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The Transatlantic Trade and Investment Partnership that U.S. and European Union negotiators are currently discussing would, among other things, promote greater collaboration between regulators on both sides of the Atlantic. Author Reeve T. Bull, attorney adviser with the Administrative Conference of the United States, says that concerns that the pact would undercut regulatory protections in the U.S. and the EU are overblown.

Far from creating a regulatory ''race to the bottom,'' he argues that TTIP may offer the best hope for the U.S. and the EU to promote a coherent regulatory agenda that will serve as a model for developed and developing nations alike.

# Far From Eroding Regulatory Protections, TTIP's Cooperative Regime Could Bolster Sound Regulation

By Reeve T. Bull

Government officials from the U.S. and European Union are currently negotiating a free trade agreement, the Transatlantic Trade and Investment Partnership, that, among other things, would promote greater collaboration between regulators on both sides of the Atlantic. Critics have argued that this agreement will erode regulatory protections in the U.S. and EU by providing additional avenues for corporations and other regulated entities to influence regulatory policymaking. This article responds to these concerns and contends that international regulatory cooperation not only promises increased gross domestic product but also provides a unique opportunity for preserving and even strengthening sensible regulatory protections. Far from creating a regulatory ''race to the bottom,'' the Transatlantic Trade and Investment Partnership may offer the best hope for the U.S. and EU to promote a coherent regulatory agenda that will serve as a model for developed and developing nations alike.

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**An Upsurge of Provincialism.** On May 25, 2014, in several member states of the EU, prominent Euroskeptics and other far right-wing parties exceeded already heightened expectations by capturing a significant share of the vote for members of the European Parliament. Nigel Farage's U.K. Independence Party won an astounding 27 percent of the vote in Britain (the first time in over one hundred years that a party other than the Tories or Labour led a nationwide vote), while Marine Le Pen's National Front racked up 25 percent of the vote in France. The extent to which such anomalous returns reflect a fundamental shift in the sentiments of

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the European electorate remains an open question, but the results undoubtedly demonstrate a high level of public dudgeon concerning the model of European integration at the core of the EU.

In some sense, the nativist backlash illustrated by the EU election returns is not terribly surprising: nations have a tendency to focus inward in trying economic times and to retract from international commitments that many see as favoring foreigners at the expense of longtime citizens. Nevertheless, this upsurge of provincialism comes at an especially inopportune time, for the European Union is currently in negotiations with the U.S. to conclude a free-trade agreement, dubbed the Transatlantic Trade and Investment Partnership (''TTIP''), which would create the largest free-trade bloc in the world (accounting for roughly half of global GDP). The potential benefits of TTIP are substantial. Economists have estimated that a modestly successful agreement would add up to 0.5 percent to GDP in both the U.S. and Europe. An EU-U.S. free trade agreement would also encourage other nations either to join the TTIP framework or pursue a separate trade deal, promoting free trade more broadly. Finally, given that it largely focuses on achieving enhanced regulatory convergence (in addition to the traditional goal of reducing tariffs and other trade barriers), the TTIP has the potential to promote closer integration of the largely balkanized regulatory regimes prevailing today.

**The various Euroskeptic and far-right parties in the EU may make common cause with left-wing parties and civil society organizations that have criticized TTIP on the grounds that it would erode the ability of sovereign nations to regulate in the interest of their citizens.**

As of yet, the various Euroskeptic and far-right parties generally have not articulated a position on TTIP. On the one hand, they presumably would appreciate the enhanced economic competitiveness such an agreement would provide; on the other hand, the focus on international integration is squarely inconsistent with the largely nationalist message at the core of their governing philosophies. If such parties ultimately oppose TTIP, though, they may make common cause with left-wing parties and civil society organizations that have criticized the agreement on the grounds that it would erode the ability of sovereign nations to regulate in the interest of their citizens. Progressives' uneasiness with free trade agreements has already led Democrats in the U.S. Congress to delay consideration of trade promotion authority, and any alliance between the Euroskeptical right and the pro-regulatory left in Europe would run the risk of derailing the agreement entirely.

**Three Criticisms.** In this light, it is worthwhile to examine some of the more salient critiques of free trade agreements generally and of the TTIP in particular. In order to enable candid discussions among the negotiators, the precise details of the contemplated agreement are largely kept private. Nevertheless, the general goals of the negotiations, as well as the overarching objections of the primary opponents, have been aired publicly.

