Crosscurrents in European Union External Commercial Relations: The Controversy over the Germany-United States Treaty of Friendship

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In the annals of the conduct of trans-Atlantic economic relations there have been few cases as complex and curious from the legal and political perspectives as that involving the German challenge to the European Commission in the matter of the Utilities Directive of 1990.[2] The invocation by Germany of the largely forgotten Germany-United States Treaty of Friendship, Commerce and Navigation of 1954[3] laid bare the rather

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[2] Council Directive of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (90/531/EEC), OJ No. L 297/1 (29.10.90)[hereinafter Utilities Directive].

[3] Treaty of Friendship, Commerce and Navigation between the United States of America and the Federal Republic of Germany, signed at Washington, D.C. October 29,

unsatisfactory state of commercial legal relations between the European Union, its Member States and the United States. While the German challenge to the Commission might well have forced a restructuring of trans-Atlantic commercial legal relations, a compromise resolution of the Germany-Commission dispute has been reached, and so for the near term at least the need for a restructuring of these relations has been averted. Nevertheless, the attention of the Commission doubtless has been fixed on the potential threat to its trade policy authority inherent in allowing the present state of affairs to continue. The longer term result is therefore likely to include an intensive review of the present state of trans-Atlantic commercial legal relations by the Commission and a proposal to restructure them in a post-Uruguay Round legal order in a manner that makes more clear the limits of Member State discretion.

1. The Subject Matter of the Trans-Atlantic Dispute and Germany's Intervention

In September of 1990 the European Council of Ministers adopted a Directive relating to public procurement which plainly discriminates against non-Union suppliers, including those in the United States. The Utilities Directive is in general intended to establish more open public procurement practices among the Member States in certain utilities sectors (for example, telecommunications), in particular by establishing a national treatment standard for all Union suppliers.[4] The Directive discriminates against products originating in third countries by permitting Union public procurement entities to reject tenders in which a majority of the products are of non-Union origin,[5] and by mandating that these Union entities discriminate against third country tenders by according a 3% price preference to equivalent Union tenders.[6] The Directive stipulated that the Member States might delay giving it effect until January 1,

1954, entered into force July 14, 1956, 7 UST 1839, TIAS 3593 [hereinafter Germany-United States FCN Treaty or FCN Treaty].

[4] Utilities Directive, *supra* note 2, *inter alia*, at art. 4(2).

[5] "Any tender for the award of a supply contract may be rejected where the proportion of the products originating in third countries ... exceeds 50% of the total value of the products constituting the tender" (id. at art. 29[2]).

[6] "... where two or more tenders are equivalent ... preference shall be given to [equivalent] tenders which may not be rejected pursuant to paragraph 2. The prices of tenders shall be considered equivalent for the purposes of this Article, if the price difference does not exceed 3%" (id. at art. 29[3]). There is an exception for products originating in third countries with which the Union has concluded an agreement on comparable access, and an

1993.[7] This article will not reflect on the wisdom of the Union's international trade policy or its strategic planning in adopting this discriminatory Directive, concerning which much indeed might be said. For present purposes, suffice it to say that under the rules of the General Agreement on Tariffs and Trade (GATT), the Union was entitled in regard to Member State public procurement to discriminate against third country supplied products when not within the scope of the GATT Government Procurement Code, and as of the dates when the Directive was adopted and when Germany later made its approach to the United States, the Utilities Directive did not concern EU Member State government procurement entities within the scope of the Code.[8] In other words, at the relevant times the Utilities Directive was not inconsistent with GATT law. For the sake of trans-Atlantic harmony, it might be pointed out that the United States itself maintains its own discriminatory public procurement laws and that these laws have been identified and criticized by the Union.[9]

The Utilities Directive, not surprisingly, was viewed as an unfriendly gesture by the United States. The United States, principally through the Office of the United States Trade Representative (USTR), made numerous overtures to the Union seeking to have it amended (or disapplied as to the United States).[10] Some success was achieved on this front when on May 24, 1993 the European Union and the United States signed a

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exception for pre-existing Union or Member States obligations to third countries (id. at art. 29[1]). See discussion of exceptions *infra*.

[7] Utilities Directive, at art. 37(2). Exceptionally, Spain was given until January 1, 1996, and Greece and Portugal were given until January, 1, 1998, to put the Directive into effect. Id.

[8] See J.H.J. Bourgeois, The Tokyo Round Agreements on Technical Barriers and on Government Procurement in International and EEC Perspective, 19 CMLR 5 (1982), for a description of the Code and its adoption by the Union. For an explanation of the relationship between the public procurement practices of the Union and the GATT Government Procurement Code in respect to the telecommunications sector, see Frederick M. Abbott, GATT and the European Community: A Formula for Peaceful Coexistence, 12 Mich. J. Int'l L. 1, 42–45 (1990).

[9] See, e.g., Services of the Commission of the European Communities, Report on United States Trade and Investment Barriers 1993, I/225/93, April 1993, at 27–34.

[10] In early 1992 then-USTR Carla Hills undertook consultations with the Union over procurement issues pursuant to Title VII of the Omnibus Trade and Competitiveness Act of 1988 which requires the USTR to identify countries which, even though complying with the GATT Government Procurement Code, discriminate against U.S. products and services not covered by the Code. If consultations do not successfully resolve U.S. concerns, the legislation appears to mandate that the United States apply sanctions. See USTR Fact Sheet on Review of Government Procurement Practices of the EC, France, Germany, and Italy under 1988 Trade Act, February, 1992 Title VII Early Review, BNA Int'l Tr. Reptr.,

Memorandum of Understanding which provided reciprocal market access rights in regard to government heavy electrical equipment procurement for a period of two years.[11] However, no success was achieved in market access talks in regard to government telecommunications equipment markets. USTR Mickey Kantor, who had been appointed by President Clinton in 1993, escalated the dispute over application of the Utilities Directive in the telecommunications sector. U.S. trade sanctions were threatened, negotiations between the two chief negotiators (the USTR and the EU External Economic Affairs Commissioner, Sir Leon Brittan) were held, and the Union held its ground. By this time all concerned appeared to realize that there was little to be gained by a trans-Atlantic trade war in the midst of the GATT Uruguay Round negotiations. To save honor all around, the United States imposed very mild trade sanctions on the Union, the Union retaliated even more modestly, and the whole affair appeared to have been moved gracefully to the back burner.[12]

Nevertheless, on June 10, 1993 during testimony before the House Government Operations Subcommittee on Legislation and National Security of the U.S. Congress, USTR Kantor stated:

> Let me announce to you [Representative Conyers] and members of your subcommittee today that about an hour and 45 minutes ago we reached an agreement with the German government that, in fact, they would not adopt the discriminatory provisions on telecommunications that have been adopted by the European Community in this area. As a result ... we have agreed not to invoke sanctions against the German government as a result. And they also

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Feb. 26, 1992 (Lexis/Nexis ITRADE/INTRAD file). See 19 U.S.C. §2515(d) (2) (B), (e)&(g).

