UPGRADING EXISTING REGULATORY MECHANISMS FOR TRANSATLANTIC REGULATORY COOPERATION

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I
INTRODUCTION

This is an exciting time to contemplate the future of international regulatory cooperation, but it is also a sobering time.

It is exciting because regulatory cooperation is now being pursued on multiple fronts more ambitiously than ever before. Some efforts like the Canada–U.S. Regulatory Cooperation Council are already achieving results today, and others currently in negotiations, like the Trans-Pacific Partnership and the Transatlantic Trade and Investment Partnership (TTIP), could effect a paradigm shift in international regulatory cooperation if they succeed. Both agreements would go beyond traditional free trade agreements in that they prioritize regulatory coherence and the removal of so-called "nontariff barriers" in addition to traditional trade barriers. Particularly in the relationship between the United States and the European Union (EU), such an agreement—what I have previously called an "economic NATO"[1]—is necessary to preserve the U.S. and EU's role as standard-setters and economic hegemons in an increasingly competitive global marketplace.

On the other hand, this is a sobering time, because protectionist forces also seem to be on the rise. These protectionist interests have severely hampered efforts to unify regulatory approaches. Transnational bodies designed to pursue regulatory uniformity, such as the Transatlantic Economic Council (TEC), have become increasingly ineffective as a result of single-issue political gridlock.[2] Meanwhile, rising Euroscepticism demonstrated by last year's parliamentary

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1. C. Boyden Gray, *An Economic NATO: A New Alliance for a New Global Order*, ATLANTIC COUNCIL ISSUE BRIEF (Jan. 22, 2013), http://www.atlanticcouncil.org/images/files/publication_pdfs/403/tar130221economicnato.pdf.view.

2. *See* Tyson Barker & James O'Connor, *Resetting the Trans-Atlantic Economic Council: A Blueprint*, ATLANTIC COUNCIL & BERTELSMANN FOUNDATION 1 (Oct. 2009), http://www.atlanticcouncil.org/publications/reports/resetting-the-transatlantic-economic-council.

elections has raised questions about TTIP's viability in Europe.[3] This political ambivalence is nothing new; indeed, it has consistently been the limiting factor on past efforts at transatlantic regulatory cooperation.[4] But it does not mean that the current push for regulatory cooperation is doomed to failure.

Recognizing the conditions on the ground, this article offers some practical suggestions for achieving real progress on regulatory cooperation under imperfect political circumstances. In particular, it discusses the optimal leadership structure of transnational bodies dedicated to regulatory cooperation, including the existing TEC. This article also comments on the availability of existing regulatory mechanisms—specifically, negotiated rulemaking—to achieve regulatory cooperation. Although such administrative solutions are available even now to promote transnational regulatory cooperation, TTIP is the best vehicle for institutionalizing these changes and using them to achieve lasting transatlantic benefits.

Beyond these specific proposals, this article aims to encourage creative thinking about what can be done in the service of regulatory cooperation using existing international institutions.[5] The EU's recent crisis over Greece underscores the importance of attaining regulatory cooperation. In contrast with Greece, other European countries that have undergone regulatory reform, such as Latvia and Germany (the former "sick man" of Europe prior to reform), are now financially stable.[6] Improving regulatory cooperation could have a significant impact on global stability.

TTIP is not the first U.S. attempt at regulatory cooperation with the EU, and one would do well to learn from the past. There have been at least nine other such efforts—the 1995 New Transatlantic Agenda,[7] the 1998 Transatlantic Economic Partnership,[8] the 1999 Joint Statement on Early Warning and

3. *See Eurosceptic 'Earthquake' Rocks EU Elections*, BBC NEWS, May 26, 2014, http://www.bbc.com/news/world-europe-27559714.

4. *See, e.g.*, Soeren Kern, *Why the New Transatlantic Agenda Should, But Won't, Be Reformed*, REAL INSTITUTO ELCANO (2005), http://www.realinstitutoelcano.org/wps/portal/rielcano_in/Content?WCM_GLOBAL_CONTEXT=/elcano/Elcano_in/Zonas_in/ARI+51-2005 ("Although the need to reform the NTA is not in dispute, there is insufficient political will at the highest levels of government on either side of the Atlantic to do so.").

5. Because I am writing from my experience as Ambassador to the EU, I take the transatlantic context as my model, but I hope these thoughts will have some application to all regulatory cooperation initiatives.

6. *See* Caroline Frontigny & Betina Tirelli Hennig, *Latvia: Maintaining a Reform State of Mind*, DOING BUSINESS (2013), http://www.doingbusiness.org/~/media/GIAWB/Doing%20Business/Documents/Annual- Reports/English/DB13-Chapters/DB13-CS-Latvia.pdf; *OECD Reviews of Regulatory Reform: Germany 2004: Consolidating Economic and Social Renewal*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT 8, 11 (2004), http://www.keepeek.com/Digital-Asset-Management/oecd/governance/oecd-reviews-of-regulatory-reform-germany-2004_9789264107861-en#page3.

7. *New Transatlantic Agenda*, EUROPEAN UNION EXTERNAL ACTION (1995), http://eeas.europa.eu/us/docs/new_transatlantic_agenda_en.pdf.

8. *Transatlantic Economic Partnership*, EUROPEAN UNION EXTERNAL ACTION (1998), http://eeas.europa.eu/us/docs/trans_econ_partner_11_98_en.pdf.

Problem Prevention Mechanisms,[9] the 2000 Consultative Forum on Biotechnology,[10] the 2002 Guidelines for Regulatory Cooperation and Transparency,[11] the 2004 and 2005 Roadmaps for U.S.–EU Regulatory Cooperation and Transparency,[12] the 2005 U.S.–EU High Level Regulatory Cooperation Forum,[13] and the 2007 TEC.[14] The TEC was intended to oversee a program of regulatory cooperation with the aim of reducing redundant tests and regulations on a sector-by-sector basis.[15] All of these initiatives aimed, in one way or another, to reduce regulatory barriers between the United States and Europe. And to varying degrees, they have achieved that goal. These initiatives are responsible for stronger relationships and improved communication between stakeholders and regulators across the Atlantic as well as for certain sector-specific mutual recognition agreements.[16]

Unfortunately, despite the strength of the U.S.–EU relationship, all of these past efforts have failed to achieve a standardized process for cooperative regulation on an ongoing basis—much less harmonization of existing regulations.[17] The "Lighthouse Priority Projects" of the TEC—harmonization of patent regimes, mutual recognition of U.S. and EU accounting standards, for example[18]—remain beacons on the horizon rather than past achievements. Today, on the threshold of yet another transatlantic agreement, regulatory cooperation is still highly sought after. In a ranking of seventeen transatlantic

9. *Joint Statement on Early Warning and Problem Prevention Mechanisms*, EUROPEAN COMMISSION (1999), http://trade.ec.europa.eu/doclib/docs/2003/october/tradoc_111711.pdf.

