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The Legal and Political Structure of Foreign Trade Relations between the United States and the European Union - A Symposium Report -

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Between 14 and 17 July 2004, the Transnational Economic Research Centre (TELC) of Martin-Luther-University, Halle, Germany, supported by the Deutsche Forschungsgemeinschaft (DFG), the Consulate General of the United States in Leipzig, and the German Marshall Fund of the United States (GMF), was host to an international symposium on the legal and political structure of foreign trade relations between the United States and the European Union. The symposium was organised and chaired by Prof. Dr Christian Tietje, Martin-Luther-Universität Halle-Wittenberg.

Bringing together leading experts on international trade relations from the United States and Europe, the symposium provided a forum for the exchange of views and ideas in a rich and stimulating atmosphere. For three days, participants who had arrived from the United States, Switzerland, Germany, France, Belgium, the United Kingdom and Italy discussed the current state of trade relations between the European Union and the United States.

I.

In his opening speech, Professor Tietje gave an incisive overview of the subject of the symposium. He started by observing that the international economic system is, in the first place, a sociological phenomenon. It is concerned, inter alia, with the power structures, capacities, and political and economic culture of its actors. From a legal perspective, the international economic system is increasingly influenced by so-called processes of constitutionalization. Constitutionalization on an international level denotes the development of legal structures which reach far beyond the level of coordination traditionally associated with international law. It is characterized by the development of a functioning international legal order which is no longer primarily based and dependent on the will of the individual state. In light of this development, a question arises concerning the relationship between national decision-making processes and the legal and economic structure of the international economic system.

Taking a closer look at relevant national decision-making processes and their results, one may argue that there exists an increasing discrepancy between the process of constitutionalization in international economic law and the way in which the United States and the European Union regard foreign trade law. While there is a growing tendency to rest the international economic system on a legal foundation, individual states and the European Union continue (perhaps even increasingly) to emphasise the primacy of politics. This discrepancy necessarily results in conflicts between the United States and the European Union, thus

jeopardising the legal structure of the international economic system as a whole, since US and EU trade policy significantly impact the world economy. However, it also becomes more and more apparent that both the United States and the European Union use the increasing legalization of the system, to an extent, in their own interest, attacking protectionist measures of their respective trading partners.

In sum, the growing tension between the ongoing process of constitutionalization in the international economic system and the continuing, and perhaps even intensified, reliance on the primacy of politics on state and EU level with regard to foreign trade law, formed the general topic of the symposium. In order to analyse this subject, presentations and comments by distinguished speakers were given from legal, economic and political science perspectives. The topics of discussion have been divided into four sections: (1) "Constitutional Law and International Trade Law"; (2) "Domestic Politics and International Trade Relations", (3) "Trade Disputes Within and Outside the Rule of Law", and (4) "Transatlantic Trade Relations, the International Rule of Law, and Domestic Policy Interests: The Case of E-Commerce". Two keynote speakers and one or two commentators for each section were given the opportunity to make presentations, after which the floor opened to discussions. This format allowed for in-depth analysis of current and contentious issues, uniting a variety of views and schools of thought, and providing instant feedback on proposals.

II.

The first topic of discussion focused on "Constitutional Law and International Trade Law". The subject was introduced by Prof. Donald H. Regan, University of Michigan, who spoke on „US Constitutional Law and International Trade Law – Historical Aspects and Current Legal Problems". Regan introduced the topic by raising two questions: 1) Does the US constitution impose any limits or legal barriers on WTO development? And 2) Does the US constitution support constitutionalization in international law and particularly in international trade law?

Concerning the first question, Regan analyzed the relevant jurisprudence of the US Supreme Court and came to the conclusion that it recognizes no serious constitutional limitations impeding a further harmonization of laws in the sphere of trade law. In Regan's opinion, the progress of constitutionalization is not so much impeded by legal barriers, as it is hampered by the continued unwillingness on the part of the United States to take action in the field of international trade law.

Tackling the second question, Regan pointed out that the US constitution supports constitutionalization neither in theory nor in practice. Trade law is economic law, which is

highly influenced by national and private lobbies. Thus the Supreme Court is unlikely to pass a decision which would grant WTO law supremacy over US constitutional law.

Following Prof. Regan's speech, Prof. Dr Markus Krajewski, University of Potsdam, took the floor with his lecture on "Constitutional Law and International Trade Law in European Legal Tradition – Historical Aspects and Current Legal Problems".

Beginning with the ECJ's decision in Portugal v. Council, in which the court denied WTO law direct effect within EU law, Krajewsky analysed the argument that foreign policy is a classical domain of the executive, which therefore remains largely unregulated. Krajewski feels that this special characteristic of foreign policy, common to all European constitutional traditions, particularly impedes constitutionalization on WTO level.