This short article seeks to respond to three of the most prominent criticisms of the TTIP:

1) that it will create a regulatory ''race to the bottom'' featuring progressively weakened regulations in the EU and U.S.;

2) that it will open new avenues for multinational corporations to challenge EU and U.S. regulations; and

3) that it will stifle regulators' efforts to enact precautionary regulations in the absence of conclusive proof that a particular activity poses a hazard. Joseph Stiglitz cleanly encapsulated these concerns in a recent New York Times article criticizing free trade agreements as a boon to the global elite won at the expense of the broader public:

Trade agreements' new boosters euphemistically claim that they are simply after regulatory harmonization, a clean-sounding phrase that implies an innocent plan to promote efficiency. One could, of course, get regulatory harmonization by strengthening regulations to the highest standards everywhere. But when corporations call for harmonization, what they really mean is a race to the bottom.[1]

Given the fact that the TTIP is one of the first major agreements to address regulatory disparities in addition to traditional trade barriers, these are not trivial concerns, and they merit careful scrutiny. Nevertheless, for the reasons explored below, these objections are somewhat overwrought in certain areas and can be adequately addressed by a carefully crafted agreement in others. EU and U.S. government officials ought not to allow these speculative risks to sink an agreement that offers enormous benefits for EU and U.S. regulators, businesses, and the general public.

## *Understanding the TTIP*

In recent years, the U.S. has entered into a number of free trade agreements. Many of these have been bilateral treaties between the U.S. and key trading partners, such as South Korea, Colombia, and Australia. Others, most notably the North American Free Trade Agreement (''NAFTA''), include a bloc of countries forming a free trade zone. Traditionally, these agreements have focused on eliminating tariffs between the U.S. and its trading partners, thereby facilitating free trade across international boundaries. Given the widespread success of such trade agreements and broader international commitments such as those associated with the World Trade Organization, tariffs are already very low by historical standards. In that light, though nations should strive to achieve further reductions in tariff rates, the additional payoffs from doing so are increasingly small. Consequently, trade advocates have recently turned

[1] Joseph E. Stiglitz, *On the Wrong Side of Globalization*, N.Y. Times, Mar. 15, 2014; *see also* Letter from Various Civil Society Organizations to Ambassador Michael Froman, U.S. Trade Representative, and Commissioner Karel de Gucht, EU Commissioner for Trade (July 10, 2014), *available at* http://www.citizen.org/documents/7-10-14-letter-TAFTA-and-chemicals.pdf (opposing inclusion of provisions on chemicals in TTIP insofar as doing so would allegedly precipitate a regulatory ''race to the bottom'').

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their attention to so-called non-tariff barriers to trade. One major such barrier is the persistence of disparities in trading partners' regulatory systems.

Of course, some level of regulatory divergence between differing nations is both inevitable and desirable: one would not expect countries with different cultures, histories, and political dynamics to respond to regulatory problems in precisely the same way. For instance, European nations have, as a general matter, chosen a more aggressive approach to combating climate change than has the U.S., and this reflects a legitimate determination by both sides concerning the amount of resources they are willing to dedicate based on the current evidence concerning environmental risk. At the same time, in a number of areas, EU and U.S. regulators have very similar goals but go about achieving those ends in very different ways. For instance, the rates of fatalities and injuries in automobile accidents are roughly the same in both the U.S. and Europe, yet regulators on both sides require rather diverse batteries of tests for new vehicles. Regulators simply have not coordinated policies with their overseas counterparts, as an historical matter, and this has resulted in a number of unnecessary regulatory differences.

TTIP aims to remove these unnecessary divergences without undermining the ability of sovereign states to select the regulatory policies that they deem appropriate (even if the policies implemented diverge from those of trading partners). This can take a variety of forms. In some (likely rare) instances, one regulatory approach may clearly prove to be optimal, and the EU and U.S. might harmonize their regulations to adopt that approach. Much more frequently, harmonization efforts might prove impracticable in light of the sunk costs associated with an existing regulatory regime, but both sides might implement mutual recognition agreements providing that compliance with U.S. regulations is equivalent to compliance with those of the EU (and vice versa), thereby eliminating unnecessary duplication. In still other instances, regulators on both sides might recognize tests, inspections, and clinical trials performed by their counterparts, and regulators should share information with one another in order to avoid wasteful replication of effort (and minimize the required amount of animal testing).