10. *EU–US Biotechnology Consultative Forum Launched*, EUROPEAN COMMISSION (2000), http://cordis.europa.eu/news/rcn/15342_en.html.

11. *Guidelines on Regulatory Cooperation and Transparency*, EUROPEAN COMMISSION (2002), http://ec.europa.eu/enterprise/policies/international/files/guidelines3_en.pdf.

12. *2004 Roadmap for EU-U.S. Regulatory Cooperation and Transparency*, OFFICE OF THE U.S. TRADE REPRESENTATIVE (2004), https://ustr.gov/archive/World_Regions/Europe_Middle_East/Europe/US_EU_Regulatory_Cooperation/2004_Roadmap_for_EU-US_Regulatory_Cooperation_Transparency.html; *2005 Roadmap for EU-U.S. Regulatory Cooperation and Transparency*, OFFICE OF THE U.S. TRADE REPRESENTATIVE (2005), https://ustr.gov/archive/World_Regions/Europe_Middle_East/Europe/US_EU_Regulatory_Cooperation/2005_Roadmap_for_EU-US_Regulatory_Cooperation_Transparency.html.

13. *See EU–USA—Regulatory Cooperation*, EUROPEAN COMMISSION (2015), http://ec.europa.eu/enterprise/policies/international/cooperating-governments/usa/regulatory-cooperation/index_en.htm.

14. *See EU–USA—Transatlantic Economic Council*, EUROPEAN COMMISSION (2015), http://ec.europa.eu/enterprise/policies/international/cooperating-governments/usa/transatlantic-economic-council/index_en.htm.

15. Framework for Advancing Transatlantic Economic Integration Between the European Union and the United States of America, § 4, Annex I, http://ec.europa.eu/enterprise/policies/international/files/tec_framework_en.pdf [hereinafter Framework for Advancing Transatlantic Economic Integration].

16. *See* RAYMOND J. AHEARN, CONG. RES. SERV., RL34717, TRANSATLANTIC REGULATORY COOPERATION: BACKGROUND AND ANALYSIS 15 (2009), http://www.fas.org/sgp/crs/row/RL34717.pdf.

17. *See id.* at 12 ("While there have been numerous political declarations calling for regulatory convergence and harmonization, few changes have been enacted in each side's existing laws that would move their regulatory regimes in this direction.").

18. Framework for Advancing Transatlantic Economic Integration, *supra* note 15, at § 3, Annex II.

regulatory goals, 120 stakeholders identified "significant regulatory process convergence across multiple sectors" as most important to the success of TTIP.[19] But the respondents ranked that same goal among the most difficult to achieve—second only to market access for genetically modified and hormone-treated agricultural products.[20]

II
SETTING REASONABLE GOALS

The first lesson to be drawn from the history of transatlantic agreements might be the necessity of reasonable expectations. Despite many points of commonality, the United States and Europe have divergent political values and asymmetrical legislative and regulatory systems. The European precautionary principle, for example, presents a practical barrier to mutual recognition of regulatory standards in certain sectors—though the United States is more precautionary in some other areas.[21]

Likewise, basic differences of governmental structure between the United States and the EU prevent perfectly parallel regulatory processes. To take one example, EU regulatory agencies are not the agenda-setting, regulation-writing bodies familiar on this side of the Atlantic. Instead, they serve a mostly reactive function, providing technical and scientific expertise when consulted by the European Commission (EC). By contrast, the European member states play a more powerful policy-making role in implementing directives from the EC than American states do in implementing laws passed by Congress. Finally, under current internal EC working procedures, opportunity for public comment is limited to the consultative process preceding the adoption of primary legislation, akin to Advanced Notices of Proposed Rulemaking used only occasionally in the United States. EC legislative proposals frequently contain a level of detail comparable to U.S. rulemakings. Nevertheless, interested parties have no chance to comment on draft text of a proposal or to convince the EC to take their comments into account in revising it. In the United States, by contrast, interested parties have a judicially enforceable right to comment on proposed administrative regulations and to have those comments taken into account by the regulatory agencies,[22] but interested parties have no advanced

19. Tyson Barker & Garrett Workman, *The Transatlantic Trade and Investment Partnership: Ambitious but Achievable*, Atlantic Council & Bertelsmann Foundation 3 (Apr. 2013) http://www.bfna.org/sites/default/files/TTIPReport_web.pdf.

20. *Id.* at 4.

21. *See* James K. Hammitt et al., *Precautionary Regulation in Europe and the United States: A Quantitative Comparison*, 25 RISK ANALYSIS 1215, 1227 (2005); *see also* AHEARN, *supra* note 16, at 8.

22. *See* Interstate Natural Gas Ass'n of Am. v. Fed. Energy Regulatory Comm'n, 494 F.3d 1092, 1096 (D.C. Cir. 2007) ("Administrative Procedure Act ('APA') strictures at 5 U.S.C. § 553 . . . include the duty to 'give reasoned responses to all significant comments in a rulemaking proceeding.'" (quoting Int'l Fabricare Inst. v. Envtl. Prot. Agency, 972 F.2d 384, 389 (D.C. Cir. 1992) (per curiam))); Int'l Fabricare Inst., 972 F.2d at 389 ("We will therefore overturn a rulemaking as arbitrary and capricious where the EPA has failed to respond to specific challenges that are sufficiently central to its decision." (citing Am. Mining Congress v. Envtl. Prot. Agency, 907 F.2d 1179, 1191 (D.C. Cir. 1990))).

opportunity to comment on primary legislation before Congress passes it.[23] At present, these disparities between the U.S. and EU legislative–regulatory processes make truly parallel rulemaking impossible. The reality is that no amount of goodwill can neutralize every transatlantic regulatory barrier—that cannot be the goal.

However, this is not to say that real progress is out of reach. There is good cause to believe that systemic regulatory cooperation is more plausible today than it has been in the past. A 2009 revision of Europe's Impact Assessment Guidelines calls for a more receptive posture toward stakeholder input—at least in the prelegislative consultation stage.[24] The Lisbon Treaty, which went into effect in 2009, allows the European Council and Parliament to delegate lawmaking authority to the EC, while empowering the legislators to set the scope of the delegation, revoke the delegation, and oppose delegated acts.[25] At the level of these delegated acts, opportunity for public comment is encouraged, though not required, and stakeholder consultation is becoming more common. Thus, delegated acts present a vehicle for increased accountability and transparency as well as systematic consideration of transatlantic economic effects. Increasing transparency, accountability, and stakeholder participation in the EC's development of proposed regulations and directives, however, remains even more important to achieving the shared objective of transatlantic regulatory compatibility.

