TRANS ATLANTIC
BUSINESS DIALOGUE

February 3, 2012

Mr. L. Daniel Mullaney
Assistant U.S. Trade Representative for Europe and the Middle East
Office of the United States Trade Representative
600 17th Street, NW
Washington, DC 20520

RE: Docket USTR-2012-0001: Part 2: TransAtlantic Business Dialogue Submission to the Federal Register Notice on the U.S. - EU High Level Working Group for Jobs and Growth

Dear Mr. Mullaney,

In addition to the joint submission of The Business Roundtable and the TransAtlantic Business Dialogue, which focused on the broader vision we see for the Transatlantic Partnership, TABD is also providing comments on specific issues requested in the Federal Register Notice. We offer operational guidance to the High Level Working Group, drawing on the experiences and priorities of TABD companies.

We stand ready to discuss these elements with you and the inter-agency team, as well as your European counterparts. Please contact either of us (jbriginshaw@tabd.com or khauser@tabd.com).

With kind regards,

Kathryn Hauser
U.S. Executive Director

Jeffries Briginshaw
EU Executive Director

TABD US Secretariat
1717 Pennsylvania NW – Suite 1050
Washington, DC 20006, USA
Tel: 703 585 6756
khauser@tabd.com

www.tabd.com

TABD EU Secretariat
101, rue Keyenveld
Brussels B-1050, Belgium
Tel: 32 497 484 826
jbriginshaw@tabd.com

Docket USTR-2012-0001: Part 2: TransAtlantic Business Dialogue (TABD) Submission to the Federal Register Notice on the U.S. - EU High Level Working Group for Jobs and Growth

TABD Recommendations to Renew and More Deeply Open the 21st Century Transatlantic Market

We are heartened by the strong momentum that has evolved since the 2011 EU-U.S. Summit, as companies across the Atlantic have offered views on how to shape the U.S.-EU relationship to advance an agenda for jobs and growth that opens transatlantic markets while simultaneously creating a dynamic environment to promote international cooperation to open global markets. There is consensus among TABD member companies for urgent action on an ambitious initiative, to avoid getting caught up in 'form and process' issues, and to ensure a visionary, 21st century problem-solving focus to accompany breakthrough thinking on actions to restore economic growth, spur job creation and ensure the long-term competitiveness of American and European businesses.

In Part 1 of our submission, prepared in partnership with the Business Roundtable, we set out a broader vision to shape the work of the High-Level Working Group. We believe the shared vision should be to deepen the U.S.-EU economic relationship and to strengthen the international economic system and its rules and standards, thereby supporting innovation, economic growth, and job creation in the United States and the EU and around the world. The vision we set forth proposes that the High-Level Working Group focus on, and integrate effectively, three core objectives: (1) renewing and opening more deeply the 21st century transatlantic market; (2) positioning our partnership so we can better both compete with and engage third countries on the fundamental rules underpinning 21st Century trade and investment; and (3) strengthening the WTO and deepening the multilateral commitment to open markets.

Here in Part 2 of our submission, we offer more detailed views, ideas and options concerning policies and measures to increase transatlantic trade and investment, drawing on the experiences and concerns of TABD member companies. This document is organized by the headings contained in the Federal Register Notice.

Observation:

It is important to note that the effort of the High-Level Working Group will take place against the backdrop of the fragile global economy. We remain concerned about the fiscal situation and financial stability in the U.S. and the EU, and encourage you in your commitment to closer cooperation on key economic and trade policies, to strengthen transatlantic leadership on these issues in the G20. In particular, we are concerned about three macroeconomic policy areas that have a critical impact on our operating environment: debt, financial market reform and accounting standards. We urge the High-Level Working Group to remain mindful of the environment in which our companies operate.

1. Conventional Barriers to Trade in Goods, such as Tariffs and Tariff-Rate Quotas

The majority of TABD member companies support the elimination of tariffs on industrial products between the United States and Europe, with some limited exceptions for sensitive products. Numerous recent economic studies have quantified the significant economic gains to be had from tariff elimination. Particularly in these economic times, these tariffs, though relatively low, cover a huge amount of bilateral trade and thus represent a significant tax on the competitiveness of transatlantic firms. The U.S. and EU should agree to eliminate industrial tariffs between us and pave the way for more countries to join this effort, opening the possibility of even greater benefits to our firms.

