May 10, 2013

Douglas M. Bell
Chair, Trade Policy Staff Committee
1724 F Street NW
Washington, DC 20508
Submitted via Online at www.regulations.gov

RE: Docket Number USTR-2013-0019, Request for Comments
For the U.S.-EU Transatlantic Trade and Investment Partnership

Dear Mr. Bell:

Intel Corporation appreciates this opportunity to provide our views on the upcoming negotiations for the Transatlantic Trade and Investment Partnership (TTIP) Agreement. We share the Administration's goal of concluding an ambitious, comprehensive, and high-standard agreement.

In particular, we agree that "*new and innovative approaches* to reducing the adverse impact on transatlantic commerce of non-tariff barriers must be a significant focus of the negotiation" and that, given their impact on world trade, the U.S. and EU should "*develop rules and principles on emerging issues of global concerns*, thus strengthening the rules-based trading system from which all economies benefit."[1] More specifically, in its Federal Register Notice, USTR has requested "concrete ideas on how greater [regulatory] compatibility could be achieved in a particular economic sector" and invited "comments on new principles or disciplines addressing emerging challenges in international trade that should be pursued in the negotiations," including ''localization' barriers to trade, and other developments on which the United States and the EU may share similar concerns."[2]

Consistent with that request, our attached comments contain a variety of recommendations related to the ICT industry. The recommendations are aggregated under a proposed Innovation Initiative Framework to enable negotiators to better understand how effectively tackling emerging trade issues in our industry, particularly non tariff barriers, often requires a multi-faceted approach that crosses over traditional trade agreement disciplines. Some of our recommendations are accompanied by specific language suggestions (either in the main text or in annexes) that should further assist USTR in its negotiations.

We look forward to working with USTR to achieve the best possible outcome.

Sincerely,

Greg S. Slater
Director, Global Trade and Competition Policy

[1] Letter from Acting United States Trade Representative Demetrios Marantis to Hon. John Boehner, March 20, 2013.
[2] "Request for Comments Concerning Proposed Transatlantic Trade and Investment Agreement," 78 Federal Register 19566, No. 62 (April 1, 2013).

Comments of Intel Corporation Concerning
The U.S.-EU Transatlantic Trade and Investment Partnership

A Proposal for A TTIP Innovation Initiative

Submitted to the Office of the United States Trade Representative
May 10, 2013

Greg S. Slater
Director, Global Trade and Competition Policy

Table of Contents

Innovation Initiative Framework
for the U.S.-EU Trans-Atlantic Trade and Investment Partnership

Overview

The Trans-Atlantic Trade and Investment Partnership (TTIP) negotiations between the European Union (EU) and the United States (U.S.) present a unique opportunity to create a TTIP "Innovation Initiative," a comprehensive framework to facilitate trade and investment in information communications technology (ICT) products and services. This paper addresses the range of policy positions necessary for the highly innovative ICT industrial sector to thrive globally and enhance the productivity of all other major economic sectors. These policies are inseparable and interdependent, making an across-the-board approach to innovation essential.

An Innovation Initiative would help satisfy the High Level Working Group's (HLWG) mandate that the TTIP break new ground, seek innovative approaches, establish trade rules that are globally relevant, and evolve over time.[3] An Innovation Initiative also would support ongoing efforts, such as Europe's "Innovation Union," to spur innovation and economic growth. The U.S. and Europe share a common interest in promoting innovation, which is the key not only to creating more jobs in the transatlantic economy but also to boosting the competitiveness of US and EU businesses in the global market. Although the U.S. and EU are among the largest innovative markets in the world, many other countries like China, India, and Japan have national innovation or high technology plans, are investing heavily in innovation, and growing quickly.[4]

A TTIP Innovation Initiative will enable the US and EU to take advantage of each market's unique strengths and set forth a high-standard policy framework to facilitate the growth and success of innovative industries globally. Sound innovation and export strategies are mutually reinforcing, resulting in higher export shares, employment growth, and better wages. Consequently, policies supporting innovation and trade are natural allies.

A number of previous initiatives, such as the EU-US Trade Principles for Information and Communications Technology Services ("ICT Principles"), have made useful contributions toward enhancing access for innovative industries, but no single U.S./EU initiative has come anywhere close to a comprehensive approach to innovation that can be achieved through TTIP.

Given the rapid changes that accompany innovation, a number of emerging or growing gaps in current trade disciplines must be addressed to ensure it can thrive. While tariff barriers and quantitative restrictions have decreased, non-tariff barriers (NTBs) -- such as licensing

[3] *See* Office of the U.S. Trade Representative, *Final Report of the U.S.-EU High Level Group on Jobs and Growth*, February 11, 2013 [hereinafter "Final HLWG Report"].

