well as the right to physical safety, so that the U.S. and EU governments have a solemn duty to protect their citizens' safety.<sup>119</sup>

The U.S. and EU reached a new agreement that was more satisfactory to the MEPs, and the European Parliament approved the agreement on July 8, 2010.<sup>120</sup> This event was quoted as “the first time that a European official was able to control and correct the operations of American agencies on U.S. territory” and that “sets a new marker for European democratic oversight over international agreement.”<sup>121</sup>

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<sup>117</sup> See European Parliament information. “Parliament’s rejection of the Swift agreement – the SWIFT dossier in Parliament since 2006”, available at [http://www.europarl.europa.eu/news/expert/background\\_page/019-68530-032-02-06-902-20100205BKG68527-01-02-2010-2010-false/default\\_p001c003\\_en.htm](http://www.europarl.europa.eu/news/expert/background_page/019-68530-032-02-06-902-20100205BKG68527-01-02-2010-2010-false/default_p001c003_en.htm) (last accessed May 18, 2010).

<sup>118</sup> European Parliament voted on May 5 to authorize opening of renegotiation of the failed SWIFT agreement (European Parliament Adopted Text Number P7\_TA(2010)0143, May 5, 2010).

<sup>119</sup> Remarks by Vice President Biden to the European Parliament, May 6, 2010, available at <http://www.whitehouse.gov/the-press-office/remarks-vice-president-biden-european-parliament> (last accessed July 3, 2010).

<sup>120</sup> The negotiated text (which was adopted as a Council Decision) was slated for voting on July 8, 2010. See European Parliament Reference number P7\_TA(2010)0143, title: “EU/USA Agreement: processing and transfer of Financial Messaging Data for purposes of the Terrorist Finance Tracking Program”, available at <http://www.europarl.europa.eu/oeil/FindByProcnum.do?lang=en&procnum=NLE/2010/0178> (last accessed July 4, 2010). Based on the BBC, the European Parliament approved the agreement on July 8 with overwhelming majority: see <http://news.bbc.co.uk/2/hi/europe/10552630.stm> (last accessed July 9, 2010). For the text of the agreement, see the Council Decision 11222/10, Council Decision on the conclusion of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program, June 22, 2010, that was sent for Parliamentary vote, is available at <http://register.consilium.europa.eu/pdf/en/10/st11/st11222.en10.pdf> (last accessed July 4, 2010).

<sup>121</sup> “Cutting off finance for terrorism: towards a European system”, European Parliament Press Release, Justice and home affairs, June 24, 2010, available at [http://www.europarl.europa.eu/news/expert/infopress\\_page/019-76423-172-06-26-902-20100621IPR76422-21-06-2010-2010-false/default\\_en.htm](http://www.europarl.europa.eu/news/expert/infopress_page/019-76423-172-06-26-902-20100621IPR76422-21-06-2010-2010-false/default_en.htm) (last accessed June 28, 2010).

## Part 4 U.S.-EU Economic Relationship

### 1. Unique Importance of the U.S.-EU Transatlantic Economic Relationship within the Global Economy

As discussed above, the EU and the U.S. are the two largest economies in the world, and they together have more than half the global gross domestic product (GDP), approximately \$25 trillion a year and 800 million consumers. The U.S.-EU economic relationship is the most important bilateral relationship within the global economy as well. Transatlantic trade between the EU and the U.S. accounts for 40% of world trade, and three-quarters of foreign direct investment into the U.S., \$1.2 trillion, came from Europe during the last decade.<sup>122</sup>

### 2. EU-U.S. Non-Tariff Barrier Study Report (December 2009)

In 2007, the EU and U.S. agreed to launch a study to quantify the potential benefits of removing non-tariff barriers between the two markets. The study was 100% funded by the European Parliament, and the Report was published in December 2009.<sup>123</sup> The Report shows that the amount of economic benefits from total removal of non-tariff barriers on both sides are expected to be up to \$211 billion per year in GDP growth, a 2% increase in export for the EU and a 6% increase in export for the U.S.<sup>124</sup> The Report confirmed that the EU-US trade issues primarily concern non-tariff barriers because existing tariffs are already very low. Therefore, to further improve the trade efficiency, it is *not* the priority for the EU and U.S. to negotiate a free trade agreement (FTA).<sup>125</sup> Rather, the focus should be on increasing efforts to accelerate the regulatory coordination.<sup>126</sup>

### 3. Brief History of U.S.-EU Economic Relationship – from the Marshall Plan to the Lisbon Treaty

Right after the World War II and at the start of the Cold War, the U.S. Truman administration adopted a key foreign policy, known as the Marshall Plan, to assist the reconstruction of Western Europe; for this purpose, the U.S. favored the European integration movement.<sup>127</sup> Under the Marshall Plan, the U.S. spent \$13.3 billion for the

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<sup>122</sup> José Barroso, March 26, 2010 *supra*; also see William Kennard, “U.S.-EU Relations: A New Page or a New Script?”, January 13, 2010, *supra*.

<sup>123</sup> Non-Tariff Measures in the EU-U.S. Trade and Investment – An Economic Analysis, reference: OJ 2007/S 180-21493, ECORYS Netherland BV, December 11, 2009. Available at [http://trade.ec.europa.eu/doclib/docs/2009/december/tradoc\\_145613.pdf](http://trade.ec.europa.eu/doclib/docs/2009/december/tradoc_145613.pdf) (last accessed May 18, 2010).

