Three Paths Forward and the Road to Nowhere

The Deep Freeze

One option is to keep transatlantic negotiations where they are now: in the deep freeze. This approach would simply recognize that for the foreseeable future the obstacles are too high, and the incentives too low, for either side of the Atlantic to invest much political capital in any major transatlantic economic initiative. Small single-issue deals might emerge, but nothing substantial. Given current inertia and mutual distractions on each side of the Atlantic, this is likely to be the default scenario for the relationship going forward.

The obstacles to significant transatlantic negotiations remain high. Even before Donald Trump was elected, TTIP negotiations were struggling. Washington was unwilling (and largely unable) to open public procurement, or compromise on geographical indications, two primary goals for the Europeans. The EU was unwilling to compromise on genetically-modified organisms and food safety standards, which meant that the agreement had little to offer U.S. agricultural interests. Provisions for investor-state dispute settlement were controversial on both sides of the Atlantic. Public and interest group opposition in Europe to the negotiations in key countries, including Germany, was unusually high. That opposition is likely to be even more fierce now, given widespread European public antipathy towards the Trump Administration.

Moreover, incentives for a revived transatlantic negotiation are low. It seems unlikely that either side would change its negotiating position in a way that would make a TTIP-style agreement work.

The Trump administration is preoccupied with other priorities, particularly China and NAFTA. It is unlikely to ever accept the EU's proposal for a multilateral Investor Court System to resolve investment disputes. It is loath to accept strong commitments on labor and environmental standards, each of which would be essential to sell the agreement to European publics. "Hire American, Buy American" strictures will prove difficult. There is concern that the Trump Administration could introduce steel import tariffs, which would not just hit China, but affect European firms as well.[41]

The UK's departure from the EU, in turn, is likely to make the EU's position less accommodating to the United States. Even when TTIP negotiations with the Obama Administration were active, European companies favoring an agreement expended little energy championing it. Those EU member states favoring the agreement also did little in the way of intra-EU diplomacy to convince more recalcitrant partners. Popular anxieties in Europe that a transatlantic trade deal is simply a cover for the United States to steamroll the "European way of life" are still very much alive.

For all of these reasons, it seems unlikely that governments or stakeholders on either side of the Atlantic are likely to want to expend the necessary political capital to conclude an ambitious US-EU agreement.

Europe's wait-and-see attitude is being reinforced by the Trump Administration's approach to the NAFTA renegotiation, which could be a precursor of U.S. positions in other trade negotiations. Several U.S. demands with regard to NAFTA (which are opposed by U.S. business, as well as Canada and Mexico) are considered so "extreme" as to raise the question of whether the Trump Administration wants an agreement at all.[42]

President Trump's bellicose rhetoric on his fall 2017 trip through Asia has only reinforced European feelings that they would have little to gain and much to lose by reengaging the Trump Administration in any ambitious transatlantic initiative.

For all these reasons, it is tempting to keep U.S.-EU negotiations in the deep freeze. But what might be some likely consequences?

For starters, U.S.-EU trade squabbles could lead the Trump Administration to play EU member states off against each other. It would be tempted to disrupt EU-UK negotiations and fast-track its own negotiations with the UK. The EU, in turn, would be tempted to turn up the heat on U.S. companies deemed to be skirting European tax or anti-monopoly provisions, look to alternative bilateral and plurilateral economic and political arrangements, including with China, and to haul the United States before the WTO on a growing number of cases. Those in the European Union keen on increasing the EU's global influence relative to the United States on economic and trade issues would be emboldened to fight Washington on such issues as the precautionary principle and the protection of geographical indications and cultural products. Brussels would become more aggressive with regard to longstanding transatlantic battles over whose regulatory standards become international norms for a wide variety of industries. The U.S.-EU Privacy Shield, a fragile compromise enabling data flows to continue across the Atlantic, would be a likely casualty, chilling transatlantic commerce.

The political fallout from this set of circumstances would harm EU-U.S. relations across the board. U.S. and European officials would be doing little to boost jobs or economic growth on either side of the Atlantic. Economic anxieties and political prejudices would be exacerbated, not eased. European differences over how best to deal with the United States would be accentuated, adding another fracture to Europe's already fragile unity. Losing the other as a key partner when each is trying to hold China and other rising powers to greater account with respect to global rules would weaken the ability of either to uphold such rules global rules. Each would face continued erosion of its respective consumer, labor and environmental standards as it found itself with far less leverage in a world of diffuse economic power.

In short, for a host of reasons, a 'do nothing' approach would not freeze the issues, it would allow them to fester. The result would be a downward spiral of mutual recrimination. It would be worse than drift; it would mean growing protectionism, U.S.-EU rivalry in third markets, and the triumph of lowest-common-denominator standards for the health, safety and welfare of Americans and Europeans alike. Standing still means losing ground.

Unfortunately, in today's political climate, the deep freeze — and the contentious and acrimonious relationship likely to accompany it — is a realistic scenario. But it is the road to nowhere.

Pathway One: Cherry Picking

The United States and the EU could choose a middle path between the Deep Freeze and ambitious negotiations. Under this path, the two parties would abandon efforts to strike a comprehensive TTIP deal in favor of "cherry picking" wins on issues where both sides were already close to agreement within the TTIP framework, or on other issues where agreement seems high and opposition low.

The United States and the EU could, for instance, commit to work jointly towards a tariff-only Free Trade Agreement, eliminating all duties on traded industrial and agricultural products. Given that most transatlantic tariffs are low (1-4%), a focused tariff-only free trade agreement might be achievable relatively quickly, and would have immediately positive effects on jobs, investment, and profits. Because the volume of U.S.-EU trade is so huge, eliminating even relatively low tariffs could boost trade significantly. And because since a substantial portion of U.S.-EU trade is intra-firm, i.e. companies trading intermediate parts and components among their subsidiaries on both sides of the Atlantic, eliminating even small tariffs can cut the cost of production and potentially lower prices for consumers. The more intense the intra-industry component of trade between two parties, like the one that characterizes U.S.-EU commerce, the greater the effects and benefits of lower

FIGURE 6: THE DEEP FREEZE

Characteristics

- Obstacles too high, incentives too low for any ambitious transatlantic effort

Potential Impact

- Unresolved issues fester, some blow up
- Contentious trade policies
- WTO confrontation
- Dedicated U.S. efforts to split the EU
- Collapse of Privacy Shield
- U.S./EU become rule-takers rather than rule-makers
- Greater digital competition
- Value chains disrupted
- Economic anxieties exacerbated
- U.S./EU failure to address Brexit or to advance a positive agenda with other European or North American partners

tariffs. Freer transatlantic trade without tariffs and with lower technical barriers could translate into millions of new jobs in the United States and Europe and improve both earnings and competitiveness for many companies, particularly small- and medium-sized enterprises.

Achieving a “Transatlantic Zero” deal may not be that hard. When TTIP negotiations paused in January 2017, negotiators had already exchanged offers to eliminate duties on 97% of tariff lines, a large majority of which would be phased out immediately upon entry into force of the agreement or phased out quickly. The toughest issues, where tariffs remain quite high, are for some specific products in such categories as textiles and apparel, footwear, and agriculture.[43] Tariffs on agriculture have always been the major barrier to Transatlantic Zero, but with agricultural trade growing across the Atlantic, and with the United States being the largest importer of EU agricultural products, now may be the time to take a bold step forward. Where agricultural tariffs are high, phase-out periods could be longer. Moreover, European and American agricultural sectors would still remain implicitly protected by a range of non-tariff barriers that are far more important, lessening the political concerns that might accompany a complete liberalization.[44]

When the Transatlantic Zero approach was being considered some years ago, a number of studies attempted to calculate its impact. A report by the European think tank ECIPE in 2010 estimated at that time that Transatlantic Zero could boost U.S. and EU goods exports each by 17% — about five times more than under the U.S.-Korea free trade deal ratified in 2011 – and boost annual EU GDP by up to .48% and U.S. GDP by up to 1.48%.[45]

Beyond Transatlantic Zero, Washington and Brussels could also cherry pick other wins, both by looking at possible low-level executive or inter-agency agreements that are “under the radar” of high-level political attention, and at promising elements from the TTIP negotiations. For example, both sides have already identified steps to reduce unnecessarily burdensome requirements and delays at each other’s borders. They have already identified potential compromises for certain issues so that final agreement could be in sight. They have already negotiated a dedicated chapter focused on small and medium-sized enterprises, which, among other things, could help small and medium-sized enterprises better navigate the transatlantic marketplace through the provision of enhanced online information and new mechanisms for U.S.-EU cooperation. They also already agreed on the importance of transparency and due process in trade remedy procedures and competition policy;[46] public affirmation of these principles would be reassuring at a time of economic uncertainty and tension.

In the area of regulatory cooperation, U.S. and EU officials already have found common ground on a number of important good regulatory practices; made good progress in developing approaches for facilitating forward-looking regulatory cooperation in areas of common interest; identified possible mechanisms for reducing unnecessary burdens in transatlantic trade arising from redundant or duplicative product testing and certification requirements; negotiated provisions that would facilitate trade subject to sanitary and phytosanitary import checks; and explored in detail ways to enable stakeholders to participate more fully in the development of product standards across the Atlantic, and how to take into account those standards. Within the TTIP framework, officials had already made good progress on as many as nine sectoral chapters or annexes. Moving forward in these areas, even without a comprehensive deal, would generate positive momentum.[47]

Critics may charge that the prospect of such agreements between the Trump Administration and the EU would be low. Yet within recent months the two parties have already shown they can strike such deals, most recently on drug regulations and on insurance.

In spring 2017 the U.S. Food and Drug Administration (FDA) and the European Medicines Agency signed a mutual recognition agreement on good manufacturing practices (GMP) for active pharmaceutical ingredients.[48] The arrangement will allow U.S. and EU regulators to utilize each other’s GMP inspections of pharmaceutical and active pharmaceutical ingredient manufacturing facilities to help determine whether a facility is manufacturing high quality drugs. The agreement covers a broad range of human drugs and biologics and veterinary drugs with specific exclusions.

Strengthening use of each other’s drug inspection expertise and resources will reduce duplicative requirements on manufacturers of pharmaceutical products and allow regulators to allocate resources more efficiently and where they are most needed, benefitting public health. Until now, the EU and the FDA sometimes would, in the same year, inspect some of the same facilities even if the facilities had a strong record of compliance. Under the new agreement, such duplication should be the exception. Because of the deep integration between U.S. and European pharmaceutical companies, the U.S. FDA conducted about 40% of its drug inspections over the last five years in the EU, even though, as the agreement confirms, U.S. and European compliance standards have been strong.[49] Reliance on each other’s good manufacturing practice reports under this agreement should allow EU and U.S. regulators to better focus their limited inspection resources on drug manufacturers in countries where there is concern of higher health risk, for instance China and India.[50]

Moreover, this type of agreement achieves those objectives without impinging on either side's sovereign rights. Both the FDA and the EU reserve the right to inspect at any time and in any country. Moreover, because the EU currently consists of 28 member states, the FDA is conducting separate assessments of each country's regulatory authority, which it expects to complete by mid-2019. EU assessment of U.S. regulators' inspection capabilities was completed in July 2017.