[4] Indeed, "Innovation has become the central driver of economic growth and thus a key focal point of countries' economic development strategies as they seek to gain competitive advantage. Accordingly, countries are increasingly designing national innovation strategies that seek to coordinate their policies toward skills, scientific research, information and communications technologies (ICTs), tax, trade, intellectual property, government procurement, standards, and regulations in an integrated approach designed to drive economic growth through innovation. However, this focus on innovation creates both global opportunities and threats…." Stephen J. Ezell & Robert D. Atkinson, "The Good, the Bad, and the Ugly (and the Self-Destructive) of Innovation Policy: A Policymakers Guide to Crafting Effective Innovation Policy" (ITIF October 2010).

requirements, conflicting standards, and challenges protecting intellectual property (IP) -- have emerged as significant barriers to trade in innovative products and services. Local content provisions (requiring that a product/service, its components or its inputs be sourced domestically, or its IP be developed domestically) also are increasingly used to close out markets to international competition in strategic industries, often under the false pretense of protecting security or privacy. By including strong protections for ICT products and services in the TTIP negotiations, the U.S. and EU will strengthen their respective innovative industries and set high standards for how these complex issues should be addressed globally.

The key elements of a TTIP Innovation Initiative Framework should include:

- *Fully open market for ICT products, services and workers that is free from tariffs, local content or other nationalistic requirements, and driven by market-based mechanisms*.

- *Transparent, technologically-neutral regulatory regimes (including licensing regimes) for ICT products and services*.

- *Joint support for an increase in the use of voluntary, market-led, global standards, principles and norms that safeguard and promote innovation in the ICT sector*.

- *Robust protection of intellectual property globally to protect innovation and ensure incentives for innovators to continue to invest in R&D*.

- *Open access to networks, freedom to legitimately access and transfer data, and ability to choose applications and services*.

These Innovation Initiative elements are consistent with both the negotiation options explored in the "Final Report of the High Level Working Group on Jobs and Growth" [hereinafter "Final HLWG Report"][5] and a "key shared objective" among U.S. and EU negotiators to "identify new ways to prevent non-tariff barriers from limiting the capacity of U.S. and EU firms to innovate and compete in global markets." (*Id.*)

The proposed elements also are consistent with the recommendations in the Final HLWG Report to identify "policies and measures to increase U.S.-EU trade and investment to support mutually beneficial job creation, economic growth, and international competitiveness." The economic multiplier effect of the ICT sector is well documented; for example, in 2009, the American ICT industry contributed $1 trillion to U.S. gross domestic product (GDP), or 7.1 percent of GDP, including $600 billion from the sector itself *and* $400 billion in benefits to other sectors that rely on ICT.[6]

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[5] *See* Office of the U.S. Trade Representative, *Final Report of the U.S.-EU High Level Group on Jobs and Growth*, February 11, 2013

[6] *See* Shapiro & Mathur, *The Contribution of ICT to American Growth, Productivity, Jobs and Prosperity* (September 2011). An independent study by Global Insight found that in 2007 Intel stimulated (i) 1.1% of US GDP ($151.2 Billion) and employment of between 823,000 – 914,000 people through its U.S. operational and productivity-based impacts; and (ii) 0.4% of EU GDP (€41.4 Billion) and employment of between 337,000 – 410,000 people through its EU operational *and* productivity-based impacts.

When our sector grows through investment, innovation and wise government policies, the global economy grows even more. For example, The World Bank has estimated that, all else being equal, a high income economy can expect to see a 1.21 percent increase in per capita GDP growth for everyone 10 percent increase in broadband penetration.[7]

We agree with the HLWG Report that the TTIP "should be designed to evolve over time – i.e., substantially eliminate existing barriers to trade and investment, while establishing mechanisms that enable a further deepening of economic integration, particularly with respect to the promotion of more compatible approaches to current and future regulation and standard-setting and other means of reducing non-tariff barriers to trade."[8] The mechanism we suggest for our industry that would help to help make the TTIP a "live agreement," empowered to address new NTBs as markets and technologies evolve, is the establishment of a Transatlantic ICT Regulatory Dialogue which can operate under the current U.S, – EU High Level Regulatory Cooperation Forum (HLRCF).

The specific principles, suggested commitments and support for same relating to each of the above Innovation Initiative elements are discussed in the main text and annexes below.