<sup>124</sup> *Id.*

<sup>125</sup> Non-Tariff Measures in the EU-U.S. Trade and Investment – An Economic Analysis, Highlight of the study, Note by Directorate-General for Trade of the European Union, Brussels, December 18, 2009. Available at [http://trade.ec.europa.eu/doclib/docs/2009/december/tradoc\\_145612.pdf](http://trade.ec.europa.eu/doclib/docs/2009/december/tradoc_145612.pdf) (last accessed May 18, 2010).

<sup>126</sup> *Id.*

<sup>127</sup> See America.gov information: The Marshall Plan (1947) – U.S. invested \$13 billion over six years to revive Europe. The relevant part is read as follows:

On June 5, 1947, U.S. Secretary of State George C. Marshall spoke at Harvard University and outlined what would become known as the Marshall Plan. Europe, still devastated by the war, had just survived one of the worst winters on record. The nations of Europe had nothing to sell for hard currency, and the democratic socialist governments in most countries were unwilling to adopt the draconian proposals for recovery advocated by old-line classical economists.

European reconstruction over the 4 years (most of the aid was grants rather than loans), and this amount is the equivalent of approximately \$100 billion in today's money.<sup>128</sup> One of the most significant conditions of this aid was for the European nations "to get together and draw up a rational plan", and that created the first opportunity for different European nations to work together for a common objective as a single economic unit.<sup>129</sup> In this sense, the Marshall Plan gave a seminal impetus for the European integration.

In 1952, the U.S. was the first country to officially recognize the ECSC; the ECSC's Washington delegate office opened soon after its formation.<sup>130</sup> However, during the course of the Cold War over the next four decades, U.S. European foreign policy focused mainly on security issues within the NATO alliance. It was not until 1990 that the U.S. and EEC jointly declared their common economic policies.<sup>131</sup> In 2007, the U.S. and EU signed an agreement called "Framework for Advancing Transatlantic Economic Integration between the European Union and the United States of America" (2007 Framework Agreement) that created a Transatlantic Economic Council (TEC) as discussed below.<sup>132</sup> After the change of U.S. administration, President Obama and his EU counterparts issued a 2009 EU-U.S. Summit Declaration on November 3, 2009, agreeing to increase economic cooperation and the role of the TEC.<sup>133</sup>

#### 4. Transatlantic Economic Council (TEC)

The 2007 Framework Agreement was signed for purposes of strengthening the transatlantic economic integration and improving the competitiveness of both the economies.<sup>134</sup> Under this Agreement, the Transatlantic Economic Council (TEC) was established as a high-level official intergovernmental policy-coordination institution between the U.S. and the EU in

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Something had to be done, both for humanitarian reasons and also to stop the potential westward spread of communism.

The United States offered up to \$20 billion for relief -- but *only if the European nations could get together and draw up a rational plan* for using the aid. *For the first time, they would have to act as a single economic unit; they would have to cooperate with each other.*

(emphasis added). Available at <http://www.america.gov/st/washfile-english/2005/April/200504291439291CJsamohT0.6520502.html> (last accessed May 18, 2010).

<sup>128</sup> For the nominal dollar amount, see America.gov information: The Marshall Plan (1947), *supra*; for the detailed breakdown of the amount of Marshall Plan aids from April 1948 through June 1952, see information at Marshall Foundation's web site: [http://www.marshallfoundation.org/library/doc\\_marshall\\_plan\\_aid.html](http://www.marshallfoundation.org/library/doc_marshall_plan_aid.html) (last accessed July 5, 2010). Approximately \$11.8 billion of the total was grants, and the remaining was loans. For the estimate of the equivalent value under today's currency, see BBC's article, "Marshall Plan: Reconstructing Europe", January 6, 2005, available at [http://news.bbc.co.uk/2/hi/uk\\_news/4152797.stm](http://news.bbc.co.uk/2/hi/uk_news/4152797.stm) (last accessed July 5, 2010).

<sup>129</sup> America.gov information: The Marshall Plan (1947), *supra*.

<sup>130</sup> EU Delegation to the USA information, History of Washington Delegation. Available at [http://www.eurunion.org/eu/index.php?option=com\\_content&task=view&id=21&Itemid=37](http://www.eurunion.org/eu/index.php?option=com_content&task=view&id=21&Itemid=37) (last accessed May 18, 2010).

<sup>131</sup> See Transatlantic Declaration, November 22, 1990, available at [http://eurunion.org/eu/index.php?option=com\\_content&task=view&id=2605&Itemid=9](http://eurunion.org/eu/index.php?option=com_content&task=view&id=2605&Itemid=9) (last accessed May 18, 2010).

<sup>132</sup> Framework for Advancing Transatlantic Economic Integration Between the European Union and the United States of America, signed on April 25, 2007 between the U.S. President, European Council President and European Commission President. Available at [http://ec.europa.eu/enterprise/policies/international/files/tec\\_framework\\_en.pdf](http://ec.europa.eu/enterprise/policies/international/files/tec_framework_en.pdf) (last accessed May 18, 2010).

<sup>133</sup> Council of the European Union, "EU-U.S. Summit, Washington, 3 November 2009", Brussels, 4 November 2009, 15351/09 REV 1, available at <http://www.eurunion.org/EU-USSummitAll-11-4-09.pdf> (last accessed May 18, 2010).