2. Reduction, Elimination, or Prevention of Barriers to Trade in Goods, Services and Investment

Trade in Goods:

Building on the success of the recent Mutual Recognition Agreement between the secure trade processes, AEO and C-TPAT, we urge the U.S. and EU to aggressively implement this agreement and minimize inefficiencies in our security regimes. The U.S. and EU should modernize the processes used by our respective customs services, in particular in the area of common electronic data filing systems for customs purposes. Further, we suggest that there may be elements of the draft Trade Facilitation Agreement that was not concluded as part of the Doha Round that may be applicable to the transatlantic market. Indeed, U.S.-EU bilateral agreement in this relatively non-controversial area might encourage other countries to adopt similar policies and have a stimulative effect on improving trade facilitation measures around the world.

We continue to regret the introduction of the requirement under U.S. law that 100% of the cargo in foreign ports destined for the U.S. must be scanned. We believe that there are currently insufficient resources, both in terms of technological equipment and in terms of manpower, to scan all cargo entering the United States. We welcome efforts by the Secretary of Homeland Security to obtain a delay in the implementation of this law, but we would prefer repeal of the legislation and replacement with a "win-win" solution based on technology options and parallel use of a risk-based system for cargo screening.

Trade in Services:

TABD supports expanded trade in services and aligns itself with the effort undertaken by the Coalition of Service Industries and its affiliates to define and carry forward an ambitious strengthening of the GATS.

Movement of People:

Restoring American and European economic growth depends not only on the secure movement of goods, but also on making possible the fastest and freest movement of people, with due respect to national security. TABD believes that existing technologies should be harnessed to expand and improve the flow of business people and travellers. We continue to support the establishment of a U.S.-EU business-government task force to investigate the merits of a Single Transatlantic Registered Traveller Framework.

Another key element affecting companies' abilities to operate efficiently, remain competitive and become ever more innovative rests on their ability to recruit the best and brightest minds, transfer employees regardless of nationality, and develop business and investment partners, suppliers and customers across national borders. Consequently, a 21st century transatlantic jobs and growth initiative must address current U.S. visa policies and ongoing uncertainty with the visa issuance process.

Investment:

We support the broad consensus of transatlantic business associations for action to liberalize investment and capital flows between the U.S. and the EU and aligning investment rules. The adoption of a model bilateral investment treaty should be given serious consideration. We should address remaining bilateral barriers to investment, such as in the aviation sector and telecoms. For foreign direct investments we need to reduce obstacles to incoming FDI in our economies, and work jointly between the U.S. and the EU to reach ambitious bilateral investment treaties (BITs) with third countries.

As to third country relations on investment more generally, both sides should work towards a joint approach on investment policies vis-à-vis third countries and engage multilaterally and bilaterally to facilitate market access and remove trade barriers in foreign countries.

At the G20 level, the U.S. and EU should provide leadership to promote on open investment policies at the international level. The OECD principles and guidelines on freedom of investments provide a solid basis on which to build. In pursuing these interests, the U.S. and the EU should make efficient use of the U.S.-EU Investment Dialogue.

For additional information, please see the TABD Report to the 2011 U.S.-EU Summit Leaders, “Transatlantic Economic Leadership for Growth and Innovation” (Annex 1).

3. Opportunities for Enhancing the Compatibility of Regulations and Standards

Our experience of transatlantic economic cooperation is now approaching two decades. If actual progress towards regulatory convergence and a single market place has been disappointing overall, arguably the single most contributory obstacle has been our inability to ‘dock’ our respective standards setting systems to effective purpose, or to meet a common ambition we believe is shared by consumers, business and government alike, to agree on single sets of high quality norms. The evidence suggests that even with different systems of managing risk employing typically more ex ante precaution by way of regulation in the EU and more ex post facto litigation risk in the U.S., our societies essentially price risk at the same level. Indeed it would be much more surprising, given broadly comparable stages of development, if consumers on one side of the Atlantic were to be more tolerant of unsafe products than on the other.

At a practical level, the High-Level Working Group could make a significant contribution by opening a new dialogue with regulatory agencies, in collaboration with their legislative committees, to improve their efficiency and effectiveness in addressing non-tariff barriers that create significant market distortions for businesses.