III
EXECUTIVE BRANCH LEADERSHIP

The second lesson of the past efforts at transatlantic regulatory cooperation has to do with institutional design. The Transatlantic Economic Council was established on April 30, 2007, while I was Ambassador to the EU. After some initial and significant successes, the TEC became "bogged down in single-issue gridlock."[26] Despite its commitment thereafter to "play a *central role* in strengthening our economies for the competitive challenges of the future,"[27] the Council has remained marginalized. This is a shame, because the TEC's aspirations coincided with TTIP's goal of "eliminat[ing] unnecessary regulatory divergences" in a wide range of sectors and disciplines.[28]

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23. Traditionally, major legislation has been preceded by congressional hearings, but in recent years the hearing mechanism has been undermined when congressional leadership bypasses the committee structure to pass politically significant legislation.

24. European Commission, at 19–20, SEC (2009) 92 final (Jan. 15, 2009), http://ec.europa.eu/smart-regulation/impact/commission_guidelines/docs/iag_2009_en.pdf.

25. *See* Council Directive 2010/30, 2010 O.J. (L153) 7 (EC) ("In preparation of a draft delegated act, the Commission shall: . . . assess the impact of the act on the environment, end-users and manufacturers, including small and medium-sized enterprises (SMEs), in terms of competitiveness including on markets outside the Union, innovation, market access and costs and benefits.").

26. Barker & O'Connor, *supra* note 2, at 1.

27. TEC, *Joint Statement*, (Dec. 17, 2010), http://www.whitehouse.gov/sites/default/files/TEC_Joint_Statement_12-17-10.pdf.

28. *See, e.g.*, Bureau of European and Eurasian Affairs, *Framework for Promoting Transatlantic*

So why did the TEC fail, and how can TTIP avoid a similar fate? On the surface, the TEC's failure was triggered by French opposition to a proposal to permit the sale in Europe of chlorine-washed poultry. Chlorinated poultry from the United States had been banned in Europe since 1997, at a cost of $200 million annually in lost sales.[29] In 2008, the EC in coordination with the TEC adopted a proposal to lift the chicken ban temporarily, pending further scientific study.[30] The French, who had been unenthusiastic about the TEC from the beginning,[31] used their EU presidency to undermine this agreement,[32] purportedly for environmental water pollution concerns—even though the practice had never been shown to be detrimental to the environment (which in any case involved water in the United States and not in France),[33] and in spite of the fact that France itself both exported chlorinated poultry at the time[34] and used chlorine to clean its own water.[35]

But even more than protecting its own producers, the French opposition was motivated by a general antagonism to the TEC and a desire to undermine a promising proposal for mutual recognition of U.S. and EU accounting standards.[36] Specifically, the French opposed mark-to-market accounting standards in both U.S. Generally Accepted Accounting Standards and Europe's International Financial Reporting Standards.[37] Unified U.S. and European

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Economic Integration, Annex I: Fostering Cooperation and Reducing Regulatory Barriers, A. Horizontal—Standards, U.S. DEPARTMENT OF STATE (Jan. 22, 2010), http://www.state.gov/p/eur/rt/eu/tec/131810.htm.

29. Stephen Castle, *EU Ban on U.S. Chicken Imports May Soon End*, N.Y. TIMES, (May 13, 2008), http://www.nytimes.com/2008/05/13/business/worldbusiness/13iht-trade.4.12857143.html.

30. EURALIA, BRIEFING NOTE, UEVP: 12–23 May 2008 (May 23, 2008), http://www.fve.org/members/uevp/pdf/elan_reports/2008_05_12.23.pdf.

31. Jean Pisani-Ferry, a French economist who is now Commissioner General for Policy Planning in the French government, once explained to me the popular sentiment in France that diluting French sovereignty with twenty-seven other member states in the EU was bad enough—adding the United States as a near equal partner in the TEC was more than they could stomach.

32. C. Boyden Gray, *A Transatlantic Failure to Communicate*, WASH. TIMES, (Aug. 30, 2011), http://www.washingtontimes.com/news/2011/aug/30/gray-a-transatlantic-failure-to-communicate/.

33. *See* RENÉE JOHNSON, U.S.–EU POULTRY DISPUTE ON THE USE OF PATHOGEN REDUCTION TREATMENTS, CONGRESSIONAL RESEARCH SERVICE (PRTS) 2–3 (2012), http://www.fas.org/sgp/crs/misc/R40199.pdf.

34. Castle, *supra*, note 29.

35. *See* G.A. Gagnon et al., *Comparative Analysis of Chlorine Dioxide, Free Chlorine and Chloramines on Bacterial Water Quality in Model Distribution Systems*, 130 J. ENVTL. ENG'G 1269, 1270 (2004).

36. *See Fact Sheet: Advancing Transatlantic Economic Integration Through the Transatlantic Economic Council*, THE WHITE HOUSE (Dec. 12, 2008) ("At its third meeting, the TEC . . . welcomed acceptance of the use of U.S. Generally Accepted Accounting Principles and International Financial Reporting Standards in EU and U.S. financial markets."), http://georgewbush-whitehouse.archives.gov/news/releases/2008/12/20081212-7.html.

37. *See id.*; *accord* Wikileaks, *French Stress Markets in DepSec Kimmitt Consultations* (Mar. 25, 2008), http://www.wikileaks.org/plusd/cables/08PARIS555_a.html ("Bank of France Governor Noyer said that . . . Monoline bond insurers have run into trouble, as have some hedge funds, and market players are wondering what could be next. This is partly due to the practical challenges posed by 'mark to market' accounting rule [sic] that impose pain and even panic, when markets fail to generate a price that auditors can use for reference as to current value."); *id.* at 14 ("Bankers . . . also noted the

accounting standards would have forced some measure of mark-to-market accounting standards on France.[38] Due to exemptions in French accounting, its financial system may not have survived the interdisciplinary adaptations necessary to harmonize with the rest of Europe and the United States.[39] When the door closed on this accounting standards agreement, the United States and Europe lost a valuable opportunity to change economic history for the better. In some important respects, divergent financial regulatory approaches have become more intractable in the years following the TEC's failure, as the United States and Europe pressed ahead with different approaches and on different timetables.[40]

In any event, the scarring fight over chicken weakened the TEC considerably. A preliminary accounting standards agreement dissolved, and the institution never fully regained its momentum.[41] One lesson from this experience is that the TEC is not as well designed as it could be to counter obstructionism. The French were opposed to U.S. poultry and international accounting standards for political reasons, and the TEC lacked the political muscle to fight back.

At least part of the TEC's problem, as reflected by its failure to overcome the chicken episode, is its lack of centralized executive oversight. There may be some irony in this observation, because the TEC was "designed, in part, to generate the kind of high-level political support that previous initiatives may have lacked."[42] At the time of the chicken debacle, the U.S. chair of the TEC was the Assistant to the President for International Economic Affairs.[43] Despite

possibility that 'mark to market' rules for accounting were generating increased volatility and that changing emphasis in prudential rules for banks were generating a 'boomerang' effect as assets were brought back onto the balance sheet.").