<sup>134</sup> 2007 Framework Agreement, Section I.

order to achieve the goals set forth under the Agreement.<sup>135</sup> The TEC is co-chaired by ministerial level officials from the both sides and it reviews ongoing EU-U.S. economic policy and regulatory coordination between the EU and U.S.<sup>136</sup> Despite the complexity and broad territories to cover, the TEC does not have a permanent secretariat or an independent web site; as such, information on TEC's activities is scarce. The European Parliament criticized the TEC's lack of transparency and efficiency.<sup>137</sup> The European Parliament, nevertheless, expects the TEC to play even more robust role to accelerate transatlantic economic integration, and the European Parliament directs the policy makers to reinforce the TEC while it also expects an enhanced role of the Transatlantic Legislators' Dialogue.<sup>138</sup>

## 5. Transatlantic Legislators' Dialogue (TLD)

The Transatlantic Legislators' Dialogue (TLD) was created for purposes of promoting the dialogue between the EU and U.S. federal legislators.<sup>139</sup> The TLD was founded in 1999 on the premise that the EU-U.S. relationship would develop beyond the traditional foreign policy and trade issues and involve other fields of legislative issues such as: economic and financial policies, energy and climate changes and issues of civil liberties. The TLD holds bi-annual meetings of delegates from the European Parliament and U.S. House of Representatives.<sup>140</sup> The TLD is designated as one of the three official "transatlantic dialogues" to consult the TEC.<sup>141</sup>

## 6. U.S. Policy Leaders' View on Transatlantic Relationship

President Obama and his administration support a strong Europe because the U.S. needs strong partners, and Vice President Biden called the European integration movement under the EU as "great endeavor" of Europeans<sup>142</sup> and the U.S.-EU relationship strong.<sup>143</sup>

In his speech at the European Parliament on May 6, 2010, Vice President Biden reminded that the post-World War II transatlantic economic relationship started with American

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<sup>135</sup> 2007 Framework Agreement, Section IV. See also Working Arrangements For The Transatlantic Economic Council (Adopted at the meeting of the TEC co-Chairs in Berlin on 28 June 2007); See ¶(1). Available at [http://ec.europa.eu/enterprise/policies/international/files/tec\\_working\\_arrangements\\_en.pdf](http://ec.europa.eu/enterprise/policies/international/files/tec_working_arrangements_en.pdf) (last accessed May 18, 2010).

<sup>136</sup> *Id.*

<sup>137</sup> European Parliament resolution of 22 October 2009 on the upcoming EU-U.S. Summit and the Transatlantic Economic Council Meeting, Strasbourg, P7\_TA(2009)0058, ¶¶20-57. Available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2009-0058+0+DOC+XML+V0//EN&language=EN> (last accessed May 18, 2010).

<sup>138</sup> *Id.*

<sup>139</sup> Information on Transatlantic Legislators' Dialogue, available at [http://www.europarl.europa.eu/intcoop/tld/default\\_en.htm](http://www.europarl.europa.eu/intcoop/tld/default_en.htm) (last accessed May 18, 2010).

<sup>140</sup> *Id.*

<sup>141</sup> Working Arrangements For The Transatlantic Economic Council, supra. ¶(2).

<sup>142</sup> See Vice President Biden's speech at the European Parliament on May 6, 2010, available at <http://www.whitehouse.gov/the-press-office/remarks-vice-president-biden-european-parliament> (last accessed July 4, 2010).

<sup>143</sup> *Id.* Vice President Biden said "*Even if* the United States and [the EU nations] *were not* united by shared value and common heritage ... our global interest alone *would* inexorably bind us together." (Italics original.)



assistance of European reconstruction under the Marshal Plan, and that it was perhaps “the greatest investment in human history.”<sup>144</sup>

Now, in his view, the Americans and Europeans have established together “the greatest commercial relationship in the world’s history [] helping usher in an era of unprecedented prosperity and technological innovation.”<sup>145</sup> He commented that the Lisbon Treaty has given the EU “more powers and a broader responsibility that comes with that increased influence”, and stated that the U.S. welcomes that change because it needs strong allies and alliances to help it tackle the problems of the 21st Century.<sup>146</sup> He stated that a close security cooperation between the NATO and the EU is important as the U.S. and Europe continue to work together to deal with new challenges of the 21st Century including the security threats (military and non-military security threats such as cyber security and energy security, and including terrorist threats from non-state actors).<sup>147</sup> Vice President Biden drew a conclusion that all of these factors above “show why Europe continues to be not just America’s largest trading partner, but our most important ally.”<sup>148</sup> In conclusion: “Europe needs the United States – we need each other more now than we have ever ... I’m here to state *unequivocally*, President Obama and Joe Biden strongly support a united, a free, an open Europe.”<sup>149</sup>

The U.S. Ambassador to the EU, William Kennard, gave a speech on the following day, May 7, 2010, still in the middle of the turmoil of European financial crisis, to the AmCham Germany in Frankfurt, to discuss the financial crisis and economic issues.<sup>150</sup> He stressed the importance of looking beyond the immediate demands of the crisis to focus on long-term structural reform, especially in the following three key areas: (i) financial sector reform, (ii) structural economic reform, and (iii) innovation.<sup>151</sup> The Ambassador emphasized the importance of U.S.-EU cooperation to lead the world in innovation, and that the U.S. and EU must further increase the dialogue on many regulatory and trade issues “with new vigor” because innovation and entrepreneurship are the core of President Obama’s vision for economic recovery.<sup>152</sup>

Earlier in January 2010, as a newly arrived Ambassador, Mr. Kennard gave an overview of the U.S.-EU relationship under Obama administration that echoed the Vice President Biden’s views above. He told the audience that “President Obama welcomes the Lisbon Treaty” because it signals a stronger, more integrated Europe and because “an increasingly strong and confident EU is good for the U.S. and good for the world.”<sup>153</sup> He said that “[t]he view from the very highest levels of the U.S. government is that we need Europe more than

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* (Italics original.)