Commenting on the preceding lectures, Prof. Dr Ernst-Ulrich Petersmann, European University Institute Florence, noted that the main difference between the European and United States constitution lies in the catalogue of basic rights contained in the EU constitution, which is binding on European decision makers with no exemption for foreign policy matters. Thus, the Council cannot violate international law. In the US constitution, however, foreign policy matters are delegated to the executive.

From a European perspective, any advanced constitutionalization raises concerns with regard to democratic aspects. Within the WTO, quite a few states do not participate in the decision-making process by reason of their poverty. In addition, several of her members may be classified as failed states. For this reason, there can be no effective checks-and-balances system.

In the following discussion, Prof. Krajewski emphasized that the constitutional traditions of the EU refer mostly to her founder states. And in the context of EU enlargement, this common good is put to the test once again. Concerning the balance of powers discussion, he advanced the view that it should be the task of a parliament to provide an opposition to the executive. If the European parliament gained the competence to participate in foreign policy issues without being bent to international law, an enormous legal uncertainty would result. Prof. Petersmann emphasised that the EU Charter of Fundamental Rights is a unique legal document which combines social, economic, and political rights. Prof. Cottier, World Trade Institute, Bern, wondered if it might be preferable to first harmonise economic policies, and then economic law.

III.

The second topic of discussion was

concerned with "Domestic Politics and International Trade Relations", and was opened by Prof. Dr Martin Klein, Martin-Luther-University Halle-Wittenberg. In his speech, Klein gave insights into "International Economic Theory, Domestic Policy-making and the Politicization of World Trade". He outlined the German attitude towards the WTO, pointing out that it suffered from an undeservedly negative image. Paradoxically, German mass media greeted the collapse of the Cancún ministerial conference as a triumph of the poorer countries, thereby reinforcing an "us against them" attitude. This view portrays the WTO as being merely an agent of the rich countries, forgetting that it serves to promote trade and create jobs. Klein feels that the German public do not know where its interests lie, nor that they are negotiated in the WTO.

On a wider note, Klein observed that multi-level governance in the European Union makes the mandate for trade policy less clear than it is in the United States. In addition, the EU has an overwhelming potential for compensating losses resulting from trade liberalisation, spending 50% of her budget on agricultural subsidies – a figure that must be reduced.

The second lecture on this topic was delivered by Prof. Kenneth F. Scheve, Jr, University of Michigan, who analysed "International Economic Theory and Domestic Policy Interests". Scheve focused in particular on the important role of public opinion in policy-making. Noting that although in most countries, there is a strong public consensus that international economic integration generates greater product variety, contributes to economic growth, lowers prices and increases efficiency, the public is conscious of the asymmetrical distribution of benefits from an increase in trade and investment: workers lose out while consumers enjoy the benefits. Thus, despite being aware of the apparent advantages, public opinion favours policy options aimed at restricting trade and foreign investment. Scheve illustrated this link between security for workers and public opinion on trade policy by citing a survey conducted in the United States. The results showed that the public is more likely to support free trade when tied to an increase in jobs, rather than free trade in isolation.

Prof. Dr Reinhard Rode, Martin-Luther-University Halle-Wittenberg, commenting on the foregoing lectures, concurred that Germany's failure, as a trading state which earns well from exports, to openly promote free trade, indeed presents a paradox. An explanation could lie in the fact that the German government can play both on the Berlin and Brussels level, resulting in a win/win situation: The government can pay lip service to the critics in Berlin while relying on Brussels to push on with liberalisation. Rode also agreed that labour

market effects matter in trade policy, but opines that the press reflects this conflicting attitude to a greater extent than actually exists.

Following these lectures, the discussion was opened by Dr Decker, German Council on Foreign Relations, Berlin, who added that not only low-skilled workers' jobs, but also those of white collar workers were at risk from outsourcing. She agreed that European Union agricultural subsidies are too high, effectively closing off the market to third world countries. Prof. Scheve noted that although public opinion is relevant to policy decisions, it does not have as great an impact as large companies do. Scheve feels that it is paramount to generate broad support for trade liberalisation, which requires a powerful programme. Mr Bercero, European Commission, acknowledged that the United States and the European Union have cooperated extremely well on the WTO Doha agenda – perhaps even a little too closely. He also pointed out that it is now much more difficult to get WTO negotiations on the way, since they require politically more complex assessment than in the past. Prof. Porges, Sidley Austin Brown & Wood LLP, raised concerns about the democratic deficit in the European Union, where the Commission plays a greater role in trade policy than the Member States, while not being elected. What this means in practice is illustrated by the example of cabotage. Cabotage is traditionally highly protected in the United States and has not been subject to change largely thanks to lobbying pressures on congress. The Commission on the other hand is putting forward numerous cabotage proposals – simply because it is not under the same democratic constraints as US congress.