I. Establish a Fully Open Trans-Atlantic Market for ICT Products / Services and Highly Skilled Workers that is Driven by Private Commercial Mechanisms

Open ICT markets free from local content or other nationalistic requirements and driven by market-based mechanisms produce the greatest innovation. Policies that seek to localize, control or contain innovation will impede rather than stimulate it by discouraging the adoption of the best available technologies, regardless of the source. Attempts by some governments to develop domestic innovative industries have led to the disturbing trends of "indigenous innovation" and "forced localization" initiatives to promote national champions and develop strategic industries domestically. The U.S. and EU should take a strong stand in the TTIP against such policies. TTIP should promote open and technology-neutral access to markets; enable the flow of highly skilled workers; eliminate trade-distorting product incentives; eliminate all tariffs; duties and levies on ICT products and services; and minimize technology mandates.

A. ***Ensure Access to Existing Markets for ICT Goods and Services.*** In the TTIP, the U.S. and EU (individually, a "Party" and collectively "Parties") should commit to prohibiting *all* forms of conditional market access for ICT products and services intended to benefit domestic ICT providers. Accordingly, either the Market Access for Goods and Trade in Services chapter, or preferably a TTIP Innovation chapter,[9] should include an article specifying that:

> *Market access for ICT goods and services covered under this chapter shall not be conditioned on requirements to (i) invest in, develop, or use local R&D, intellectual property, ICT manufacturing or assembly capabilities; (ii) transfer technology to another party involuntarily; or (iii) disclosure of unnecessary proprietary information except as provided for in Annex 5 on intellectual property.*

[7] World Bank, *Information and Communications for Development 2009: Extending Reach and Increasing Impact*, (2009).
[8] HLWG Report, p. 2.
[9] Ideally, all of our proposed elements of an Innovation Initiative would be contained in a single chapter, but we understand that may be difficult to do.

The Parties shall exercise best efforts, both individually and jointly, to encourage other governments to make similar commitments on market access.

B. ***Minimize Regulatory Barriers in Developing Innovative ICT Markets.*** ICT has rapidly evolved from a single sector into an integral aspect of many sectors from banking to travel to commerce. ICT will continue to transform virtually every aspect of our lives. In certain sectors, such as health IT, there are demonstrated advantages for patient outcomes, quality of care and reduced costs (as explained further in Section III.E). However, regulations and policies remain in place that stand in the way of greater progress in e-health. These types of barriers prevent new markets dependent on ICT from emerging or growing faster. As technology advances, policies must keep pace. In most cases this will require coordination with policymakers in fields beyond commerce and trade.

Accordingly, to enhance opportunities for ICT products and services, TTIP should include a mechanism for the Parties to (i) identify new markets or applications for ICT products and services; and (ii) facilitate collaboration and convergence, where appropriate, on new regulatory and policy frameworks that will allow widespread use of new ICT applications. E-health could serve as a pilot initiative which, if successful, could then be expanded into other sectors (e.g., payments, distance learning) where regulation is required. Aside from the uneven adoption of health IT related standards (where standards in fact exist), which inhibits interoperability among data systems and between technologies as further discussed in Section III.E, other common e-health regulatory challenges include aligning payment incentives with coordinated care objectives; assuring privacy and security of online health data; and ensuring adequate broadband infrastructure to allow the benefits of tele-medicine to reach ageing and other populations in remote locations. The mechanism we suggested earlier to make the TTIP a live agreement, an ICT Regulatory Dialogue, could be a cross agency, cross-border committee that develops a joint policy roadmap for new / emerging transatlantic ICT markets such as e-health on which necessary U.S. and EU regulations could converge to minimize barriers and burdens.

C. ***Enable the Flow of Workers with STEM Degrees.*** High value innovation is increasingly collaborative and cross-border, involving multiple sites, corporate affiliates or other parties. U.S. and EU workers with science, technology, engineering and mathematics (STEM) degrees often are involved in transatlantic R&D projects that require regular in person interaction with employees at other sites. Moreover, U.S. employers should be able to easily hire highly skilled workers from the European Union and vice-versa.

Too often, however, visa applications take an unreasonable amount of time to process and these delays restrict important business activities. With global competition and the rapid pace of innovation, employers in dynamic industries like ours must be able to quickly and regularly deploy key employees to their sites in the United States and Europe.

TTIP can modernize the rules that guide workforce mobility for employees with STEM degrees and their employers based in the U.S. and EU. Simpler and more-streamlined immigration policies for employees with STEM degrees will strengthen the US-EU relationship and enhance innovation and cooperation between US and European companies.