<sup>150</sup> Ambassador William E. Kennard, “Partnering for Transatlantic Action: From Vision to Execution”, AmCham Germany 107th Annual Membership Meeting, May 7, 2010 (Frankfurt, Germany), available at [http://useu.usmission.gov/speech\\_050710.html](http://useu.usmission.gov/speech_050710.html) (last accessed June 28, 2010).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> Ambassador William E. Kennard, “U.S.-EU Relations: A New Page or a New Script?”, January 13, 2010, *supra*.

ever”); and that the U.S. has no better-suited partner for that shared responsibility than the EU not only because of meaningful alignment in the issues, but also because the U.S. and EU share a commonality of history, values and culture.<sup>154</sup> He stressed the importance of strong economy as a means to accomplish broader political goals, and pointed out that the boosting growth and vital transatlantic economy depends on greater transatlantic trade and investment.<sup>155</sup> For this reason, he told the audience that he would be working closely with the EU officials and with Washington “to look for concrete measures to further reduce trade and investment barriers and to open third country markets.”<sup>156</sup>

## **7. European Policy Leaders’ Perspective for the Future of Transatlantic Partnership**

The EU Commission President José Barroso gave a speech on “New Atlanticism” on March 26, 2010. In his view, the fact that the EU and U.S. share common values, including respect for rule of law and human rights, will help the two sides to face the global challenges of the 21st Century together.<sup>157</sup> He urged that the U.S. should strive to build a new Atlanticism around the strategic EU-U.S. partnership to shape the global agenda. The backdrop of this partnership is a robust transatlantic economy, which is highly significant in the global economy; and the combination of high level of economic integration and shared values constitutes a strong foundation upon which both sides can foster an even stronger partnership.<sup>158</sup> Based on Mr. Barroso, the Lisbon Treaty has empowered the EU in economic regulation, trade, justice and security, among others, and as a result, the Lisbon Treaty has given the EU a new profile in external affairs and increased the EU efficiency. Therefore, it is now possible to make a qualitative leap in transatlantic relationship for a more dynamic approach.<sup>159</sup>

According to Angelos Pangratis, the Acting Head of the EU Delegate to the U.S. since November 2009, the EU-U.S. economic relationship is rapidly becoming less competitive as both sides now share more common interests because of (1) recent technological innovations, (2) new global economic dynamisms of emerging economies, and (3) the current global challenges from financial crisis, environmental issues, and security issues.<sup>160</sup> As a result, the EU and U.S. increasingly need and have a fundamental interest in creating the political, legislative and regulatory common responses to global challenges; this coordination is essential for the EU and U.S. to lead the transition of the global economy in the 21st Century.<sup>161</sup>

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> José Barroso, “A New Atlanticism for the 21st Century”, March 26, 2010 *supra*.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> Angelos Pangratis, Minister and Deputy Head of Delegation of the European Commission to the USA, “EU Visions of Sustainability in the XXI Century” at Fifth Annual European American Business Council Ambassador’s Dinner, House of Sweden, Washington, DC, July 9, 2009. Available at <http://www.eurunion.org/APSustainabilitySpeech-07-09-09.doc> (last accessed May 18, 2010).

<sup>161</sup> *Id.*

## 8. European Parliament's Proposals

After the Lisbon Treaty went into force, the European Parliament adopted a resolution on March 10, 2010 on the overall EU foreign policy issues, which included the transatlantic relationship with the U.S.<sup>162</sup> The European Parliament viewed this relationship as “one of the main pillars” of the EU’s external relationship,<sup>163</sup> and urged the High Representative Catherine Ashton to “ensure that the EU acts as a coherent, active, equal and yet autonomous partner to the U.S.” in strengthening global security and stability, promoting peace and respect for human rights and in adopting a united approach to global challenges such as nuclear proliferation, terrorism, climate change and energy security.<sup>164</sup> The Lisbon Treaty, based on its view, had opened up a “propitious opportunity” for improving and renewing the framework of EU-U.S. relations, and the European Parliament “encourage[d]” the High Representative Ashton to “work toward strengthening EU-U.S. institutional mechanism” in line with Parliamentary resolutions.<sup>165</sup>

Approximately one year earlier on March 26, 2009, the European Parliament adopted a resolution to re-evaluate the status of transatlantic relationship following the inauguration of President Obama.<sup>166</sup> The resolution also considered the prospective ratification of the Lisbon Treaty.<sup>167</sup> The European Parliament demanded that the EU negotiators start negotiating a new EU-U.S. Partnership Agreement with the U.S. immediately after the Lisbon Treaty would enter into effect with a goal to sign it before 2012.<sup>168</sup> It also expected that the TEC would work more intensely toward the goal of achieving a “genuine, integrated transatlantic market” by 2015.<sup>169</sup> Under the plan, there should be a separate new high-level consultative body for foreign and security policy, the Transatlantic Political Council (TPC).<sup>170</sup> The plan also called for upgrading the Transatlantic Legislators’ Dialogue into a fully-fledged bilateral chamber of legislators called the Transatlantic Assembly, which is made up of delegates from the European Parliament and both houses of U.S. Congress.<sup>171</sup>

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<sup>162</sup> European Parliament resolution of 10 March 2010 on the annual report from the Council to the European Parliament on the main aspects and basic choices of the Common Foreign and Security Policy (CFSP) in 2008, presented to the European Parliament in application of Part II, Section G, paragraph 43 of the Interinstitutional Agreement of 17 May 2006 (2009/2057(INI)). Available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0060+0+DOC+XML+V0//EN&language=EN> (last accessed May 18, 2010).

