

TACD

TRANS ATLANTIC DIALOGUE TRANSATLANTIQUE
CONSUMER DIALOGUE DES CONSOMMATEURS

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TACD PROPOSALS REGARDING THE STRENGTHENING OF THE EU-U.S. ECONOMIC PARTNERSHIP

The Transatlantic Consumer Dialogue (TACD) represents all the major consumer organizations in the United States and the European Union. We appreciate the opportunity to give comments on how the transatlantic economic relationship can be strengthened. TACD has studied the transatlantic economic, trade and consumer issues and developed consensus policy positions outlining the consumer interest in numerous discussions and debates. TACD resolutions and background papers, including those prepared for the June 2004 EU-U.S. Summit, may be consulted at www.tacd.org.

In this submission TACD makes recommendations for enhancing economic integration, as well as establishing the context for our recommendations. The submission contains the following sections:

- Section I describes the changed context of the multilateral trading system, creating a new context for the transatlantic marketplace, and a need for a strategic rethinking of the U.S.-EU partnership (page 2)
- Section II describes the reasons that previous U.S.-EU attempts at economic integration have failed. It proposes a new model for the future that includes open processes and advances best practices (pages 3-4)
- Section III presents our recommendations for specific government actions to enhance U.S.-EU economic integration, lift standards, and increase consumer confidence and safety (pages 5-10)

I. Context for transatlantic economic integration from a consumer perspective

TACD represents very significant stakeholders: consumers. Consumers are the demand side of the economic relationship. As Adam Smith said, consumption is the end of production, and the producer interest should be attended only as necessary to promote that of the consumer.

The EU and U.S. recognized the importance of consumer organization input in the transatlantic economic partnership when they helped to establish TACD in 1998. The policies advocated by TACD can help create the more vital economic marketplace sought by the U.S. and the EU.

Since the transatlantic relationship was formalized with the adoption of the New Transatlantic Agenda (NTA) in 1995, and redefined with the launch of the Transatlantic Economic Partnership (TEP) in 1998, the context of the multilateral trading system has dramatically changed. Global economic relationships and institutions have been greatly affected by historic events and a changing political environment, including the events of September 11, 2001 and military action in Afghanistan and Iraq. They have created a new context for the transatlantic marketplace, and a need for strategic rethinking.

The additional relevant changes include the following:

- The future and the legitimacy of the WTO are in question. The U.S. and EU have been at loggerheads in several important WTO cases involving consumer issues. Developing countries have identified U.S. and EU agricultural dumping practices and subsidies as major impediments to a new trade round and balked at negotiations on the Singapore issues. The promise of a “development round” has not yet been realized.
- The AIDS epidemic has become a global emergency and has focused new attention on intellectual property issues. There is global demand for access to affordable drugs for HIV-AIDS and many other diseases, and global controversy has arisen over the nature of patent protection regimes and the terms of the WTO TRIPS Agreement.
- Citizen confidence in corporations and government regulation has been shaken by corporate fraud and greed at the executive level, governance dysfunction, malfeasance by major auditing firms, and weak oversight and enforcement by government agencies.
- Globally, civil society organizations, political leaders, government officials and policy-makers have come to challenge some of the assumptions now underlying free trade negotiations. Many do not believe that such negotiations, and their economic results, have sufficiently served the public interest. Many poor nations have experienced trade-related increases in poverty.

Many of these events have a particular resonance in the relationship between the world’s two largest developed economies that play key roles in the multilateral trading system. As the U.S. and EU grapple with this changed environment, and these complex and critical economic and social issues, their response will have global impacts.

Reaching out to and incorporating the ideas of a diverse array of stakeholders must pave the way for a rethinking and redefinition of the goals and *modus operandi* of the TEP.

The joint statement of the U.S. and EU launching outreach to stakeholders, the Report and Recommendations of the TABD to the June 2004 EU-U.S. Summit, and the June 2004 “Roadmap for U.S.-EU Regulatory Cooperation and Transparency” contain some statements and proposals we support. But it will take more to breathe new life into the transatlantic economic relationship. The policies advocated by TACD provide a sound basis for revitalizing the transatlantic economy and generating consumer confidence in results of the multilateral trading system.