38. Conversation with Chris Cox, Former Chairman, U.S. Securities and Exchange Commission (July 8, 2015); Conversation with Chris Brummer, Professor of Law, Georgetown Law (July 9, 2015). Chris Cox managed the U.S. side of the effort to unify accounting standards between the United States and Europe. *Accounting Standards: EU Commissioner McCreevy and SEC Chairman Cox Affirm Commitment to Elimination of the Need for Reconciliation Requirements*, EUROPEAN COMMISSION (Feb. 9, 2006), http://europa.eu/rapid/press-release_IP-06-142_en.htm?locale=en. Chris Brummer is an expert on international financial regulation having worked in Europe and the United States before becoming a law professor. *Chris Brummer Faculty Biography*, GEORGETOWN LAW, https://www.law.georgetown.edu/faculty/brummer-chris.cfm#.

39. Conversation with Chris Cox, *supra* note 38; conversation with Chris Brummer, *supra* note 38.

40. *See generally* SHARON BOWLES & CHRISTOPHER MURPHY, THE DANGER OF DIVERGENCE: TRANSATLANTIC FINANCIAL REFORM & THE G20 AGENDA 15 (2013) ("When one jurisdiction introduces regulation in a particular area while the other has not, it can create suspicion—and even expose a country to being less devoted or 'softer' in the relevant area of financial regulation.").

41. *See* Suparna Karmakar, Prospects for Regulatory Convergence Under TTIP, BRUEGEL (Nov. 4 2013), http://www.bruegel.org/publications/publication-detail/publication/800-prospects-for-regulatory- convergence -under-ttip/.

42. AHEARN, *supra* note 16, at 2; *see also id.* at 18 ("Given that the two TEC leaders are cabinet-level appointees, the TEC was expected to have the kind of high-level political support that previous efforts at economic integration may have lacked.").

43. Bureau of European and Eurasian Affairs, *Second Meeting of the Transatlantic Economic Council: Joint Statement of the European Commission and the United States*, U.S. Dep't of State, http://2001-2009.state.gov/p/eur/rls/or/104918.htm.

his best efforts, he lacked the political clout to counter the French attack. Would the result have been different if the U.S. chair had been closer to the President—someone like the Vice President, with more of the gravitas of the White House behind him? Or if the EU chair had been an official with a broader institutional perspective on regulatory cooperation—such as the EU Commission President? Who can say? Perhaps under such leadership, the TEC could have anticipated and avoided the debacle. An agreement like TTIP is crippled when responsibility for its implementation is placed in the hands of staff too far removed from the chief executive.

Today the TEC is nominally chaired by Michael Froman, current United States Trade Representative and former White House Deputy National Special Advisor for International Economic Affairs, and the European Commissioner for Trade, formerly Karel De Gucht. Froman and De Gucht have admirably shepherded TTIP. But placing two trade specialists in charge of the TEC highlights the risks of over-delegation in the area of transatlantic regulatory cooperation. The TEC's ambitious agenda has stalled, and the Council has not met since 2013.[44] To achieve its regulatory cooperation goals, TEC leadership must be perceived as transcending trade and other sectoral concerns. Although trade is important, it is ultimately secondary to TTIP's regulatory cooperation agenda.

The TEC experience teaches that the U.S. president must maintain a firmer grip on transatlantic negotiations to prevent them from descending into protectionist squabbles.[45] Maintaining centralized control of transatlantic regulatory cooperation would force the White House to set sectoral priorities and to ensure that the whole apparatus of transatlantic regulatory cooperation is not sabotaged by ultimatums concerning a single sector. TTIP presents an opportunity to reinvigorate the TEC by making the U.S. Vice President and President of the European Commission its co-chairs[46] and by directing the Office of Management and Budget (OMB) to work with the Vice President to coordinate regulatory cooperation.[47] This can be done through executive action. The TEC was designed to be chaired by "a U.S. Cabinet-level official in the Executive Office of the President" and a member of the EC.[48] So, installing the

44. *See* TRANSATLANTIC ECONOMIC COUNCIL, http://www.state.gov/p/eur/rt/eu/tec/ (last visited Feb. 6, 2015); *see also* EU–USA—TRANSATLANTIC ECONOMIC COUNCIL, http://ec.europa.eu/enterprise/policies/international/cooperating-governments/usa/transatlantic-economic-council/index_en.htm (archived Feb. 2, 2015) ("This website is no longer being updated.").

45. Executive leadership of transatlantic regulatory cooperation is more promising than legislative leadership. *Cf.* AHEARN, *supra* note 16, at 21 ("While a more pro-active role for Congress would likely enhance the political basis of support for transatlantic regulatory cooperation, it is no means certain that there a consensus in favor of developing the necessary mechanisms and mandate to move in this direction.").

46. Other commentators have made a similar recommendation. *See* Barker & O'Connor, *supra* note 2, at 9.

47. *See infra,* notes 56–59 and corresponding text.

48. Framework for Advancing Transatlantic Economic Integration, *supra* note 15, § 4. The TEC's U.S. chair was initially Allan Hubbard, Director of the National Economic Council, and the EU chair

U.S. Vice President and EU Commission President as co-chairs would require neither legislation nor negotiation.

Recent history offers encouraging precedent for such a vice presidential role. Consider President Reagan's Task Force on Regulatory Relief, chaired by Vice President George H.W. Bush, and the successor Council on Competitiveness, chaired by Vice President Dan Quayle—both widely recognized as successes.[49] The work of both entities went beyond general policy pronouncements. Vice President Bush's Task Force, for instance, directly coordinated with the Office of Information and Regulatory Affairs (OIRA) in the OMB, and it often served to referee disagreements between OIRA and the regulatory agencies about specific regulations.[50] Or consider Vice President Cheney, who chaired the influential National Energy Policy Development Group,[51] and Vice President Al Gore, whose debate with Ross Perot on the North American Free Trade Agreement is widely credited with securing its passage.[52] Vice President Biden, former chairman of the Senate Foreign Relations Committee, is certainly well equipped to lead a transatlantic project of this magnitude.

Giving the Vice President responsibility for promoting the U.S. position would help to legitimize the TEC's activities and move its plans beyond brainstorming to implementation. This would also help to avoid the sectoralism and single-issue disputes that might throw a wrench in the gears if the U.S. chair were to represent a specific department of the federal government, like the Secretary of Commerce or the U.S. Trade Representative.[53] TTIP, like the TEC before it, aims to be more than a trade deal.[54] To succeed it must install in supervisory roles executive branch officials with the political authority to advance a comprehensive cooperative transatlantic regulatory agenda.

