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Eliminating Anticompetitive Market Distortions Through The Transatlantic Trade and Investment Partnership

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I. INTRODUCTION

The close on July 12th of the first round of negotiations under the auspices of the Transatlantic Trade and Investment Partnership (“T-TIP”) offers an opportunity to reflect on the possibilities presented by this historic agreement.² The T-TIP offers a promising opportunity for both the United States and the European Union to maximize their competitive environments and improve consumer welfare through eliminating anticompetitive market distortions (“ACMDs”). These regulatory distortions are imposed by governments (or by the private sector, with government support) to give an artificial advantage to particular businesses or industries. ACMDs stifle growth and impose hidden economic and competitive costs. U.S. and EU negotiators should take advantage of the opportunity provided by the T-TIP to harmonize the two economies’ regulatory promulgation processes.

It is in the regulatory area that trade and competition policy converge, and maximizing this convergence to generate non-zero sum growth will be the yardstick by which this agreement is ultimately measured. The T-TIP represents a once-in-a-lifetime opportunity for the United States and the European Union, which jointly represent the “backbone” of the global economy,³ to unleash the forces of competition by taking the trade negotiations to a new level of depth and substance through provisions that meaningfully reduce ACMDs.⁴ A U.S.-EU trade agreement that truly eliminated these anticompetitive distortions would generate trillions of dollars of new wealth in the global economy.⁵

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² The first round of TTIP negotiations was held during July 8-12 in Washington, D.C. Readouts from TTIP Negotiating Rounds (2013), available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/readouts> (last visited Jul. 20, 2013).

³ Press release, Remarks by President Obama, U.K. Prime Minister Cameron, European Commission President Barroso, and European Council President Van Rompuy on the Transatlantic Trade and Investment Partnership (Jun. 17, 2013) [hereinafter Obama, Cameron et al.], available at <http://www.whitehouse.gov/the-press-office/2013/06/17/remarks-president-obama-uk-prime-minister-cameron-european-commission-pr> (last visited Jul. 16, 2013).

⁴ Shanker Singham, *Freeing the Global Market*, COUNCIL ON FOREIGN RELATIONS 1 (Oct. 2012) [hereinafter *Freeing the Global Market*], available at <http://www.cfr.org/world/freeing-global-market-boost-economy-curbing-regulatory-distortions/p29123> (last visited Jul. 20, 2013).

⁵ *Id.*

II. ADDRESSING ANTICOMPETITIVE MARKET DISTORTIONS THROUGH THE T-TIP

U.S. and EU heads of state officially launched the T-TIP negotiations in June 2013.⁶ According to U.S. and EU officials, the fundamental purpose of the T-TIP is to promote prosperity by creating new economic growth and job opportunities.⁷ As part of this goal, negotiators should move beyond the traditional trade policy approach based on mercantilist thinking⁸ and ensure that the T-TIP includes provisions to minimize the deadweight economic losses caused by ACMDs.

These regulatory distortions include barriers imposed by government or the private sector (with government support) to give an unfair, artificial advantage to a particular industry or business.⁹ They include laws that govern market entry as well as product standards, price, and quantity.¹⁰ ACMDs take the form of regulations that cap the number of businesses, like pharmacies, in a particular area; place limits on production or sales; impose standards in order to restrict competition; or control prices through, for example, the imposition of minimum prices.¹¹ ACMDs that lower costs for a particular industry or firm are particularly damaging and tend to quickly alter market share and international trade patterns.¹²

The Organization for Economic Co-operation and Development (“OECD”) also has developed a list of four types of ACMDs. The four categories include regulations that “limit the number or range of suppliers[,] ... limit the ability of suppliers to compete[,] ... reduce the incentives of suppliers to compete[,] ... [or] limit the choices and information available to consumers[.]”¹³ Depending on how they are structured and the prevailing market conditions, ACMDs can damage consumers and producers both in the home country and abroad.

Specific examples of ACMDs in the United States include the Buy American Act, which requires the U.S. government to purchase U.S.-made products unless the cost of the domestically

⁶ See press release, U.S., EU Announce Decision to Launch Negotiations on a Transatlantic Trade and Investment Partnership (Feb. 13, 2013) [*hereinafter* Announcement of T-TIP Launch], available at <http://www.ustr.gov/about-us/press-office/press-releases/2013/february/statement-US-EU-Presidents> (last visited Jul. 15, 2013); see also *supra* note 3, Obama, Cameron *et al.*

⁷ See *id.*

⁸ *Supra* note 4, *Freeing the Global Market*, at 1, 13-14.