II. Lessons from difficulties with past proposals for regulatory cooperation & proposal for a new road forward

Given this opportunity to discuss how to further transatlantic economic integration, it is worth looking at previous efforts at regulatory cooperation between the EU and U.S. We believe that earlier attempts at economic integration, advocated by the TABD and geared toward eliminating perceived barriers to trade by seeking regulatory harmonization, have failed for several reasons. In particular:

- items for harmonization or regulatory convergence have not been chosen in a public way;
- a balanced group of stakeholders were not consulted or involved;
- industry applied pressure for downward harmonization to lowest-common-denominator standards, and;
- discussions on how to make regulatory cooperation work have not been open for public input.

These previous efforts include:

- **1998 U.S.-EU Mutual Recognition Agreement**

Key aspects of the 1998 U.S.-EU MRA have failed to progress, failed to assist transatlantic businesses and have caused a great deal of tension between U.S. and EU officials and regulators. The pharmaceutical annex of the MRA, for instance, failed largely due to the inability of the U.S. and the EC to determine significantly different regulatory systems to be equivalent without abrogating law and regulation. The electrical safety annex of the MRA failed because the terms of the agreement directly contradict U.S. regulation. The medical device annex is years behind schedule. The MRA was negotiated and implemented with little public input or balanced stakeholder consultation. In 2001, TACD produced one of the first papers pointing out consumer concerns with the MRA model and the flawed processes used to negotiate the 1998 U.S.-EU MRA which can be accessed at: www.tacd.org/docs/?id=193. U.S. and EC officials may want to revisit this paper whose recommendations are relevant even today.

- **Early Warning Mechanism**

The 1999 U.S.-EU “early warning system”, urged by TABD, was geared toward prompting early discussions on regulatory matters that were causing trade tensions in order to avert more formal trade disputes. However, the list of items nominated by industry for “early warning” included important consumer protection, public health and environmental policies on both sides of the Atlantic. TACD considered many of these items to be non-discriminatory regulations on important public policy issues and did not consider them appropriate candidates for a trade-related complaint or closed door discussions between governments or between industry and government. TACD repeatedly asked to be part of these early warning discussions because we knew that we could provide much needed information on why certain regulations were reasonable policy responses to identified public problems. TACD formally recommended that the early warning discussions be noticed to the public and include a broader array of stakeholders in the discussions. After much urging, and correspondence with both Ambassador Zoellick and European Commissioner for Trade Pascal Lamy, the U.S. and EC did post a list of early warning items on their respective websites. But the governments have failed to update these lists, to otherwise bring greater transparency to early warning discussions, or to involve a broader array of stakeholders.

- **Guidelines for Regulatory Cooperation**

TABD was also instrumental in pushing the 2002 U.S.-EU “Guidelines for Regulatory Cooperation”. TACD commented on the “Guidelines” proposal, advocating that any regulatory cooperation be open and transparent, and aid regulators in doing their jobs – protecting health and safety. Numerous matters

were considered for regulatory convergence, but little appears to have happened under the Guidelines. One key reason is that regulators at the EU, U.S., federal and national levels have, as their primary responsibility, the protection of the health and safety of their citizens per their own statutes and binding regulation. They do not have the financial or human resources to actively engage in transatlantic harmonization, especially when they worry that it would undermine public protection. Any model for regulatory cooperation must give regulators incentives to do their jobs better, for example, by providing them with new data or information on better technology or processes that will enhance their scarce resources and aid them in their understanding of complex emerging issues. The recent severe shortage of flu vaccine in the US due to problems at a UK plant is perhaps a case where closer cooperation could have been beneficial.

Given the track record of efforts to date, TACD would view with concern any new proposal for binding transatlantic harmonization or binding regulatory cooperation. However, if a new model of regulatory cooperation is pursued by the U.S. and EU – one that ensures robust public debate and a higher level of public health and safety, and which treats standards as a floor for building upon rather than a ceiling stifling innovation – not only will the economies of these great trading partners be strengthened, but the perception and the legitimacy of the world’s global trading system will as well.