Similarly, after years of negotiation, the United States and the EU signed an international agreement (the "Covered Agreement") that formalizes substantial regulatory cooperation regarding the transatlantic insurance and reinsurance sectors. The Covered Agreement creates a legally binding framework for cross-border regulatory cooperation premised on a finding that the signatories have a regulatory system "substantially equivalent" to each other.[51] The Covered Agreement provides a federal framework within which individual insurance regulators in the U.S. states, which retain jurisdiction for insurance (unlike banking and securities), can strike legally binding international agreements with their European counterparts. It establishes a legally binding framework for providing mutual recognition and national treatment to insurance and reinsurance firms seeking to conduct transatlantic cross-border business. As such, it creates a framework for the free flow of capital – and supervisory information – in the insurance sector at the transatlantic level. This is a significant achievement, particularly given well-publicized U.S.-EU friction in other regulatory areas.[52]

In this area as well, each side has shown a capacity to reach an agreement that improves efficiencies, reduces costs, and facilitates transatlantic commerce without challenging basic precepts of sovereignty. Neither agreement compels either party to adopt the other's system. Neither imposes exactly the same regulation on both sides of the Atlantic. Rather, each reflects the belief of the respective regulators, supported by evidence, that the quality of drug inspections, or the level of consumer protection regarding insurance, is substantially equivalent in the EU and in the United States.

Other sectors show similar promise for U.S.-EU agreement: automotive safety regulations; unique identification of medical devices; fiber names and labelling, safety requirements, and conformity assessment procedures in the textiles sector; cosmetics; pesticides; chemicals; information and communications technology; engineering; and technical barriers to trade. The two sides could initiate workstreams in which officials could chip away at workaday issues and seek to capitalize on progress achieved both within and outside the TTIP framework. The U.S.-EU High Level Regulatory Cooperation Forum (HLRCF), established in 2005, could be revived to allow regulators themselves to promote best practices in such cooperation. Over time, case by case agreements in these areas would build a significant transatlantic 'acquis' that would influence regulatory officials in many other areas of the world.

A logical framework for such efforts could be a revived Transatlantic Economic Council (TEC), the cabinet-level body formed in 2007 by the European Union and the United States at the instigation of German Chancellor Angela Merkel. Under the TEC, U.S. and EU officials sought ways to advance transatlantic cooperation on regulatory affairs, intellectual property, investment, secure trade, financial markets regulation, and innovation and technology. Initial TEC discussions generated concrete outcomes, including common efforts to advance concerns regarding China, including joining their cases in the WTO against China's unfair trade practices in auto parts.

FIGURE 7: CHERRY PICKING

Characteristics

- Harvest whatever wins you can from comatose TTIP
- U.S.-EU "Transatlantic Zero" Tariff Agreement on Goods
- Case by case agreements on sectoral and regulatory cooperation

Potential Impact

- Momentum on goods trade; some impact on jobs
- Could dampen potential U.S.-EU antagonism
- Piecemeal progress on individual issues
- Can shift some regulatory attention to higher-risk countries
- Selective progress as global rule-makers
- Low profile: marginal impact without high-profile push
- Does little to reposition either the U.S. or EU for greater global competition
- Insufficient to mitigate privacy/tax/other disputes
- U.S./EU failure to address Brexit or advance a positive agenda with other European or North American partners

Resurrecting the Transatlantic Economic Council could facilitate sector-by-sector agreements where they are possible. The precedent exists, its legacy is Republican rather than Democrat, it gives each side a high-level platform from which to engage on common challenges, and it offers an alternative to TTIP without falling prey to inertia.There is much that could be achieved along the cherry-picking road. But there are also some downsides. Past could be prologue. Soon after the TEC was launched, it became mired in intractable bilateral disputes over how chickens should be cleaned and electrical appliances should be approved. By the end of the Bush Administration TEC meetings had become rather moribund, low-level affairs where little was achieved. While cherry-picking can ensure that important elements of progress are not lost, unless there is high-profile will to compromise and construct more meaningful arrangements, low-profile sectoral arrangements are unlikely to do much to boost jobs and economic growth, or to reposition the transatlantic economic relationship for the challenges of the future global economy. A low-profile exercise would be unlikely to mitigate higher-profile U.S.-EU disputes over privacy or tax rules. Both sides are already struggling to put together a U.S.-EU engagement plan taking the relationship forward.

Because it is a bilateral U.S.-EU approach, the cherry-picking path also fails to take account of Brexit or the dense connections the United States and the EU have with countries in the wider North Atlantic space. For instance, once the UK leaves the EU, it is unclear how it would relate to the recent U.S.-EU pharmaceutical agreement.[53] And the pharmaceutical industry of Switzerland, which is not an EU member, is deeply intertwined through investments, R&D and intra-company trade with the United States and the EU, yet could be frozen out of U.S.-EU arrangements. Greater attention needs to be paid to how such U.S.-EU agreements can be reconciled with the deep linkages each partner has with non-EU states and NAFTA members Canada and Mexico.

Cherry picking could also run into President Trump's deregulatory agenda. Some officials in the Commission are actually not averse to using as a baseline President Trump's mantra that for every new regulation, two should be eliminated.[54] Progress is conceivable on isolated issues. But even the Obama Administration, which was working to strengthen labor and environmental regulations in the United States, was castigated by TTIP opponents in Europe as seeking to undermine European norms in these areas. European critics will have an even easier time galvanizing popular opposition to EU cooperation with the Trump Administration.[55]

In short, the cherry-picking path could record some important isolated achievements, particularly Transatlantic Zero. Overall, it is inadequate to current challenges. But in today's political climate, it would be better than the Deep Freeze.

Pathway Two: TTIP 2.0

Another pathway is to resume TTIP negotiations, albeit with some modifications and improvements. There are various reasons why this path may still be viable, despite current ups and downs.

First, the economic and strategic rationale for an agreement between the world's two largest advanced industrial economies has only grown stronger since TTIP negotiations began in 2013. TTIP has the potential to increase the trade and investment flows that fuel economies and support high-quality jobs 8n both sides of the Atlantic. An agreement between the United States and the European Union would be the largest mega-regional agreement in history. The European Commission has noted that an agreement would boost the EU's economy by €120 billion, the U.S. economy by €90 billion and the rest of the world by €100 billion. Moreover, since the U.S. and the EU economies are similar in many ways, there is more potential for job-winning innovation and growth and less potential for low-wage foreign labor to undercut jobs. According to an independent study, the increased level of economic activity and productivity gains created by an agreement will benefit the EU and U.S. labor markets, both in terms of overall wages and new job opportunities for high- and low-skilled workers.[56]

Second, TTIP is more than just another free trade agreement. It offers the United States and the EU a means to go beyond traditional trade arrangements to forge understandings regarding mutual investment; open services markets; non-tariff and regulatory barriers; basic ground rules of the international economic order; and new agreements in areas not yet covered by multilateral regimes. All of these elements make TTIP a next-generation economic negotiation that breaks the mould of traditional trade agreements. At the heart of the ongoing talks is the question whether and in which areas the two major democratic actors in the global economy can address costly frictions generated by their deep commercial integration by aligning regulations and other instruments and setting benchmarks for high-quality global norms and rules.

Third, if TTIP is to have real impact, U.S. and EU officials would need to tackle behind-the-border non-tariff barriers to transatlantic commerce. Since at-the-border trade tariffs are relatively low across the North Atlantic, as much as 80% of TTIP's total potential gains would come from cutting bureaucratic and regulatory costs, liberalizing trade in services, and opening public procurement.

According to Berden and Francois, the trade cost equivalent (i.e., the synthetic ad-valorem tariff equivalent) on all goods between the EU and the United States ranges between 12.9-13.7%, with some sectors such as agricultural products, beverages and tobacco, pharmaceuticals and processed foods being considerably higher.[57] They found the trade-cost equivalent of services sector barriers overall to range between 8.5-47.3%, and for business services and financial services to be around 30% on average. When one considers that the large majority of jobs in the United States and across the European Union are in the services sector, such barriers are significant.

Building down such barriers could offer a considerable boost to transatlantic commerce. A report by the Dutch firm Ecorys, commissioned by the European Commission,[58] suggested that between 25-50% of these non-tariffs barriers could be removed. In the most optimistic scenario, U.S. exports would increase by 6.1% and EU exports by 2.1%. The benefits of removing non-tariff barriers could also be exponential. According to a study from the Centre for Economic Policy Research, eliminating 25% of non-tariff barriers between the United States and the EU would boost trade by 75% more than if only 10% of non-tariff barriers were removed.[59]

Fourth, freeing the transatlantic services economy through TTIP could be the single most important external initiative either side could take to spur growth and create jobs on both sides of the Atlantic. Services represent the sleeping giant of the transatlantic economy. Most American and European jobs are in the services economy, which accounts for over 70% of U.S. and EU GDP. The United States and the EU are each other's most important commercial partners and major growth markets when it comes to services trade and investment. The services economies of the United States and Europe have never been as intertwined as they are today in financial services, telecommunications, utilities, insurance, advertising, computer services, and other related activities. Deep transatlantic connections in services industries, provided by mutual investment flows, are not only important in their own right; they are also the foundation for the global competitiveness of U.S. and European services companies. A good share of U.S. services exports to the world are generated by European companies based in the U.S., just as a good share of EU services exports to the world are generated by U.S. companies based in Europe.

Protected services sectors on both sides of the Atlantic, however, account for about 20% of combined U.S.-EU GDP — more than the protected agricultural and manufacturing sectors combined. Major services sectors such as electricity, transport, distribution and business services suffer from particularly high levels of protection. TTIP negotiations in this area have been tough. Yet a targeted opening of services could present vast opportunities to firms and huge gains to consumers in both the EU and the United States. Removing barriers in these sectors would be equivalent to 50 years' worth of GATT and WTO liberalization of trade in goods. Moreover, because the manufacturing and services sectors are increasingly intertwined, liberalization of services trade would enhance the competitiveness of U.S. and European manufacturing firms as well.[60]

Fifth, an important rationale for TTIP was not just to open transatlantic commerce, but to do so in ways that gave both the United States and the EU greater leverage with regard to third countries, particularly China. This rationale has if anything become even stronger with the advent of the Trump Administration. The EU shares many of the Trump team's frustrations with Chinese cybertheft, its assaults on intellectual property, its efforts to pressure companies into technology transfer arrangements, poor implementation of its WTO obligation, and its overcapacity in steel and potentially autos, robotics and other sectors of the economy. Severe Chinese restrictions on investment by U.S., European and other non-Chinese companies in modern services, energy, agriculture and high-tech sectors are a further shared concern. Both are wary of growing investments by state-owned Chinese firms in Europe and the United States. While the EU would almost certainly not support an aggressive "unilateralist" approach to address these problems, it is likely to participate in joint diplomatic pressure and could be persuaded to join WTO complaints, particularly if convinced that this was a way to head off U.S. unilateral action.[61]

TTIP was not conceived as an anti-China instrument, however, but as a way for the United States and the EU to maintain high-standard rules for the global economy. By reviving TTIP, they could move forward with this agenda. Among TTIP discussions that could go beyond the WTO or are not even on the WTO's plate include negotiations on mutual acceptance of standards; regulatory coherence/co-operation and good regulatory practices; improving transparency and establishing a framework for regulating conformity assessment requirements; supporting small and medium enterprises; creating rules to facilitate participation of business and civil society in the process; negotiations on e-commerce, the internet, data protection and privacy; competition policy; and, government procurement.