One issue that merits immediate attention by the High-Level Working Group is the regulatory divergence between the U.S. and EU over audit quality and auditor independence. These are vital to the public interest and to the efficient functioning of transatlantic capital markets. We oppose several proposals currently under consideration, such as those that would impose mandatory firm rotation, restrict audit tenure, further limit non-audit services, mandate audit-only firms, and weaken the role of the audit committee because these provisions are more likely to impair audit quality and increase costs to companies. We support transatlantic consultation to ensure consistency of approaches in order to enhance transparency, independence, audit quality and competition.

TABD seeks genuine ambition in the work of the High Level Working Group to encompass early steps to harmonise proportionate rules and regulations, standards and interoperability in emerging new technology areas, such as cloud computing, nanotechnology, electric vehicles, ICT and internet services, green energy solutions, smart grids, healthcare IT, and data privacy and security - linked to consistent progress on IPR erosion. The High Level Working Group may wish to note that the effort over the past year to develop a transatlantic standard for electric vehicles is an example of best practice that involved all relevant stakeholders and achieved cooperation between industry, government standards setters and regulators.

New regulatory measures particularly in these difficult times - whether in financial services, data protection or the like - must pass test of real consumer need and real enhancement of jobs and growth, within a pro-competitiveness framework. Regulation must also be seen holistically (for cumulative impact) and not through narrowly based impact assessments.

4. Reduction, Elimination, or Prevention of unnecessary “Behind the Border” Non-Tariff Barriers to Trade in all Categories

Much of the world’s innovation still takes place within and between the U.S. and the EU. We have an abundance of existing innovation assets, often in different and complimentary areas such as ICT, energy efficient technologies and automotive manufacturing. However, to remain competitive, the transatlantic economy must work together to develop and implement appropriate policies that support and accelerate innovation, setting an example for other countries to follow.

We commend to you TABD’s 10 Innovation Policy Principles (contained in Annex 1), which lay a foundation for American and European commercial interests to collaborate and create a transatlantic innovation economy. The principles seek to describe 'boundary conditions' necessary for innovation to flourish and are a prelude to globally-focused cooperation on investment, IPR, indigenous innovation policy, state owned enterprise behavior, ICT, raw materials and the adoption by key emerging economies of policies that are supportive of balanced and sustainable global economic growth.

Intellectual Property Rights (IPR)

Intellectual Property Rights (IPR) are at the heart of the EU-U.S. innovation model. A few IP-specific topics in particular deserve consideration by the High-Level Working Group:

There is a need for transatlantic alignment of legislation and civil remedies available for cyber theft of trade secrets -- the only major form of IP not governed primarily at the federal (U.S.) or community (EU) level. Trade secret protection now falls to an unsatisfactory patchwork of state and national laws; a new transatlantic agreement must address convergence of remedies and prosecution powers while encouraging national trade secret legislation consistent with global IP protection regimes.

In addition to improving domestic *legislation*, the U.S. and EU must also look to align trade secrets diplomacy toward other countries since cyber theft does originate outside the U.S. and EU. Transatlantic diplomacy should take the form of a broad collaborative effort on the part of the U.S. and EU to encourage China and other WTO members to protect against trade secret misappropriation, with reference to TRIPS Article 39.2 and Section III.

The breakthroughs of last year in U.S. patent law provided an unparalleled opportunity for further international coordination of laws that accommodate the realities of research communities and innovative industries across the globe. Adopting a 12-month period of non-prejudicial disclosures (often referred to as a "grace period") is an important step in achieving a standardized global patent system that spurs job creation and market growth through innovative products and services.

5. Enhanced Cooperation for the Development of Rules and Principles on Global Issues of Common Concern and also for the Achievement of Shared Economic Goals relating to Third Countries

We are concerned about four issues arising from global application of the boundary conditions for innovation: IPR erosion; indigenous threats to innovation; the roll out of agreed U.S.-EU ICT principles; and data flow protectionism. We believe agreement on joint positions at the level of principles in key business and policy areas - as was done in the ICT sector in 2011 - for joint U.S.-EU advocacy with third countries (e.g. BRICS and Japan) in trade or other global governance fora. These need not be treaty based or even MRAs but could be joint agreements to implement common principles on topics such as raw material availability and competitive neutrality.

IPR Erosion

The existing framework of intellectual property protection is under serious threat. Well-funded NGOs and major emerging economies continue to advocate policies that would weaken IPR, citing climate change, development, or equity concerns – with little or no evidence or economic data to support their proposals. Such policies would destroy the value of the IP assets that U.S. and European enterprises have built and continue to build as we commercialize our R&D, creating significant harm to our competitive positions in fast-growing markets around the world. They would further slow the much-needed globalization of R&D into developing markets and the integration of these fast growing economies into global supply chains.