A New Model: As a way forward, TACD recommends using this opportunity to create **an open process**, where activities geared toward regulatory cooperation are nominated and discussed in a democratic and accountable fashion with a balanced group of stakeholders, with clear avenues for public input and transparent methods of decision-making and record-keeping. Such a process should allow for a public discussion on which items are chosen for regulatory cooperation, an assessment of the benefits of each regulatory proposal for consumer health and safety as well as the costs, and public involvement in any negotiations. The Codex Alimentarius Commission, and OECD-led discussions on consumer protection in Internet commerce, have successfully used such an open process model.

Rather than limit discussions to eliminating perceived “barriers to trade” and proposals for downward harmonization, we would turn that notion on its head. TACD endorses a discussion of **best practices** between the EC and U.S. TEP officials and regulators. Regulatory convergence should be pursued only where there are clear public benefits to justify the use of scarce public resources. In instances where regulatory cooperation is in the public interest, regulators should be funded to attend conferences and exchange ideas, discuss emerging data on new problems, and identify best practice in their regulatory fields that are geared toward improving the health and safety of consumers. Even the best type of harmonization can result in a type of “regulatory freeze,” making changes in strictly harmonized regulations more difficult to enact. That is why we advocate that any progress towards regulatory convergence is not only based on the concept of identification of best practices and upward harmonization, but also clearly identified as a foundation for future improvements rather than a ceiling on innovation.

III. Concrete recommendations for specific government actions to enhance US-EU economic integration, lift standards, and enhance consumer confidence

1. Establish real parity for consumer input

The U.S. and EU should provide a transatlantic process in which consumers are assured a role consistent with their importance as the demand side of the transatlantic economy. There must be true parity with TABD in the consultation process. Business has greater resources and a close working relationship with the TEP government officials, sometimes to the exclusion of TACD. This was evident when TACD was excluded from a meeting with the Presidents in Dromoland Castle in 2004. The TEP should assure that any task forces, consultations, and meetings with the Presidents and senior officials include consumer representatives on an equal basis with business.

Regarding the model outlined in the next recommendation, all discussions regarding perceived trade barriers and other regulatory matters should include a broad array of stakeholders, not just industry. Balanced stakeholder representation can help the governments avoid negative press and public perceptions of undue industry influence, and enhance the chances of ratification and acceptance of any agreements reached.

2. Employ a new “open process” model to improve transparency and ensure needed breadth of input

The TACD applauds the open stakeholder consultation being undertaken by the governments on a forward agenda for the U.S.-EU relationship. The U.S. and EU should build on this to conduct the affairs of the TEP with even greater transparency. In order for all interested parties to be informed of important matters under discussion, we suggest that government-to-government negotiations be conducted in the open, with business, consumer groups and other interested parties as official “observers”, following the model of the Codex Alimentarius Commission. This could allow governments to hear all sides of an issue as they work toward compromise and agreements.

We believe the Codex model has advantages over, and often better outcomes than, the model used in WTO negotiations, where discussions are held among a few Members, behind closed doors, and the results are presented as a *fait accompli* to the excluded Members. Trade issues are often so complex, with such far-reaching and sometimes unanticipated consequences, that negotiators often cannot foresee all the impacts, nor visualize all possible alternative solutions. They would thus benefit from ongoing, continuous participation by all affected parties.

Greater transparency is also needed for early warning discussions and all discussion on regulatory matters between the nations. If the MRAs, the early warning mechanism, or the guidelines for regulatory cooperation are going to continue to be utilized, or new vehicles for transatlantic convergence developed, each vehicle needs to be revamped with an eye to ensuring that the public is made aware of the existence of these mechanisms and their avenues of input into these discussions.

In the past TACD has recommended that the EU consider adopting a process similar to the U.S. Administrative Procedures Act (APA) for their domestic rulemaking and to enhance public input into trade policy discussions. TACD has repeatedly urged the US government to make more frequent use of the APA when developing trade policy and especially before taking a position on emerging trade disputes.