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was initially Vice President Günter Verheugen, European Commissioner for Enterprise and Industry. *See* Bureau of European and Eurasian Affairs, *Framework for Advancing Transatlantic Economic Integration between the United States of America and the European Union*, US DEP'T OF STATE, http://www.state.gov/p/eur/rls/or/130772.htm.

49. *See, e.g.,* Murray Weidenbaum, *Regulatory Process Reform From Ford to Clinton*, *in* REGULATION (2000), http://www.cato.org/sites/cato.org/files/serials/files/regulation/1991/1/reg20n1a.html (noting that the Task Force on Regulatory Relief, along with the accompanying executive order, had a "substantial impact"); H.R. REP. NO. 104-037, 13–14 (1995) (listing areas of success for the Council on Competitiveness).

50. Weidenbaum, supra note 49.

51. *See* KEN G. GLOZER, CORN ETHANOL: WHO PAYS? WHO BENEFITS? 49, 52 (2011).

52. PHILIP A. MUNDO, NATIONAL POLITICS IN A GLOBAL ECONOMY: THE DOMESTIC SOURCES OF U.S. TRADE POLICY 170 (1999).

53. *See* AHEARN, *supra* note 16, at 9 ("[N]either the Commerce Department nor the Office of U.S. Trade Representative (USTR), the lead agencies for U.S. undertakings in the realm of transatlantic regulatory cooperation, have authority to overhaul domestic regulatory policymaking.").

54. Jordi Bacaria, *TTIP: More than a Free Trade Agreement*, BARCELONA CENTRE FOR INTERNATIONAL AFFIARS (Apr. 2015), http://www.cidob.org/en/publications/publication_series/notes_internacionals/ttip_more_than_a_free_trade_agreement ("TTIP is not envisaged as a classic trade agreement that limits itself to eliminating tariffs and opening markets up to investment, services and public procurement. Its importance . . . is that it claims to go further with the modification of the technical rules and standards that are currently the greatest barriers to transatlantic trade.").

It is also critical that OIRA be involved in every effort related to regulatory cooperation between the United States and Europe.[55] Unlike typical free trade agreements, TTIP is primarily about regulatory cooperation. The U.S. perspective must therefore include the office that is the focal point of the U.S. regulatory process. OIRA supervises the rule-making process across agencies through review of major rules, and it provides the executive branch's internal enforcement of the standards of the Administrative Procedure Act.[56] No other agency has the authority, expertise, or cross-disciplinary interest necessary to implement forward-looking regulatory process reforms that transcend sectoral issues.[57] The U.S. Trade Representative in particular, though well-adapted to implementing traditional free trade agreements, lacks the regulatory expertise and system-wide viewpoint that a comprehensive agreement like TTIP demands. And the President, by executive order, has expressly tasked the OIRA Administrator with coordinating the government's international regulatory cooperation activities as chair of the Regulatory Working Group.[58]

The U.S.–Canada Regulatory Cooperation Council (RCC), established in 2011, exemplifies the benefits of OIRA's involvement in international regulatory cooperation. The RCC has already witnessed success in reducing nontariff barriers in response to several issue-specific initiatives.[59] Moreover, the RCC is now attempting to institutionalize a process for regulatory cooperation that will continue to bear fruit in the future.[60] This is due in large part to the structure of the RCC. It has been driven by OIRA and by the Privy Council Office, which serves a similar interagency coordination function in the Canadian government.[61]

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55. OIRA is currently seriously understaffed due to pillaging by OMB, of which OIRA is a component part. OIRA must be authorized to make hire personnel adequate to perform its current mandate before it can reasonably be expected to take on a transnational regulatory cooperation agenda.

56. Administrative Procedure Act, 5 U.S.C. §§ 500 *et seq.* (2006). *See generally* Cass R. Sunstein, Commentary, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838 (2013).

57. *See generally* Susan E. Dudley, *Observations on OIRA's Thirtieth Anniversary*, 63 ADMIN. L. REV. 113, 115–16 (2011).

58. Exec. Order No. 13,609, 3 C.F.R. 13,609 (2012), http://www.whitehouse.gov/sites/default/files/omb/inforeg/eo_13609/eo13609_05012012.pdf. One scholar has noted that this executive order could revive the previously defunct Regulatory Working Group by calling for coordination through that Group. Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1816 n.337 (2013).

59. *See, e.g.*, *Work Planning Format*, REGULATORY COOPERATION COUNCIL, http://www.trade.gov/rcc/documents/a1-hc-fda-wp-pharmaceuticals-bio.pdf (Pharmaceuticals); *Work Planning Format*, REGULATORY COOPERATION COUNCIL, http://www.trade.gov/rcc/documents/b1-pmra-epa-wp-it-solutions.pdf (Joint IT Solutions); Laureen Kinney & Susan McDemott, *RCC Motor Vehicles Working Group: Existing and New Motor Vehicle Safety Standards Work Plans*, REGULATORY COOPERATION COUNCIL, http://www.trade.gov/rcc/documents/f2-tc-dot-wp-motor-vehicle-std.pdf.

60. U.S.–Canada Regulatory Cooperation Council, Joint Forward Plan 3 (Aug. 2014), http://www.whitehouse.gov/sites/default/files/omb/oira/irc/us-canada-rcc-joint-forward-plan.pdf ("Our next phase of work will seek to make regulatory cooperation a routine, ingrained practice between Canadian and U.S. regulatory authorities.").

61. Terms of Reference for the U.S.–Canada Regulatory Cooperation Council 3 (June 3, 2011),

IV
TRANSNATIONAL NEGOTIATED RULEMAKING

In addition to these two lessons from the TEC, this article concludes with a third, procedural suggestion. This article has already alluded to impact assessments and stakeholder input and will not dwell on cost-benefit analysis, which has already received significant attention by scholars on both sides of the Atlantic.[62] Rather, the focus of this article is negotiated rulemaking.

The success of an agreement like TTIP that is focused on regulatory cooperation depends upon setting reasonable expectations. An approach that accepted nothing less than joint rulemaking by U.S. and EU regulators would fail inevitably, because the legislative and rule-making structures of these two governments do not allow for perfect symmetry. What *can* be accomplished in spite of procedural differences is true cooperation, in which U.S. and EU regulators coordinate rulemakings and conscientiously involve the other party's regulators and businesses in their respective domestic regulatory processes. And both the U.S. and EU regulatory systems already possess the necessary tools.

In the typical notice-and-comment rulemaking in the United States, the agency develops a proposed rule using whatever sources of information it has available, and it then publishes the proposed rule without the benefit of formal input from the entities the rule will affect.[63] But only after the proposed rule has issued do regulated entities and other concerned parties have an opportunity to offer formal input on the content of the rule.