FIGURE 8: WHAT IS TTIP?

MARKET ACCESS	REGULATORY COOPERATION	RULES (Facilitating IM/EX, FDI)
Goods Trade / Custom Duties	Regulatory Coherence	Sustainable Development
Services Trade	Technical Barriers to Trade	Energy & Raw Materials
Public Procurement	SPS - Food Safety, Animal & Plant Health	Customs / Trade Facilitation
Rules of Origin	Specific Sectors: • Chemicals • Engineering • Medical Devices • Vehicles • ICT • Medicines • Textiles & Clothing	SMEs (no real rules)
		Investment protection & ISDS
		Competition Rules
		Intellectual Property Rights & Geographic Indications
		Overall (Gov-to-Gov) Dispute Settlement

Source: Daniel S. Hamilton and Jacques Pelkmans, "Rule-Makers or Rule-Takers? An Introduction to TTIP," in Rule-Makers or Rule-Takers? Exploring the Transatlantic Trade and Investment Partnership (Washington, DC/Brussels: Routledge, 2015).

The EU and the United States can still be pioneers for the global economy, striking agreements around which others can associate themselves. There is precedent for this. The Information Technology Agreement negotiated by the United States and the EU eventually became the basic multilateral agreement in this area. And when the United States and the EU finalized their Open Skies agreement on transatlantic air transport in 2007, legal texts were created enabling a range of additional countries, not only in Europe but in other parts of the world, to implement provisions of the agreement through separate accords.[62] If the two largest economies succeed in establishing disciplines, common standards, and best practices in these areas, the TTIP could be a viable template for expansion of such rules to other partners in the global economy.

TTIP 2.0 would have even greater impact if the United States and the European Union made it clear that they would be open to "docking" mechanisms enabling like-minded third countries to associate with, or join, TTIP once a deal was done. As the Obama administration was drawing to a close, Brussels and Washington began to acknowledge that TTIP could be designed as an "open platform," yet neither ever defined what that could mean in practice.[63]

Sixth, even in the new political context, one could make the case that TTIP is the best path forward. First, the Trump Administration, as well as European counterparts, have each raised their concerns about China to new levels. Each will need partners in dealing with China, and each is the other's best partner in this regard, both with regard to overlapping interests and clout due to the size of the U.S. and European markets. In addition, TTIP is a bilateral negotiation, and the U.S. administration has expressed a preference for bilateral negotiations. The Trump Administration has also indicated that it does not like traditional trade agreements that it sees as causing jobs to be exported. TTIP is a very different type of agreement that does not suggest low-wage competition and seeks to ease regulatory burdens, which should appeal to the new administration. Finally, much of the TTIP agenda had to do with building down unnecessary regulatory barriers to transatlantic commerce, which should resonate with the Trump Administration.

Finally, TTIP 2.0 is important because despite the bad press, especially in Europe, the EU and the United States have already made considerable progress toward finalizing an agreement. As outlined earlier, the two sides have already exchanged offers to eliminate duties on 97% of tariff lines, finalized a number of negotiating chapters, and identified landing zones for other important issues.

TTIP was not completed, however, and significant work remains to resolve differences in several important areas of the negotiations. These include:

» how to treat the most sensitive tariff lines on both sides;

» how to expand and lock in market access in key services sectors;

» how to reconcile differences on sanitary and phytosanitary measures;

» how to encourage the recognition of qualifications to facilitate licensing of experienced professionals;

» how to improve access to each other's public procurement markets;

» how to address standards and conformity assessment procedures in ways that yield greater openness, transparency, and convergence, reduce redundant and burdensome conformity assessment procedures, and enhance cooperation;

» how best to ensure investor rights while preserving the right of governments to regulate, including with respect to dispute resolution mechanisms;

» how and whether to include strong and effective disciplines on labor and environmental protection;

- how to enhance digital market access and participation across the Atlantic (and beyond), notably in the areas of intellectual property, consumer protection, data privacy, network access, network security and internet governance, and standards (for example, for e-health), while respecting legitimate concerns about protecting privacy;
- how best to promote transparent, open, and secure energy markets; and
- how to reconcile different approaches to trademarks, generic names, and geographical indications.

If the Trump Administration and the European Union decided to revive the TTIP negotiations, they would have to address these issues. In the current political climate, that could be a tough sell.

Negotiating mutual recognition of essentially equivalent norms and regulatory coherence across a plethora of agencies rendered TTIP enormously complex. It gave the impression that trade negotiators might be prepared to bargain away basic rules and standards that regulated, stabilized and legitimized markets in ways that societies on each side of the Atlantic had devised through their respective democratic procedures. TTIP's complexity created a deep gap between the aims of the partnership and what ordinary citizens believed it would produce. This gulf has created a toxic public atmosphere, particularly in Europe, and requires a fundamentally new narrative and approach.

TTIP 2.0 must ease popular economic anxieties and fears of diminished sovereignty, not exacerbate them. Negotiators must convince key stakeholders that TTIP is not about lowering high levels of safety, health, environmental, labor and consumer protections in the EU or in the United States, but rather about identifying where such standards are essentially equivalent, or where regulators can cooperate more effectively together, to facilitate jobs and growth across the Atlantic and better prepare the United States and the European Union to address greater global competition.

That is likely to be difficult, given the Trump Administration's deregulatory agenda, its aversion to including environmental, labor and social protections in trade agreements, and its "Hire American, Buy American" preferences that would make any effort to open public procurement markets – the EU's top TTIP priority — extremely difficult. The Trump Administration is also unlikely to follow the European Commission's lead in making its negotiating positions and goals public in response to widespread public anxieties about trade. Moreover, the Trump Administration would almost certainly want to rebrand a future U.S.-EU negotiation to distinguish it from an Obama-style TTIP.

Given TTIP's complexity, a TTIP 2.0 of ambitious scope is also unlikely to come to fruition in the term of the current European Commission, which ends shortly after the next European Parliament elections in May 2019.

In short, political timetables, continued public opposition in much of Europe, and the Trump Administration's policy preferences mean that for the time being, TTIP's "deep integration" agenda seems to have reached its political limits.

A transatlantic initiative focused exclusively on the U.S.-EU bilateral relationship also ignores the need to deal with the transatlantic implications of Brexit, and the importance of encompassing value chains across non-EU Europe and NAFTA that have become of considerable significance to U.S. and European companies. TTIP conveyed the impression of a closed shop. There was no provision for other key European or North American partners to associate themselves with an eventual deal. Given the danger of fragmentation today, TTIP 2.0 should

FIGURE 9: TTIP 2.0

2.0

Characteristics

- Seek Transatlantic Zero on Goods; open services markets; public procurement; rules of origin
- Seek regulatory cooperation, sectoral agreements, alignment on technical barriers to trade and sanitary and phyto-sanitary measures
- Improve U.S. and EU position vis-à-vis third countries

Potential Impact

- Difficult to achieve with Trump and current European Commission
- Toxic public reaction, especially in much of Europe
- Greater public anxieties regarding trade
- ISDS a deal-breaker
- Little chance of progress re. labor/environment
- Does not address Brexit or wider European/NAFTA value chains

be more explicit in how partners and allies across the North Atlantic space could link up with any eventual agreement.

An Alternative Path: The North Atlantic Marketplace

Each of the previous paths presents considerable challenges. North American and European decision-makers might consider an alternative – one that addresses the difficulties of old approaches while taking account of new trends.

Under this path, European and North American decision-makers would set forth a more compelling narrative about the need to create a North Atlantic Marketplace[64] that focuses squarely on boosting jobs and growth in ways that preserve sovereignty while ensuring that the North Atlantic remains a rule-maker, rather than a rule-taker, for the global economy.

The North Atlantic Marketplace would advance an activist agenda instead of falling prey to inertia suggested by the Deep Freeze option. It would be high profile politics, not low-profile "cherry picking." It would not be a warmed-over TTIP, in fact it would abandon some TTIP fundamentals. It would replace the TTIP framework with a new template – a Jobs and Growth Agreement (JAGA) – that embraces a different set of priorities. Finally, it would be multi-channel. It would include, but go beyond, the single bilateral frame of negotiations between the United States and the EU to encompass a series of bilateral agreements with the United Kingdom and other non-EU European allies and partners, as well as Canada and Mexico.

Efforts to forge a North Atlantic Marketplace would be guided by some basic principles.

First, the focus would be jobs and growth, not trade or harmonized domestic regulations. It would prioritize actions that would bring – and be seen to bring — direct benefits to citizens on each side of the Atlantic in clear and tangible ways. It would be motivated by the understanding that our democratic, market-based systems must be seen to be working to benefit our own people. Otherwise they will not be supported at home and will have declining resonance elsewhere around the world. It would change the message about trade to one of creating jobs and protecting American and European global leadership.[65]

Under this approach, transatlantic leaders would make job creation and economic growth the centerpiece of transatlantic cooperation by establishing the goal of creating 5 million jobs in a North Atlantic Marketplace by 2025, and charting roadmaps with benchmarks toward that end. They would begin by identifying immediate initiatives that the United States, the EU and their partners could take, in concert or in parallel, to spark job creation and spur growth.

The goal of a North Atlantic Marketplace by 2025 would not be to negotiate yet another preferential "free trade agreement;" it would be framed by a more politically relevant series of bilateral Jobs And Growth Agreements, a discrete set of principles and tailored contractual undertakings, agreed by sovereign signatory parties, to advance strategies, together or in parallel, to promote jobs and growth. Instead of focusing primarily on complicated and drawn-out processes of regulatory convergence, JAGA signatories would seek out practical areas where progress could be made in relatively short time.

Of course, bilateral U.S.-EU negotiations would remain quite central to the overall approach, given the size and density of this economic relationship. A U.S.-EU JAGA is likely to provide basic orientation to other North Atlantic arrangements. But in the context of a North Atlantic Marketplace, the U.S.-EU framework need not be a reheated TTIP, nor would it need to be limited to a "single undertaking," or traditional trade negotiation, whereby nothing is agreed until all issues are agreed. The United States and the EU would instead focus single-mindedly on agreements that can have direct and visible impact on jobs and growth. They would forge and implement agreements wherever possible, without allowing contentious issues to block areas of agreement. This would allow the two parties to harvest successes, as suggested under the "cherry-picking" pathway, and also pursue those elements of the previous TTIP discussions that seemed promising, without being beholden to a single process in which the perfect becomes the enemy of the good. Too many past attempts to open the transatlantic market have failed because of this dynamic.