Separate from the above patent-related developments, some governments effectively require U.S. and European innovators to disclose or license trade secrets as a condition of market access. Relevant measures include government-backed testing or certification regimes that require companies to disclose confidential information without appropriate protection mechanisms for the information, and government-led compulsory licensing to force disclosure to domestic competitors. The entire economic value of a trade secret stems from the competitive advantage conferred by the confidential nature of the information. Thus, any forced or otherwise compelled disclosure irreparably destroys a trade secret's entire value – in addition to being inconsistent with global IPR rules.

Finally government policies that reduce manufacturers' ability to distinguish their products from those of their competitors through branding and packaging can be mentioned in this context as well. Even in areas where valid health or environmental concerns exist, they create a dangerous precedent with far-reaching implications for the use of trademarks and other forms of IPR around the world. Such actions open a Pandora's Box of unintended consequences which the business community finds most troubling. A related danger, which we believe should not be underestimated, is that the precedent would then be emulated by other governments, for other products, thereby undermining the framework of IP protection that underpins investment and innovation. Narrowly tailored policy alternatives should be considered instead and an evidence-based approach pursued.

Indigenous Innovation

More than three dozen countries have implemented national innovation strategies to increase their competitiveness and generate more economic growth. However, the nature of those strategies differs widely among governments and the differences between innovation policy and industrial policy can be murky at best. The trend in the emerging countries is to incentivize strategic industries and technologies, and in some cases even favor domestic firms and products with targeted market preferences.

The U.S. and Europe need to continue to closely coordinate their approaches to influencing China's indigenous innovation policies. This coordinated transatlantic approach should be intensified and broadened to apply to all BRICs – especially India, where there is strong evidence that it, too, is adopting prolific indigenous innovation.

ICT Principles

We welcome the U.S.-EU agreement on a set of trade-related principles for ICT services. The challenge now is to jointly promote the adoption of these principles by other countries, and we offer three ideas for consideration: First, implementation in the context of the WTO and with priority countries; second by seeking similar sets of principles in other related areas (such as transborder data flows, data privacy and data security, cloud computing and perhaps also cyber-security norms); and third by ensuring that the U.S. and EU fully respect the ICT principles themselves as evidence of exemplary best practice.

Data Flow Protectionism

Gaps in global rules and inadequate enforcement of existing commitments are contributing to a growing threat of digital protectionism around the world. The U.S. and the EU should drive the development and adoption of transparent and high-quality international rules, norms and best practices on cross-border flows of digital data and technologies while also holding countries to existing international obligations.

Raw Materials Access

We urge the High-Level Working Group to addess the issue of raw material security as a key area for transatlantic cooperation, agreement and joint advocacy. We urge comprehensive assessment of the opportunities for growth and job creation, beginning in the short /medium term focused on the urban mines available in the US and EU. Additional actions to be considered in 2012 include, in the field of electronics scrap under the EU WEEE and the US National Strategy for Electronics Stewardship. The goal should be to first define "market based instruments" and "standards for recycling" in order to foster a climate of investment and job creation. This could then form the basis for further implementation on broader application (other waste) and larger geographical scale (Japan, China, etc.).

Relationship Between the High-Level Working Group and the Transatlantic Economic Council

Finally, we would like to underscore the importance of continuing the momentum of the TEC process in parallel with the work of the High-Level Working Group. One is not a substitute for the other and, indeed, both can reinforce the efforts of the other. We urge the U.S. and EU to use this opportunity afforded by the renewed attention on the transatlantic market to strengthen the TEC process, in particular with outreach to regulatory agencies and key legislators. One element for consideration is to fashion a dialogue where regulators, agencies and legislators can act together to liberalize and strengthen transatlantic economic relations, create jobs and expand growth.

2012 TABD Membership

The TransAtlantic Business Dialogue is the principal business interlocutor with the U.S. government and the European Union on the transatlantic economic relationship. The TABD was convened in 1995 by the U.S. Department of Commerce and the European Commission to serve as the official dialogue between American and European business leaders and U.S. cabinet secretaries and EU commissioners. TABD promotes a barrier-free transatlantic market for growth, innovation and sustainability in the global economy.

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