⁹ Alden F. Abbott & Shanker Singham, *Enhancing welfare by attacking anticompetitive market decisions*, CONCURRENCES NO. 4-2011 ¶ 14 (2011) [*hereinafter* Enhancing Welfare]; *supra* note 4, *Freeing the Global Market*, at 1.

¹⁰ SHANKER SINGHAM, ROUNDTABLE ON TRADE AND COMPETITION, IMPROVING U.S. COMPETITIVENESS; ELIMINATING ANTI-COMPETITIVE MARKET DISTORTIONS 19 (2011), available at http://tradecompetition.org/images/Paper_on_Improving_US_Competitiveness_Eliminating_ACMDs_15NOV11.pdf (last visited Jul. 20, 2013).

¹¹ *Id.*

¹² *Supra* note 9, *Enhancing Welfare*, at ¶ 7.

¹³ ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), COMPETITION ASSESSMENT TOOLKIT, VOL.2, 30 (2011), available at <http://www.oecd.org/competition/assessment-toolkit.htm> (last visited Jul. 20, 2013).

produced good is prohibitively high compared to a foreign-made alternative.¹⁴ Buy American provisions are included in the American Recovery and Reinvestment Act of 2009: The law stipulates that “[n]one of the funds appropriated or otherwise made available by this Act may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States.” The requirement can be waived in certain circumstances, for example, if the “inclusion of iron, steel, and manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent.”¹⁵ In the European Union, ACMDs include stricter regulations on genetically modified organisms (“GMOs”) than those found in the United States,¹⁶ as well as a ban on imports of chlorinated chicken.¹⁷

Another characteristic of ACMDs is the difficulty of addressing them through the multilateral trading system.¹⁸ Broadly speaking, the problem with tackling ACMDs under the auspices of the World Trade Organization (“WTO”) Agreements is twofold: either the actions taken (or condoned) by the government of the country where the ACMD is imposed are not covered by a WTO Agreement, or the WTO finds it difficult to construct a framework to analyze the claims.¹⁹

Though the comprehensive treatment of competition policy in WTO case law is beyond the scope of this article, it should be noted that the literature is replete with arguments over whether—and the degree to which—the WTO can address competition-related issues.²⁰ One

¹⁴ The Act was first passed in 1933 as Making Appropriations for the Treasury and Post Office Departments for the fiscal year ending June 30, 1934, and for other purposes, ch. 212, 47 Stat. 1520 (1933) (HeinOnline); see also JOHN LUCKEY, CONG. RES. SERVICE, DOMESTIC CONTENT LEGISLATION: THE BUY AMERICAN ACT AND COMPLEMENTARY LITTLE BUY AMERICAN PROVISIONS 1-2 (2012) [*hereinafter* CRS DOMESTIC CONTENT], available at <http://www.fas.org/sgp/crs/misc/R42501.pdf> (last visited Jul. 20, 2013).

¹⁵ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat 115, available at <http://www.gpo.gov/fdsys/pkg/PLAW-111publ5/pdf/PLAW-111publ5.pdf> (last visited Jul. 20, 2013); see also *id.*, CRS DOMESTIC CONTENT, at 16.

¹⁶ Diahanna Lynch & David Vogel, *The Regulation of GMOs in Europe and the United States: A Case-Study of Contemporary European Regulatory Politics*, COUNCIL ON FOREIGN RELATIONS (Apr. 2001), available at <http://www.cfr.org/agricultural-policy/regulation-gmos-europe-united-states-case-study-contemporary-european-regulatory-politics/p8688> (last visited Jul. 20, 2013); see also Joe Kirwin, *Some Say U.S.-EU Trade Deal Would Undo Europe's Curbs on Genetically Modified Crops*, BNA'S INTERNATIONAL TRADE DAILY, Mar. 11, 2013, available at BLOOMBERG BNA.