IV.

With his lecture titled "Exit and Voice in International Law: has the GATT club turned into a Fortress?", Prof. Joost H.B. Pauwelyn, Duke University, opened the third topic of discussion – "Trade Disputes within and outside the Rule of Law". Pauwelyn introduced the topic by pointing out that 23% of all DSU disputes are brought by the European Union and the United States, and that both have at least some involvement in 2/3 of cases, which raises concerns that the US and EU may have too much influence in DSU cases. Furthermore, 40% of cases brought by the EU are filed against the US, while the US only directed 30% of her cases against the EU. When sued, however, the EU settles more readily than the US. And although the US will comply with a judgement, she is reluctant to alter the offending practice, and more likely to be in repeat violation.

Pauwelyn also explained that the WTO resembled a fortress both to those on the inside and on the outside: it can be a policy straitjacket to its members, while developing countries have no choice to stay out.

Concerning the EXIT (thickness of the legal normative structure) / VOICE (participation in the political decision-making process) paradigm, Pauwelyn found that there is now less opportunity to walk away from one's obligations in the WTO than there was under GATT, and that WTO practice rules seem to have closed off exit too extensively. Pauwelyn argued for maintaining existing exit options, since they were fundamental to reaching agreement on the strong DSU and also to continued support for the trade system. Exit options such as safeguards, compensation and suspension for a delay in implementing a ruling, tariff negotiations, etc. offer an important safety valve when governments face democratically justified demands for non-compliance or change of particular trade rules. And, Pauwelyn expanded, if these exit options are complemented by a high degree of participation in the political process (voice), exit becomes less likely.

With her speech on "The Tension between Political and Legal Interests in Trade Disputes", Dr Decker followed the preceding presentation and pointed out that since the United States and the European Union are each other's most important trading partners, this intensive transatlantic relationship most likely accounts for the high number of disputes. She also emphasised the desirability of diplomatic solutions between the US and the EU, and thus the need for more political will.

By way of comment on the foregoing lectures, Prof. Porges observed that economic growth will only occur if dispute settlement can provide investment certainty. Porges pointed out that there is a real need for regulatory harmonisation between the US and the EU, since it is the regulators who hold the key to market access. Prof. Petersmann felt that there are too many votes in the system today (too much voice) – especially with regard to the developing countries, which could lead to a collapse of the system. On the question of regulatory reform, Petersmann argued that cooperation in this field can only lead to limited results, since US regulators enjoy far-reaching autonomies.

In the ensuing discussion, Hannes Schloemann of Baker & McKenzie reasoned that the real test for a functioning system is the quality of its exceptions. Prof. Thomas Cottier, University of Berne, advanced the view that dispute settlement is beneficial for governments, particularly in cases where no-one can win the cake: since governments are under pressure from many different interests, dispute settlement gives them the opportunity to put up a fight, while not being directly responsible for the results.

V.

The fourth topic of discussion, "Transatlantic Trade Relations, the International Rule of Law, and Domestic Policy Interests: The Case of E-Commerce" was introduced by

Dr Catherine L. Mann, Institute for International Economics, who started the final part of the academic programme of the symposium with her lecture on "E-Commerce, Economic Theory, Domestic Policy Interests, and the Rule of Law in International Trade Relations: The US Perspective". Mann pointed out that although the key component of e-commerce is product selling, it is not only production that needs to be regulated, but also purchase, delivery services, and data elements. In all of these areas, an increasing density of regulation is expected.

Tensions between global market places and regulatory matters with regard to e-commerce relate in particular to data protection, tax issues, and to the protection of intellectual property rights. Especially concerning the protection of intellectual property, Mann admonished the need to find a balance between the protection of innovators' rights, and societal interest. Without the protection of property rights, society would see a decline of wealth in the future. Unfortunately, these rights are increasingly hard to generate, but disproportionately easy to copy.