<sup>163</sup> *Id.* at ¶42.

<sup>164</sup> *Id.* at ¶42.

<sup>165</sup> *Id.* at ¶42.

<sup>166</sup> European Parliament resolution on 26 March 2009 on the state of transatlantic relationship in aftermath of the U.S. elections (2008/2199(INI)), Preamble. Available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0193+0+DOC+XML+V0//EN&language=EN> (last accessed May 18, 2010). This resolution was adopted in anticipation of President Obama’s attendance at an informal EU-U.S. summit that was to take place in Prague on April 5, 2009. See ¶4.

<sup>167</sup> *Id.* at Preamble ¶B.

<sup>168</sup> *Id.* at Preamble ¶J and ¶¶5 & 6. The European Parliament believed that the existing framework, the 1995 New Transatlantic Action (NTA), should be replaced by the new agreement because of the changes of the world since then, and the relationship needs more solid and updated legal basis.

<sup>169</sup> *Id.* at ¶46.

<sup>170</sup> *Id.* at ¶9.

<sup>171</sup> *Id.* at ¶10.

## 9. European Parliament President Jerzy Buzek's Vision for Transatlantic Community

The President of the European Parliament Jerzy Buzek made a speech at a university in Washington on April 29, 2010 during his visit to the U.S. to open the European Parliament's Washington delegate office.<sup>172</sup> In his speech, Mr. Buzek stressed the importance of transatlantic partnership in response to increased influence of the emerging economies; he believed that the EU and U.S. need to "take a lead in building and shaping a new form of global governance."<sup>173</sup> In his view, unless the EU and U.S. work together, the global economy could become fragmented, making it increasingly difficult for the world to deal with the political and economic challenges of the 21st Century. If the EU and U.S. can cooperate and exercise the necessary leadership, Mr. Buzek stressed, there is a way to bring the new economic powers, i.e. Russia, China, India and Brazil and other regional powers, on board to integrate the global economy and achieve global stability.<sup>174</sup>

President Buzek set forth an ambitious goal: in ten years, the EU and U.S. should "implement a genuine transatlantic single market, based on four freedoms which already exist in Europe – the free movement of goods, services, capital and (yes) people." And he further added: "I would add a fifth freedom, the free movement of knowledge across the Atlantic."<sup>175</sup> In his opinion, a transatlantic market could build on "one of the European Union's greatest success stories – the single market that [Europeans have been] building continuously for over 50 years."<sup>176</sup> He challenged the young American audience to think of a "Euro-Atlantic community", which is a common space where one can "live, work, and study on either side of this inner sea which is the Atlantic Ocean", and concluded his speech by explaining how to materialize this grand vision: "That may seem a dream, but our challenge is to change the context and create a new reality."<sup>177</sup>

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<sup>172</sup> European Parliament President Jerzy Buzek's speech on "The New European Parliament: Politics and Power in Today's European Union" at the School of Advanced International Studies, John Hopkins University, Washington, DC, April 29, 2010. Available at <http://www.europarl.europa.eu/president/view/en/press/speeches/sp-2010/sp-2010-April/speeches-2010-April-2.html> (last accessed May 18, 2010).

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* Note that Mr. Buzek gave another speech at Columbia University on the following day, April 30, 2010, and concluded his speech with the following statement: "I believe fundamentally that the EU's unique model of sharing sovereign – of promoting common solidarity and common responsibility – is working well and can be a model for the rest of the world." See "EU/EP after Lisbon Treaty and the Transatlantic Partnership", Speech by professor Jerzy Buzek, President of the European Parliament, at Columbia University in New York, Friday, April 30, 2010, available at <http://www.europarl.europa.eu/president/view/en/press/speeches/sp-2010/sp-2010-April/speeches-2010-April-3.html> (last accessed June 28, 2010).

<sup>177</sup> Jerzy Buzek "The New European Parliament: Politics and Power in Today's European Union", *supra*.

## CONCLUSION

### 1. Need for an Integrated U.S.-EU Transatlantic Community and a Single Market

One decade into the 21st Century, the center of gravity of the global economy is increasingly shifting toward the emerging economies. With a population of only 300 million as compared to the 2.5 billion in India and China (and approximately 7 billion in the world), and with a substantially slower economic growth rate, the U.S. will find it increasingly difficult to maintain its influence in the global economic order without strong allies.<sup>178</sup> The combined GDP (PPP based figure) of China and India (\$12 trillion) is now rapidly approaching that of the U.S. (\$14 trillion).<sup>179</sup> The U.S. and EU need to work together to protect the open market and lead the world toward global economic integration.

Especially in the time of economic downturn, it is extremely important that the world leaders avoid the temptation to move away from free trade to find a refuge in the insular, protectionist mentality and policy. Protectionist policies only promote the narrow interests of protected companies and industries to the detriment of all the rest; they stifle the sustainable growth that the world economy definitely needs. Therefore, it is a positive move that the G-20 global leaders at the Toronto Summit reaffirmed their commitment to free trade as a means to achieving the sustainable global economic recovery. While the ultimate goal of world-wide free trade remains a distant dream, there is a realistic possibility that the U.S. and EU can achieve economic integration relatively fast and reap significant economic benefits because they share the same level of economic development and the similar political and socioeconomic characteristics. The potential benefit from the removal of trade barriers is enormous even if it adds only a small percentage of additional boost to economic growth, if only because of the large absolute size of the U.S. and EU economies. For the U.S. businesses, this move will expand the size of their market from the 300 million to 800 million consumers.