[11] Hearing of the Legislation and National Security Subcommittee of the House Government Operations Committee, Testimony of Mickey Kantor, US Trade Representative, Federal News Service, June 10, 1993 (Lexis/Nexis OMNI file). The Memorandum of Understanding (MOU) also bilaterally extended the scope of the GATT Government Procurement Code to services and construction. Id.

[12] The United States imposed sanctions barring EU companies from bidding on about $ 20 million worth of U.S. contracts for telecommunications equipment and the EU retaliated with about $ 15 million in sanctions of the same type. See U.S.-German Agreement on Procurement Provokes Division in European Community, BNA Int'l Tr. Reptr., June 16, 1993 (Lexis/Nexis ITRADE/INTRAD file); EC/United States: Council to Decide Tuesday on Retaliatory Measures (Very Moderate Ones) in the Public Contracts Affair, Agence Internationale d'Information pour la Presse, No. 5993, June 4, 1993, at 8; EC/United States: The Council's Response to the American Restrictions on Public Procurement Is Very Moderate, Agence Internationale d'Information pour la Presse, No. 5998, June 11, 1993, at 10.

will not adopt the sanctions against us that have been adopted by the European Community, which are, frankly, on [*sic*] symbolic in nature.[13]

It would appear that in connection with a Uruguay Round-related ministerial level market access meeting in Paris, the German Economics Minister, Günter Rexrodt, told the USTR that Germany would not apply the discriminatory provisions in the Utilities Directive because to do so would put Germany in conflict with the Germany-United States FCN Treaty.[14] USTR Kantor sent a letter to the German Minister apparently intended to confirm this arrangement. This letter was made available to the European Commission, though its contents have not been made public.[15] In mid-June 1993 it was reported that the German government had agreed to consult with the Commission before responding to the letter.[16] -

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[13] Hearing of the Legislation and National Security Subcommittee of the House Government Operations Committee, Testimony of Mickey Kantor, US Trade Representative, *supra* note 11. Subsequently in the same testimony, USTR Kantor twice referred to his accommodation with Germany as an "understanding." First, in reiterating what had transpired for a Congressman who came late to the hearing, he said:

"I announced that the German government had reached an understanding with us which will turn into an agreement very quickly within the next few hours to open up their telecommunications market to the United States, not to invoke art. 29, not to invoke the European sanctions. And of course, we won't invoke sanctions with regard to Germany, which I think is only fair." Id. He later said: "Now, we – Germany is now – we've reached an understanding with them." Id. See also U.S. Drops Sanctions Against Germany Following Telecommunications Agreement, BNA Int'l Tr. Reptr., June 16, 1993 (Lexis/Nexis ITRADE/INTRAD file).

[14] See, e.g., id. and EC/United States: German Explanations in the Public Procurement Affair do not Dispel the Perplexity and Concerns of the Commission and Some Member States – Legal Analysis Underway, Agence Internationale d'Information pour la Presse, No. 6003, June 18, 1993, at 8.

The author recognizes that the various accounts in congressional hearings transcripts and the press do not provide a very clear picture of the process by which the United States and Germany reached their "agreement" or "understanding." USTR Kantor's own testimony on the subject is internally inconsistent. He first announces an agreement, and later an understanding which will shortly become an agreement. It is not inconceivable that even among the principal parties there is some confusion as to what exactly transpired and as to how whatever did transpire should be characterized.

[15] See EC and U.S. Fail to Resolve Dispute over U.S. German Telecommunications Deal, BNA Int' Tr. Reptr., June 23, 1993 (Lexis/Nexis ITRADE/INTRAD file).

[16] See EC/United States: German Explanations in the Public Procurement Affair do not Dispel the Perplexity and Concerns of the Commission and Some Member States – Legal Analysis Underway, Agence Internationale d'Information pour la Presse, No. 6003, June 18, 1993, at 8.

Only in March 1994 was a formal confirmation from the German government reported recently to have been received by the United States.[17]

A review of the Germany-United States FCN Treaty indicates that in asserting the existence of a prohibition on discrimination in the public procurement context, Germany would be referring to art. XVII which provides as follows:

> 1. Each Party undertakes (a) that enterprises owned or controlled by its Government, and that monopolies or agencies granted exclusive or special privileges within its territories, shall make their purchases and sales involving either imports or exports affecting the commerce of the other Party solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale; and (b) that the nationals, companies and commerce of such other Party shall be afforded adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases and sales.
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> 2. Each Party shall accord to the nationals, companies and commerce of the other Party fair and equitable treatment, as compared with that accorded to the nationals, companies and commerce of any third country, with respect to: (a) the governmental purchase of supplies; (b) the awarding of concessions and other government contracts; and (c) the sale of any service sold by the Government or by any monopoly or agency granted exclusive or special treatment.

Paragraph one of art. XVII appears to provide protection against discrimination by government-owned and chartered enterprises with respect to imported U.S. products based on non-market factors such as national origin. Paragraph two appears to accord most favored nation treatment to U.S. suppliers of German government-owned utilities, although it does not expressly accord MFN treatment regarding government-chartered utilities.[18] The German government concluded that since United States suppliers and products must be treated in an approximately non-discriminatory manner and since, at least as regards government purchases, they must be treated in the same manner as non-German EU Member

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[17] See U.S. Lifts Sanctions Against Germany Imposed Over EU Procurement Directive, BNA Int'l Tr. Reptr., Mar. 16, 1994 (Lexis/Nexis ITRADE/INTRAD file). This report is discussed *infra*, text accompanying notes 67–70, in the context of the ultimate resolution of this case.