## *Preventing a Regulatory 'Race to the Bottom'*

At the turn of the previous century, various States of the Union attempted to enact child labor laws and other protections designed to shield the labor force and consumer public from the depredations of largely unregulated industry. In addition to facing a hostile Supreme Court (which took a very narrow reading of Congress's ability to regulate commerce), such efforts often faltered in light of the classical public goods problem: any individual state had scant incentive to act unilaterally, for doing so would place it at a competitive disadvantage and drive industry away to states offering a laxer regulatory climate. The Court eventually loosened its limitations on Congress's authority to regulate the economy, and Congress proceeded to enact a raft of public welfare legislation over the ensuing decades, resolving the collective action dilemma and building the modern federal regulatory state.

Nevertheless, in the international context, the same stark economic calculus that once thwarted state-level regulatory efforts prevails: the ''first mover'' in any given regulatory arena risks driving its domestic corporations overseas. In so doing, it not only inflicts damage upon its own economy but also potentially fails to curtail the activity it sought to regulate, since affected corporations (especially large businesses) may find it preferable to move their operations elsewhere. Traditionally, such ''forum shopping'' for the optimal regulatory climate has been relatively rare in the international context (the cost of moving to a new country generally greatly exceeds that of moving to a new city or province within any given nation), but it has likely become increasingly viable as the cost of conducting international business has precipitously declined in recent decades. To critics of the TTIP, efforts to promote greater convergence between U.S. and EU regulations accelerate this regulatory ''race to the bottom'': businesses on both sides of the Atlantic will lobby in favor of harmonizing regulations to the lowest levels currently prevailing in either the U.S. or EU. For instance, European banks might advocate for watering down the financial regulatory reforms enacted by Dodd-Frank, and U.S. manufacturers might lobby for weakening strict environmental protection standards in the EU.

**In the regulation-friendly EU-U.S. context, neither side faces a strong temptation to ''harmonize downward'' to the other's level of protection.**

Any effort to achieve greater regulatory convergence must remain sensitive to the risk of progressive erosion of regulatory protections, but this concern undoubtedly carries somewhat less weight in the EU-U.S. context, given that American and European regulations are among the strongest in the world, such that neither side faces a strong temptation to ''harmonize downward'' to the other's level of protection. Further, both the U.S. and EU governments have been quite explicit in disclaiming any interest in relaxing prevailing regulations, even where EU regulations are stronger than their U.S. counterparts and vice versa.

Indeed, from the outset, the proponents of TTIP have downplayed efforts to ''harmonize'' regulations and have instead primarily sought to negotiate mutual recognition agreements, which would allow each side to maintain existing regulations and simply acknowledge where different systems produce equivalent results (e.g., U.S. and EU automobile testing yield very similar levels of safety in traffic accidents). Executive Order 13,609, the highest-level commitment to international regulatory cooperation to date, avers that such cooperation can ''identify approaches that are *at least as protective* as those that are or would be adopted in the absence of such cooperation'' (emphasis added).

ACUS Recommendation 2011-6, which inspired the executive order, urges agencies to pursue international regulatory cooperation efforts ''when appropriate to further the agencies' missions or to promote trade and competitiveness *when doing so does not detract from their missions*'' (emphasis added). In short, the Admin-

istration has telegraphed its intention to preserve the existing levels of regulatory protection, and one can reasonably assume that the TTIP negotiators will remain faithful to that principle.

Of course, such vague, largely hortatory commitments to the regulatory status quo may fall by the wayside in the heat of a closely contested negotiation, especially insofar as U.S. and EU businesses strongly pressure negotiators to adopt positions favorable to their economic interests. Furthermore, the TTIP envisions an ongoing process by which regulators on both sides of the Atlantic will continue to seek opportunities for regulatory convergence.

Nevertheless, the pro-regulatory position does not lack champions. First, the relevant U.S. agencies and EU directorates-general are intimately involved in the negotiations, and they will presumably advocate on behalf of their regulations. Second, in many instances wherein EU regulations are stronger than their U.S. counterparts (or vice versa), the prevailing state of affairs is backed strongly by civil society groups and the general public. For instance, European organizations have been quite vocal in demanding that TTIP negotiators avoid any concessions that would weaken stringent environmental and labor protection standards. Third, business interests do not speak with one voice: large corporations often favor stronger regulations insofar as they can easily pass along costs to consumers, creating a competitive advantage vis-à-vis smaller companies. Fourth, though negotiators on both sides have distanced themselves from any effort to *weaken* regulations, neither side has disavowed regulatory cooperation efforts that may actually *strengthen* regulations in one trading partner or the other.