¹⁷ RENEE JOHNSON, CONG. RES. SERVICE, U.S.-EU POULTRY DISPUTE 1 (2010), available at <http://www.fas.org/sgp/crs/row/R40199.pdf> (last visited Jul. 20, 2013). See also Doug Palmer, *Senior senators outline priorities for U.S.-EU trade pact*, REUTERS, Feb. 12, 2013, available at <http://www.reuters.com/article/2013/02/12/us-usa-eu-trade-idUSBRE91B1H120130212> (last visited Jul. 20, 2013); Olga Khazan, *Transatlantic trade: How chlorine-washed chicken prevents greater U.S.-E.U. trading*, THE WASHINGTON POST, Feb. 13, 2013, available at <http://www.washingtonpost.com/blogs/worldviews/wp/2013/02/13/the-transatlantic-trading-partnership-how-chlorine-washed-chicken-prevents-u-s-e-u-trade/> (last visited Jul. 20, 2013).

¹⁸ *Supra* note 9, *Enhancing Welfare*, at ¶ 7.

¹⁹ See *id.* at ¶ 9-12.

²⁰ See e.g., David J. Gerber, *Competition Law and the WTO: Rethinking the Relationship*, 10(2) J. INT'L ECON. L. 707, 708-709 (2010); D. Daniel Sokol, *Limiting Anticompetitive Government Interventions that Benefit Special Interests*, 17 GEO. MASON. L. REV. 119, 121-122, 189 (2009) (Westlaw); John O. McGinnis, *The Political Economy of International Antitrust Harmonization*, 45 WM. & MARY L. REV. 549, 552 (2003) (Westlaw); Ignacio Garcia Bercero & Stefan D. Amarasinha, *Moving the Trade and Competition Debate Forward*, 4(3) J. INT'L ECON. L. 481, 481 (2001);

common thread found throughout the debate is the idea that the WTO disciplines do not extend to activities undertaken by private firms.²¹ Ultimately, “[m]ost [ACMDs] either fall outside the strictures found in the various WTO Codes and Agreements, or, even if they do not, the WTO has proven itself largely unable to tackle them or to apply the right metric to analyze them.”²²

III. ELIMINATING ACMDS WOULD ADD TRILLIONS TO THE GLOBAL ECONOMY²³

As noted earlier, the economic gains from a free trade agreement leading to consumer welfare maximizing regulatory reform and competitive markets would likely reach into the trillions of dollars.²⁴ It is difficult to calculate the precise economic impact of ACMDs because a metric has yet to be developed to ascertain their costs—though efforts to establish a metric are underway.²⁵

Given the distortive effect of ACMDs and the difficulty of addressing them through the multinational trading system, the T-TIP presents a golden opportunity for U.S and EU officials to work in tandem toward their elimination. This opportunity is particularly fortuitous considering that both economies share a fundamental normative framework that emphasizes the role of competition based on innovation and comparative advantage as the driving force of economic growth and prosperity.²⁶

Moreover, studies suggest that this type of economic model is successful: An article recently published by the *Journal of Competition Law & Economics* shows that over the long term (ten years), economic growth as measured by GDP per capita is positively affected by the establishment of antitrust laws, and a study of OECD countries in 2009 found that opening the “product market” improves productivity.²⁷ Given this context, the United States and the

Alan O. Sykes, *Regulatory Protectionism and the Law of International Trade*, 66 U. CHI. L. REV 1, 13-16 (1999) (Westlaw).

²¹ See e.g., Aditya Bhattacharjea, *The Case for a Multilateral Agreement on Competition Policy: A Developing Country Perspective*, 9(2) J. INT’L ECON. L. 293, 295 (2006); Brendan Sweeney, *Globalisation of Competition Law and Policy: Some Aspects of the Interface between Trade and Competition*, 5 MELB. J. INT’L L. 375, 383-84 (2004) (Westlaw); Robert E. Hudec, *Private anticompetitive behavior in world markets: a WTO perspective*, 48 ANTITRUST BULL. 1045, 1046-47 (2003) (HeinOnline).

²² See *supra* note 9, *Enhancing Welfare*, at ¶ 9.

²³ *Supra* note 4, *Freeing the Global Market*, at 2, 16.

²⁴ *Id.* at 1.

²⁵ *Id.* at 14-15.