[18] Note that art. XVII deals specifically with government owned or regulated monopolies and that other provisions of the FCN Treaty generally establish national treatment with respect to conducting business within each party's territory (e.g., art. VII, subject to certain limitations). National and most favored nation treatment is accorded with respect to the importation of products in general (e.g., art. XIV), but this is subject to an exception for customs unions or free trade areas which the parties may establish (art. XIV[6]).

State enterprises and products, the discriminatory features of the Utilities Directive could not be applied to the United States without breaching art. XVII.

The European Commission apparently perceived risks to Union external trade policy posed by the German overture to the United States and demanded an explanation. In response to inquiry by the Commission, the German government asserted that it had not entered into a bilateral agreement with the United States, but had simply informed the USTR of Germany's position regarding implementation of the Utilities Directive.[19] This, according to the German Economics Ministry, is a critical distinction because it acknowledges that Germany is not entitled to enter into an agreement with the United States on the subject matter of this dispute in light of the common commercial policy. An explanation of a decision based on a pre-existing treaty is, in its view, a different matter. Germany assured the Commission that it intends to act in compliance with Union provisions, but did not indicate an intention to revise the position it had taken in this matter *vis à vis* the United States.[20]

2. The EC Treaty, the Common Commercial Policy, and the FCN Treaty

The first paragraph of art. 234 of the EC Treaty provides:

> The rights and obligations arising from agreements concluded before the entry into force of this Treaty between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.

The language of the first paragraph of art. 234 is unambiguous. If a preexisting treaty between a Member State and a third country confers rights or establishes obligations with respect to a third country, e.g. the United States, those rights and obligations take precedence over inconsistent obligations established by the EC Treaty. This interpretation of the first paragraph of art. 234 has been confirmed by the European Court of

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[19] EC/United States: German Explanations in the Public Procurement Affair do not Dispel the Perplexity and Concerns of the Commission and Some Member States – Legal Analysis Underway, Agence Internationale d'Information pour la Presse, No. 6003, June 18, 1993, at 8.

[20] EC/United States: On Alleged Bilateral Agreement with U.S. on Public Telecommunications Procurement, Germany Reaffirms Its Compliance with Community Provisions (But Does Not Apply EC Preference), Agence Internationale d'Information pour la Presse, No. 6003, June 12, 1993.

Justice, for example, in *Attorney General* v. *Burgoa*.[21] Moreover, in *Burgoa*, the Court of Justice said:

> Although the first paragraph of art. 234 makes mention only of the obligations of the Member States, it would not achieve its purpose if it did not imply a duty on the part of the institutions of the Community not to impede the performance of the obligations of Member States which stem from a prior agreement.[22]

The Germany-United States FCN Treaty predates the EC Treaty. Under ordinary principles of treaty law,[23] express provisions of the EC Treaty,[24] and by reference to the case law of the Court of Justice, the FCN Treaty which pre-dates the EC Treaty would, in the absence of contrary law, prevail over secondary Union legislation such as the Utilities Directive, both as to third country parties and with respect to the Union organs.

Germany's case, however, need not rely only on the language of art. 234, para. 1 of the EC Treaty. It is in art. 29 of the Utilities Directive that the provisions which discriminate against third country suppliers are found. Art. 29(1) of the Utilities Directive reads as follows:

> 1. This Article shall apply to tenders comprising products originating in third countries with which the Community has not concluded, multilaterally or bilaterally, an agreement ensuring comparable and effective access for Community undertakings to the markets of those third countries. It shall be without prejudice to the obligations of the Community or

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[21] See Case 812/79, *Attorney General* v. *Burgoa*, ECR 2787, 2 CMLR 193 (1980), in which the Court said: "... the purpose [of the first paragraph of art. 234] is to lay down, in accordance with international law, that the application of the Treaty does not affect the duty of the Member State concerned to respect the rights of non-member countries under a prior agreement and to perform its obligations thereunder". Id. at 2803. See also Case 286/86, *Ministère Public* v. *Deserbais*, (1988) ECR 4907, 1 CMLR 516 (1988).

[22] *Burgoa*, (1980) ECR at 2803.

[23] Pursuant to art. 30(4)(b) of the Vienna Convention on the Law of Treaties a later in time treaty does not affect the obligations of parties to a prior treaty which are not also parties to the later treaty as among themselves. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS 331 (entered into force Jan. 27, 1980; not in force for the United States), U.N. Doc. A/Conf. 39 (1969), reprinted in 63 Am.J.Int'l L. 875 (1969), art. 30.

[24] For example, art. 173 of the EC Treaty confers on the Court of Justice the power to review the legality of acts of the Council and Commission on grounds, *inter alia*, of "infringement of this Treaty." Under art. 174, the Court may declare an act of the Council or Commission void.

its Member States in respect of third countries [emphasis added].[25]

Taken on its face the language of art. 29(1), second sentence, might be understood to provide that Germany's approximate non-discrimination and MFN obligations to the United States under art. XVII of the FCN Treaty, as well as similar obligations of other Member States under similar FCN treaties with the United States, were intended to survive the adoption of the Utilities Directive. To belabor the obvious, art. 29(1), second sentence, refers to the obligations of the Union "or" its Member States, so that as a matter of express construction art. 29(1), second sentence, was not intended to refer only to joint Union-Member State undertakings such as the so-called "mixed" agreements.[26]

Both art. 234 of the EC Treaty and art. 29(1) of the Utilities Directive, however, are part of a larger legal context. Although the first paragraph of art. 234 states the basic rule that the EC Treaty does not supersede existing Member State treaty obligations, the second and third paragraphs of that article obligate the Member States to eliminate incompatibilities between those pre-existing treaties and the EC Treaty, providing:

> To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.
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> In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under this Treaty by each Member State form an integral part of the establishment of the Community and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.

Art. 113, para. 1 of the EC Treaty provides for the establishment of a common commercial policy among the Member States of the Union and mandates a uniformity in purpose in the conclusion of trade agreements and the liberalization of Member State trade. It provides:

> 1. [After the transitional period has ended,] the common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of unifor

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[25] Utilities Directive, *supra* note 2. Also, the preamble to the Utilities Directive reads in its relevant part: "Whereas the Community's or the Member States' existing obligations must not be affected by the rules of this Directive."