**TTIP could put both the EU and U.S. in a more favorable position to urge China and other major trading partners to enact sound regulations.**

Furthermore, by creating a free trade bloc among nations with comparatively stringent regulatory protections, both the EU and U.S. would be in a more favorable position to urge China and other major trading partners to enact similar regulations. In short, it is simplistic to assume that international regulatory cooperation is necessarily a one-way ratchet that will produce weakened regulations in every case.

Ultimately, both past practice and the underlying dynamics of the situation suggest that concerns about a ''race to the bottom'' are overblown. It is, of course, entirely appropriate for civil society organizations to advocate in favor of the regulatory status quo, but opposing the entire enterprise on the assumption that it will necessarily precipitate a downward spiral that ravages hard-fought progressive victories of the past century both sacrifices the significant economic benefits an agreement would produce and eliminates opportunities for cooperative exchanges that might actually strengthen the level of regulations prevailing worldwide.

## *The Impact of Empowering Regulatory Opponents*

Though international regulatory cooperation need not precipitate a ''race to the bottom'' in theory, it may nevertheless have that effect in practice. A major goal of the TTIP negotiations is promoting enhanced stakeholder input and regulatory accountability in both the U.S. and EU, and reducing the barriers to citizen participation in agency decisionmaking may ultimately favor corporate interests at the expense of consumers, disadvantaged groups, and the public at large. Indeed, the U.S. regulatory process is already quite open to citizen participation, with no limits on who may participate in notice-and-comment rulemaking and relatively liberal standing limitations on challenging agency actions in court, and industry has proven far more effective at exploiting these levers of influence.

U.S. companies have sought a more prominent role in European policymaking, hoping to penetrate the rather insular process by which the EU Commission consults with certain stakeholder groups while preparing a draft regulation or directive, and European companies hope to erect a more formal mechanism for influencing U.S. agencies prior to the notice-and-comment process. In addition, many preexisting free trade agreements include so-called investor-state dispute settlement (''ISDS'') provisions, which allow companies to challenge the actions of sovereign nations deemed to derogate from the terms of the agreement in an international arbitral forum. In this light, some have contended that TTIP threatens to concentrate power in the hands of multinational corporations while further eroding the ability of already beleaguered regulatory authorities to act in the public interest.

Nevertheless, such a lugubrious perspective ignores the substantial benefits that derive from enhanced opportunities for public input. Even if one adopts the most pessimistic outlook and assumes that TTIP will create new avenues for large corporations to influence agency decisionmaking while foreclosing participation by small and medium enterprises, civil society groups, and the general public, it is not entirely clear that such a development exacerbates the existing state of affairs. As previously suggested, industry groups already dominate the notice-and-comment process in the U.S. and the stakeholder consultation process in the EU. Increasing opportunities for foreign firms to influence domestic agencies will expand the universe of special interests seeking to ''capture'' government decisionmakers, but it will not necessarily render the agency any more susceptible to corporate persuasion.

**Expanding the number of factions vying for influence may actually diminish their cumulative power insofar as one faction offsets another and it becomes increasingly challenging for diverse groups to collude.**

Indeed, as James Madison recognized in Federalist No. 10, and as Daron Acemoglu and others have re-

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cently articulated in the context of international economic development, expanding the number of factions vying for influence may actually diminish their cumulative power insofar as one faction offsets another and it becomes increasingly challenging for diverse groups to collude. To illustrate, imagine that the National Highway Traffic Safety Administration (''NHTSA'') proposes a new rule imposing higher fuel efficiency standards upon automobile manufacturers to curtail carbon emissions. The ''Big Three'' U.S. automobile manufacturers would likely oppose such a rule, since they have traditionally built relatively large cars with poor fuel economy, and they may lobby the NHTSA to abandon such a rule and, if it ultimately finalizes the proposal, challenge the rule in court. Now imagine that, post-TTIP, European automobile manufacturers enjoy an expanded opportunity to influence U.S. agencies. Since European manufacturers have traditionally built smaller vehicles with superior fuel economy, they may strongly support the rule and furnish information to the NHTSA bolstering its argument for the stronger standards. In short, as more companies enter the participatory process, ''industry'' becomes less monolithic and more balkanized, including numerous groups with highly disparate interests.