The U.S.-EU commercial relationship will be an important, yet not exclusive, foundation for the North Atlantic Marketplace. In coming years, non-EU Europe will become increasingly important to both the United States and the European Union. Following Brexit, the United Kingdom will become each party's most important non-EU commercial partner in Europe. But countries such as Turkey, Switzerland, Norway and Iceland are also important parts of intra-European and North Atlantic supply chains and value networks, maritime and air routes. And the potential of Europe's extended periphery is becoming even more significant. The total output of the region is larger than that of China and 60% greater than that of India. It is projected to expand more quickly than the eurozone. Strong secular forces for growth include the build out of infrastructure and the expanding middle class.[66]

Over time, separate bilateral JAGAs with these countries, starting with developed Europe, could help North Atlantic economies capitalize on opportunities and offer new means of leverage to upgrade standards and norms while integrating Europe's periphery into a more integrated North Atlantic commercial architecture. One shortcoming of the narrow U.S.-EU TTIP framework was that it did not do this.

It had been widely argued that allowing non-EU European economies such as Norway, Switzerland, Iceland, Liechtenstein, and Turkey to associate themselves with, or even join, TTIP would not only have enhanced the direct and indirect economic benefits of the deal, including positive spillover effects, but also its soft power benefits in terms of extending norms and rules beyond the United States and the European Union. As mentioned earlier, only late in the TTIP negotiations did Brussels and Washington begin to acknowledge that TTIP could be designed as an "open platform," without ever defining what that could mean.

A North Atlantic Marketplace would provide concrete mechanisms to include non-EU European countries in a broad North Atlantic commercial architecture. It would supplement the U.S.-EU track of negotiations with a series of complementary bilateral tracks with other North Atlantic partners.

For instance, U.S. and EU leverage would be further enhanced if they would be prepared to devise mechanisms by which third countries can align or accede to a U.S.-EU JAGA, or to design disciplines that are potentially inclusive for third countries, such as inviting others to join in a U.S.-EU Zero Tariff deal or in certain sectors of such an arrangement, or devising a uniform set of rules of origin that would apply to all of their preferential trade agreements, enabling others to access both the EU and U.S. markets by complying with the requirement of either one of them. If a critical mass of participants develops, benefits could be extended to all WTO members on a most-favored-nation basis. Here again, there is precedent for this. This plurilateral approach was successful in negotiations leading to the 1997 Information Technology Agreement. Such arrangements could also generate potential positive effects for emerging economies, through increased global demand and greater transatlantic regulatory compatibility, which would help them manufacture products that meet U.S. and European standards and requirements.

Such an approach would be significant with regard to each party's relations with Switzerland, for example. The EU is Switzerland's main trading partner and Switzerland is the EU's third trading partner after the United States and China. The EU and Switzerland are also among each other's top destinations for foreign investment. Swiss firms are deeply integrated into intra-European and transatlantic value chains, especially in chemicals/pharma and medicinal products, machinery, instruments and watches and jewelry. Switzerland also has one of the largest asset bases in the United States of any nation at $1.4 trillion (mainly in services like insurance and financial services, but also pharmaceuticals). Swiss-owned affiliates were the largest foreign source of R&D in the United States in 2014 (the last year of available data), accounting for $10.6 billion in R&D spending, which was a quarter of the European total. Swiss companies based in the United States directly employ almost half a million Americans.[67]

While a U.S.-Switzerland JAGA would be tailored to bilateral issues, it could use as orientation the series of bilateral sectoral agreements Switzerland has forged with the EU on issues ranging from public procurement, agriculture and air and land transport to scientific research, taxation, professional training and combating fraud. It could provide an important flanking measure to an eventual U.S.-EU arrangement, and perhaps could be extended to an EFTA-U.S. deal.

A 2014 study found that a EU-U.S. agreement on its own would be likely to damage the Swiss economy, whereas if such an agreement would be flanked by EFTA-U.S. agreements, the Swiss economy would benefit. A U.S.-EU agreement that featured convergence in EU and U.S. regulatory standards would also benefit the Swiss economy, since Switzerland, through its mutual recognition agreement with the EU, is already streamlining and harmonizing its regulations with those of the EU, and so might be expected to actually benefit more from any most-favored-nation spillovers than would other third countries. A comparable EFTA-US agreement would more than offset the discriminatory impact of a purely bilateral EU-US deal. An EFTA-U.S. deal could mean a bump of between 1.74% - 2.87% of Swiss GDP.[68] That underscores the importance of a broader architecture that includes, but ranges beyond, a U.S.-EU deal.

The fortunes of U.S. and European companies, workers and consumers are also directly tied to a variety of dynamic regional value chains with NAFTA partners Canada and Mexico, similar to those that EU member states conduct among themselves. Moreover, Canada and the EU have recently signed a Comprehensive Trade and

Economic Agreement (CETA), and Mexico and the EU are negotiating to modernize their current bilateral "Global Agreement." Spotlighting the way these value chains create jobs and boost growth will enhance the importance of an initiative that ranges beyond TTIP and offers an opportunity to engage non-EU European partners as well as Canada and Mexico. Here too, a possible option could be for Canada and Mexico to individually sign accords that define their relationship to a U.S.-EU JAGA.

The North Atlantic Marketplace could conceivably include all members of NAFTA, all members of the EU, all members of EFTA, and all members of NATO. It would seek to build synergies rather than competition among the disparate strands that now threaten to fragment European and North American economic ties in ways that can enhance prospects for growth and jobs. A broad initiative would provide an umbrella under which each of the five evolving pillars of the North Atlantic Community (UK-EU; UK-US; US-EU; US-EU-non-EU Europe; Europe-NAFTA) can be strengthened during this period of turbulence. It would seek to identify and harness potential synergies among these various tracks, rather than allow them to proceed without any sense of overall direction. Such an approach would also take account of the fact that the value chain map of the North Atlantic economy is broader than the institutional map of the U.S-EU relationship.[69]

What's in a JAGA?

Notionally, a JAGA might have five baskets. The specific content is likely to vary according to particular issues or opportunities of relevance to bilateral signatory parties.

In a first basket of issues, signatories could explore how they can work more effectively on workforce development, help small- and medium-sized enterprises that are the source of most jobs, boost innovation economies, and take advantage of the transatlantic digital economy.

A second basket could look at where these goals could be advanced through such bilateral trade measures as lowering tariffs or removing restrictions on job-creating investments.

In a third basket, signatories would affirm their mutual commitment to the sanctity of democratically established and transparent domestic laws, including those with respect to disputes between foreign private investors and domestic public authorities. A JAGA would separate investment issues from trade issues and jettison those attributes, such as investor-state dispute settlement (ISDS) provisions, that have been the subject of intense criticism on both sides of the Atlantic. A JAGA with a country like Turkey or Mexico could be tailored to include investor right provisions, but with prospects for graduation once there is strong and consistent adherence to the rule of law, thus offering new tools of conditionality regarding domestic reforms in those countries.

A fourth basket would reverse previous priorities with regard to regulatory cooperation. Before, the emphasis was on reducing costs to companies and boosting trade; helping regulators was a distant second rationale. Under a JAGA framework, bilateral regulatory cooperation would be about helping regulators become more efficient and effective at protecting their citizens in ways that are democratically legitimate and accountable, and not primarily about removing or reducing non-tariff barriers to trade. It would be about helping regulators do their job; any positive economic gains that might result would be important, but secondary, results. It would recognize, however, that if regulators are to do their job better, they need to take better account of the deeply intertwined nature of transatlantic commercial connections, through more effective regulator-to-regulator dialogue and cooperation.[70]

Such cooperation would also be limited to regulations and standards that directly apply to goods and services traded between the two parties. Laws and regulations that go to predominantly domestic matters, such as those on working hours, wage levels, air pollution standards, etc., would be set explicitly outside the scope of any general disciplines on regulatory cooperation, even though those measures may have an indirect effect on trade. Such cooperation would also apply solely to executive agencies, not legislative bodies.

In a fifth basket, signatory parties would seek to align their efforts with regard to third country issues. They could leverage their commitment to regulatory principles and mutual obligations by affirming that they would welcome other countries undertaking similar disciplines, either by associating themselves with the document or replicating those obligations and principles in other agreements. It will be difficult to open some regulatory arrangements to third parties. But countries may be able to join or attach themselves to some provisions.[71] Here again, there is precedent. When the United States and EU finalized their Open Skies agreement on transatlantic air transport in 2007, for instance, a number of additional countries, not only in Europe but in other parts of the world, were able to implement provisions of the agreement through separate accords.

The five JAGA baskets

BASKET I:

In a first basket of issues, JAGA signatories would identify immediate initiatives that they can take directly together, in parallel, or in cooperation with key stakeholders in the short run to spur job creation and growth. The following areas would be worth consideration:

Workforce Development: Both sides of the Atlantic are struggling to various degrees with growing income disparities, low workforce participation rates, skills gaps, the impact of automation and the digital revolution on jobs and the nature of work, and the effect of competition from other locales with relatively low labor costs on jobs and employment. Given that European companies investing in the United States employ millions of American workers and are America's leading source of onshored jobs, and that U.S. companies investing in Europe employ millions of European workers and are Europe's leading source of onshored jobs, it makes great sense that an ongoing public-private process involving U.S. and European stakeholders should look at how to better prepare workers for future jobs and changes in the workplace. Such an effort could explore a range of topics, including apprenticeships and related employment-based training, matching educational outcomes with employment needs, recognizing certifications, preparing for new technologies, and sharing best practices in data collection and transparency about job markets and training. The Trump Administration has shown itself open to such ideas, and a number of U.S. states and European

FIGURE 10: THE NORTH ATLANTIC MARKETPLACE

Characteristics

- Drop TTIP in favor of a focus on jobs and growth in the North Atlantic.
- Multi-channel initiative, not a 'single undertaking' limited to U.S.-EU
- Seek series of bilateral Jobs and Growth Agreements, not only U.S.-EU but also U.S.-UK, UK-EU, U.S.-non-EU Europe, EU/Canada/Mexico etc.

Five baskets:

1. Jobs and growth: workforce development; SMEs; innovation economy; digital economy.
2. Tackle trade barriers to these goals.
3. Split investment from trade; exclude ISDS; affirm the primacy of domestic law.
4. Regulatory cooperation should focus on helping regulators become more efficient and effective at protecting their citizens in ways that are democratically legitimate and accountable, and not primarily about removing or reducing non-tariff barriers to trade. Take account of 'transatlantic' costs and benefits. But limit to goods and services traded between the two parties. Apply only to executive agencies, not legislative bodies.
5. Align policies toward third countries such as China.