3. *Recognize lack of regulation as an impediment to trade*

The U.S. and EU should recognize that regulations to prevent fraud, and ensure public health and safety, fundamentally enhance trade overall. Consumers on both sides of the Atlantic are concerned about food and drug safety, for instance, and want precautions taken in advance of sale to protect their life and health. Absence of effective regulation can lead to lack of confidence in the integrity and fairness of the marketplace, lack of confidence in the safety of products, and consumer avoidance of risky products and services. Consumer and environmental protections should not be viewed, first and foremost, as barriers to trade. Rather, they should be considered to be vehicles that help create confidence in the fairness of the marketplace, and thus encourage trade, online purchases, and other economic activity that is beneficial to the business community.

4. *When engaging in regulatory convergence or harmonization, harmonize up*

The U.S. and the EU can avoid controversy, and increased trade tensions if they focus on proposals for upward harmonization. TACD believes that harmonization efforts should only be undertaken if there is a proven public health or consumer benefit. The EU and U.S. have made progress on cooperation and upward convergence in nutritional labeling. We note that the Joint FAA-JAA (U.S. Federal Aviation Administration and the EU's Joint Aviation Authorities) harmonization effort describes its program for streamlining and accelerating regulatory convergence by focusing on the adoption of the higher standard between the two regulatory authorities. This approach could be adopted by other regulatory agencies.

To this end, we propose the establishment of a joint government-consumer-business task force to identify which regulations represent "best practices" that will advance consumer health, safety and other protections and at the same time facilitate a more successful transatlantic marketplace. Those should be the priority items for harmonization or regulatory convergence. As a starting point, TACD has already recommended that the EU approach to GMO labeling and traceability and chemical safety be adopted by the U.S. In turn, the EU should learn from the U.S. approach to transparent governance (the Administrative Procedures Act) and credit/charge back regulations.

5. *Refrain from launching new trade disputes and resolve old ones*

Both the TABD and TACD have called upon the U.S. and EU government to refrain from new transatlantic WTO disputes, which increase transatlantic friction and often harm the plaintiff as well as respondent. TACD has especially called for the U.S. to refrain from launching WTO suits over sensitive consumer issues. The ongoing unresolved trade wars over beef hormones and GM foods are examples of the U.S. pursuing damaging trade disputes to enable U.S. producers to enter a market where there is simply no consumer demand for the product. Even if the U.S. wins these cases, there will be minimal benefits to U.S. companies due to lack of European consumer acceptance.

Alternatively, the US and the EU could step forward on a new foot. The U.S. could drop the beef hormone and GM food complaint, and both EU and U.S. could pledge to refrain from any new WTO complaint with regard to non-discriminatory consumer or environmental issues. Nations have the sovereign right to regulate in the public interest and respond to emerging new data or issues without the threat of WTO cases hanging over their heads.

6. *Develop a program of best practices to tackle rising obesity rates*

Much can be done to reduce skyrocketing obesity rates, related deaths and illness, and related medical costs. Food marketing and advertising to children, school food programs, food labeling and other measures all play a role in this trade-related public health problem. As a first step, the U.S. and EU should convene a meeting of CEOs of the leading European and U.S. food companies and, consumer groups, to discuss what steps each company is taking in the EU and the U.S. to address the obesity crisis and related dietary problems. If a company is taking various steps (e.g. improved food labeling, reformulation of sugar or fat content, changes in marketing practices) on one side of the Atlantic, but not the other, this asymmetry should be discussed. Governments should take the opportunity to deal with this common problem, by facilitating a unified approach.

The U.S. and EU should work with TACD to develop new regulatory proposals to limit the advertising of high calorie, energy-dense, nutrient-poor foods to children and use the public airwaves to promote healthier eating among children. The U.S. and EU governments should also take steps to implement the World Health Organization's Global Strategy on Diet, Physical Activity, and Health. This document could be the basis for a harmonized regulatory approach between the transatlantic nations.

7. *Foster secure travel while maintaining important privacy protections*

The U.S. and EU should work to harmonize upwards the privacy standards surrounding Passenger Name Records to meet the protections enshrined in the European Data Protection Directive. At the same time, they should ensure that Europeans are protected by U.S. undertakings that are legally binding, such as, for instance, enabling air travelers to obtain court redress in case of abuse. Consumers must be involved as the U.S. and EU work out the complex issues in ensuring security while protecting the fundamental right to privacy.