[26] See discussion of mixed agreements, *infra* text accompanying notes 32–39.

mity in measures of liberalization, export policy and measures to protect trade such as those to be taken in case of dumping or subsidies.[27]

That the regulation of imports from third countries to the Union government procurement market is a subject matter within the common commercial policy is beyond reasonable doubt. The European Court of Justice has held that the common commercial policy must be interpreted broadly.[28] In the International Rubber Agreement case the ECJ said:

> Art. 113 empowers the Community to formulate a commercial "policy," based on "uniform principles" thus showing that the question of external trade must be governed from a wide point of view and not only having regard to the administration of precise systems such as customs and quantitative restrictions. The same conclusion may be deduced from the fact that the enumeration in art. 113 of the subjects covered by the common commercial policy ... is conceived as a non-exhaustive enumeration which must not, as such, close the door to the application in a Community context of any process intended to regulate external trade. A restrictive interpretation of the concept of common commercial policy would risk causing disturbances in intra-Community trade by reason of the disparities which would then exist in certain sectors of economic relations with non-member countries.[29]

The question whether Member State governments are entitled in their purchasing to discriminate against products imported from third countries in favor of locally produced products directly and specifically affects the external trading relations of the Union. The fact that discriminatory policies of the Member States may be implemented through internal procurement regulations or policies does not diminish their character as regulations or policies affecting external trade. The direct connection between discriminatory domestic regulation and external trade is well recognized both as a matter of international trade law[30] and Union law.[31] Moreover, the issue of the relationship of external government procurement policy

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[27] The bracketed language was deleted by the Maastricht Treaty.

[28] See, e.g., Opinion 1/78 of 4 October 1979, International Agreement on Natural Rubber, (1979) ECR 2871, (1979) CMLR 639. See Jacques H.J. Bourgeois, The Common Commercial Policy – Scope and Nature of the Powers, in: E.L.M. Völker (ed.), Protectionism and the European Community (1983), at 1–6.

[29] International Rubber, id. at para. 45.

[30] See, e.g., GATT art. III.

[31] The case law of the ECJ with regard to art. 30 of the Union treaty and measures having the equivalent effect of quantitative restrictions on the movement of goods between the Member States is an explicit recognition of this link. See, e.g., *Rewe-Zentral AG* v. *Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, Case 120/78, (1979) ECR 649; and cases cited in George A. Bermann [et al.], European Community Law (1993), at 343–358.

to the common commercial policy was specifically considered and addressed by the Commission and Council in the context of the conclusion of the GATT Tokyo Round Government Procurement Code.[32] The conclusion of the Government Procurement Code as a sole undertaking of the Community was approved by the Council of Ministers in 1979 under art. 113 of the EEC Treaty.[33] Since external government procurement policy falls squarely within the common commercial policy, it follows also from well established ECJ doctrine that external government procurement policy is within the exclusive competence of the Community.[34]

Hilf has analyzed the process by which the EEC and the Member States (and specifically Germany) have concluded GATT-related agreements.[35] He points out that the Tokyo Round agreements were concluded by the EEC and its Member States in two different forms. Some agreements were concluded in the form of so-called "mixed" agreements as to which both the EEC and the Member States are parties. Hilf suggests that perhaps political reasons dictated the mixed result in the few cases in which it was employed.[36] Referring to mixed adherence to the Technical Standards Code, he observes that "legal arguments were also put forward: a mixed agreement was necessary as the Community was not competent to adopt the relevant technical standards for all sectors."[37] The Government Procurement Code, just as the preponderance of the Tokyo Round agreements, was concluded solely by the EEC and is, in

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[32] See Bourgeois, *supra* note 8, at 21–22.

[33] Council Decision of 10 December 1979, concerning the conclusion of the Multilateral Agreements resulting from the 1973 to 1979 trade negotiations (Decisions 80/271/EEC [OJ.1980, L 71]); Bourgeois, id. at 22.

[34] Understanding on Local Cost Standard, (1975) ECR 1355; (1976) CMLR 85. The ECJ said: "To accept that the contrary were true would amount to recognizing that, in relations with third countries, Member States may adopt positions which differ from those which the Community intends to adopt, and would thereby distort the international framework, call into question the mutual trust within the Community, and prevent the latter from fulfilling its task in the defence of the common interest", (1975) ECR 1355, 1364.

[35] See Meinhard Hilf, The Application of GATT within the Member States of the European Community, with Special Reference to the Federal Republic of Germany, in: Meinhard Hilf [et al.] (eds.), The European Community and GATT (1986), at 153–186.

[36] Id. at 164–165. Bourgeois likewise suggests that the Union had the competence also to conclude the Technical Standards Code as an exclusive Community agreement, but that political pressure in a time-constrained setting produced the mixed conclusion in this case. Bourgeois, *supra* note 8, at 21.

[37] Hilf, *supra* note 35, at 165 (footnote omitted).

Hilf's words, a "pure Community Agreement" even though in the case of the Government Procurement Code the concentration of implementing measures was likely to be in national law.[38] With regard to the place of the GATT agreements in the Union legal order, he suggests:

> As an interim conclusion it may be stated that the assumption of the competences relevant for GATT by the European Community has led to an increased legal status of GATT law within the Community. At the same time the role of the Member States has essentially been restricted to cooperation within the framework of Community and GATT institutions despite individual "running fights" of some Member States.[39]

This is not by any means to suggest that the parameters of the common commercial policy are fixed or absolutely clear. There is a considerable scholarly literature addressing the scope of the common commercial policy.[40] Questions can be and have been raised as to what extent the common commercial policy, for example, encompasses competition policy and capital movements.[41] This author and others have suggested that the common commercial policy does not encompass the right of establishment.[42] However, this author is not aware of any scholarly opinion to the effect that external government procurement policy is or may not be within the common commercial policy, and there is significant scholarly support for the conclusion that it is within the common commercial policy.[43] In addition is the express acknowledgment by the Council of Ministers in its decision to approve the GATT Government Procurement Code as a sole Community undertaking. Finally, and much to the point, the German Economics Ministry has indicated that it accepts the view that Germany does not have the authority to conclude an international

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[38] Id. at 170.

[39] Id. at 173. Bourgeois also opines that the process by which the Tokyo Round codes were concluded appears to confirm a broad interpretation of the common commercial policy. Bourgeois, *supra* note 8, at 22.

[40] Much of this literature is discussed in The European Community and GATT, *supra* note 35, which generally treats the relationship between the common commercial policy and the international trading system, including especially the GATT.