Accordingly, for employees with STEM degrees, TTIP negotiators should include an expansion of permissible business activities, a new treaty visa similar to the one created for Canada and Mexico in the NAFTA agreement, streamlined procedures for intra-company transfers, improved treatment for family members relocating with a worker, and an adjustment to the J-1 home residency requirement. More detail for our proposed worker mobility provisions for TTIP is found in Annex 1.

Intel recognizes that issues relating to immigration policy are sensitive generally in Congress, and even more so in the context of a bilateral trade agreement. However, it is critically important for USTR to re-engage on this issue and work with Congress and other agencies in the Administration so that the TTIP includes meaningful commitments to enhance the flow of skilled workers with STEM degrees between the US and the EU. While this may be a challenging task, it is certainly not an insurmountable one, particularly in light of the significant consensus that now exists on U.S. STEM immigration reform and the benefits that would result for both the ICT industry and the transatlantic economy as a whole.

D. ***Prohibit ICT Product Incentives.*** Various governments are interested in developing their own domestic ICT industry. As a result, they are exploring a number of ways to do so, including in some cases the use of trade distorting product incentives based on local content requirements that are both traditional in nature and also extend upstream to include domestically developed intellectual property (IP) in the value add calculations of local content measures. To encourage sound ICT investment, TTIP should commit the US and EU to bind themselves to the following principles that need to be advocated globally:

1. *No subsidies shall be given for ICT goods and services. Any subsidies in the ICT sector must be based solely on supporting capital investment and offered in a non-discriminatory, transparent and technology-neutral manner in accordance with applicable national law*.

2. *The Parties agree to jointly cooperate in focusing the subsidies of other governments on enabling funding for pre-competitive research or supporting operational aspects of technology development (e.g., reducing the cost of manufacturing), rather than favoring specific products, services, or technologies.*

We understand that the European Commission would like to address trade distorting subsidies in the TTIP as a competition matter, and thus believe we have an opportunity to include product related incentives in the discussion.

E. ***Prohibit ICT Tariff / Duties***. As the Information Technology & Innovation Foundation (ITI) has stated various times, "the vast majority of economic benefits from technology, as much as 80 percent, come from the widespread usage of technology, while only approximately 20 percent of the benefits of technology comes from its production." The best way to increase the demand and dissemination of ICT products, with their associated benefits, is to eliminate all tariffs, duties, charges and levies placed on technology.

In an era when many tariffs are declining around the world, governments still impose fees or other charges that act like tariffs.[10] TTIP negotiators already have committed in the High Level Working Group's report to "eliminate all duties on bilateral trade, with a substantial elimination of tariffs upon entry into force, and a phasing out of all but the most sensitive tariffs in a short time frame" and "consider options for the treatment of the most sensitive products."

Moreover, the US and EU are working together in negotiating with other governments an ambitious expansion of the zero tariff WTO Information Technology Agreement (ITA). Preliminary estimates by the Information Technology and Innovation Foundation show that an expanded ITA would remove tariffs on an additional $800 billion in global two-way ICT trade – a 20 percent increase over the $4 trillion in annual trade under the existing ITA product coverage. More specifically, ITA expansion would increase U.S. exports of ICT products to the tune of $2.8 billion annually, boost revenues of U.S. ICT firms by $10 billion, support the creation of roughly 60,000 new American jobs, and increase world GDP by $190 billion.[11] Remarkably, this important agreement has not been expanded for 16 years, even though the ICT sector has been bursting with innovation and growth.

To avoid any shortcomings in the multilateral ITA expansion effort, however, Intel proposes that the Parties:

1. *Commit to phasing out within three years all remaining tariffs, duties, levies and other charges on ICT products and services imported into each Party's territory or occurring within the transatlantic market*.

2. *Commit to jointly advocating with other governments for the phasing out and eventual elimination of all tariffs, duties, levies and other charges on ICT products and services imported into or occurring within their territories*.

The foregoing commitments would ensure that U.S. and EU ICT businesses can take full advantage of the growing demand for ICT products and services in emerging markets to enhance the lifestyles of their people and the levels of productivity and innovation within those markets.

F. ***Minimize Technology Mandates Globally.*** There is arguably no faster and more effective way to deny market access to American and European owned technologies than through the use of technical regulations[12] that act as technology mandates because they are prescriptive rather than performance based.[13] Locking in technology through regulation impedes

[10] For example, the U.S. merchandise processing fee is broadly imposed on imports and has become an increasingly significant import tax, especially with the increase of the fee's ad valorem rate from .21% to ~.34% in 2011. Intel recommends that the U.S. seek elimination of these border fees or charges, as well as tariffs, duties and levies in the context of TTIP.

[11] *See, e.g.,* http://www.itic.org/media/news-releases/global-high-tech-sector-unites-for-ita-expansion.