TACD is particularly alarmed about plans to put remotely readable RFID chips in passports - particularly unencrypted and publicly readable chips that could significantly facilitate identity theft, financial crime, and clandestine surveillance by organized crime and terrorists. TACD urges the EU and U.S. to refrain from deploying this technology in passports, and instead to set up a Task Force of government, business and consumers to explore other effective but less privacy-intrusive measures.

8. *Improve consumer redress and protect privacy on the Internet*

Noting that consumers must have confidence to shop online across the Atlantic, TACD urges the EU and U.S. to work towards regulatory convergence based on best practice in distance shopping so that both buyers and sellers clearly understand their rights and obligations. For example, the EU Distance Selling Directive provides an automatic cancellation right, something that U.S. law could also provide for.

Privacy is also a concern for online shoppers. TACD believes that the U.S. and EU should work towards a common understanding by using best practices on privacy protection to make consumers more confident that their personal information will only be used for the purposes of processing their online transactions. The EU Directive on Data Protection and Directive on Privacy and Electronic Communications give consumers stronger rights to protect their privacy than does U.S. law. For example, TACD believes that laws regarding spam should be harmonized to give people the right not to receive unsolicited commercial emails unless they have "opted in", and that law enforcement transatlantic cooperation should be strengthened. On the other hand, some of the prohibited

practices and enforcement provisions in the U.S. Can-Spam Act might be useful for the EU to emulate. In the area of protecting children's privacy, the U.S. Online Children's Privacy Protection Act provides specific requirements and prohibitions, concerning the collection and use of information gleaned from children online, which could be useful to incorporate into EU law.

Because disputes are difficult to resolve across borders in traditional forums, accessible Alternative Dispute Resolution (ADR) programs are very important. The EU and U.S. should develop uniform guidelines for ADR in e-commerce based on the principles set out in prior TACD resolutions. Another avenue of recourse for online shoppers is through the payment mechanisms they use, but the rules concerning payment dispute rights vary, not only between the EU and the U.S., but also within individual countries. For example, consumers should have the same dispute rights when they use debit cards and online third-party payment services as when they use credit cards. Best practices in this area need to be identified and payment dispute rights should be harmonized upwards to provide better protection for consumers.

9. *Address use of intellectual property rules to segment markets and limit trade*

Intellectual property (IP) rules are increasingly used, especially in the digital environment, to segment markets, to limit trade and to raise prices. This is particularly true of the transatlantic market or, more correctly, of the two segmented markets on each side of the Atlantic. For example, DVD regional encoding is a private agreement to segment markets and enforce it technically through IP-protected schemes, and subsequently bar technical fixes to these solutions. Another example is the use of regional exhaustion in trademarked and copyrighted goods that allows branded goods manufacturers, such as Levi's, to bar trade in their trademarked goods. The current segmentation of the transatlantic market is a barrier to closer economic integration. We urge the EU and U.S. to address this problem.

10. *Develop a new mechanism and new policies concerning support of innovation and public health*

TACD is very concerned about the continual expansion of the scope and enforcement of intellectual property rights in the area of medical Research and Development (R&D), and trade negotiations that promote high prices for medicines as a mechanism to support R&D. There is mounting evidence that current private sector R&D efforts, which often encourage secrecy and proprietary control over data and technologies, are only marginally effective in producing new medicines that are rated better than existing treatments. There is of course much concern over problems of affordability or access. These problems are most acute in developing countries, where resources for health care are scarce. But high drug prices increasingly strain household and third-party payer budgets in the United States and Europe as well.

In addition, in some important areas the poor implementation of patents and other intellectual property rules is stifling innovation and creativity rather than promoting it, for example where low standards for patentability result in patent thickets that are barriers to follow-on research.

TACD calls upon EU and US policy makers to ensure that government-funded medical R&D is managed in the public interest, and either made freely available, or licensed in such a way to ensure that prices to consumers are fair.