**Empowering SMEs, NGOs, Individuals.** Though even the worst-case scenario may represent an improvement over the status quo (by expanding and diversifying the participating corporations), the TTIP negotiators need not and should not resign themselves to this state of affairs. In this light, the TTIP discussions should consider mechanisms for integrating small and medium enterprises, civil society groups, and everyday citizens into the decisionmaking process. In the U.S., this might entail agencies' specifically reaching out to underrepresented groups for input prior to preparing a notice of proposed rulemaking.

In a lamentably underexploited process referred to as negotiated rulemaking, agencies do precisely this, convening a small committee that includes a balanced representation of all relevant interest groups and tasking this committee with negotiating the text of a proposed rule. Though negotiated rulemaking itself may not prove feasible in most cases, agencies could apply similar principles to run-of-the-mill rulemakings, striving to ensure that each affected interest group has an opportunity to furnish input.

The EU Commission nominally utilizes a similar process for gathering input on proposed regulations and directives, but it tends to be dominated by large European corporations and major civil society groups (such as unions), shutting out less favored groups and foreign interests. By promoting reforms designed to expand and diversify stakeholder input, TTIP would not only achieve greater international collaboration but also combat the industry capture that has come to characterize regulation in the U.S. and EU.

**Managing the ISDS Process.** If expanded public participation in agency decisionmaking represents an opportunity for quelling industry capture, ISDS clauses seem to advance it by their very nature. Under these provisions, a company aggrieved by a host government's actions can bring a challenge before an international arbitration panel, which will determine if the government violated the terms of the trade agreement. If the challenger prevails, the host government must provide appropriate compensation, providing an incentive for it to adhere scrupulously to the agreement in the initial instance and to amend the offending regulation(s) if it loses such a challenge.

Notwithstanding the unseemliness of multinational corporations' suing sovereign nations, it is worth noting that ISDS provisions merely represent one possible approach to ensuring that nations honor their international commitments (which are otherwise largely unenforceable, given the absence of any supra-national executive power or judiciary). In this light, they call to mind the ''private attorneys general'' phenomenon in the U.S., whereby the government empowers everyday citizens to bring private suits to enforce laws deemed especially critical to the public interest. Thus, objections to ISDS provisions are purely procedural in nature: they challenge not the underlying substance of any agreement reached but rather the mechanism chosen for enforcing it.

Ultimately, the determination of whether to include any sort of ISDS provision in the TTIP should be mindful of the benefits of enhanced enforcement and the costs of subjecting regulations to industry challenges. On the one hand, empowering private citizens to challenge regulatory actions deemed to violate a trade agreement will create a strong incentive for governmental compliance with the agreement in the initial instance. U.S. laws relying on the ''private attorneys general'' model such as the Racketeer Influenced and Corrupt Organizations Act are undoubtedly more vigorously enforced than they would be if the Department of Justice were the sole enforcement body. On the other hand, permitting industry groups to challenge regulatory actions can thwart governmental efforts to advance the public good, as evidenced by the ossification emerging from the rather vigorous regimen of judicial review practiced in the U.S.

**The primary focus of pro-regulation advocates should be on ensuring that the substantive provisions of TTIP preserve regulators' right to act aggressively to promote the public welfare.**

In making this determination, it is worthwhile to note that ISDS provisions in the North American Free Trade Agreement have led to relatively few challenges, and the U.S. government has prevailed in all such suits to which it has been a party and the tribunal has issued a final ruling. Nevertheless, the number of multinational corporations in the EU greatly exceeds the combined total in Canada and Mexico, and such challenges to U.S. laws would undoubtedly become increasingly common. Furthermore, the EU might be especially susceptible to challenges from U.S. firms, given that EU regulations are much stronger than their American counterparts in a number of important areas.

In any event, regardless of whether the TTIP ultimately integrates an ISDS clause, the primary focus of advocates of robust regulation should be on ensuring that the substantive provisions of the agreement preserve regulators' right to act aggressively to promote

the public welfare, not on attempting to maintain regulators' flexibility to circumvent the final terms of the agreement by providing relatively innocuous enforcement mechanisms.