²⁶ See e.g., Deputy Secretary of Commerce Rebecca Blank, Remarks on Revitalizing American Manufacturing, Spartanburg, South Carolina (Feb. 15, 2013), available at <http://www.commerce.gov/news/deputy-secretary-speeches/2013/02/15/remarks-revitalizing-american-manufacturing-spartanburg-so> (last visited Jul. 20, 2013); *Competitiveness and Innovation Framework Programme (ICP): Support to Innovation*, EUROPEAN COMMISSION, http://ec.europa.eu/cip/eip/innovation/index_en.htm (last visited Jul. 20, 2013); EUROPEAN COMMISSION: COMPETITION, COMPETITION POLICY IN THE EUROPEAN UNION, available at http://ec.europa.eu/dgs/competition/factsheet_general_en.pdf (last visited Jul. 20, 2013); press release, Lisbon Strategy for Growth and Jobs: frequently asked questions (Dec. 8, 2006), available at http://europa.eu/rapid/press-release_MEMO-06-474_en.htm?locale=en (last visited Jul. 20, 2013). See also Shanker A. Singham & Alden F. Abbott, Comments on the Proposed Transatlantic Trade and Investment Partnership (“TTIP”) by The Roundtable on Trade and Competition (2013), available at <http://www.regulations.gov>.

²⁷ Niels Petersen, *Antitrust Law and the Promotion of Democracy and Economic Growth*, 00(00) J. COMPETITION L. & ECON. 2013 25-27(OXFORD JOURNALS); Alessandro Diego Scopelliti, *Competition and Economic Growth: an*

European Union should take advantage of the opportunity provided by the T-TIP negotiations to eliminate sources of economic loss and bring their economies closer to the normative model on which they are based.

Existing analyses of potential gains from the T-TIP that include discussions of non-tariff barriers do not factor in the “combined static and dynamic losses caused by ACMDs” which impact “downstream markets and cause significant efficiency losses[.]”²⁸ [This is not surprising, given that a metric to quantify the costs imposed by ACMDs has not yet been developed (more on this below).²⁹] For example, one study released in 2013—which is posted on the EU website—estimates that a comprehensive T-TIP which removes not only all tariffs, but also one-quarter of non-tariff barriers on goods and services and fifty percent of non-tariff barriers related to procurement could add EUR 313.3 billion to the global economy by 2027.³⁰ British Prime Minister David Cameron named a similar figure, stating that the T-TIP could inject £265 billion pounds sterling (or EUR 308 billion³¹) of new wealth into the global economy.³²

Another report published in 2009, which also is posted on the EU website, estimates that an “ambitious” free trade agreement where half of regulatory differences are harmonized could add EUR 163 billion annually to the U.S. and EU economies combined.³³ However, these studies do not take into account all of the elements required for a thorough analysis of the impact of ACMDs. Such a metric would:

measure the impact on consumer welfare as well as on trade, and include direct and indirect costs.[.] Regulatory distortions can lead to significant price increases for consumers. But there are also larger dynamic losses caused by firms deciding not to invest in new products or new technologies[.] ... The static losses caused by ACMDs spawn a vicious cycle of losses that travel through the downstream firms and can have wide-ranging ripple effects across the whole economy.³⁴

IV. THE UNITED STATES AND THE EUROPEAN UNION ACKNOWLEDGE THE NEED TO REDUCE NON-TARIFF BARRIERS

Hearteningly, documents and statements issued by both the United States and the European Union indicate that officials understand the magnitude of opportunity presented by the T-TIP to eliminate ACMDs. For example, in June 2013, European Commission President

Empirical Analysis for a Panel of 20 OECD Countries, Munich Personal RePEc Archive (MPRA) Paper No. 20127, 50 (Dec. 2009), available at <http://mpra.ub.uni-muenchen.de/20127/> (last visited Jul. 20, 2013).

²⁸ *Supra* note 4, *Freeing the Global Market*, at 5.

²⁹ *Id.* at 14-15.

³⁰ CENTRE FOR ECONOMIC POLICY RESEARCH, REDUCING TRANSATLANTIC BARRIERS TO TRADE AND INVESTMENT: AN ECONOMIC ASSESSMENT 82, 33 (2013), available at http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150737.pdf (last visited Jul. 20, 2013).

³¹ XE CURRENCY CONVERTER, <http://www.xe.com/currencyconverter/convert/?Amount=265&From=GBP&To=EUR> (currency conversion calculation Jul. 19, 2013).

³² *Supra* note 3, Obama, Cameron *et al.*

³³ ECORYS, NON-TARIFF MEASURES IN EU-US TRADE AND INVESTMENT – AN ECONOMIC ANALYSIS xiii, xiv (2009), available at http://trade.ec.europa.eu/doclib/docs/2009/december/tradoc_145613.pdf (last visited Jul. 20, 2013).

³⁴ *Supra* note 4, *Freeing the Global Market*, at 15.