TACD urges the U.S. and European policy-makers to undertake a new initiative on product innovation that will explore methods of encouraging innovation that (1) are cost effective, (2) promote more effective and rapid advances in medical science and product development, (3) address priority research needs, and (4) are consistent with equitable access. To this end, we urge the U.S. and EU to (a) consider new trade frameworks that focus directly on medical R&D rather than intellectual property rights or drug prices, and (b) consider and evaluate new models for financing R&D, including approaches that separate the markets for innovation from the markets for the innovative products, and which better address health care priorities.

11. Address Problems in Copyright

Consumers of knowledge goods want copyright policies that support creativity, access and fairness. While the copyright system provides enormous benefits to society, we are concerned with the rush to implement new technological protection measures (TPMs) and digital rights management (DRM) systems for information goods. These new systems are (1) creating new limits on the rights of consumers to use knowledge goods, (2) undermining important limitations and exceptions in traditional copyright laws, (3) building barriers for innovations in knowledge goods, and (4) posing enormous threats to privacy. We are also concerned with the failure of governments to control anticompetitive practices in the areas of software, music, scientific publishing and other areas. We therefore ask the U.S. and the EU to support discussions in the World Intellectual Property Organisation of how to implement Article 40 of the TRIPS (Agreement on Trade-Related Aspects of Intellectual Property Rights) on the Control of Anticompetitive Practices. The EU and U.S. should explore ways to create global norms supporting broader access to government-funded research, and to use government purchasing power to promote more competitive and open software markets.

12. Collaborate on pressing environmental concerns

In a number of areas, EU efforts to address environmental issues have become bones of contention between the EU and U.S. Continuing tension over the EU's REACH chemical policy is one example, and as the EU moves to implement the Kyoto agreement on global warming, there may be further disputes. We urge the EU and U.S. to undertake a cooperative, rather than adversarial, approach to what must be acknowledged as real environmental problems, be they chemical pollution or global warming. A new model of regulatory cooperation focusing on balanced stakeholder participation and best practices would provide an opportunity for regulators to learn about the strengths and weaknesses of each other's systems. For instance, the EU and U.S. could share emerging data on hazards of chemicals that may be available on one side of the Atlantic, but not the other. This could apply also to new evidence regarding global warming and other global environmental concerns. Global problems demand global solutions and require leadership by the world's most developed nations in cooperation with environmental experts on both sides of the Atlantic. EU and U.S. efforts could also be strengthened by fostering and providing support for a Transatlantic Environmental Dialogue.

13. Discipline agricultural export dumping to advance market competition

TACD is concerned that the final framework text on the Doha Round negotiations, adopted by WTO members on 31 July 2004, does not provide the basis for negotiations leading to the phasing out of agricultural dumping. TACD reiterates its call for the U.S. and EU to support the OECD's ongoing work on the costs of agricultural policies, which includes the development of a uniform methodology for calculating agricultural dumping margins based on the cost of production, and the

annual publication of a report on agricultural dumping by OECD countries. We strongly recommend that the EU and U.S. converge around the principle of ceasing to export agricultural products at a price that is less than the cost of production. As long as U.S. and EU policies support the unfair trading practice of trading at below the cost of production prices, the objective of a fair and open agricultural trading system cannot be fulfilled.

14. Ensure a Right to Regulate Under GATS

The WTO panel decision on the Antigua gambling case, which found three U.S. federal and four state anti-gambling laws to be in violation of the General Agreement on Trade in Services (GATS), is of great concern to the U.S. regulatory community and US state governments. The U.S. has indicated that it will not comply with the panel decision. This case raises serious questions about the ability of WTO members to maintain domestic laws and regulations in relation to services. We urge the EU and U.S. to discuss TACD's proposal for a new article to be included in the GATS that would assert the right of governments to regulate services in the consumer interest.

In conclusion, there are good reasons for the U.S. and EU to step back and review whether the transatlantic relationship can be strengthened and improved. Many of the underlying assumptions and methods of operation of their partnership can benefit from reexamination.

TACD, a critical stakeholder in this partnership, proposes progressive approaches in this paper that will promote the interests of consumers in ways that will enhance the benefits of trade for consumers and business alike. We look forward to discussing these recommendations with the European Commission and U.S. Government over the next few months.