Potential Impact

- Recognizes new dynamics of Europe/Brexit
- Seeks to build synergies among the evolving pillars of the North Atlantic space
- Directly addresses anxieties about jobs and growth
- Addresses popular critique of ISDS
- Offers a different and more sustainable rationale for regulatory harmonization
- Addresses concerns about lower third country standards; repositions North America and Europe as rule-makers
- Difficult to manage/different tracks
- Requires high level support, not limited to trade officials

regions have had successful experiences with these types of partnerships.[72]

Small and Medium-Sized Enterprises (SMEs). Small and medium-sized enterprises are the main engines of job creation and innovation on both sides of the Atlantic. Yet only a small fraction of the 50 million SMEs in the United States and Europe engage in commercial activity across the Atlantic. There is much untapped potential here. Regulatory divergences and duplicative red tape are especially burdensome for SMEs. They can find it particularly difficult to absorb the cost of building a product to different European and U.S. standards or undergoing multiple inspections of a manufacturing facility. Such costs can be an insurmountable barrier for SMEs wishing to engage in transatlantic commerce. Governments could build on the draft SME chapter from TTIP with a stakeholder-driven process that works to lower barriers and capitalize on opportunities for SMEs.[73]

The Digital Economy: The transatlantic economy is undergoing an unprecedented digital transformation. It is reshaping how we buy, sell, learn, work and play. Its potential is enormous. Digital flows have become the lifeblood of world trade and the global economy, and cross-border data flows between the U.S. and Europe are the highest in the world. Whether through digitally-enabled services, e-commerce, the growing app and bot economy, data flows, social media, or submarine cables crisscrossing the Atlantic, the transatlantic digital economy has quickly become a major force in global commerce. Digital transformation is becoming the single most important means by which both sides of the Atlantic can reinforce their bonds and position themselves for a world of more diffuse power and intensified competition. Yet digitization not only faces barriers in both Europe and the United States, it also confronts societies on each side of the Atlantic with a host of legal, economic, societal and normative questions.

Each side of the Atlantic faces a divide between economic sectors pushing towards the digital frontier and those lagging behind. Some of the most important hurdles to digital commerce are actually conventional barriers rooted in the analog economy, such as onerous customs procedures and duties, basic differences among postal regimes, and traditional barriers to services trade. Simplifying and aligning such standard regulations could go far to enhance the efficiency of transatlantic and global digital trade.[74]

Perhaps the most significant challenge facing both the United States and Europe is the potential impact of the digital economy on jobs and the nature of work. Forecasts vary widely. Some see boundless opportunities in previously unimagined job categories, enhanced productivity and liberation from mundane routines. Others project massive dislocation and unemployment, widening skills gaps and growing income disparities.

Each side of the Atlantic is also challenged by a range of cyberthreats. A decade ago, malicious digital activities did not register at all on the list of major threats to U.S. national security compiled by the Director of National Intelligence. In 2015, they ranked first. Public-private resilience partnerships are especially urgent because U.S. and European companies are the world's leading targets of cyberattacks by states, terrorists and criminals.

These examples underscore that the United States and Europe face a number of common challenges in the digital world. Yet the transatlantic digital economy is also held back by basic EU-U.S. differences on a range of issues, including privacy and personal data protection, rules regarding hate speech and fake news, and intellectual property protection. Avoiding a transatlantic digital divide is highly important to economies on both sides of the Atlantic. Initial cooperative activities could focus on such issues as e-labelling and e-accessibility, as well as standards related to cloud computing and the Internet of Things. Tougher issues await, such network neutrality rules, data protection rules, intermediary liability, online copyright protection and related exceptions and limitations, and competition law and policy.[75]

The Transatlantic Innovation Economy: North Atlantic flows in research, development and innovation are the most intense in the world, and essential to such leading-edge sectors as biotechnology and nanotechnology, which in turn have the potential to deliver hugely significant economic benefits across the entire economy, just as electricity, computers and mobile phones have done in the past. In 2014 U.S. companies invested $31 billion in research and development in Europe, a record annual total, representing 60% of total global R&D expenditures by U.S. companies abroad. R&D spending by European companies in the United States was even higher, totaling $42 billion, and accounting for 75% of all R&D performed by majority-owned foreign affiliates in the United States.

Non-EU economies such as Switzerland and soon the UK are major investors in the U.S. innovation economy, another reason why a broader North Atlantic Marketplace, including but ranging beyond the U.S.-EU partnership, is important to both Americans and Europeans. Swiss-owned R&D in the U.S. totaled $10.6 billion in 2014, a quarter of total European affiliate R&D in the United States. An additional 17.3% was attributed to British affiliates.[76]

Continued high levels of innovation will be essential to the ability of the United States and Europe to recover from the economic crisis and to prosper in today's highly competitive and connected global economy. To remain competitive, the United States and the EU must work together to support and accelerate innovation, setting an example for other countries to follow. The prosperity of Americans and Europeans alike will be increasingly dependent on the strength of their knowledge links to each other and to other global hubs of innovation and ideas.

Under a JAGA, the United States and the EU could revive, and consider expanding, their Innovation Dialogue to NAFTA partners and non-EU European partners, to accelerate efforts to spur growth, productivity and entrepreneurial activity, including by sharing best policy practices and ways of improving the policy environment for innovative market activities on each side of the Atlantic. They could build on links that have been developed, for instance, between the EU's Horizon 2020 program and U.S. research agencies, universities and other institutions. They could affirm earlier joint statements of innovation principles to guide the transatlantic innovation economy and serve as the basis for globally focused cooperation on investment, intellectual property rights (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. Such a process should involve close consultation with business and other stakeholders.

JAGA parties would seek to align their regulations regarding IPR. According to Business Europe, a convergence of IPR regulations between the EU and the United States could generate an increase in national incomes of $1.1 billion in the EU and $4.8 billion in the United States. Signatory parties would also seek to speak with a strong common voice on the importance of respect for IPR globally. The United States and its European partners face a major challenge in addressing calls from those who do not have a shared understanding of the concept of intellectual property – a fundamental pillar of the transatlantic economy. Nowhere is the erosion of such rights, and the diminishing ability of the transatlantic partners to halt such erosion, as visible as the November 2017 decision by the remaining 11 partners of the Trans-Pacific Partnership (TPP) to move forward with a new trade agreement, without the United States, by dropping 11 intellectual property provisions upon which Washington had insisted.

The United States and the EU have cooperated in strengthening global protection of intellectual property rights, including through the provision of training and technical assistance to other countries. Given the stakes involved in anti-counterfeiting and piracy, the United States and the EU, along with the private sector, should continue to press for full respect for IPR in third countries. U.S. JAGAs with the UK and other European partners could reinforce this commitment. Through international organizations and directly, JAGA parties could:

» Engage developing countries in formulating intellectual property policies and enforcement strategies that ensure "win-win" outcomes both for IPR holders and national interests.

» Achieve convergence between U.S. and EU patent regulation.

» Engage with industry and consumer representatives to examine how IPR protection can be effective in the digital age.

» Develop a joint agenda for dealing with counterfeiting and piracy around the world and bring joint legal action against such abuses at the World Trade Organization.

Fighting Economic Crimes: Money laundering, corruption, terrorist financing, sanctions violations and other economic-related criminal activities represent the shadow side of the North Atlantic Marketplace. As these activities grow and are powered by new digital possibilities, JAGA parties could commit to engaging more effectively together to tackle these issues across the Atlantic space, and cooperating better on these issues within broader international organizations and groupings.

BASKET II:

In this basket, JAGA signatories would look at areas where jobs and growth can be advanced by reducing trade tariffs and other barriers to job-creating investments, and by liberalizing services.

Transatlantic Zero: Achieving tariff-only Transatlantic Zero tariff agreements, which would eliminate all duties on traded industrial and agricultural products, remains a viable option on the road to a North Atlantic Marketplace, especially if such arrangements could be extended to non-EU European partners. As discussed earlier with regard to the "Cherry-Picking Path," given that U.S.-EU tariffs are generally low, a focused tariff-free trade agreement could be achieved relatively quickly and would have immediately beneficial effects on jobs, investment and profits, since a substantial portion of transatlantic trade is intra-firm, i.e. companies trading intermediate parts and components among their subsidiaries on both sides of the Atlantic. When TTIP paused in January 2017, negotiators had already exchanged offers covering 97% of transatlantic trade. Freer transatlantic trade without tariffs and with lower technical barriers could translate into millions of new jobs across the North Atlantic space and improve both earnings and competitiveness for many companies, particularly SMEs.

Reduce Trade Obstacles: Under the previous TTIP framework the United States and the EU had already identified steps to reduce unnecessarily burdensome requirements and delays at each other's borders. They also agreed on the importance of transparency and due process in trade remedy procedures and competition policy. A U.S.-EU JAGA could move forward with these understandings. Using that set of understandings as a basis for bilateral JAGAs with other North Atlantic partners could have additional impact.

Open Services Markets: Efforts to break down services barriers would have the single greatest direct impact on jobs on each side of the Atlantic. As was discussed earlier, North America and Europe are each other's most important commercial partners and major growth markets when it comes to services trade and investment. North Atlantic services economies have never been as intertwined as they are today in financial services, telecommunications, utilities, insurance, advertising, computer services, and other related activities. Deep transatlantic connections in services industries, provided by mutual investment flows, are not only important in their own right; they are also the foundation for the global competitiveness of U.S. and European services companies. A targeted opening of services could present vast opportunities to firms and huge gains to consumers in both the EU and the United States. Removing barriers in these sectors would be equivalent to 50 years' worth of GATT and WTO liberalization of trade in goods.

BASKET III:
A Different Approach to Investor-State Dispute Settlement.

Under this basket, JAGA signatories would affirm their mutual commitment to the sanctity of democratically established and transparent domestic laws, including those with respect to disputes between foreign private investors and domestic public authorities. A JAGA would separate investment issues from trade issues and jettison those attributes, such as investor-state dispute settlement (ISDS) provisions, that have been the subject of intense criticism on both sides of the Atlantic.

The ISDS provisions that had been contemplated for TTIP have their origin in an extra-territorial system of arbitration, developed over five decades and anchored in bi- and multilateral treaties, intended to protect foreign investors from predatory expropriation by states, particularly where rule of law, or institutions upholding it, are weak. Most countries have investment protection rules with ISDS in place; thousands of such treaties are in force worldwide.

Over time, however, the system has evolved so that foreign investors are able to argue that a domestic measure violates the international treaty under which their investment operates. This could include not just for arbitrary and capricious government actions, but also adverse regulatory changes, even if the impugned policy applies to foreign and domestic investors alike and is decided under established and legitimate procedures of democratically established standards of signatory countries that have fully developed and transparent systems of law.[77] The ISDS texts under discussion via TTIP followed this model, and would have given foreign firms the right to bring claims against sovereign governments before extrajudicial tribunals of three private-sector lawyers if they believe they had not been given 'fair and equitable treatment.' Under these provisions, domestic citizens or entities would not be able to participate meaningfully, and appeal would not be possible.[78]

Through ISDS, foreign investors alone are granted the ability to bypass robust, nuanced, and democratically-responsive U.S. and European legal frameworks. No less an authority than John Roberts, the Chief Justice of the U.S. Supreme Court, has warned that ISDS arbitration panels hold the alarming power to review a nation's laws and "effectively annul the authoritative acts of its legislature, executive, and judiciary." ISDS arbitrators, he added, "can meet literally anywhere in the world" and "sit in judgment" on a nation's "sovereign acts."[79] By allowing investors to bring disputes to a panel of three corporate lawyers that can judge the actions of sovereign governments, the current ISDS system shifts multinational corporations' investment risks onto the public.[80]

Stillborn Alternatives. A number of alternatives to ISDS have been proposed, but all are problematic.

One proposed alternative would be to consider the fixes to ISDS that were incorporated into the EU-Canada CETA deal: appointing public judges rather than relying on panels of corporate lawyers; instituting an appeals system; and tightening the language on what constitutes 'fair and equitable treatment' for foreign investors. But so many questions have arisen over the legitimacy of the investment court system that the investment chapter has not been included as part of the provisional implementation of CETA, and is unlikely to survive. And if such provisions are unlikely with Canada, they are even less likely with the United States.