José Manuel Barroso stated that the “core challenge” was “moving our regulatory regimes closer, and addressing the harmful effect of behind-the-border trade barriers. Huge economic benefits are expected from reducing red tape, avoiding divergent regulations for the future.”³⁵

A White House Fact Sheet also issued in June states that “[the] T-TIP will aim to ... [t]ackle costly “behind the border” non-tariff barriers that impede the flow of goods[.]”³⁶ Additionally, a European Commission report observes that “cutting red tape and having more coordination between regulators[.]” could constitute as much as two-thirds, or even four-fifths, of the benefits of the T-TIP.³⁷

The High Level Working Group on Jobs and Growth (“HLWG”), commissioned in November 2011 to “identify policies and measures to increase U.S.-EU trade and investment to support mutually beneficial job creation, economic growth, and international competitiveness[.]”³⁸ likely deserves a large part of the credit for the official acknowledgement of the importance of addressing ACMDs. In its Final Report issued in February 2013, the HLWG concluded that “a comprehensive agreement that addresses a broad range of bilateral trade and investment issues, including regulatory issues, and contributions to the development of global rules, would provide the most significant mutual benefit[.]”³⁹

The publicly available reports and statements suggesting that the two economies are serious about reducing ACMDs raise questions about what types of provisions will ultimately be included the T-TIP’s competition chapter. To answer this question it is worthwhile to turn again to the Final Report of the HLWG, which dedicates roughly two of its six pages to the issue of regulatory and non-tariff barriers.

One of the five recommendations of the HLWG is that the T-TIP partners negotiate “[c]ross-cutting disciplines on regulatory coherence and transparency for the development and implementation of efficient, cost-effective, and more compatible regulations for goods and services, including early consultations on significant regulations, use of impact assessments, periodic review of existing regulatory measures, and application of good regulatory practices.”⁴⁰ The Report notes that the United States and the European Union share “the aim of developing during the course of negotiations concrete action plans to reduce regulatory costs[.]”⁴¹

³⁵ *Supra* note 3, Obama, Cameron *et al.*

³⁶ Fact Sheet: Transatlantic Trade and Investment Partnership (T-TIP) (Jun. 17, 2013), *available at* <http://www.whitehouse.gov/the-press-office/2013/06/17/fact-sheet-transatlantic-trade-and-investment-partnership-t-tip> (last visited Jul. 18, 2013).

³⁷ TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP: THE REGULATORY PART, EUROPEAN COMMISSION 2 (2013), *available at* http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151605.pdf (last visited Jul. 20, 2013).

³⁸ Fact Sheet: High-Level Working Group on Jobs and Growth (Nov. 28, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/11/28/fact-sheet-high-level-working-group-jobs-and-growth> (last visited Jul. 18, 2013).

³⁹ FINAL REPORT OF THE U.S.-EU HIGH LEVEL WORKING GROUP ON JOBS AND GROWTH (Feb. 11, 2013), *available at* <http://www.ustr.gov/about-us/press-office/reports-and-publications/2013/final-report-us-eu-hlwg> (last visited Jul. 18, 2013).

⁴⁰ *Id.*

⁴¹ *Id.*

The remaining recommendations call on the United States and the European Union to include a mechanism in the T-TIP for future cooperation in the area of regulatory barriers, and to build on existing WTO Agreements to ensure that standards related to Sanitary and Phytosanitary Measures (“SPS”) and Technical Barriers to Trade (“TBT”) are established transparently and are not more burdensome than necessary.⁴²

The theme of reducing costs associated with regulatory barriers constitutes a common thread woven throughout a number of documents posted on the European Commission website,⁴³ as well as stakeholder comments submitted to T-TIP governments.⁴⁴

V. NEGOTIATORS SHOULD FOCUS ON THE REGULATORY PROMULGATION PROCESS

Ultimately, the best way to take action on these calls to promote economic growth by reducing ACMDs is to focus on both economies’ promulgation processes for the establishment of new regulations, as opposed to an approach that targets the regulatory outcomes themselves. Utilizing the window of opportunity offered by the T-TIP to harmonize U.S. and EU regulations *per se* could squander the chance to address ACMDs because the substantive differences that set U.S. and EU regulations apart are not likely to be bridged in the near future.