According to the “new trade theory” of Paul Krugman, which earned him the Nobel Economic Prize in 2008, the integration of two advanced industrialized markets further increases the wealth on the both sides.<sup>180</sup> This “new theory” provided the theoretical and

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<sup>178</sup> Two-third of the world growth is now from the emerging market, based on “Our Agenda for the G-20”, Op-ed contribution by Timothy Geitner and Lawrence Summers, Wall Street Journal, June 23, 2010, available at [http://online.wsj.com/article/SB10001424052748704853404575322791729932502.html?mod=googlenews\\_wsj](http://online.wsj.com/article/SB10001424052748704853404575322791729932502.html?mod=googlenews_wsj) (last accessed June 26, 2010).

<sup>179</sup> Based on the IMF World Economic Database figures. Available from the web portal, <http://www.imf.org/external/pubs/ft/weo/2010/01/weodata/download.aspx>. See also the compilation at [http://en.wikipedia.org/wiki/List\\_of\\_countries\\_by\\_GDP\\_\(PPP\)](http://en.wikipedia.org/wiki/List_of_countries_by_GDP_(PPP)) (Last visited July 4, 2010). The PPP (purchase power parity) based GDP reflects the price difference among different countries (Chinese and Indian people don't need as much nominal income to maintain the same level of living standard as is required by the American counterpart due to the difference in the prices).

<sup>180</sup> Paul Krugman (1979), Increasing Return, Monopolistic Competition, and International Trade, *Journal of International Economics* 9: 469-479. See also The Royal Swedish Academy of Science, Information for the Public – The Prize in Economic Science 2008, International Trade and Economic Geography, available at [http://nobelprize.org/nobel\\_prizes/economics/laureates/2008/info.pdf](http://nobelprize.org/nobel_prizes/economics/laureates/2008/info.pdf) (last accessed June 30, 2010); Prize Committee of the Royal Swedish Academy of Sciences, Scientific background on the Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 2008, Trade and Geography – Economies of Scale, Differentiated Products and Transport Costs, available at [http://nobelprize.org/nobel\\_prizes/economics/laureates/2008/ecoadv08.pdf](http://nobelprize.org/nobel_prizes/economics/laureates/2008/ecoadv08.pdf) (last accessed June 30, 2010)

mathematical model to prove the empirical experience that the trade between two similar, industrialized countries also generates a net benefit (not just the trade between different types of economies as was explained under the classic trade model of the comparative advantage theory of David Ricardo going back to the 19th Century, and under the Heckscher-Ohlin trade model from the early 20th Century).<sup>181</sup> In this case, both markets benefit from the increased intra-industry trade of industrial goods, which increases the total consumer utility for the both, because each industrial manufacturer in the combined market can take advantage of the economies of scale within the larger combined market through specialization. And this makes a greater variety of goods available in the market at lower prices, thus satisfying the consumers' preference for diversified goods.<sup>182</sup>

Krugman's new trade theory gives the best theoretical support why the U.S. and EU, the two most advanced and the largest economies in the world, should open their markets each other even more. The removal of non-tariff barriers between the two largest economies in the world will not only generate large direct benefits for the U.S. and EU economies but also will generate positive impacts for the rest of the world because additional growth in the two largest economies should stimulate the growth elsewhere in the ripple effects.

## **2. Need for a Legal Coordination Center for Removal of U.S.-EU Non-tariff Barriers**

Legal coordination between the U.S. and EU is essential to achieve the removal of the remaining non-tariff barriers. This should take the form of a new partnership agreement between the EU and the U.S., and the coordination center to further develop the legal underpinnings needed to maintain the new order.

As discussed above, the European Parliament a couple of years ago funded a study of transatlantic nontariff barriers in agreement with the EU policy makers and their U.S. counterpart, and this fact itself shows its seriousness in this policy goal. Now that this study has quantified the size of the economic benefits, up to \$211 billion per year, it is time for the EU and U.S. legislatures to provide funding to organize a joint legal coordination center project to achieve the result.

## **3. A Proposal for the Future of Transatlantic Community**

### **a. U.S.-EU Transatlantic Economic Partnership Agreement**

The U.S. and EU should promptly negotiate and sign a new **U.S.-EU Transatlantic Economic Partnership Agreement** to update their mutual legal framework to reflect the new legal structure of the EU after the Lisbon Treaty and the new challenges of the world

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<sup>181</sup> The Royal Swedish Academy of Science, Information for the Public – The Prize in Economic Science 2008, International Trade and Economic Geography, *supra*.

<sup>182</sup> *Id.* Each consumer has the diminishing marginal utility, i.e. if a consumer has \$2 instead of \$1, he would rather use \$1 each for two different goods (e.g. one can of soda and French fries) instead of using all the \$2 to buy twice the amount of a single product (e.g. French fries).

of the 21st Century. The Agreement should establish a number of basic principles, including the legal status of the EU, the legal foundation of future U.S.-EU agreements and application of laws affecting the transatlantic economic activities of private parties, and set forth an institutional framework to promote economic integration of Transatlantic Community.