A second proposed alternative is to replace ISDS with an Equitable Investment provision that would fix the ISDS double standard.[81] Instead of foreign investors enjoying rights that domestic investors, unions and environmental groups don't, such a provision would level the playing field. Just as an investor can now ask a tribunal to determine whether capital controls violate a state's obligations, unions would have recourse on collective bargaining rights, environmental NGOs could challenge weak carbon emissions plans, or domestic investors could complain about preferential treatment received by wealthy foreign companies. Proponents argue that these rulings will allow citizens to name and shame bad governments without compromising sovereignty, and would give domestic courts ultimate jurisdiction to accept or reject arbitrational rulings.[82] This alternative, however, does nothing to address the challenges to sovereignty, democracy and the rule of law that are at the heart of the matter. It simply extends the privilege of extra-judicial recourse beyond foreign investors to a panoply of differing interest groups.

A third proposed alternative is that of a single multilateral dispute settlement system, with permanent adjudicators and an appeals tribunal, designed to be open for inclusion of any existing or future investment treaty. The European Commission presented this idea in July 2017 to representatives from 60 leading trading nations meeting at the United Nations Commission on International Trade Law in Vienna. The United States and Japan, however, flatly rejected Brussels' plan. Even if the EU gains some traction with this notion, it would take a decade or more for it to become operational, and it is simply a non-starter with the Trump Administration, rendering moot its relevance for either a revived TTIP or for a North Atlantic Marketplace.[83]

ISDS: Shouldn't Do It, Needn't Do It. Given the extreme controversy surrounding ISDS as related to TTIP, and the lack of viable alternatives, the United States and its European partners would be well advised simply to drop it from consideration. ISDS is unlikely to provide either the United States or Europe with any significant benefits, and whatever benefits might accrue are unlikely to outweigh the associated costs.[84] There are a number of political, economic and legal reasons why.

Politically, voters on each side of the Atlantic have opted for leaders favoring local and national identities and demanding greater democratic control and accountability. On the right, nationalists and nativist populists believe such agreements are destroying sovereignty. On the left, there is a groundswell of support for those who believe such agreements are destroying jobs and hard-fought standards at home.[85] Proposing trade deals that appear to grant special rights to foreign investors would alienate people further, and are likely to derail future transatlantic partnerships. The fact that a deal with such positive potential such as TTIP could be reduced to a debate about investment protection should be a warning to governments that they must avoid efforts that could lead voters to believe they are favoring large multinationals over their own citizens, which, as we have seen, is certain to generate a backlash against any deals across the Atlantic.

In addition, the Trump Administration has already signaled through its NAFTA negotiations that it considers ISDS a dead letter. It has proposed that such arbitration be voluntary, essentially arguing that the U.S. government should not be in the business of encouraging investment abroad when its priorities are at home, and that provisions such as ISDS that protect American companies against the risks of investing abroad are effectively providing them with an unfair taxpayer-funded subsidy. Many Democrats share this view, and say they will vote against a revised NAFTA deal unless the ISDS provision is dropped. 200 U.S. scholars signed a letter urging that ISDS be dropped from NAFTA and other U.S. trade deals.[86]

Another political argument that had been made to include ISDS provisions within TTIP was that it was important to give the EU and the United States leverage with regard to protecting their companies' investments in third countries. If the United States and the EU could not agree on an ISDS arrangement, so went the argument, how could either hope to reach such agreements protecting their investments in countries like China?

This argument may still be valid with respect to countries such as India, which in 2016 unilaterally scrapped some 50 bilateral investment treaties with countries all over the world, including 23 EU member states. But China has not expressed similar concerns; in 2015 it signed an investment treaty with Australia that included ISDS – even though Australia had refused to include ISDS provisions into its own bilateral free trade agreement with the United States. Beijing has expressed interest in an investment treaty with the EU and not indicated any concern with including ISDS provisions as part of such an agreement.[87] ISDS provisions may still be needed in a JAGA with Turkey (see Section V), perhaps with periodic review mechanisms. But the goal would be to reach a point where each party does not believe it must resort to such mechanisms because it has confidence in the strength of the other party's domestic law.

In addition, if the political costs of including ISDS in North

Atlantic deals are likely to be high, the economic benefits from such a provision are likely to be low. There is little empirical evidence that investment treaties containing ISDS actually promote FDI in any significant way. Data show that such agreements do not spur investment, particularly across the Atlantic, where the rule of law and institutions supporting it are strong. In short, the costs aren't worth the minor benefits. [88]

Moreover, if the political and economic reasons for not moving forward with ISDS within the North Atlantic space are strong, the legal reasons are even stronger. To cite the scholars' letter mentioned earlier:

> If the main historical purpose of ISDS has been to act as a substitute for poor judicial systems, it is not clear why it must be included in agreements between countries that have strong judicial systems anchored by respect for the rule of law. This is the case across the European Union and the United States. While critics could point to cases where justice has not been served on both sides of the Atlantic, such cases are exceptions to the rule, and even in such cases the judicial process on each side offers various measures of oversight, recourse and appeal. Property rights, and enforcement of contracts, are protected under the U.S. Constitution and in the laws of the European Union and its member states.[89]

The United States and Australia used this rationale when they decided not to include ISDS in their 2005 free trade agreement. Australia pointed out that developed economies with advanced domestic legal systems do not need ISDS-type clauses because their domestic court systems have an established record of upholding the rule of law.[90]

This was also the logic behind the European Parliament's 2013 vote to clarify that future EU investment agreements should include ISDS only "[i]n the cases where it is justifiable." And it was the argument used by former EU Trade Commissioner Karel De Gucht, who stated that the EU did not need to push for ISDS with partners with well-developed legal systems, like the United States: "[o]bviously you need [ISDS] when it is an agreement with a third country that does not have a properly-functioning judicial system, where one can have doubts about the rule of law." The United States is not such a country and nor are any of the EU member states that do not currently have Bilateral Investment Treaties (BITs) with the United States.[91]

In fact, this was the very argument made by Germany when the proposal to include ISDS within TTIP first came up. Berlin opposed the idea, arguing that strong legal systems on each side of the Atlantic made such provisions moot, even though Germany had no BIT with the United States.

The soundest alternative, therefore, is offered by the U.S.-Australia trade agreement, which affirms the sanctity of each party's domestic legal system, and states that investor-state disputes are to be settled within each country's domestic court system.

If European or American actors believed that the other party's system of rule may not be sufficiently robust, the appropriate recourse would be to insist that that party's legislature, pass implementing legislation securing a right to access their courts for certain violations – but not to include ISDS in a transatlantic deal itself.[92]

This conclusion has been further reinforced by the May 2017 decision of the European Court of Justice that investment dispute mechanisms, as well as non-direct foreign investment, were areas of "mixed competence" among the European Commission and EU member states. This means that international agreements addressing these issues must be approved not only by the European Parliament but by almost 40 other parliaments within the European Union. Trade, on the other hand, was deemed to be an exclusive competence of the EU, meaning that such agreements need only be ratified by the European Parliament and EU governments as represented at the European Council.[93]

This decision opens an opportunity to negotiate separate JAGA baskets on trade and investment provisions, rather than to make one reliant on the other.[94] The European Commission is in fact already working to carve investment-related provisions out of any pending trade deals, and to split such deals into two parts. Those dealing with trade can proceed along a fast track, while those dealing with investment are likely to be slow and be subjected to a tedious political process, with high likelihood of challenges.[95]

This does not mean that national legislatures will lose their say, since they can still be asked to give their approval to trade deals before national governments approve them at the EU level. This is precisely what the German Bundestag did before Berlin gave its consent to the CETA agreement. But it means that national parliaments would be involved earlier in the negotiations, rather than part of the end game.[96]

This has significant implications for U.S.-European economic ties. Deleting ISDS from any JAGA, and replacing it with language similar to that found in the U.S.-Australian trade deal affirming a mutual commitment to domestic law, would not only remove what has become a most contentious issue, it would allow such agreements to move ahead more quickly.

BASKET IV:

New Approaches to Regulatory Cooperation. A fourth basket would take a different approach to differences on regulations and standards than had been the case with TTIP under Obama or the Transatlantic Economic Council under Bush. Previous efforts emphasized the benefits of reducing costs to companies and boosting trade; helping regulators was a distant second rationale. Under a JAGA framework, these priorities would be reversed.

Bilateral regulatory cooperation should be about helping regulators become more efficient and effective at protecting their citizens in ways that are democratically legitimate and accountable, and not primarily about removing or reducing non-tariff barriers to trade. It must be helping regulators do their job; any positive economic gains that might result would be important, but secondary, results.[97] Such cooperation should also be limited to regulations and standards that directly apply to goods and services traded between the two parties. Laws and regulations that go to wholly domestic matters, such as those on working hours, wage levels, air pollution standards, etc., should be outside the scope of any general disciplines on regulatory cooperation, even though those measures may have an indirect effect on trade. Such cooperation should also apply solely to executive agencies, not legislative bodies.

Economic relations between the United States and Europe are distinct from other major economic relationships given that they are conducted by generally open economies and democratic societies of comparable levels of income and wealth that make similar products, and so pose less risk to each other of social dumping. They are, in fact, each other's main source of onshored jobs. The U.S. and European economies are characterized by a unique combination of low overall tariffs on goods trade, deeply intertwined services economies, dense investment flows, significant intra-firm trade, and transparent, politically accountable regulatory systems that maintain generally high, yet often different regulations when it comes to safety, health, the environment and consumer welfare (SHEC). This deep integration is generating new transatlantic networks and new economic opportunities. But because it reaches into traditionally domestic areas, it can also generate social dislocations, anxiety and friction, for instance on such issues as food safety, competition policies or privacy protection.

These forces have pressured regulators in two ways. They have raised the importance, and the public profile, of differing transatlantic regulations for companies and consumers, and they have made it harder for regulators to do their jobs effectively.

First, because transatlantic tariffs are generally quite low and European and US industries are so deeply intertwined with each other, 'behind the border' non-tariff barriers are more important impediments to a free transatlantic marketplace. Deep transatlantic integration can mean that domestic non-tariff measures can become transatlantic non-tariff barriers. As Chase and Pelkmans note, "Different technical regulations and specifications, standards and conformity assessment procedures represent important barriers requiring companies to design and manufacture two families of products for the transatlantic market with all associated costs. Furthermore, this may also delay market entry of innovative products."[98] U.S. and EU legislators and regulators have traditionally determined the level of safety they desire based on domestic costs and benefits. Yet the U.S. and EU economies are so tightly integrated that these approaches do not take into account both the transatlantic costs and benefits stemming from these domestic choices.