The debate over the “precautionary principle” is a prime example of these divergences. The principle is defined as follows: “where scientific data do not permit a complete evaluation of the risk, recourse to this principle may ... be used to stop distribution or order withdrawal from the markets of products likely to be hazardous.”⁴⁵ The European Union website, *Europa*, explains that “[t]he precautionary principle... aims at ensuring a higher level of environmental protection through preventative decision-taking in the case of risk. However, in practice, the scope of this principle is far wider and also covers consumer policy, European legislation concerning food and human, animal and plant health.”⁴⁶

On the other hand, the U.S. position—as articulated by the U.S. Ambassador to the European Union in 2011—is that “the EU’s approach to regulation, and in particular, its application of the so-called ‘precautionary principle’ is not only an impediment to trade, but also out of step with global norms.”⁴⁷ The U.S. “believe[s] that ... in too many cases, the EU is not

⁴² *Id.*

⁴³ See e.g., EU-US TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP: TRADE CROSS-CUTTING DISCIPLINES AND INSTITUTIONAL PROVISIONS: INITIAL EU POSITION PAPER, EUROPEAN COMMISSION (Jul. 16, 2013), available at http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151622.pdf (last visited Jul. 20, 2013); press release, Transatlantic Trade and Investment Partnership (Jul. 16, 2013), available at <http://ec.europa.eu/trade/policy/in-focus/ttip/> (last visited Jul. 18, 2013).

⁴⁴ See e.g., Public Comments Concerning the Proposed Transatlantic Trade and Investment Partnership, National Association of Manufacturers (May 2013), available at <http://www.regulations.gov>; RE: Transatlantic Trade and Investment Partnership, North American Meat Association (May 2013), available at <http://www.regulations.gov>.

⁴⁵ *The precautionary principle*, EUROPA SUMMARIES OF EU LEGISLATION, http://europa.eu/legislation_summaries/consumers/consumer_safety/l32042_en.htm (last visited July 18, 2013).

⁴⁶ *Id.*

⁴⁷ Ambassador William E. Kennard, Remarks at the Heinz high-level dinner at the European Parliament (Mar. 29, 2011), available at http://useu.usmission.gov/ep_heinz_032911.html (last visited Jul. 18, 2013).

striking the right balance. In too many cases, decisions are not based on science. In too many cases, science-based decision-making is abandoned in favor of subjective judgments based on culture and tradition—or presumptions about consumer preferences.”⁴⁸

In the United States, the cost-benefit analysis which was initiated by Executive Order 12291 during the Reagan Administration,⁴⁹ later developed and refined through Executive Order 12866 under the Clinton Administration,⁵⁰ as well as through the A-4 Circular promulgated by the George W. Bush Administration,⁵¹ is working towards a welfare effect test. Remarks by President Barack Obama’s first head of the Office of Information and Regulatory Analysis (“OIRA”), Cass Sunstein, suggest that he envisaged a welfare effects analysis as being part of the regulatory promulgation process.⁵² The most recent Executive Order, No. 13609, includes taking into account the effect on international trade of new regulations.⁵³

At the same time, domestic competition agencies are engaging in more rigorous competition assessment of new regulation and legislation: Chair of the International Competition Network (“ICN”), Eduardo Pérez Motta, stated in his closing speech during the 2013 INC Conference that stakeholders are calling for the ICN to engage with economic policymakers to “remind them that more effective competition and sound competition policy must be part of the solution to make markets work better.”⁵⁴ Motta also observed that “[o]ne way we can do this is with our new project on competition assessment,” which will consist of “recommended practices for conducting an assessment of the competitive effects of proposed and existing regulations.”⁵⁵

While the ICN’s Competition Assessment Project is still in a developmental phase, one of its operating philosophies is that competition agencies “should examine existing or proposed laws and regulations to determine whether they may have a significant impact on competition.”⁵⁶ This competition assessment by definition imposes a welfare effects analysis in the regulatory promulgation process—something that both the United States and the European Union have at least conceptually agreed on. Ultimately, in light of the differences between the substantive content of U.S. and EU regulations, negotiators will be able to make greater progress under the

⁴⁸ *Id.*

⁴⁹ Exec. Order 12,291. 3 C.F.R. 127 (1982, ed. 1983), *reprinted in* 5 U.S.C. § 601 app. at 431-34 (1982) (HeinOnline).

⁵⁰ Exec. Order 12,866. 3 C.F.R. 638 (1994), *reprinted in* 5 U.S.C. § 601 app. at 557- 561 (1982) (HeinOnline) (*supplemented by* Exec. Order 13,563, 3 C.F.R. 215 (2012) (HeinOnline)).