Foreign governments and regulators have the same opportunity as any other interested party to comment on proposed federal rules in the United States. The agency is required to consider and reasonably respond to significant public comments before finalizing a rule,[64] but the influence of such comments tends to

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http://www.whitehouse.gov/sites/default/files/omb/oira/irc/us-canada_rcc_terms_of_reference.pdf ("The RCC will be co-chaired by high-level representatives of the central regulatory oversight agencies in both governments.").

62. Three points about cost-benefit analysis are worth mentioning briefly. First, further development of Europe's cost-benefit practice is critical to aligning the EU and U.S. rulemaking systems. Second, the EC's Impact Assessment Guidelines are compatible with a more rigorous cost-benefit analysis. *See* European Commission, *supra* note 24, at 31 ("[Y]ou should select options that promise the greatest net benefits."); *id.* at 45 ("Full cost-benefit analysis should be used when the most significant part of both costs and benefits can be quantified and monetised, and when there is a certain degree of choice as regards the extent to which objectives should be met (as a function of the costs associated with the proposed measures)."). Finally, both the United States and the EU should incorporate consideration of transatlantic effects into their cost-benefit analyses. The EC's guidelines already require impact assessments to "establish whether proposed policy options have an impact on relations with third countries." *Id.* at 42. This "could include an analysis of similar regulations which already exist in the EU's main trading partners." *Id.*

63. Agencies often discuss possible options with stakeholders informally and—less frequently—solicit input through Advanced Notices of Proposed Rulemaking.

64. *See* Interstate Natural Gas Ass'n of Am. v. Fed. Energy Regulatory Comm'n, 494 F.3d 1092, 1096 (D.C. Cir. 2007) (quoting Int'l Fabricare Inst. v. Envtl. Protection Agency, 972 F.2d 384, 389 (D.C. Cir. 1992) (per curiam)).

be limited.[65] They typically represent competing viewpoints of parties with conflicting interests who disagree about whether the agency does too much or too little. Thus, even if one party's comments could overcome the inertia of the agency-drafted proposal, these comments are often effectively canceled out by those of other parties. Typical notice-and-comment rulemaking does not privilege the comments of foreign governments over those of any other member of the public, so the capacity of foreign comments to nudge a proposed rule toward harmonization with European law is limited.

Foreign regulators could have a much greater influence in negotiated rulemaking (reg-neg). In reg-neg, the entities that will be affected by a rule are included much earlier in the rule-making process—in the drafting of the proposed rule—and provide input in a collaborative process rather than independently of one another.[66] The point is to allow stakeholders to strike bargains that would not be feasible through ordinary notice-and-comment rulemaking.

At its most ambitious, transnational reg-neg could work effectively as part of a coordinated plan of rulemaking in the United States and the EU, to avoid unnecessarily duplicative regulations. The EU's own 2009 Impact Assessment Guidelines could justify a roughly analogous mechanism for input by U.S. regulators in the EU's impact assessment process. But even a more modest application of reg-neg could help reduce barriers to trade by inviting European input in the drafting of specific U.S. rules with anticipated transatlantic effects.

Reg-neg has existed as an idea in the minds of academics since the mid-1970s,[67] but it started gaining momentum in the 1980s when the Environmental Protection Agency engaged in several negotiated rulemakings, and it attracted the support of the Administrative Conference of the United States (ACUS).[68] Congress passed the Negotiated Rulemaking Act in 1990,[69] and made ACUS the implementing agency.[70]

Under the Act, a federal agency has discretion to establish a negotiated rulemaking committee using, if it chooses, the services of a convener to identify

65. Shawn Donnan, *US Pushes for Greater Transparency in EU Business Regulation*, FINANCIAL TIMES (Feb. 23, 2014), http://www.ft.com/cms/s/0/6e9b7190-9a65-11e3-8e06-00144feab7de.html#axzz3f8PRbFoB (discussing the United States' push for the EU to give businesses greater opportunity for comment and to fully consider those comments).

66. *See* U.S.–Canada Regulatory Cooperation Council, *supra* note 60, at 9 ("Collaboration may also be valuable throughout our respective regulatory processes including during the early stages of the development of regulations.").

67. *See* Charles C. Caldart & Nicholas A. Ashford, *Negotiation As a Means of Developing and Implementing Environmental and Occupational Health and Safety Policy*, 23 HARV. ENVTL. L. REV. 141, 143 (1999).

68. David M. Pritzker, *The Administrative Conference and the Development of Federal ADR*, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (Oct. 29, 2014, 8:05 AM) https://www.acus.gov/newsroom/administrative-fix-blog/administrative-conference-and-development-federal-adr.

69. Negotiated Rulemaking Act of 1990, 5 U.S.C. § 561 (2012).

70. Negotiated Rulemaking Act of 1990, Pub. L 101-648, 104 Stat. 1969, § 589 (1990).

interested parties to participate in the negotiation.[71] The agency publishes notice of the negotiated rule-making committee, and interested parties not already identified by the convener may apply for membership.[72] Under the leadership of a facilitator nominated by the agency and approved by the negotiated rulemaking committee, the committee then attempts to reach consensus on a proposed rule.[73]

The benefits typically associated with reg-neg include improved information due to the iterative nature of negotiation and the related incentive to cooperate,[74] the increased sense of legitimacy that parties involved in the drafting process attribute to the resulting rule,[75] closer correlation between the final rule and the proposed rule,[76] the avoidance of litigation,[77] reduced delay,[78] and faster adaptation to the new rule by regulated entities involved from the beginning.[79]

Some critics of reg-neg have questioned whether it has actually achieved these benefits in practice.[80] But these criticisms turn on erroneous calculations of the duration of various rule-making proceedings, and unfair comparisons of traditional rulemaking and reg-neg, which tends, by design, to involve more

71. 5 U.S.C. § 563 (2012).

72. *Id.* § 564.

73. *Id.* § 566.

74. *See* EDWARD P. WEBER, PLURALISM BY THE RULES: CONFLICT AND COOPERATION IN ENVIRONMENTAL REGULATION 126 (1998) ("The interactive bargaining format is intended to facilitate the flow of information among interested parties such that innovative bargains can be struck in a timely manner that facilitates the interests of all players."); *see also* Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 NYU ENVTL. L.J. 60, 121 (2000) ("On balance, the combined results . . . of the study suggest that reg neg is superior to conventional rulemaking on virtually all of the measures that were considered. Strikingly, the process engenders a significant learning effect, especially compared to conventional rulemaking; participants report, moreover, that this learning has long-term value not confined to the particular rulemaking.").