On the matter of taxation, Mann feels that the main problem lies in pinpointing the place of value creation. Differences in direct and indirect taxation provoke distortion and provide opportunities for evasion. Mann prefers a system of profit taxation. A technological solution is insufficient because it requires data collections to track transactions, which could lead to privacy violations of personal and business data. Introducing the case of a bookshop which attempted to avoid sales taxes by offering an internet service providing for online purchase and payment, while allowing the goods to be collected in a shop, she illustrated the shortcomings of the existing system of international taxation. Thus, there is a real need for an international tax regime in the area of e-commerce. However, the EU is still struggling with V.A.T. and online taxes, which are afflicted with negative outcomes, and which require considerable enforcement mechanisms, whereas the US chose the incentives approach with satisfactory success. Mann concluded that solving taxation problems requires an increasing use of technological solutions, while maintaining an effective protection of individual and corporate privacy.

The second keynote speaker, Mr Sascha Wunsch-Vincent of the O-ECD (but speaking strictly in his personal capacity), gave insights to „E-Commerce, Economic Theory, Domestic Policy Interests, and the Rule of Law in International Trade Relations: The EU-Perspective". Wunsch-Vincent began by outlining the WTO Work Programme on E-Commerce and the Doha Development Agenda, with particular focus on the non-agricultural market access negotiations (NAMA), and the negotiations on services. Comparing the different rationales

for these negotiations, he concluded that the United States pursues the most trade liberalising approach for e-commerce, hoping to avoid trade barriers to the new media. In contrast, the European Union and her member states are seeking to preserve the maximum margin for manoeuvre to implement support measures for content industries. Within the WTO, a number of central issues remain unresolved: How should digitally-delivered content products be classified – as goods (GATT), or as services (GATS)? And if classed as GATS, then which service trade commitments are applicable?

E-commerce is a transmission technology for goods and services. The latter is an abundant source of economic growth, but still the GATS is lacking case law in the areas of software and the telemedia market. The white list approach within GATS creates boundaries between services and products. Classification problems initially appeared in the negotiation of visual rights during the Uruguay Round. While the data delivery service is protected since hardware is a "product", its content does not enjoy the same protection. In the US, the media trade market has not yet been subject to extensive regulation, making it easy to find room for negotiation. In the EU on the other hand, there are numerous regulations limiting the scope for negotiation, e.g. the "TV without frontiers" Directive. The cultural and audiovisual carve-out in the EC's Doha mandate is the first "safety lock", while the carve-out of cultural and audiovisual services from the EC's Common Commercial Policy represents the second. In the US, however, an audiovisual policy is almost non-existent on a national level, and in the external sphere, the "Trade Act of 2002" provides a mandate for free trade in digital content.

It is these unequal positions which will probably cause a moderate outcome of the Doha Round, Wunsch-Vincent explained. Digital trade achievements of the Doha Round must therefore be rated as slow or without progress. But bilateral agreements negotiated by the US can merely be regarded as laboratories to test the rules. There is, therefore, an urgent need for further multilateral negotiations, notwithstanding the likely difficulties.

Mr Jeff Rohlmeier, International Trade Administration, Washington D.C., in his summarising comments, pleads for referring to OECD principles in the process of negotiating media protection. In his opinion, the EU's attitude on e-commerce and digital products has potentially discriminatory effects. Currently, businesses have to deal with national level tax issues in an online world of consumer-, and legal uncertainty. Thus the key challenges are the implementation of an infrastructure and the passing of legislation according to the market places approach. Rohlmeier pointed

in particular to the UNCITRAL model law for e-contracts.

The discussion on this fourth topic was initiated by the remarks of Prof. G. C. Hufbauer, Institute for International Economics, who believes that the OECD would not have been as successful without leaving aside WTO issues. He argued for bilateral agreements with effective dispute settlement solutions, rather than including these matters under the umbrella of the WTO. Prof. Tietje agreed that starting at OECD level and later proceeding to WTO level would be the preferable approach. These thoughts were taken up by Dr Mann, who called attention to the unattractive nature of negotiations on these issues for the US, since finding a compromise is proving to be increasingly difficult. But at the same time, the role of the WTO should be more than taking up uncontentious matters only.

VI.

In summary it can be said that in the light of the fact that the United States and the European Union already make excessive use of WTO dispute resolution, the participating experts agreed that any further legalization of trade relations might be undesirable. Rather than referring cases primarily concerned with political and ideological questions to the WTO, these disputes ought to be solved on a political and diplomatic level. This is supported by a search for the root of these conflicts, which are often caused by inherent social and structural differences between a single-unit nation and a young multi-national democracy.

Consensus was also reached on the position of the developing nations which, it was said, would fare better for integration into the world trading system, than by maintaining dependence on foreign aid.

The European Union, however, did not win a unanimous sentence. While some believed that her power structures are too diffuse for her to significantly impact international economic policy, others praised the European Union for her proactive attitude and expressed high hopes for the European constitution.

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