Most of these barriers were not established intentionally, but when legislators and regulators on either side make decisions without considering this deep transatlantic integration, even if they are separately trying to achieve the same level of safety, they may do so in ways that require products and services to be designed and produced differently to be sold in each market. This raises costs to producers, at times to the point where they cannot profitably supply a product or service to the other side of the Atlantic. This is particularly so for smaller firms, many of which only know that the regulatory requirements and standards are different, and don't have the ability to research or re-tool to meet them. But it also affects large firms – the cost of crashing over a hundred custom-made models to meet different safety, testing, and certification requirements in automobiles, for instance, run to hundreds of millions of dollars. The same can happen for medicines, especially for rare illnesses. And this, of course, raises costs to consumers, who may be wholly denied products and services that they want or need. [99]

Second, deep integration makes it harder for regulators to do their jobs. Regulators allocate limited resources to ensure that rules are being observed for products and services being sold in their market. Because of the enormous volumes of trade, investment and data that cross the North Atlantic, regulators must devote a correspondingly large amount of those limited resources to ensure that regulations are being respected and upheld among relatively wealthy countries with largely similar rules. At the same time, however, globalization has also generated significant inflows of goods, services, investment and data from many other, and potentially riskier, jurisdictions, where SHEC regulations may be lower or less well monitored. These flows also require regulator attention. As a result, regulators and inspectors are in danger of being stretched too thinly to do their jobs well,[100] and are thus motivated, and also pressured, to allocate limited resources more efficiently and effectively.

Here is where transatlantic regulatory cooperation can help. In general, the United States and the European Union have identified the same sorts of goods and services as posing risks to their citizens, and strive for the same level of safety in those areas—that is, their regulatory objectives and outcomes are generally similar. A 2011 study published by Resources for the Future (RFF), based on 20 case studies and 3,000 observations of risk-reducing regulatory decisions in the United States and EU, found that overall risk stringency is about the same, with the differences largely due to non-safety related issues. A 2016 study commissioned by the European Parliament also found that "Transatlantic regulatory patterns overall, and in four key sectors: food, automobiles, chemicals, and pharmaceuticals, indicate that EU risk regulation is not always or generally more stringent than US regulation. The reality is a complex mix of parity and particularity... regulatory variation can also be the basis for learning to improve future regulatory design, both by comparing outcomes across regulations in different jurisdictions, and by planning adaptive regulation over time."[101]

If regulators have evidence demonstrating that their transatlantic counterparts are able to enforce levels of protection similar to their own, they can develop a partnership with that counterpart regulator, allowing them to focus their limited enforcement resources on higher-risk problems emanating from other areas of the world. Indeed, it was precisely this broader gain from international regulatory cooperation that motivated President Obama to issue Executive Order 13609, encouraging U.S. regulators to be more active in this area, especially with places like the EU, which share U.S. regulatory values. Regulatory dialogue and harmonization may lead to less need for duplication of testing, less adjustment needs for different markets, fewer contradictory technical requirements and overall save producers large unnecessary costs – without lowering levels of protection.

The idea of regulatory cooperation is not new; Washington and Brussels have developed a variety of forums, dialogues and agreements in this area over more than two decades. Each has accumulated significant knowledge about the other's regulatory systems and both have succeeded in aligning standards in areas such as organic food and aircraft safety certification; recognizing as compatible different procedures to wash pigs and beef; or seeking common standards in such areas as the infrastructure of electric vehicles.[102] TTIP became the vehicle to deepen these efforts.

Unfortunately, as cooperation advanced, each side's public narrative began to reverse the order of the two motivations. Trade was seen to come first, and ensuring good regulation second. The growing public perception was that such an approach compromised the mandates of the regulators, and generated impressions that domestic regulations could be sacrificed or compromised by overzealous trade officials eager to strike a deal.[103] The ability for enhanced transatlantic regulatory cooperation to increase the efficiency and therefore the effectiveness of U.S. and EU regulators was one of the most misunderstood issues during TTIP debates, even by some of the regulators themselves. Public officials simply allowed their narrative to get away from them.

If transatlantic regulatory cooperation is to advance, the two motivations must be presented in the right order. Before the emphasis was on reducing costs to companies and boosting trade, and helping regulators a distant second rationale. Now regulatory cooperation across the North Atlantic should be about helping regulators become more efficient and effective in achieving their goals, and not primarily about removing or reducing non-tariff barriers to trade. It must be helping regulators do their job, with any positive economic gains that might occur would be secondary, if still important, results.[104]

Creating a more effective narrative, and establishing clear priorities, means framing transatlantic regulatory cooperation in a more defined, and limited sense. Transatlantic regulatory cooperation is increasingly necessary because diverging U.S.-EU regulations and approaches can make it harder, absent such cooperation, to reduce risks across the Atlantic. If regulators can establish mechanisms on sharing product safety data, for instance, they will be better informed and can be better at their jobs. If regulators could identify certain rules, regulations and inspection procedures that are essentially equivalent, they could allocate scarce resources to deal with regulatory challenges emanating from area of the

BOX 1. THE ISSUE OF NOTICE AND COMMENT

One issue that had been under debate in the TTIP negotiations was how U.S. and EU actors would be able to comment on proposed or existing regulations in the other's jurisdiction. The United States argues that by law under the Administrative Procedures Act, the U.S. regulatory process is generally open for participation by any stakeholder, including those in Europe. Proposed rules are published well in advance; all comments must be received and published, and must be responded to by the regulatory agency in adopting its final rule. The system is not perfect, but it is generally open, transparent, and accountable.

This type of system does not exist to the same extent within the European Union. The United States argues, on the grounds of transparency, participation, and accountability, that U.S. and other foreign stakeholders should have a reciprocal right to see drafts and offer comment on EU regulatory documents, just as EU officials and stakeholders can do with U.S. regulatory documents. In particular, the United States argues that the Commission should publish draft legislation and regulation on the internet for comment from all stakeholders, and that it should then summarize and respond to the substantive comments and evidence provided through that process when it finalizes the proposal.

The European Commission is reluctant, however, because it believes that publication of a draft legislative proposals for comment prior to adoption of a proposal would undermine one of its central powers under the EU treaties – its right to initiate legislation. But it also finds itself under pressure by many European stakeholders in the business sector and from civil society to provide opportunities for comment on draft legislation. Reforms could come from within Europe, independently of a U.S.-EU agreement, and in fact the Commission now makes proposed legislation public and posted for comment before final agreement. It is not as open to full stakeholder comment as it could be, but there has been some progress.[1]

The EU has also sought opportunity to comment on bills being offered in the U.S. Congress. Yet the U.S. executive has no control over the legislative process, and the Congress will never surrender its right to legislate for the sake of a trade deal or a regulatory cooperation agreement. This is why any agreement on regulatory cooperation should apply solely to executive agencies rather than legislative bodies.

1. Stakeholders have provided comments in response to a formal request by the Commission on facilitating input in the legislative and regulatory process. Chase and Pelkmans, op. cit., provide a number of ways input on legislative proposals could be handled without endangering the right of initiative.

BOX 2. A NORTH ATLANTIC STANDARDS APPROVAL COUNCIL (NASAC)

Another way forward is to focus on the interplay between regulations and standards. Each can, and do, generate barriers to transatlantic commerce. But whereas regulations are imposed by public authorities with a legal mandate to ensure safety and security, health, environmental and consumer protection (SHEC)[1], standards are non-binding documents developed by privately governed standards developing organizations (SDOs). The "presumption of conformity" through standards applied in the EU (called the New Approach), and the "incorporation by reference" method practiced in the United States, are examples of interlinkages that exist between private standardization and public rule-making activities in both the EU and the United States.[2]

In instances where European and U.S. regulators identify or develop essentially equivalent regulations, and agree on performance-based regulatory requirements, panels of technical experts could be established to evaluate whether particular standards — regardless as to where they were developed or who developed them - meet the meet the technical requirements defined in the aligned regulation.

These panels, which could comprise a North Atlantic Standards Approval Council (NASAC), would not come together to develop standards. Rather, they would determine which standards meet the technical requirements defined in the aligned regulation. It could be that there is one standard, two standards, or numerous standards that achieve this status under the same regulation. If one or more standards comply, they could efficiently be adopted in both the EU and United States, since NASAC panels would assure regulatory agencies that such standards achieve a sufficiently adequate outcome in relation to the mandatory requirements set by the regulators.

NASAC would offer a voluntary platform where the EU and United States could align, but need not change, their approaches with regard to standards in support of regulations. For example, through NASAC an SDO could pursue a one-time approval of standards in support of mandatory requirements set out in both EU and U.S. legislation.

This approach would not impinge on any country's "right to regulate" because it is premised on an initial decision by regulators. Performance-based evaluation via NASAC panels would resolve what has become an intractable transatlantic impasse over which SDOs are suitable for standards alignment. NASAC would not create another standards development process or push all standards into any particular SDO to be recognized as international. NASAC panels would simply determine whether submitted standards comply with performance-based requirements set by regulators. It would ensure flexibility, allow innovation, and ultimately lower transatlantic barriers without lowering standards.

NASAC could also offer a means to generate North Atlantic alignment beyond the EU and the United States. Arrangements such as the European Economic Area (EEA), the integration agreements between the EU and Switzerland and the customs union between the EU and Turkey all comprise undertakings that support extensive technical alignment with the EU. Most of these countries also have their national SDOs represented as members at the European standardization organizations, or ESOs. This means more aligned regulatory cooperation through a NASAC process will indirectly affect all non-EU countries that have engaged in technical harmonization with the EU. Although these countries do not take part in the cooperation between EU and U.S. regulatory agencies, technical experts from such countries could conceivably be included in NASAC panels. A similar approach could be considered for the United Kingdom following Brexit.

Similarly, NAFTA parties are currently obliged to make their respective standards-related measures compatible. In this vein, the United States, together with Canada and Mexico, established bilateral Regulatory Cooperation Councils (RCC). Though NAFTA is not as deep and comprehensive as the technical harmonization existing in Europe, NASAC could further standards convergence among NAFTA states and European partners. Under CETA, the EU and Canada have agreed to set up a Regulatory Cooperation Forum where regulators can engage in regulatory cooperation and, in the field of standardization, to strengthen links between their SDOs. Regulatory convergence between Canada and EU through CETA could provide a basis for an integrated approach via NASAC. Where regulatory alignment exists, an accord could provide a basis for mutual market access terms for products complying with NASAC approved standards.

Moreover, such an approach would likely have repercussions far beyond the North Atlantic space. If North Atlantic partners aligned behind specific performance-based technical standards in particular areas, such standards would likely serve as key benchmarks for broader international standardization, reducing the likelihood that others will impose more stringent, protectionist requirements for either products or services, or that lower standards could erode key protections for workers, consumers or the environment.[3]

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1. Jacques Pelkmans, "The Economics of Single Market Regulation," Bruges European Economic Policy Briefings 25 / 2012, College of Europe, file:///C:/Users/Owner/Downloads/beep25.pdf.
2. Chase and Pelkmans, op. cit.
3. Chase and Pelkmans, op. cit.; ASTM International, "Strengthening Transatlantic Trade Through a Common Understanding on Standards," White Paper.; Kullander, op. cit.

world where SHEC regulations and procedures may be more questionable.[105]

This means that transatlantic regulatory cooperation should be bounded in three ways.[106] First, it must preserve regulator autonomy and be conducted in ways that are democratically legitimate and accountable. While such cooperation can help ensure that regulators are better informed about the consequences of their decisions for the transatlantic partner, it must also recognize that changes to regulation must go through each party's respective domestic decision-making procedures; that regulators are, and will remain, under political oversight; and that they must retain their autonomy to make decisions appropriate to their jurisdictions, even if those decisions create divergences. This understanding addresses public concerns about transatlantic regulatory cooperation. In the end, regulators must make decisions that reflect the political will of their electorate.