75. Freeman & Langbein, *supra* note 74, at 232 ("Most significantly, the negotiation of rules appears to enhance the legitimacy of outcomes. [The] data indicate that process matters to perceptions of legitimacy. Moreover, . . . reg-neg participant reports of higher satisfaction could not be explained by their assessment of the outcome alone. Instead higher satisfaction seems to arise in part from a combination of process and substance variables."). Stakeholder satisfaction is significant because of "mounting evidence in social psychology that 'satisfaction is one of the principal consequences of procedural fairness.'" *Id.*

76. Ellen Siegler, *Regulatory Negotiations and Other Rulemaking Processes: Strengths and Weaknesses from an Industry Viewpoint*, 46 DUKE L.J. 1429, 1434 (1997).

77. *Id.* ("Through direct participation, a sense of 'ownership' in the rule among participants is thought to preempt the litigation considered inevitable for most EPA rulemaking efforts.").

78. Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 NYU ENVTL. L.J. 32, 45–49 (2000).

79. WEBER, *supra* note 74, at 127 ("[B]y giving stakeholders a direct role in writing the rule, as an ex-EPA administrator explained, the likelihood is increased that players at the table 'underst[and] exactly what [is] meant by the regulation and what [is] expected of them once the regulation [is] final.'").

80. *See* Cary Coglianese, *Assessing the Advocacy of Negotiated Rulemaking: A Response to Philip Harter*, 9 N.Y.U. ENVTL. L.J. 386 (2001); Cary Coglianese, *Assessing the Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255 (1997); Andrew P. Morriss, Bruce Yandle & Andrew Dorchak, *Choosing How to Regulate*, 29 HARV. ENVTL. L. REV. 179, 195–202 (2005).

complicated and contentious issues than garden-variety rulemaking.[81] These critics also point out that negotiated rulemaking has largely fallen into disuse, but this is not because it is ineffective. Rather, individual agencies perceive reg-neg as diluting their regulatory authority, because interested parties are brought into the process during the drafting of a proposed rulemaking, and agencies are deterred by the up-front cost of reg-neg.[82] For its part, OMB perceives rules produced through reg-neg as less amenable to OMB input because they represent a compromise between the responsible agency and interested parties.[83] But OMB can always review any rule before it is finalized.[84] OMB can even participate in the negotiation.[85] And the tendency of negotiated rulemaking to attract advance support from outside of the government is a benefit, whether or not OMB perceives it that way.

The reformulated gasoline rule (RFG) is a good example of reg-neg achieving a better result than could have been accomplished in the absence of stakeholder input at the drafting stage.[86] Like a rule with transnational implications, the RFG rule was a good candidate for reg-neg because of its complexity, and because collaboration with affected parties and other regulators would result in better information than the convening agency could obtain by itself.[87] The process brought together thirty-five interested parties, including oil interests, alcohol fuel producers, environmental advocates, automotive manufacturers, state-level regulators, and the Department of Energy.

The inclusion of state regulatory agencies in the RFG rulemaking offers a good model for the involvement of foreign sovereigns in the rule-making process. Along with environmental advocates, the state regulators insisted on "a formal, written protocol guaranteeing that their good-faith bargaining efforts

81. *See* Philip J. Harter, *A Plumber Responds to the Philosophers: A Comment on Professor Menkel-Meadow's Essay on Deliberative Democracy*, 5 NEV. L.J. 379 (2004); Harter, *Assessing the Assessors*, *supra* note 78; Laura L. Langbein & Cornelius M. Kerwin, *Regulatory Negotiation Versus Conventional Rule Making: Claims, Counterclaims, and Empirical Evidence*, 10 J. PUB. ADMIN. RESEARCH & THEORY 599, 627 (2000); Jeffrey S. Lubbers, *Achieving Policymaking Consensus: The (Unfortunate) Waning of Negotiated Rulemaking*, 49 S. TEX. L. REV. 987, 1004 (2008); Daniel P. Selmi, *The Promise and Limits of Negotiated Rulemaking: Evaluating the Negotiation of a Regional Air Quality Rule*, 35 ENVTL. L. 415 (2005).

82. Lubbers, *supra* note 81, at 997–98.

83. *See id.* at 999.

84. *Id.*

85. *Id.*

86. Regulation of Fuels and Fuel Additives, 40 C.F.R § 80.40 (2011); Regulation of Fuels and Fuel Additives, 40 C.F.R § 80.83 (2006).

87. WEBER, *supra* note 74, at 127. Indeed the rulemaking was so ambitious and the timetable so tight, that some considered it impossible. *See id.* at 124 ("Given the technical sophistication of the EPA's task, the time and resource constraints, and the number of players with high stakes on the table, conflict and delay seemed inevitable." This contributed to "considerable doubt that the RFG rulemaking would be concluded by the congressionally mandated deadline."). *Id.* at 131 (quoting Richard Wilson of EPA's Office of Mobile Service's estimate "at no more than 50–50 that an agreement, 'at least in principle,' would be reached.").

would not be wasted due to intervention from the Bush Administration."[88] I was among the small group of high-level executive branch advisors that hashed out the resulting protocol with the state regulators.[89] Our protocol barred executive branch intervention during and after the reg-neg and obligated stakeholders not to litigate the final rule as long as it was consistent with the negotiated rulemaking committee's consensus. This preliminary agreement was crucial to the success of the rulemaking.[90] State regulators also influenced the negotiation of a key bargain over the means used to reach compliance.[91] In exchange for allowing refiners to average the emissions of their total fuel pool, state regulators and environmental organizations extracted a more stringent baseline for emissions reductions and tougher emissions standards.[92]

In the end, the RFG rulemaking was widely considered a success.[93] The compromise that allowed tougher-than-expected emissions standards in the context of averaging could not have been achieved through traditional notice-and-comment procedure, which lacks the back-and-forth of reg-neg. As a result of the negotiation, the rule was based on the best available scientific data,[94] oil interests were satisfied that they could comply with the new rule, and environmentalists and regulators approvingly regarded it as more stringent than the rule EPA would have issued otherwise.[95] Most importantly, the state regulators' satisfaction with the rule meant that individual states were less likely to implement their own competing emissions programs, which would have resulted in duplicative regulatory regimes and high compliance costs.[96]

This description of negotiated rulemaking in practice shows how reg-neg could be adapted to the transatlantic context. The Negotiated Rulemaking Act makes clear that the process is open to "innovation and experimentation,"[97] so policymakers should think creatively about its potential as a device for promoting regulatory cooperation. Reg-neg works best for rulemakings that are complex and controversial.[98] And introducing transnational corporations and a

88. *Id.* at 130.

89. *Id.* The other advisors were Michael Boskin, counsel to Vice President Quayle's Council for Competitiveness, and Michael Elliot of EPA's Office of General Council. *Id.*

90. CHRISTOPHER MCGRORY KLYZA & DAVID J. SOUSA, AMERICAN ENVIRONMENTAL POLICY: BEYOND GRIDLOCK 201 (2013) ("This 'assurance mechanism' . . . was crucial in securing the participation of environmentalists and state regulators in the process. This would ensure that the agreement would stick, giving the negotiated rule safe passage through the environmental policy labyrinth.").