[12] A technical regulation is defined in Section 1 of Annex 1 of the WTO Agreement on Technical Barriers to Trade (TBT) as a "Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method."

[13] *See* TBT Agreement, Article 2.8.

innovation and denies consumers the benefits of new, more advanced ICT goods and services. Although clearly counterproductive in the long run, some governments erroneously believe that technical regulations requiring the use of domestic technologies can accelerate their economic development. Others use technical regulations as trade barriers when they have security or privacy concerns that may be legitimate, but can be handled more effectively by other means.

This subject is so critical to the transatlantic ICT industry that we touch on its different facets in each of the first three sections of our proposed Innovation Initiative TTIP Framework. Technical regulations can be quite burdensome, especially for small and medium size businesses, and become quickly outdated as technology evolves. They should only be used in situations where no other options are available to achieve legitimate objectives, such as ensuring adequate protection of health, safety or the environment. Even more rare is the case where a technical regulation needs to take the form of a technology mandate that requires the use of a particular technology to achieve legitimate regulatory objectives. These kinds of mandates can easily promote vested domestic interests seeking protection from competition.

The WTO Agreement on Technical Barriers to Trade (TBT) disfavors prescriptive technical regulations, but its relevant provision is too general to be effective in reducing the increasing use of technology mandates in emerging markets.[14] There have been various valiant attempts to establish "good regulatory practices" (GRP) or principles of regulatory reform,[15] but they have not had much traction among governments and thus little positive effect.

Accordingly, we believe the Parties should develop and promote more robust (TBT+) *global* principles to minimize the development and use of technical regulations, especially prescriptive ones. Specifically, the Parties should adhere to the following GRPs or "regulatory hierarchy":

1. *Before implementing a technical regulation, especially if it is prescriptive rather than performance based, the Parties should thoroughly consider alternative mechanisms, including for example education programs, voluntary standards, codes of good practice, economic instruments (e.g., fees and charges), insurance schemes, liability laws, self-regulation, and co-regulation)*

2. *A Party that proposes a technical regulation must:*

    - *Explain in detail which regulatory alternatives were considered and why they were disregarded;*

    - *If the proposed technical regulation is intended to be prescriptive rather than performance based, the Party must explain in detail why it needs to prescribe*

[14] Article 2.8 of the TBT Agreement simply states: "Wherever appropriate, Members shall specify technical regulations based on product requirements in terms of performance rather than design or descriptive characteristics."

[15] *See, e.g.,* "APEC-OECD Integrated Checklist on Regulatory Reform: A Policy Instrument for Regulatory Quality, Competition Policy and Market Openness" (APEC/OECD); "APEC Information Notes on Good Practice for Technical Regulation" (September 2000); "Principles and Features of Good Practice for Technical Regulation," APEC Sub-Committee on Standards and Conformance.

certain developmental or manufacturing processes, or dictate design or descriptive characteristics, for the ICT good or service affected;

- *Provide a meaningful opportunity for comments by any stakeholder operating in the transatlantic region and explain why meaningful public input suggesting an alternative approach was not taken into account; and*

- *Provide a means for the affected stakeholders to promptly appeal to an independent government authority the decision to finalize any prescriptive technology mandate.*

3. *Through the ICT Regulatory Dialogue,*[16] *the Parties shall (i) periodically and jointly review their application of the GRPs in the Transatlantic Region and (ii) promote them through their own bilateral free trade agreements, and whenever and wherever they can with other governments*.

These GRPs could set a good example for other governments that, hopefully, would then adopt them through OECD, APEC or other trade agreements. A detailed description of available alternatives to technical regulations, and a current and critical case study from our industry on how to apply those alternatives, is contained in Annex 2.

II. Ensure Technical Regulations and Conformity Assessments Are Transparent, Open, and Efficient so that They are Not More Trade Restrictive than Necessary

The GRPs we recommended in Section I help governments minimize technical regulations to those that are truly essential. In this section, we suggest the Parties adopt several more requirements to ensure that both technical regulations and conformity assessments achieve their purpose and are not more trade restrictive than necessary.[17] Unintended consequences from ill-conceived regulation can impair technology and have adverse impacts on the ability of innovation to contribute to economic growth. Duplicative and burdensome testing and certification requirements raise costs, impede the timely introduction of new products, and add little value to ensuring the safety and performance of ICT goods and services. With these concepts in mind, we recommend that the Parties adopt the requirements set forth below.