In this Agreement, the U.S. would formally acknowledge the EU as a *sui generis* entity which can speak with one voice on behalf of its Member States and its citizens externally under EU law on matters within the scope of the Lisbon Treaty. The Agreement should formally declare that this Agreement and future U.S.-EU bilateral treaties and “executive agreements” that are validly entered into in accordance with the EU’s internal law and U.S. law respectively will be binding upon the EU and all EU Member States as well as upon the U.S. Such an agreement would allow the U.S. to deal with a single EU negotiator on transatlantic economic issues rather than 27 separate negotiators of Member States, at least with respect to the many matters that fall into the broad EU competence under the Lisbon Treaty. The agreement should also specify that the U.S. will update its domestic law and regulations accordingly.

#### b. U.S.-EU Legal Coordination Center for Trade, Investment and Finance

The U.S. and EU should jointly establish a **U.S.-EU Legal Coordination Center for Trade, Investment and Finance** (“the Legal Coordination Center”) This Legal Coordination Center should be established for purposes of undertaking the task of studying and developing long-term legal coordination strategies and of providing specific proposals for the legislatures and policy makers of the U.S. and EU in order to achieve the transatlantic economic integration through legal coordination. Creation of an effective, permanent Legal Coordination Center is an essential condition for building a successful, stable, long-lasting, and mature economic relationship between the U.S. and the EU. It should be funded jointly and staffed by reputable jurists and other specialists from the both sides.

The legal and regulatory coordination would involve careful study of the complex transatlantic and cross-disciplinary legal issues. Legal rules are interconnected within each country’s legal system and they are ingrained in the distinctive legal traditions and culture of each nation, and it is not just the matter of modifying the isolated texts of the statutes and regulations. Therefore, it is critical that the legal profession from the both sides of the Atlantic, including prominent legal scholars from American and European academic institutions, should undertake and support this legal coordination work. Because of the magnitude and the complexity of the work involved, it is essential that these legal coordinating studies and programs have a common central coordinating center and a strong secretariat.

Also, this work will require close coordination with the legislators on both the European and American sides because of the nature of the subject. Therefore, this legal coordination center and related U.S.-EU joint legal coordination programs need to be established and

managed in cooperation with the U.S. and EU legislatures and their joint Assembly (if the European Parliament's proposal is implemented).

The Center's main goals should include:

- (1) to identify outdated legal framework and rules governing transatlantic economic relationships and other practical issues under the existing laws;
- (2) to offer specific proposals for legal coordination with a view to build a comprehensive and harmonious transatlantic legal system that is conducive to further development of the transatlantic economic relationship and to the creation of a genuinely integrated Transatlantic Community; and
- (3) to promote transatlantic judicial cooperation in civil matters.

The scope of the subject matters that will be handled by the Legal Coordination Center should be sufficiently broad in order to achieve the goal of U.S.-EU economic integration through the removal of non-tariff barriers. Therefore, the scope of its tasks encompasses about the same degree of broad subject matters as that of the EU's competences, including its Common Commercial Policies as expanded by the Lisbon Treaty. (Please see ANNEX for a tentative nonexclusive list of subject matters that it will handle.)

The Legal Coordination Center's role is generally consultative, but its opinions and views should have a substantial weight that is persuasive to the U.S. and EU legislatures. In some cases, it may draft the text of a binding treaty under specific mandate (subject to ratification by the both parties). In this respect, the UNCITRAL's consensus-based drafting culture and working method may be a good operational model for the Center.<sup>183</sup>

The Legal Coordination Center's tasks should include studies for streamlining the transatlantic dispute resolution procedures and the cross-border judicial cooperation in civil matters (for instance, harmonization of contract and commercial laws and court procedure rules<sup>184</sup>) in view of the increasing volume of transatlantic trades and commerce. There may be a need for a specialized Transatlantic Commercial Tribunal that offers a fast, reliable and cost-effective channel of dispute resolutions for specific classes of players in the transatlantic commercial activities and the consumers who benefit from transatlantic economic integration. These specific classes of parties may include those engaged in e-commerce transactions, those in specific industries with unique characteristics or a pattern of disputes, and those who engage in high volume, low-value transactions.

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<sup>183</sup> UNCITRAL has been drafting three different types of texts, i.e. (i) binding convention, (ii) Model Law (recommended text), and (iii) Legislative Guide. This flexible approach can be especially useful when the legal rules concern the areas that have been traditionally covered by the U.S. states laws and the areas reserved for EU Member State's national laws. UNCITRAL's consensus-based drafting approach allows input of diversified stakeholders and experts as well as the official delegates in open discussions on specialized technical rules. See for instance, United Nations document A/CN.9/702/Add.1 ¶¶1-7 for the discussions on the three levels of texts.

<sup>184</sup> Under the EU Treaties, TFEU Article 81 discusses judicial cooperation in civil matters. TFEU Article 81(1) states: "The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States", and Article 81(2) provides a detailed list of such cooperation areas.



It is logical that the U.S.-based office of the Center be in New York. New York City occupies the unique central position within such global economic and financial systems, and it will continue to assume the leading role in the more integrated global economy and the Transatlantic Community. It has a unique and unmatched world-class financial industry and the expertise in cross-border business and investment, which enable it to handle the complex business issues affecting the global economy. In addition, New York is the location of for the United Nations headquarters, and has a sophisticated network of academia, professional organizations, think-tanks, influential NGOs, cultural leaders and world-class media.