## *The Future of the 'Precautionary Principle'*

As early as the late 19th century, Woodrow Wilson and the other early proponents of public administration sought to harness the power of the natural and social sciences in service of governmental policymaking. By devolving powers to administrative agencies staffed by apolitical, highly educated experts, governments sought to protect against both the vagaries of nature and the depredations of corporations intent upon maximizing profit at the expense of the public welfare. Though an increased emphasis upon scientific evidence helped to rationalize the regulatory process in both the U.S. and EU, referring to modern regulation as ''science-based'' is a gross oversimplification, obscuring the subjective, policy-based decisions that undergird the process. In most instances, regulators cannot await absolutely conclusive evidence prior to regulating.

Hence, especially in Europe, many regulations reflect some version of the so-called ''precautionary principle'': absent compelling evidence that a particular activity is safe, governments should proscribe or strictly limit it until additional evidence can be uncovered. Yet even if regulators possess relatively conclusive scientific evidence of the risks posed by a particular activity, the societal costs associated with regulating it may not justify the benefits derived from doing so. Thus, particularly in the U.S., agencies often attempt to quantify the monetary benefits and costs associated with a proposed regulation and determine if the former outweigh the latter prior to acting.

**Terms such as ''precautionary principle'' largely serve to obscure rather than clarify comparisons between the EU and U.S. regulatory regimes.**

Unfortunately, terms such as ''precautionary principle'' largely serve to obscure rather than clarify comparisons between the EU and U.S. regulatory regimes. As Professor Jonathan Wiener has shown, EU regulations are more ''precautionary'' than their U.S. counterparts in certain areas (e.g., climate change, genetically modified foods), but U.S. regulations are more ''precautionary'' in others (e.g., new drug approval).[2] By the same token, though U.S. agencies rely on cost-benefit analysis in many areas, they do not do so in others (e.g., statutes that prohibit consideration of costs, independent regulatory agencies not subject to the cost-benefit mandate of Executive Order 12,866), while the EU Commission considers costs and benefits, among other things, in its impact analysis for new regulations and directives and its evaluation of existing laws. Any effort to determine which regulatory regime is more ''science-based'' or economically efficient is certain to devolve into mutual recriminations, with both the U.S. and EU pointing to countless inefficiencies in each other's system.

**A More Productive Approach.** In this light, a more productive approach to international cooperation would focus less on harmonizing the process by which a given nation's regulators determine how to respond to a particular threat (i.e., ''risk management'') and more on promoting information sharing and cooperation among regulatory scientists (i.e., ''risk assessment''). Fortunately, there is no shortage of ''low-hanging fruit'' in the risk assessment arena. In numerous instances, U.S. and EU regulatory scientists conduct separate tests, inspections, clinical trials, and other investigations, unnecessarily replicating effort.

Were regulators on both sides of the Atlantic to mutually recognize previously conducted investigations and to divide responsibility for future endeavors, they could eliminate such needless duplication and thereby husband resources (a significant benefit in a constrained budgetary climate). U.S. and EU regulators also have traditionally acted separately in inspecting goods imported from third countries, including many that may not adhere to the rigorous regulatory standards prevailing in developed nations. U.S., EU, and Australian drug safety experts recently undertook a joint initiative that divided responsibility for inspecting various pharmaceutical plants in China. Such efforts to divide up regulatory responsibility preserve the exceedingly high standards that prevail in the EU and U.S. while minimizing the burden on regulators.

By contrast, efforts to bring the European and American risk management regimes into greater congruity pose a much more significant challenge (and may elude resolution in the context of the TTIP negotiations). For instance, Europeans are unlikely to welcome imports of genetically modified foods from the U.S. anytime soon, notwithstanding the fact that objections to bioengineering lack any firm basis in science (and are instead based on some version of the ''precautionary principle,'' given that such foods also have not been conclusively proven to be safe in all cases). In short, sovereign nations must retain the right to determine the level of risk to which to expose their citizens, and TTIP is not intended to undermine that right.

That said, both European and U.S. regulators would be well served to consider whether risk management regimes that allocate resources to combatting specific risks that are disproportionate to the severity of the underlying risk are worth defending. As then-Professor (currently Supreme Court Justice) Stephen Breyer contended in *Breaking the Vicious Circle*, regulations enacted by U.S. agencies have an extraordinarily wide range of costs per unit of regulatory benefit produced. For instance, certain regulations cost roughly $100,000 per premature death averted (an extraordinary bargain), whereas others cost as much as $5.7 trillion per life saved (roughly one third of U.S. GDP). Though some might defend the preservation of human life regardless of the cost, it is important to recognize that the tradeoff is not purely one of dollars and lives, since money merely represents a medium for allocating societal resources to their most efficient uses.