A. ***Ensure Transparency and Full Participation.*** One of the most effective ways to avoid unintended consequences from poorly drafted regulations and conformity assessment procedures (whether licensing or other mechanisms) is for the U.S. and EU governments to allow ICT manufacturers and service providers a meaningful role in providing input during their development. For stakeholders to provide such input in a timely manner, the TTIP Parties should strengthen the transparency and participation provisions of previous US FTAs so that they provide information regarding how a regulatory decision will be made and applied, and by whom; give access to the decisions and all supporting information that is not confidential; and ensure all stakeholders are provided with an opportunity for meaningful engagement on a

[16] *See* Section I.B *supra*.

[17] As a reminder, TBT Article 2.2 requires WTO Members to ensure that "technical regulations are not prepared, adopted, or applied with a view to or with the effect of creating unnecessary obstacles to international trade."

proposed regulation, including sufficient time to analyze its requirements, provide adequate feedback, and understand why significant comments were not incorporated into the final regulation. We propose specific language for the TTIP in Annex 3.

Transparent and open rulemakings ensure that technical regulations and conformity assessments are narrowly tailored to achieve their objectives and also prevent discrimination. It is fairly easy to notice when a technical regulation *explicitly* favors domestic technology. It is more difficult to determine whether and when a technical regulation or conformity assessment *implicitly* favors -- either from a procedural or substantive approach – domestic products, services, technologies, or intellectual property over like foreign products, services, technologies, or intellectual property.

B. ***Minimize Duplicative Conformity Assessment Requirements.*** Once technical regulations are adopted, governments should refrain from imposing conformity assessment requirements that are duplicative, burdensome or restrict trade in ICT products. The TTIP should reflect the basic principle that conformity assessment procedures recognize comparable measures between the U.S. and EU as well as those of other parties as equivalent, including recognizing testing performed by certified labs in other geographies. In other words, given the direction from the High Level Working Group that the TTIP enhance regulatory compatibility between the US and EU, the TTIP should exceed the standard of conformity assessment commitments contained in previous U.S. FTAs by committing the US and EU to recognize appropriate testing performed in the other party and manufacturer declarations of conformity as the preferred methods for obtaining compliance with technical standards.

Accordingly, the US and EU should commit to accept the results of conformity assessments performed in the territory of the other Party. Only in unusual circumstances, with prior notification, should in-country testing be necessary. (See Annex 3 for suggested text.) The Parties also eventually could jointly advocate the same approach with other governments.

Whenever possible based on a risk assessment, the Parties should accept declarations of conformity by suppliers and effective post-market regimes (including surveillance and enforcement) because they offer a more flexible, trade-friendly method to meet regulatory objectives. In addition, the TTIP should make it clear that there is no need for mandated government-conducted on-site audits or factory inspections, as these are often redundant and can best be carried out by those with the necessary technical expertise within the private sector and from third-party certification bodies. This latter issue is occurring in emerging markets, and by effectively addressing it in the TTIP it sets the right example.

C. ***Ensure Efficient Flow of Goods and Services.*** Although U.S. leadership on technology is well known, because of the complex nature of ICT products and services our industry thrives on a global supply chain. Moreover, the ICT industry is so competitive and innovative that product cycles often are very short, and this means that overly complex customs and trade procedures that are non-automated and slow can have a disproportionate impact on U.S. and EU technology companies. In a report entitled *Enabling Trade — Valuing Growth Opportunities,* the World Economic Forum noted that "Reducing supply chain barriers to trade could increase GDP up to six times more than removing tariffs." Further, World Trade Organization (WTO) Director-General Pascal Lamy has stated that "removing barriers to trade

and cutting red tape in half… could stimulate the USD $22 trillion world economy by more than $1 trillion."

While customs and trade officials within the U.S. and EU have made trade facilitation a high priority over the years, the Parties should set an example for the world and include relevant commitments in the TTIP. Although many other improvements are possible, our recommended commitments emphasize the use of technology to reduce burdens and delays for cross-border shipments. Specifically, Intel recommends that the Parties establish:

- *A single window within the territory of each TTIP Party that enables traders to electronically transmit all customs or other data required by a government for the import, export or transit of goods;*

- *Robust deployment of automated systems and procedures that expedite the release of goods and processing of customs information, ensure system interoperability and compatibility, and avoid redundancy via use of common data elements and related processes for the import, export and transit of goods;*

- *A U.S./EU mutual recognition agreement that streamlines criteria and procedures for trusted trader programs by using technology, such as developing a common web-based application process for participation in trusted trader programs between the EU and the U.S. and among EU member states; and*

- *Capability for the export documentation/declaration of one party to be used as the import documentation/declaration of the other party, while ensuring harmonization of data requirements*.