91. WEBER, *supra* note 74, at 131–32.

92. *Id.* at 132–33.

93. *See* CHRISTOPHER MCGRORY KLYZA & DAVID J. SOUSA, AMERICAN ENVIRONMENTAL POLICY: BEYOND GRIDLOCK 200 (2013) (citing WEBER, *supra* note 77, at 120–42).

94. WEBER, *supra* note 74, at 138–39.

95. *Id.* at 137.

96. *Id.* at 138.

97. 5 U.S.C. § 561 (2012) ("Nothing in this subchapter should be construed as an attempt to limit innovation and experimentation with the negotiated rulemaking process or with other innovative rulemaking procedures otherwise authorized by law.").

98. Harter, *supra* note 81, at 381 ("A reg-neg, then, is typically used only to address highly

foreign sovereign into the picture adds a layer of complexity that would be well served by reg-neg, even when the underlying regulation is straightforward.

In a transnational context involving foreign regulators, the role of convener would become especially important. The TEC or some other existing agency or officer with responsibility in the field of international regulatory cooperation could serve as the statutory "convener," to "identify[] persons who will be significantly affected by a proposed rule," to "conduct[] discussions with such persons to identify the issues of concern to such persons," and to identify "persons who are willing and qualified to represent interests that will be significantly affected by the proposed rule."[99] These interested persons would include transatlantic businesses as well as regulators from both the EU and the United States.

European regulators should welcome the opportunity to participate in reg-neg in the United States. The process would give them access to valuable data and help to strengthen relationships with their U.S. counterparts. Reg-neg could also allow European regulators to have a say in the resulting rule. Nothing prevents them from exerting the same kind of pressure that state regulators exerted in the RFG negotiated rulemaking.

A preliminary agreement like the protocol in the RFG rulemaking could help to define the foreign regulators' roles in the reg-neg and maximize the benefits of transnational regulatory cooperation. For example, in exchange for their support and an agreement to prioritize convergence in their own related rulemakings, European regulators would gain the information exchanged in the reg-neg and an opportunity to influence their U.S. counterparts. But even short of a formal agreement, regulators who participate in the other party's negotiated rulemaking and buy into the consensus position would be more likely to advocate adoption of a similar regulatory approach in Europe.

If transatlantic reg-neg works in the United States, it may influence the EC to experiment with a similar process by including U.S. businesses and regulators in the stakeholder consultation process. The EU's Impact Assessment Guidelines already encourage consultation of affected stakeholders early in the EU regulatory process, and there is no reason that U.S. regulators could not be included. More recently, the EC has promised to "continue to improve its planning of consultations through the preparation of consultation strategies at the policy preparation stage" and to adopt new internal guidelines "with a view to enhance the quality of consultations."[100] Those new guidelines should establish procedures for involving U.S. regulators at the consultation stage to enable "comparison of policy options"[101] when significant transatlantic effects

complex and controversial rules.").

99. 5 U.S.C. § 563 (2012).

100. *Communication from the Commission to the European Parliament, the Council*, *the European Economic and Social Committee and the Committee of the Regions*, at 14, COM (2014) 368 final (June 18, 2014), http://ec.europa.eu/smart-regulation/docs/com2014_368_en.pdf.

101. European Commission, *supra* note 24.

are at stake. Especially when conducted in tandem or in close sequence, regulatory negotiation in the United States and Europe could contribute to valuable regulatory convergence.

V
CONCLUSION

This article offers some realistic suggestions for advancing transatlantic regulatory cooperation. Reinvigorating the TEC with high-level leadership and inviting European regulators to participate in negotiated rulemakings are both developments that could be integrated into a successful TTIP. But nothing prevents the United States and the EU from taking these practical steps now. Indeed, demonstrating the success of U.S.–EU cooperation in a strategically targeted reg-neg overseen by a TEC, which in turn would be chaired by the U.S. Vice President and EU Commission President, could add momentum to the TTIP negotiations and help to solidify sorely needed political support for the agreement.

Consider, for example, a negotiated Environmental Protection Agency rulemaking convened by the TEC, with participation from U.S. and European auto manufacturers and regulators seeking to establish a new minimum octane rating for U.S. market fuel.[102] U.S. manufacturers must meet increasingly stringent fuel efficiency and greenhouse gas regulations; to do so, they want to be able to build next-generation vehicles with efficient high-compression engines.[103] Such vehicles are already available in Europe,[104] but they require a higher-octane fuel than the U.S. standard 87 AKI.[105] A reg-neg with the participation of European automakers and regulators could enable more efficient, less polluting vehicles in the United States, and could achieve valuable standardization between the U.S. and European auto markets. Regulators and industries could nominate other policies in various sectors that could serve as models of transatlantic cooperation through negotiated rulemaking.

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102. *Cf.* U.S.–Canada Regulatory Cooperation Council, *supra* note 60, at 19 ("Environment Canada and the U.S. Environmental Protection Agency will continue collaborating under the U.S.–Canada Air Quality Committee (AQC) towards the development of aligned vehicle and engine emission regulations and their coordinated implementation.").

103. *See* Robert Babik, General Motors LLC, *Comments on Proposed Tier 3 Rule*, EPA-HQ-OAR-2011-0135-4288, at 14 (June 28, 2013); Julian Soell & R. Thomas Brunner, *Mercedes-Benz, Comments on Proposed Tier 3 Rule*, EPA-HQ-OAR-2011-0135-4676, at 3–4 (June 28, 2013); Cynthia Williams, Ford Motor Company, *Comments on Proposed Tier 3 Rule*, EPA-HQ-OAR-2011-0135-4349, at 3, 16–17 (July 1, 2013) [hereinafter Ford Comments].

104. *See* Ford Comments, *supra* note 103, at 17 ("High compression ratio engines are already found in Europe . . . . [T]he introduction of higher octane rated/intermediate level ethanol blend fuel would allow for a faster introduction of more efficient vehicle designs from Europe with lower CO_2 emissions and increased efficiency . . . without the need for significant design changes.").

105. *See* Stephen Douglas & Julia Rege, *Alliance of Automobile Manufacturers & Association of Global Automakers, Comments on Proposed Tier 3 Rule*, EPA-HQ-OAR-2011-0135-4461, at 52–53 (July 1, 2013); Ford Comments, *supra* note 103, Appendix A: Literature Review of the Benefits of High Octane/High Ethanol Fuels, at 2.

More than proving the merit of these specific ideas, this article seeks to encourage creative thinking about repurposing existing regulatory institutions and mechanisms in the transnational context. In a world of ever more complex regulatory systems, creative approaches to regulatory cooperation will be critical to the continued vitality of U.S.–European leadership in the global economy.