[41] See, e.g., Joseph Jude Norton, Status of U.S. Commercial Treaties with the E.E.C. Member States, in: J. Norton (ed.), European Economic Union: Trade and Investment (1986), at 10–11, 10–35 to 10–44.

[42] See Frederick M. Abbott, NAFTA and the Future of United States–European Community Trade Relations: The Consequences of Asymmetry in an Emerging Era of Regionalism, 16 Hastings Int'l & Comp. L. Rev. 489, 504–509 (1993); Norton, id. at 10–36 to 10–39.

[43] See Bourgeois, *supra* note 8, at 21–22; Hilf, *supra* note 35; Norton, id. at 10–45 to 10–46.

agreement concerning the external aspects of government procurement.[44] In this light, there is no point to be served by attempting here to define the outer limits of the common commercial policy. The place of external government procurement policy as the subject matter of the common commercial policy is beyond reasonable doubt.

The Commission proposes to the Council with respect to implementation of the common commercial policy. The Commission, upon Council approval, negotiates trade agreements with third countries.[45] Since the Community is responsible for the conduct of the common commercial policy and the negotiation of trade agreements, and since a Member State FCN treaty which contravenes the common commercial policy (as established by the EC Treaty) would be inconsistent with that Community responsibility, art. 234, para. 2 read in conjunction with art. 113(1) requires a Member State to modify an FCN treaty which contravenes the common commercial policy. This analysis of the EC Treaty and the legal precedence of the common commercial policy over Member State FCN treaties is in fact already accepted and implemented by a series of Council decisions.

In 1961 the Council decided that in light of Union responsibility for conducting external trade policy on behalf of the Member States, trade agreements between Member States and third countries would not remain in force beyond the end of the twelve year transition period from entry into force of the EC Treaty.[46] This 1961 decision envisaged that the Commission would review such treaties before the end of the transition period for their conformity with the common commercial policy. However, recognizing in 1969 that there remained in force a considerable number of bilateral trade-related treaties between the Member States and third countries which might become an obstacle to carrying out the Union's common commercial policy, but that the Union was not yet prepared to negotiate new arrangements, the Council decided to require the

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[44] The German Economics Ministry indicated in an interview with the author that Germany does not have the authority to enter into a trade agreement with the United States that would be contrary to the common commercial policy in the area of government procurement.

[45] Art. 113(2) provides that the "Commission shall submit proposals to the Council for implementing the common commercial policy" and art. 113(3) provides that when negotiations need to be undertaken with third countries, the Commission shall make proposals to the Council which will authorize the necessary negotiations. The Council acts under art. 113 by qualified majority (art. 113[4]).

[46] Council Decision of 9 October 1961 on standardisation of the duration of trade agreements with third countries, OJ No 71, 4.11.1961, p.1274/61, at art. 2.

Member States to notify the Commission of all existing bilateral treaties concerning commercial relations.[47] Upon proposal from the Commission, the Council might grant temporary authorization to extend such agreements in force in derogation of the 1961 Council decision on standardization.[48] If it was determined that a provision of such a treaty could "constitute an obstacle to the implementation of the common commercial policy, in particular by reason of divergencies between the policies of Member States," the Commission would submit a report to the Council. "This report shall be accompanied by the necessary proposals and, where appropriate, by recommendations requesting that the Commission be authorised to open negotiations with the third countries in question."[49] Since the 1969 decision the Council has annually approved the continuation in force of Member State FCN treaties, including the Germany-United States FCN Treaty.[50] However, under the terms of the 1969 decision, the Commission would apparently have the power to cause a Member State to amend or terminate an FCN treaty which is inconsistent with the common commercial policy by refusing to recommend its continuation in force to the Council. The Council, on the other hand, would

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[47] Council Decision of 16 December 1969 on the progressive standardization of agreements concerning commercial relations between Member States and third countries and on the negotiation of Community agreements (69/494/EEC), OJ L 326/39 (29.12.69).

[48] Id. at art. 3.

[49] Id. at art. 4.

[50] Until the Council in December 1993 acted to renew authorization of the FCN treaties on the basis of a tacit understanding with Germany and other affected Member States regarding the Utilities Directive and the FCN treaties, the most recent approval was Council Decision of 28 April 1992 authorizing the automatic renewal or maintenance in force of provisions governing matters covered by the common commercial policy contained in the friendship, trade and navigation treaties and similar agreements concluded between Member States and third countries (92/234/EEC), 1992 OJ L 120 (May 5, 1992). The 1992 Council Decision authorized maintenance in force of the FCN treaties until December 31, 1993. A proposal for renewal had been pending when the German overture to the United States was made. See Proposition de Décision du Conseil autorisant la tacite reconduction ou le maintien en vigueur des dispositions dont les matières relèvent de la politique commerciale commune, contenues dans les traités d'amitiés, de commerce et de navigation et dans les accords commerciaux conclus par les États membres avec les pays tiers, I/75/93-Corr.1 (in author's files). The renewal forming the basis of the compromise in this matter is Council Decision of 6 December 1993 authorizing the automatic renewal or maintenance in force of provisions governing matters covered by the common commercial policy contained in the friendship, trade and navigation treaties and in trade agreements concluded between Member States and third countries (93/679/EC), 1993 OJ L 317/61. This renewal authorization expires December 31, 1994. See discussion *infra* text accompanying notes 59–70.

appear to be entitled to amend the Commission's proposal and approve such continuation in force by unanimous vote.[51]

That the Council authorizes the Member States to continue in force FCN treaties with third countries, provided that those agreements do not conflict with the common commercial policy, is a phenomenon well-known to commentators.[52] Also is the fact that insofar as those treaties deal with subjects both within and outside of the common commercial policy, the boundary line between those treaty provisions within the Union's sole competence and those outside its sole or concurrent competence may not in all cases be clearly drawn.[53] However, notwithstanding that these boundary lines may not in all cases be precisely drawn, the provisions in FCN treaties dealing with the external trade-related activities of government entities have been recognized as being within the minimum (and non-controversial) sphere of competence of Union regulation (e.g. the Union may demand renegotiation by the Member States).[54]

The foregoing discussion of the EC Treaty and related Council decisions with respect to FCN treaties and the common commercial policy indicates that: if Germany was technically within its rights to rely on the Germany-United States FCN Treaty when it advised USTR Kantor that it would not discriminate against the United States because the FCN Treaty prevailed over the EC Treaty pursuant to art. 234, para. 1, Germany nevertheless would be obligated to conform to the common commercial policy as decided by the Council, even if this meant it must modify or terminate its treaty with the United States, absent additional factors.