⁵¹ Circular A-4 To the Heads of Executive Agencies and Establishments, Sep. 17, 2003, *available at* http://www.whitehouse.gov/omb/circulars_a004_a-4 (last visited Jul. 19, 2013).

⁵² See Cass R. Sunstein, *Smarter Regulation* (Feb. 7, 2011), *available at* <http://www.whitehouse.gov/blog/2011/02/07/smarter-regulation> (last visited Jul. 20, 2013).

⁵³ Exec. Order 13,609. 3 C.F.R. 255 (2013), *available at* <http://www.gpo.gov/fdsys/pkg/CFR-2013-title3-vol1/pdf/CFR-2013-title3-vol1-eo13609.pdf> (last visited Jul. 20, 2013).

⁵⁴ Eduardo Pérez Motta, Closing speech to International Competition Network Conference (Apr. 26, 2013), *available at* <http://internationalcompetitionnetwork.org/uploads/library/doc898.pdf> (last visited Jul. 20, 2013).

⁵⁵ *Id.*

⁵⁶ INTERNATIONAL COMPETITION NETWORK (ICN), IDENTIFYING THE NATURE OF REGULATORY RESTRICTIONS: DRAFT SECTION FOR ICN AWG COMPETITION ASSESSMENT PROJECT (Apr. 4, 2013), *available at* http://icnwarshaw2013.org/docs/icn_awg_discussion_draft_competition_assessment_substantive.pdf (last visited Jul. 20, 2013).

auspices of the T-TIP if they focus on the promulgation process, rather than on regulatory outcomes.

To be more specific, negotiators should seek to include in the competition chapter a provision requiring that, prior to the promulgation of any new regulatory measures, the United States and the European Union shall conduct cost-benefit analyses of the proposed regulations and publish the findings. Crucial to this process is the commitment that both economies will make the costs to consumer welfare explicit in their published analyses. A party in breach of the requirement to conduct the analysis and publish the data could be subject to consultations or arbitration.

In this way, data that clearly shows the impact on consumer welfare will be available for legislators to use as part of their deliberations when considering whether to adopt the new regulatory measures. The requirement to make this data readily available for not only lawmakers but also civil society will help ensure the transparency of the regulatory promulgation process.

VI. ADDRESSING ACMDS WITHIN THE UNITED STATES AND THE EUROPEAN UNION WILL BENEFIT THIRD COUNTRIES

There are two major components to the argument that reducing ACMDs within the United States and the European Union will be a boon to the global economy. First, reduced regulatory barriers within United States and the European Union will make it easier—and less costly—for other countries to export their products and services to these markets. This will result in increased output and new wealth in third countries, as well as increased consumer welfare in the United States and the European Union.

Second, given the size and strength of the U.S. - EU economic relationship, which EU and U.S. leaders describe as “the world’s largest” and “accounting for half of global economic output and nearly one trillion dollars in goods and services trade,”⁵⁷ the two economies have the opportunity to influence the contours of the global economy. As expressed by European Council President Herman Van Rompuy, “[t]ogether, Europe and the United States are the backbone of the world economy. ... What is at stake with the transatlantic free trade area is to enshrine Europe and America’s role as the world’s standard-setters, beyond product specifications[.]”⁵⁸ The combined mass of our two economies will exert a gravitational pull, establishing a new competitive trajectory within the global economy.

VII. CONCLUSION

Since the United States and the European Union announced their intention to enter into negotiations in February 2013, the two economies—whose bilateral relationship already represents thirty percent of global trade—have moved decisively toward the negotiation of a free trade agreement that will facilitate trade and investment between the two economies.⁵⁹ The United States and the European Union should incorporate provisions into the Agreement that reduce or eliminate ACMDs through the establishment of a common regulatory promulgation process that makes the economic costs of new regulations explicit.

⁵⁷ *Supra* note 6, Announcement of T-TIP Launch.

⁵⁸ *Supra* note 3, Obama, Cameron *et al.*

⁵⁹ *See supra* note 6, Announcement of T-TIP Launch.

ACMDs represent deadweight economic losses that contract the market. As we live in a zero-sum world, reduction in output leads to higher prices, which lowers the quality of life for consumers. The T-TIP represents a historic, once-in-a-lifetime opportunity for high-level officials on both sides of the Atlantic to unleash the economic potential of the U.S. - EU bilateral relationship.