[2] Jonathan B. Wiener, *Whose Precaution After All? A Comment on the Comparison & Evolution of Risk Regulatory Systems*, 13 Duke J. Comp. & Int'l L. 207, 225–29 (2003).

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**Overregulation may actually lead to a net loss of human life.**

Thus, to the extent that resources dedicated to solving one problem might have been allocated to solving another problem that poses a graver threat to human life (a phenomenon economists call ''risk-risk tradeoffs''), overregulation may actually lead to a net loss of human life. For example, imagine that a regulation imposes a cost of $100 million per statistical life saved (an unusually high figure). Some of the $100 million in lost economic activity would have been spent on frivolous consumer goods and services, but some presumably would have been spent on cancer research, environmental preservation, development of life-saving drugs, education, and other worthy activities designed to preserve and enrich human life.

Thus, regulatory cost-benefit analysis should not be conceived of as an encroachment by the ''dismal science'' into the noble efforts of civil servants to advance the public interest. Rather, it should be viewed as an effort to ensure that limited resources are allocated to their most productive uses. Of course, certain costs and especially benefits are nearly impossible to quantify (e.g., how does one calculate the economic benefit of preserving a tract of old-growth forest?), and it is entirely appropriate to weigh qualitative benefits against quantitative costs when monetization efforts prove infeasible.

**Increased regulator-to-regulator dialogue under TTIP may serve to enrich the risk management process on both sides by promoting a broader perspective on regulatory alternatives.**

Unfortunately, neither the U.S. nor the EU has fully exploited the benefits of regulatory cost-benefit analysis. In the U.S., independent regulatory agencies are not subject to executive order-based requirements to conduct regulatory cost-benefit analysis (though certain statutes may require them to do so), and many statutes explicitly forbid agencies from considering regulatory costs. In the EU, though cost-benefit analysis informs the impact analysis process, it is one factor among many in a holistic calculus, providing an easy avenue for regulators to justify favored projects by pointing to a bevy of factors other than economic efficiency. Since some European regulations are more economically rational than their counterparts in the U.S., and some American regulations are more cost-benefit justified than those in Europe, the increased regulator-to-regulator dialogue that results from TTIP may serve to enrich the risk management process on both sides by promoting a broader perspective on regulatory alternatives. Nevertheless, democratic societies must retain the flexibility to allocate resources in whatever manner they deem fit (including pursuing regulatory activities for which the monetary costs exceed the benefits), and TTIP neither proposes to nor ultimately could alter that dynamic.

## *Onward and Upward*

As the TTIP negotiators hammer out an agreement in the halls of Brussels and Washington, an equally important battle is raging in the courts of popular opinion. Sadly, at the moment, TTIP opponents have more effectively arrayed their forces and have largely captured the public dialogue by trotting out a parade of horribles that may ensue if the agreement passes. Given that the alleged costs of the agreement are more visceral than the benefits (ravaging environmental and human health protections versus creating a fractional increase in annual GDP), the greater publicity accorded to the critics is not terribly surprising.

Nevertheless, particularly in light of the resounding success of Euroskeptic and other populist parties in the EU elections, obtaining public buy-in is increasingly critical to the agreement's ultimate success. In that light, this article has sought to respond to some of the more salient criticisms and explain why a successful agreement might actually enhance justifiable regulatory protections rather than undermining them.

**The Globalization Imperative.** At the end of the day, however, perhaps the strongest argument in favor of an agreement is the fact that globalization will proceed apace regardless of whether EU and U.S. regulators can come to any formal understanding designed to promote enhanced regulatory convergence. As China, India, Brazil, and other rising industrial juggernauts become increasingly integrated into the global economy, the U.S. and EU can either exercise joint leadership in advocating sensible regulatory protections that promote economic growth while preserving human health and the environment, or they can stand aside as an actual ''race to the bottom'' plays out, with businesses increasingly offshoring production to the developing world to escape heavy regulatory burdens in developed economies.

In this light, it is not an exaggeration to say that TTIP represents not a threat to the regulatory state but an unprecedented opportunity to ensure its continued survival in an increasingly flat world.