In the present case, the position that has been asserted by the German Economics Ministry is that Germany is not obligated to modify its attitude toward the Union because it has merely provided the United States with its interpretation of a pre-existing bilateral agreement which (a) remains valid under art. 234, para. 1, and (b) does not contravene the common commercial policy because of an express exception in the Utilities Directive as adopted by the Council. As noted earlier, art. 29(1), second

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[51] The Council must in general act only on the basis of a proposal from the Commission. However, it may amend a proposal from the Commission by unanimous vote. See EC Treaty, art. 149; Josephine Steiner, Textbook on EEC Law (3rd ed. 1992), at 14.

[52] See, e.g., Ulrich Everling, The Law of the External Economic Relations of the European Community, in: Hilf [et al.], *supra* note 35, at 85, 90; Norton, *supra* note 41.

[53] E.g. *Everling*, id. at 90; Norton, id. at 10–28 to 10–48.

[54] Norton, id. at 10–45. Norton specifically identifies art. XVII of the Germany-United States FCN Treaty as being subject to renegotiation. Id. at 10–45, n. 3.

sentence, of the Utilities Directive states that art. 29 (concerning discrimination against third countries) is "without prejudice to the obligations of the Community or its Member States in respect of third countries." The Economics Ministry asserts that this provision must be taken literally and be understood to mean that its FCN Treaty obligation to the United States does not contravene the common commercial policy because that policy – in the form of the Directive – specifically was without prejudice to existing Member State treaty obligations. Germany therefore was both technically justified in invoking the FCN Treaty with the United States because it had not been superseded by the EC Treaty, and was relieved of any obligation to amend the FCN Treaty following the Commission's objection to its invocation because the Commission misinterpreted the common commercial policy in this case.

Germany's interpretation of art. 29(1), second sentence, as a statement of the common commercial policy with respect to the Utilities Directive is not the only reasonable interpretation of that sentence.[55] That sentence says in essence that art. 29 does not interfere with the pre-existing treaty obligations of the Union or the Member States to third countries. As such, art. 29(1), second sentence, could well be understood as a restatement and affirmation of the Union's longstanding commitment to respect its international obligations and those of the Member States, as evidenced with respect to the Member States by the express language of art. 234, para. 1 of the EC Treaty and by decisions of the ECJ (e.g., *Burgoa*, discussed *supra*). In art. 29(1), second sentence, the Council may be understood only to have said that in adopting the Utilities Directive the Union did not intend to signal a breach or termination of its (or its Member States) international obligations. This was not a statement of the common commercial policy, which might better be understood by reference to art. 29(1), first sentence, which provides that Union public purchasers must discriminate against products from third country suppliers

[55] There is nothing in the Commission's report to the Council concerning the basis for the Utilities Directive which would appear to support Germany's argument that art. 29(1), second sentence, was intended to exempt Member States from applying the discriminatory features of art. 29 in reliance on pre-existing FCN treaties. See Kommission der Europäischen Gemeinschaften, Vorschlag für eine Richtline des Rates betreffend die Auftragsvergabe durch Auftraggeber im Bereich der Wasser-, Energie- und Verkehrsversorgung (von der Kommission vorgelegt), KOM(88) 377 endg., 11.10.1988. This document refers to the predecessor proposal to the final Utilities Directive. The language of the predecessor proposal to art. 29 is somewhat different than the final, but the principles and general discussion remain applicable.

unless effective market access agreements are concluded with the governments of those suppliers. Under this interpretation of art. 29(1), Germany in the ordinary course of fulfilling its obligations under art. 234, paras. 2 and 3 of the EC Treaty and secondary legislation regarding Member State obligations to conform FCN treaties with the common commercial policy, would be required to amend its FCN Treaty with the United States to conform with the Utilities Directive, or to terminate that FCN Treaty.

Discriminatory laws and practices affecting public procurement in the European Union and the United States have been the subject of negotiations between the Commission and U.S. trade officials for more than two decades. These negotiations resulted in the conclusion of the GATT Government Procurement Code in 1979, and sufficient concern was raised in the United States by a lack of subsequent progress that legislation effectively mandating the intensification of these negotiations was adopted in 1988.[56] During more than two decades of negotiations, and until Germany's approach to the United States in 1993, neither Germany, other EU Member States nor the United States had invoked an FCN treaty provision as the basis of a binding obligation to provide non-discriminatory public procurement market access.[57]

3. Strategic Maneuvers

The Commission responded to the German challenge in this case first by demanding from Germany an explanation of the legal basis for the action it had taken.[58] The Permanent Representative of the German government to the Union orally explained the German position at a Committee of Permanent Representative's meeting in the presence of Commission representatives. The Commission, rather than bringing an action against Germany before the European Court of Justice, chose to deal with the FCN Treaty problem by deciding not to propose to the Council reauthorization of continuation in force of the Germany-United States

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[56] See Omnibus Trade and Competitiveness Act of 1988, *supra* note 10.

[57] The author has confirmed U.S. practice on this question in conversation with an official in the Office of the USTR responsible for U.S.-EU market access negotiations.

[58] EC/United States: German Explanations in the Public Procurement Affair do not Dispel the Perplexity and Concerns of the Commission and Some Member States – Legal Analysis Underway, Agence Internationale d'Information pour la Presse, No. 6003, June 18, 1993, at 8.