Legal coordination is not about physical construction, but is about the leadership and political will to harmonize human ideas through consensus and to gradually change people's habits and behaviors step by step. Under wise political leadership and effective stewardship, this small investment can generate an enormous return one day. A stable and prosperous transatlantic community of 800 million citizens would promote global economic integration and peace. In a July 2010 interview with the London Times, European Commission President José Manuel Barroso spoke of the need to seize this opportunity to grow the transatlantic relationship<sup>185</sup>:

The transatlantic relationship is not living up to its potential. I think we should do much more together. We have conditions like we have never had before and it would be a pity if we missed the opportunity. President Obama is extremely popular in Europe and in Europe today you have probably the most transatlantic generation of leaders since the Second World War. I think we should do more, for instance in breaching the regulatory gap, we are not exploring the full potential of the transatlantic market - it is by far the biggest relationship in the world still today if you put together trade and investment, much more important than - it is more fashionable to talk about emerging markets in Asia but indeed the transatlantic relationship is the most important one - so if you bridge the regulatory gaps and have a common agenda for growth and jobs on both sides of the Atlantic, that is what the business community of the United States and Europe are asking from us.

Since growth and jobs are now at the top of the agenda on both sides of the Atlantic, the time is right for the United States and the EU to explore and maximize the undoubted

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<sup>185</sup> See excerpt from July 15, 2010 interview of European Commission President José Manuel Barroso with the editor of the London Times, available at [http://www.eurunion.org/eu/index.php?option=com\\_content&task=view&id=3806&Itemid=451](http://www.eurunion.org/eu/index.php?option=com_content&task=view&id=3806&Itemid=451) (last accessed September 1, 2010).

potential of the transatlantic relationship. Establishing the Legal Coordination Center would be a good first step in that direction.

## ANNEX – PROPOSED U.S.-EU LEGAL COORDINATION CENTER

### Principles Guiding the Proposed U.S.-EU Legal Coordination Center for Trade, Investment and Finance

**The U.S.-EU Legal Coordination Center for Trade, Investment and Finance** (the Legal Coordination Center) will undertake the task of studying the legal coordination between the U.S. and the EU in order to assist the both sides to achieve genuine economic integration of Transatlantic Community.

The new Legal Coordination Center should be funded jointly and staffed by reputable jurists and other specialists from the both sides. The Center's function and goals should include: (i) to identify outdated legal framework and rules governing transatlantic economic relationships and other practical issues under the existing laws; (ii) to offer specific proposals for legal coordination with a view to build a comprehensive and harmonious transatlantic legal system that is conducive to further development of the transatlantic economic relationship and to the creation of a genuinely integrated Transatlantic Community; and (iii) to promote transatlantic judicial cooperation in civil matters.

The Legal Coordination Center should work on, among other strategically important matters, the following matters that concern transatlantic economic and trade relationships:

- 1) manufacturing of high technology items
- 2) e-commerce, telecommunications, privacy and data protection laws, consumer protection laws
- 3) trade of services, including mutual recognition of professional licenses and diploma, trainee exchanges, immigration rules, labor law and social security and healthcare charges
- 4) intellectual properties, including cross-border sale, licensing and enforcement of intangible rights, cultural and media regulations, anti-piracy measures, and the issue concerning the fair use in cyberspace
- 5) cyber securities
- 6) bank secrecy laws and anti-terrorist measures
- 7) technological, engineering and financial standards
- 8) cross-border transportation and shipping industry
- 9) agriculture and fishery
- 10) cross-border investment, financing and mergers and acquisitions (M&A), and securities and exchange laws and other investor protection laws
- 11) regulations of financial industry including hedge funds and private equities, international payment system, insurance, derivatives and other financial products
- 12) taxation measures affecting cross-border investment and anti-tax avoidance measures in cross-border context
- 13) fair competition (antitrust) law, state aids and state procurement
- 14) export licensing, national security restrictions, and arms control and trade
- 15) general trade rules and other regulatory rules, including environmental protection, health and safety, drug and controlled substances, immigration and human trafficking, nuclear materials, national security and anti-terrorist measures, as affecting the economic conditions for conducting business and trade
- 16) coordination on energy policies, space and deep seabed development, including off-shore drilling; development aids to third-world countries including microfinancing, and macro-economic measures that affect international trade and business
- 17) coordination on general policies and strategic decisions in multilateral international negotiations that affect global economy and trade (e.g. Doha Round, global environmental agreement)
- 18) judicial cooperation, including recognition of foreign judgment and arbitration awards, rules on practice of law, document legalization and evidence taking in cross-border disputes, and alternative dispute resolutions
- 19) harmonization of civil procedures, contract and property laws and commercial laws in the cross-border contexts, including the rules on recognition of legal personality of foreign business entities, cross-border mergers and acquisitions, security interests, equipment leasing, cross-border agency, sales, shipping and transportation contracts, and international bankruptcy, trust and inheritance
- 20) transatlantic dispute resolution mechanisms, including possible formation of Transatlantic Commercial Tribunal or Arbitration Tribunal which will have jurisdiction over specific classes of transatlantic commercial disputes, for instance disputes concerning e-commerce and specific industry with high volume of low-value disputes.

The above list is a preliminary list and merely *examples* of subject matters that the U.S. and EU can work together through the new Legal Coordination Center. After the passage of time and as it accumulates experience, both the U.S. and EU should discuss about updating the list from time to time.

As a principle, the U.S. and EU should spend their energy to harmonize specific rules only if the change is necessary to remove any impediment against the furtherance of common economic goals and only if it does not discourage sound free-market competitions on both sides of the Atlantic. Often, different legal rules in different jurisdictions encourage, rather stifle, sound free-market competitions while each jurisdiction experiments different approaches, and that is especially the case when a new technology leads to a rapid development of a new industry and when the development of legal systems has not caught up with the pace of the emergence of a new business reality.

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