TTIP provides an excellent opportunity to use technology to harmonize some of the more burdensome U.S. and EU customs procedures and increase their efficiency.

III. Promote Voluntary, Market-led, International/Global Standards, Principles and Norms to Enable Further Development of the Information Economy

While major convergence, or even full policy interoperability, of the U.S. and EU regulatory systems is neither likely nor necessary to avoid many negative trade impacts, the Parties should pursue commitments in TTIP to better align ICT standards and principles -- for example in the critical areas of privacy, cyber security, and encryption -- to facilitate trade in ICT goods between the Parties and reduce costs associated with producing product to varying standard specifications in each market.

A strong statement from the U.S. and EU on the "gold" standard for addressing privacy, cyber security, and encryption concerns will contribute to the High Level Working Group's goal of using the TTIP to enhance cooperation on the development of rules and principles on global issues of common concern. Although the TTIP cannot legally bind third parties, the U.S. and the EU have a unique opportunity to promote global standards, principles and norms on issues that can impede data flows, the dissemination of ICT products and services, and the digital economy.

A. ***Jointly Promote International/Global Standards.*** A number of industries, including ours, are heavily reliant on global standards to ensure the interoperability of hardware and software that make up a multitude of connected digital devices. Standards are an effective and efficient means of achieving legitimate commercial and policy objectives. International or global standards that producers can rely on in manufacturing components and end products can facilitate the diffusion of technology and innovation. Indeed, voluntary and market led global standards are critical to the ICT and the global digital infrastructure cannot operate without them. A laptop alone is based on more than 500 standards that help its computing and communications functions work seamlessly with other digital devices.

When national standards are developed and applied only within a single market, however, these measures can reduce competition, stifle innovation and create unnecessary technical barriers to trade. This is particularly true for innovative ICT products and services. For example, Japan's cellular industry became isolated due to over reliance on unique Japanese telecommunications standards, particularly during the 1990s. The inward focus and negative global consequences for the Japanese mobile phone industry have been described as a "Galapagos Syndrome."[18] When countries adopt standards on ICT products that are unique to their market, they suppress innovation, raise barriers to trade, and increase costs to consumers with no meaningful increase in the safety or reliability of products. In the TTIP, the U.S. and EU should affirm the principle that global standards are preferable to domestic standards as they leverage the work and expertise of the global community and ensure broad interoperability.

However, the TTIP also should be clear that the scope of "international standards" is not limited strictly to standards adopted by the International Electrotechnical Commission (IEC), International Standards Organization (ISO), or International Telecommunications Union (ITU). Clearly, there are many more standard setting organizations (SSOs) that promulgate international standards.[19] At a minimum, the TTIP should include a definition of "international standard" that includes any standard developed by an international SSO that meets the criteria in Annex 4 of November 2000 TBT Committee Second Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade (G/TBT/9) (13 November 2000). The TTIP should commit the Parties to clarify the scope of the TBT definition of international standards, where necessary, so that it is applied in a consistent manner by U.S. and EU authorities.

Lastly, TTIP should reaffirm the importance of adherence to the Code of Good Practice (Code) in Annex 3 of the TBT Agreement. Too many WTO members have signed up to the Code and yet fail to abide by its provisions requiring transparency, non-discrimination, and other safeguards in standard setting activities that ensure any standards that are developed serve legitimate purposes and do not stifle trade. Adherence to the Code, particularly its transparency provisions, is especially important in jurisdictions where the government is significantly involved in standard setting because, in such markets, standards can become *de facto* binding.

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[18] *See, e.g.,* http://www.nytimes.com/2009/07/20/technology/20cell.html?_r=0.

[19] *See, e.g.,* European Communities – Trade Description of Sardines, AB-2002-3, WT/DS231/AB/R (26 September 2002) (Codex Stan 94, developed by Codex Alimentarius Commission of the United Nations Food and Agriculture Organization and the World Health Organization, is an "international standard" for purposes of the TBT Agreement).

B. ***Apply and Promote Robust Transatlantic Privacy Principles.*** Most privacy laws are based on the Fair Information Practices Principles, which have been developed over time in the US and the EU, and a version of which was ratified by the OECD as part of their Privacy Guidelines in 1980. This commonality means basic interoperability to privacy exists across the U.S., EU and other countries at the principle level, even if significant divergences exist in domestic laws and implementation methodologies due to local legal and cultural priorities.

Economic growth requires individuals to trust their use of digital devices and the services which rely upon them. The U.S. and the EU have the shared objective of maintaining high privacy principles to foster this trust, while also promoting maximum interoperability to enable the global information flows supporting the digital economy and information society. Privacy laws are necessary to provide sufficient trust, but they must avoid undue administrative burdens and restrictions on international data transfers. In addition to well considered interoperable legislation, trust requires that regulatory agencies follow through with robust and predictable enforcement activity.