FCN Treaty.[59] This appeared to present Germany with the options of renegotiating the provisions which the Commission considered an obstacle to the common commercial policy or terminating its bilateral treaty relationship with the United States.[60]

The Commission decided to follow the same procedure *vis à vis* FCN treaties of the United States with Belgium, Denmark, Greece, Ireland, Italy, Luxembourg and the Netherlands, even though these countries had not given their FCN treaties the same interpretation as Germany.[61] While indeed the FCN treaties of these other Member States contain provisions similar to that of Germany's,[62] and while legal symmetry may have required the Commission also not to recommend approval of their continuation in force, this Commission decision presented it with a considerable difficulty. In the first place, in order for its recommendation of non-renewal to be approved, the Commission would require a qualified majority vote in the Council.[63] The total of eight countries whose FCN treaties were subject to the Commission's non-renewal proposal could

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[59] EC Commission, Pressuring Germany, Moves to Block U.S. Bilateral Pacts, BNA Int'l Tr. Reptr., July 21, 1993 (Lexis/Nexis ITRADE/INTRAD file); EC/United States: The Commission Proposes a Procedure Designed to Abolish Provisions of the FRG/USA Agreement which Are Incompatible with the Common Trade Policy (Public Procurement Case), Agence Internationale d'Information pour la Presse, No. 6022, July 15, 1993, at 7.

[60] See Council Decision of 28 April 1992 authorizing the automatic renewal or maintenance in force of provisions governing matters covered by the common commercial policy contained in the friendship, trade and navigation treaties and similar agreements concluded between Member States and third countries (92/234/EEC), 1992 OJ L 120 (May 5, 1992), art. 1, indicating that the existing renewal authorization would expire on December 31, 1993.

[61] EC Commission, Pressuring Germany, Moves to Block U.S. Bilateral Pacts, id., and EC/United States: The Commission Proposes a Procedure Designed to Abolish Provision of the FRG/USA Agreement which Are Incompatible with the Common Trade Policy (Public Procurement Case), id. These two reports differ slightly in the countries with FCN treaties named in addition to Germany, the BNA report adding Greece and Ireland to Agence Internationale's list of five.

[62] See Treaty of Friendship, Establishment and Navigation, Feb. 21, 1961, U.S.-Belg., 14 UST 1284, at, e.g., art. 7; Treaty of Friendship, Commerce and Navigation, Oct. 1, 1951, U.S.-Den., 12 UST 908, at, e.g., art. XVII; Treaty of Friendship, Commerce and Navigation, Aug. 3, 1951, U.S.-Greece, 5 UST 1829, at, e.g., art. XIV; Treaty of Friendship, Commerce and Navigation, Jan. 21, 1950, U.S.-Ir., 1 UST 785, at, e.g., art. XIV; Treaty of Friendship, Commerce and Navigation, Feb. 2, 1948, U.S.-Italy, 63 Stat. 2255, at, e.g., art. XVIII; Agreement Supplementing the Treaty of Friendship, Commerce and Navigation, Sept. 26, 1951, U.S.-Italy, 12 UST 131; Treaty of Friendship, Commerce and Navigation, Feb. 23, 1962, U.S.-Lux., 14 UST 251, at, e.g., art. VII; Treaty of Friendship, Commerce and Navigation, Mar. 27, 1956, U.S.-Neth., 8 UST 2043, at, e.g., art. XVII.

[63] See EC Treaty, art. 113(4).

have caused the rejection of the Commission's proposal, potentially creating a chaotic situation.[64] A rejection might have left the Union's external trade policy in an uncertain state since, by refusing to approve the measure authorizing continuation in force of Member States FCN treaties other than the offending treaties, the Council would not have provided a substitute legal framework for Member State relations with third countries.[65] The Council, on the other hand, by unanimous consent could apparently have amended the Commission's proposal so as to permit the continuation in force of the offending treaties (or adopted some alternative interim solution). While the prospects for Council unanimity were uncertain, a decision which challenged the Commission's position might have forced the Commission's hand and resulted in a challenge to the Council in the European Court of Justice.

The Commission might have chosen to immediately challenge Germany in the ECJ. It has been suggested that the Commission adopted its non-renewal strategy because this put off any concrete action for close to a year, during which time the Commission hoped that the government procurement negotiations going on in parallel with the GATT Uruguay Round negotiations would be concluded in a way which made the Utilities Directive controversy moot.[66] The Commission may also have hoped to avoid a very high stakes litigation with Germany when there remained a prospect for a negotiated resolution of the dispute.

The Commission and the Member States affected by its non-renewal proposal reached a compromise resolution of this dispute.[67] Germany had refused the Commission's initial proposal that it renegotiate its FCN Treaty with the United States. The author understands that Chancellor Kohl directed that Germany should not upset its treaty relationship with the United States.

The compromise formula which appears finally to have been agreed entailed the adoption of a Council Decision customarily authorizing the

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[64] Under the qualified majority voting formula in art. 148(2) of the EC Treaty, the eight countries named can muster 43 of 76 votes.

[65] While there may be some mechanism by which the Commission could have brought before the Council separate proposals involving the FCN treaties considered obstacles and other FCN treaties, it would not appear to have been in the interest of adversely affected Member States to accept such a bifurcation.

[66] This is suggested in EC Commission, Pressuring Germany, Moves to Block U.S. Bilateral Pacts, BNA Int'l Tr. Reptr., July 21, 1993 (Lexis/Nexis ITRADE/INTRAD file).

[67] The German Economics Ministry advised the author concerning the terms of this settlement in December 1993.

renewal of existing FCN treaties for a one year period (in this case until December 31, 1994),[68] and acceptance of a formal declaration by Germany and other Member States to the effect that they would not invoke provisions of FCN treaties running counter to the common commercial policy.[69] There was a tacit understanding that Germany would maintain its waiver of the discriminatory aspects of art. 29 in favor of the United States on the basis of art. 29(1), second sentence, of the Utilities Directive under the particular facts of this case, but that Germany would apply the discriminatory features of art. 29(1), second sentence, to other third countries with which it does not maintain FCN treaty obligations (e.g. Japan). Germany would advise the United States of this position, and it expected that the United States would waive with respect to Germany the procurement-related trade sanctions applicable to the Union. Germany in turn would not apply to the United States the trade sanctions adopted by the Union in response to the U.S. imposition of sanctions. In March 1994 it was reported that the United States recently had received formal confirmation from Germany that it would not apply the discriminatory features of the Utilities Directive to the United States, and that the United States had lifted with respect to Germany the sanctions it had imposed on the

[68] Council Decision of 6 December 1993 authorizing the automatic renewal or maintenance in force of provisions governing matters covered by the common commercial policy contained in the friendship, trade and navigation treaties and in trade agreements concluded between Member States and third countries (93/679/EC), 1993 OJ L 317/61.