Second, transatlantic regulatory cooperation should focus on laws and regulations that directly apply to goods and services that are or could be traded between the two parties. Laws and regulations that go to wholly domestic matters, such as those on working hours, wage levels, air pollution standards, etc., should be outside the scope of any general disciplines on regulatory cooperation, even though those measures may have an indirect effect on trade. Such cooperation should also not be subjected to pressures emanating from the need to liberalize trade.

Third, the obligations on regulatory cooperation should not apply to national legislatures or to the European Parliament. They should apply solely to the European Commission and related autonomous agencies and advisory bodies, and to the U.S. Executive branch and independent agencies.

With these three considerations in mind, the regulatory basket of a JAGA should have four essential components:

» agreement on principles and best practices in domestic regulation (sometimes referred to as 'regulatory coherence');

» general (or 'horizontal') provisions governing regulatory cooperation;

» sectoral annexes reflecting agreements that have been, and will be, agreed between counterpart US and EU regulators, both during and after the TTIP treaty negotiations; and

» provisions on how such regulatory cooperation should relate to third parties.

This structure, and in particular the use of sectoral annexes, is essential to the acceptance and functioning of transatlantic regulatory cooperation for three reasons. First, it recognizes that trust and confidence between counterpart sectoral regulators must be the foundation of regulatory cooperation. Second, it guarantees, for citizens and legislators alike, that the regulators themselves (rather than trade negotiators) are in responsible for determining the nature and degree of cooperation for which they are politically accountable. Third, it allows regulatory cooperation to take the form of a "living" agreement that can, over time, include additional regulator-to-regulator agreements, as those regulators gain additional experience, trust, and confidence in their transatlantic counterparts, or that can, conversely, reduce agreements should such trust and confidence fade.

Regulatory Coherence. Efforts at regulatory coherence should help improve both sides' understanding of, and trust and confidence in, the domestic rule-making procedures of the other side. Given regulators' political accountability at home, whether to Congress, the European Parliament or the EU member states, their ability to cooperate with a foreign counterpart is directly proportional to the level of trust and confidence that they have in that counterpart. And that comes only with time and experience. Regulatory cooperation is only likely to work if regulators on both sides havefull trust and confidence in one another, they are convinced that levels of protection are similar, and they have evidence that enforcement of those regulatory requirements is effective.

This is important in the current context. On the one hand, two decades of cooperative experience have positioned U.S. and European regulators well to take more ambitious approaches to regulatory cooperation. On the other hand, under current political circumstances it is questionable whether the foundation of trust and confidence is there for both sides to take more ambitious steps.

Given currently low levels of trust and high levels of uncertainty about the aims and goals of each partner harbored by the other, it will be critical for the two parties to reaffirm the principles and practices that are the foundation upon which the trust and confidence of regulators are to be built – a common understanding of what constitutes a strong, democratically accountable regulatory system. This should not be difficult to draft: the United States and the EU have twice issued such joint statements (in 2002 and 2011). Each focused in particular on the need for transparency, stakeholder participation, and accountability in rule-making, as well as the need for quality impact assessments, evidence-based decision-making and related high-standard procedures.[107]

Regulatory Cooperation. Regulatory cooperation should establish obligations that apply generally to all regulatory agencies of each signatory party to ensure that their decisions are informed about the impact of proposals on the transatlantic partner, keeping in mind the three limiting factors outlined earlier: the need to explicitly affirm regulator autonomy; a focus on regulations that directly affect products and services that are or could be traded between the two parties; and to limit the application of these regulatory cooperation commitments to the executive branch departments and independent agencies, rather than to legislatures.

Within this scope, the horizontal regulatory cooperation provisions of a JAGA could establish the explicit goal of making regulatory regimes of the two parties increasingly compatible, as warranted, and giving regulators the tools necessary to achieve this goal.[108]

The goal should be simple, and unbounded by time. It provides a direction to the ongoing regulatory cooperation process, but recognizes that building trust and confidence between counterpart regulators takes time, and indeed can be quickly lost, and that more effective collaboration it will not reach an endpoint, since laws and regulations, unlike static trade tariffs, are and should be dynamic.

The regulatory cooperation provisions within a JAGA should explicitly provide regulators on either side the legal authority to enter into agreements with their transatlantic counterpart, consistent with their existing legislative authority and on the understanding that such agreements will be subject to political oversight on either side. It should also affirm that any regulator-to-regulator agreement can be suspended immediately, should something happen that leads a regulator on either side to lose confidence in the other, and that the agreements can be unilaterally terminated within a specified period of time, should the trust and confidence not be restored following consultation.

Based on this authority and understanding, provisions for regulatory cooperation should help regulators better understand the costs and benefits of existing and newly proposed domestic regulation as it affects the other party, and the trade in goods, services and data between them. In each case the goal would be to inform regulator decisions, not to determine them.

In this regard, two instruments are worth consideration, one for proposed regulations and one for existing regulations.

For new regulations that will affect a product or service in which there is a significant amount of transatlantic commerce, a JAGA could provide for a regulatory compatibility assessment (RCA) as part of the impact assessment process that regulators would normally undertake anyway. The details and methodology of this would need to be spelled out in more detail. In brief, however, the RCA would: a) require the regulator to contact its transatlantic counterpart, b) identify whether the product or service is regulated on the other side of the ocean, c) determine whether the counterpart had a similar or different definition of the problem the regulation is meant to address, d) assess whether the proposed approach is compatible with that of the counterpart and e) evaluate the costs and benefits of adopting a non-compatible approach. This impact assessment would be made available for public comment, enabling all stakeholders to see and provide relevant evidence related to the RCA. Regulators would be informed by this process, but would not be bound to act on it in any way.

For existing regulations, a JAGA could provide for a regulatory equivalence assessment (REA) process. Under this process, interested parties could submit a petition, with supporting evidence, to the relevant regulator confirming that levels of safety, or required tests or manufacturing processes, for a specified product or service (or groups of products or services) achieve the same regulatory outcomes on both sides of the Atlantic. The regulator receiving the petition would share it with his or her counterpart, and both would publish the petition and the evidence provided for public notice and comment. The two would then review the responses, and hold hearings on them. They would then write a joint or separate report in response to the petition, including what, if any, follow-on steps they would propose. Again, there would be no requirement that any specific result comes from this.

The RCA and REA procedures could apply to all regulated sectors. including, for instance, financial services. As noted above, they would not jeopardize a regulator's autonomy, but they could ensure regulatory decisions that are better informed about the "transatlantic costs" of proposed or existing regulations. If agreements for enhanced regulatory cooperation emerge from the process, those agreements (after going through the appropriate domestic approval process) could then be reflected in a sectoral annex.

Arguably, regulators on both sides are already supposed to consider the trade implications of their proposed regulations, and additional transparency, participation and accountability would help provide information about these impacts. Further, regulators on both sides probably already could receive and consider petitions asserting equivalence. But enshrining these procedures as obligations under a JAGA would ensure that they are followed, and that there is increased consultation between the regulatory agencies. It would also give grounds for one party to complain if it had reason to believe that a regulatory agency on the other side did not undertake the required consultation steps.

Sectoral Agreements or JAGA Annexes. Once regulators agree to enhance their cooperation, they would be able to conclude regulator-to-regulator agreements in specific product and services areas that could either be self-standing or appended as annexes to the bilateral JAGA. This process would underscore again that regulators, not trade negotiators, have the lead with regard to regulatory cooperation, and that a JAGA would not sacrifice domestic regulations for the sake of building down commercial barriers. If such cooperation leads to some degree of liberalization, that could be a secondary benefit. But it would not be the primary goal.

These annexes, which given the dynamic nature of regulation would include provisions for periodic mutual review, would ensure that the JAGA process is a "living" agreement: it can change, expand or even contract over time. It signifies a recognition that regulator-to-regulator agreements can only come where regulators have trust and confidence in one another, that trust and confidence take time to build, and that they can also evaporate.

There are other benefits to this arrangement. Because a JAGA would not be a "single undertaking" in traditional trade parlance, it would not hold trade and regulatory issues hostage to one another. Under the previous TTIP framework, for instance, the United States and the EU had made progress on nine sectoral chapters or annexes, with more pending. They did not move forward with these agreements, however, because the overall TTIP deal was not done. Under a JAGA framework, regulator-to-regulator agreements could proceed without waiting for the many details of a trade agreement to be nailed down. Similarly, trade liberalization would not need to be delayed until regulatory processes unfolded.

Of course, regulatory agencies do not necessarily need a framework agreement like a JAGA to reach agreements with other regulators; U.S. and EU regulators, for instance, have signed 20 such agreements. But a JAGA, with horizontal obligations for such things as the RCA and the REA, would provide direction to that cooperation and give it a higher political profile without undermining regulatory processes.[109]

BASKET V:

Relation to Third Parties. In each of the other four baskets the question could arise as to how enhanced cooperation between the signatory parties would affect their relations with third parties. In a fifth basket the signatories could clarify their stance. Here they are likely to face three sets of issues.

First, while many of the regulatory provisions and principles to which the United States and the EU, or the United States and the UK, may agree in a JAGA may not significantly change the way they do business, they could leverage their commitment to those principles and obligations by affirming that they would welcome other countries undertaking similar disciplines, either by associating themselves with the document or replicating those obligations and principles in another agreement that such countries sign.

It will be difficult simply to open some regulatory arrangements that might emerge from a U.S.-EU JAGA, or to open the "living agreement" aspect of a JAGA process, because such elements are likely to be based on trust and confidence generated among U.S. and EU regulators. But countries may be able to join or attach themselves to some provisions.[110] For instance, when the United States and EU finalized their Open Skies agreement on transatlantic air transport in 2007, legal texts were created enabling a range of additional countries, not only in Europe but in other parts of the world, to also implement provisions of the agreement through separate accords.

This could help to reinforce cooperative links, based on common principles, across the North Atlantic Marketplace if JAGA signatories may provide for possible association by countries such as the UK, Canada, Mexico, Norway, Switzerland, Iceland or Turkey, as counterpart regulators get to better know and trust one another.

Second, signatory parties could use a JAGA to affirm that they would engage third parties on the basis of certain standards and principles. A mutual commitment to act according to such principles could help blunt the impact of third country efforts to advance standards that could erode safety, health, environmental, consumer, labor and intellectual property protections. Finding some common ground on issues such as intellectual property right/copyright, state-owned enterprises, and treatment of small to medium enterprises, for example, would be useful.

Third, signatory parties could extend their influence further by agreeing to use agreed principles as the basis for work together or in parallel in international forums or organizations. Here again there is precedent: the long-standing United Nations Economic Commission for Europe forum for car standards, and the more recent International Conference on Harmonization forum for medical devices and pharmaceuticals, each evolved out of initial bilateral U.S.-EU cooperation.