[69] See fax of January 31, 1994 from J.V. Ketelsen of DGIB to the author (in author's files) enclosing renewal authorization decision, id., and stating that:

"The decision was possible because some of the Member States accepted a formal declaration to the sense that they would not invoke provisions of FCN treaties running counter to EU commercial policy." The formal declaration is not a public document. However, the author understands that the language of the declaration is substantially similar to language in the preamble of the Council Decision authorizing maintenance in force of the FCN treaties (id.) by which the Member States are said to have acknowledged an obligation to adapt or terminate treaties that hinder implementation of the common commercial policy. It should be noted that the language of the preamble of the 1993 Council Decision is identical or similar to language in the same portion of prior decisions on the same subject. See, e.g., Council Decision of April 28, 1992, *supra* note 50; Council Decision of 25 March 1991 authorizing the automatic renewal or maintenance in force of provisions governing matters covered by the common commercial policy contained in the friendship, trade and navigation treaties and similar agreements concluded between Member States and third countries (91/167/EEC), 1991 OJ L 82 (March 28, 1991), and; Council Decision of 23 October 1979 authorizing the tacit renewal or continued operation of certain treaties of friendship, trade and navigation treaties [*sic*] and similar agreements concluded between member states and third countries (79/880/EEC), 1979 OJ L 270 (Oct. 27, 1979).

Union.[70] Germany thus preserved its posture in the present case, but is expected to abandon its overall policy of non-discriminatory public procurement treatment in favor of third countries.

The United States continues to maintain federal public procurement-related legislation that discriminates against exports from the European Union, including Germany.[71] If the United States and Germany have come to an understanding or agreement that art. XVII of the Germany-United States FCN Treaty governs their bilateral public procurement relations, the logical legal consequence is that the United States should by some mechanism disapply its discriminatory public procurement legislation as to Germany. There has as yet been no indication from the U.S. government that it has drawn or accepted this conclusion.

4. Final Analysis

Questions with respect to government procurement market access were not resolved in parallel with adoption of the Uruguay Round Final Act as perhaps the Commission thought they might be. Reciprocal market access in the heavy electrical equipment sector as had been provided for by the EU-U.S. Memorandum of Understanding[72] was finally integrated into a Government Procurement Agreement concluded in April 1994 in connection with the conclusion of the GATT Uruguay Round.[73] However, the EU and the United States still were not able to resolve the question of access to government telecommunications equipment markets, although they continue to pursue negotiations regarding this sector. These negotiations will apparently be conducted on the basis of a report on market opportunities in each party to be prepared by an independent consulting firm.[74] At least for the time being, the discriminatory features

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[70] See U.S. Lifts Sanctions Against Germany Imposed Over EU Procurement Directive, BNA Int'l Tr. Reptr., Mar. 16, 1994 (Lexis/Nexis ITRADE/INTRAD file).

[71] See note 9, *supra*, and U.S., EU Agree to Open Markets in Public Procurement, Except Telecom, BNA Int'l Tr. Reptr. April 20, 1994, at 627, noting continued refusal of United States to remove important "Buy American" restrictions applicable to the EU.

[72] See note 11, *supra*.

[73] See note 71, *supra*.

[74] GATT: Successful Conclusion to Seven-Year-Old Trade Talks, Tech Europe, Europe Info. Serv., Jan. 6, 1994 (Lexis/Nexis OMNI file), and Press Conference with U.S. Trade Representative Mickey Kantor, Fed. News Serv., Fed. Info. Systems Corp., Jan 12, 1994 (Lexis/Nexis OMNI file). The Government Procurement Agreement also is reported to open EU and U.S. government procurement markets at the sub-central and sub-federal levels, respectively.

of the Utilities Directive remain applicable to the United States in the field of telecommunications equipment.

While the Commission and Germany appear to have come to an understanding which permits Germany to maintain its waiver in favor of the United States, while requiring Germany to apply the discriminatory features of the Utilities Directive to third countries without favorable FCN treaty relations, this does not seem likely to have brought an end to the whole affair. The Commission has now been made painfully aware that there are significant limits placed on its ability to conduct the common commercial policy because of lingering third country obligations of individual Member States. Though this has in the past been true in the abstract, this is perhaps the first time that this state of affairs has created a real problem for the Commission.[75] Thus there may well be a new impetus within the Commission to seek to impose a new trans-Atlantic treaty relationship on the Member States on the basis of art. 234, para. 2 of the EC Treaty and the common commercial policy. The Commission's analysis of its options will need to take into account both changes brought about by the Uruguay Round Final Act,[76] and the present political context.

Under present political circumstances the Commission's ability to impose its own conception of a trans-Atlantic commercial legal order may well be constrained. The Member States may not at the moment be inclining towards a significant enhancement of authority in Brussels. A Commission proposal to renegotiate trans-Atlantic commercial legal relations would require Germany and the other Member States either to permit the Commission to undertake such negotiations itself or require the Member States to negotiate under Commission supervision. The Commission may see itself losing the momentum toward a more complete integration if it does not follow though and make clear Union dominion over the common commercial policy. It does not necessarily follow that the Member States will share the Commission's concerns.

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[75] The prospect for disputes arising out of the old FCN treaties has been raised before the present dispute erupted. See, e.g., Norton, *supra* note 41, and Abbott, *supra* note 42.

[76] See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations [Dec. 15, 1993], 33 I.L.M. 1 (1994). The Final Act includes the Agreement Establishing the World Trade Organization (WTO) and the General Agreement on Trade in Services (GATS). The effect of the GATS on bilateral treaty relations between the Member States and third countries is a matter of some complexity. For present purposes it may be adequate to state that the GATS will not in the near term comprehensively substitute for the Member State FCN treaties.

The author and other commentators have previously noted the potential for trans-Atlantic conflict inhering in the present situation.[77] The author has previously suggested that the EU, the Member States and the United States might negotiate a Memorandum of Understanding to clarify their commercial legal relationship in order to avoid trans-Atlantic disputes.[78] It perhaps now is also apparent that a conflict between the United States and the European Union involving a Member State FCN treaty may involve a Member State conflict with the common commercial policy. Thus there is a distinct intra-Union motivation for clarifying the basis of trans-Atlantic commercial legal relations.

[77] See notes 41–42, *supra*.

[78] See Abbott, *supra* note 42, at 510. Norton has suggested the desirability of negotiating a new blanket treaty. See note 41, *supra* at 10–13 to 10–14, 10–48 to 10–52.