An example of such a beneficial and cooperative approach is the current work being undertaken in APEC to map Binding Corporate Rules (BCRs) and Cross Border Privacy Rules (CBPRs). This mapping seeks to find the common elements between BCRs and CBPRs so that credit can be given for the valid work of complying with one standard when demonstrating compliance with the other standard. This mapping and interoperability will reduce much of the duplicative effort required to comply with separate regulations without diminishing the standards upon which the regulations are founded.

Accordingly, Intel recommends that the Parties take the following approach in TTIP with respect to privacy:

1. *Minimize the potential burdens and unintended consequences of developing and implementing separate, yet credible privacy policy frameworks and regulations;*

2. *Adopt global standards that facilitate innovation and access to the latest privacy features in ICT products and services;*

3. *Explore flexible and "totality of the circumstances" ways of recognizing credible approaches to privacy based on common principles to safeguard personal information in a way that furthers the digital economy and information society;*

4. *Support and expand the mapping of new and existing regulations and policy frameworks to allow global organizations to leverage existing compliance procedures to satisfy some or all of the compliance requirements of other regulations;*

5. *Continue to honor existing international agreements related to data flows; and*

6. *Recognize the benefit to the economy and individual prosperity of new technologies, business models, and data flows. Similarly, recognize the essential role of privacy in supporting the trust in these data flows and commit best efforts on each side of the Atlantic to optimize the combined benefits of both of these objectives*.

These "transatlantic privacy principles" will encourage global interoperability, thus ensuring a high standard of personal data protection in a manner that avoids undue administrative burdens and restrictions on international data transfer.

C. ***Apply and Promote Robust Transatlantic Cyber Security Principles.*** In recent years, there has been a dramatic increase in both the quantity and the severity of malicious cyber attacks. It is important for the U.S. and the EU to pursue policies to incentivize organizations to create a more secure global digital infrastructure. To date, countries and regions have approached cyber security in a disconnected manner. Through TTIP, the U.S. and EU have an opportunity to embrace emerging common cyber security standards, incentives and principles that minimize both security threats and any trade-distorting impacts.

Specifically, in June 2012, ITI, Digital Europe (DE), and the Japan Electronics & Information Technology Industries Association (JEITA) issued a "Global ICT Industry Statement: Recommended Government Approaches to Cybersecurity." This statement provides all governments with a common foundation for policymaking in the area of cyber security. The 12 recommendations represent a cooperative approach between government and industry that meets security needs while preserving interoperability, openness, and industry's capability to innovate and compete. We urge the Parties to use the TTIP to promote these approaches. Our recommended cyber security principles are set forth in Annex 4.

D. ***Promote Globally the WSC Encryption Principles.*** Today, encryption technology is ubiquitous and an essential component of increasing security in ICT products and services. Indeed, nearly all ICT products contain encryption to prevent data loss, ensure security and integrity of data, and allow for valuable commercial applications such as mobile payments, e-health, e-passports. However, some outdated government security policies place unnecessary restrictions on the use of and trade in products containing encryption. These restrictions provide too much opportunity for discrimination against foreign products under the guise of national security concerns. To avoid such trade barriers, the U.S. and EU should formally adopt as part of the TTIP the Encryption Principles developed by the World Semiconductor Council (WSC) for commercial encryption used in widely available ICT.[20]

The WSC Encryption Principles generally state that there should be no regulation of cryptographic capabilities in widely available products used in the domestic commercial market because mandating or favoring specific encryption technologies will raise product costs and reduce, not increase, security as security threats continue to evolve. The WSC Encryption Principles strongly encourage the use of global or international standards, including for normative algorithms, to enable more secure technologies due to the peer review involved. International standards also are essential to avoid fracturing the global digital infrastructure and creating unnecessary obstacles to trade. Because security functions are growing in ICT products and applications, interoperability has become more critical and thus international security standards such as Common Criteria for Information Technology Security Evaluation will increase in importance.

[20] Over the last three years the WSC, comprised of the semiconductor industry associations in China, Chinese Taipei, EU, Japan, Korea and the U.S., has developed (with approval from their respective governments) a solid set of encryption best practices to ensure the continued growth of the ICT industry.

The governments and authorities (GAMS) representing each of the six WSC regions agreed in 2012 to abide by and encourage all GAMS members and other governments to observe the WSC Encryption Principles.[21] The GAMS have acknowledged the value of the WSC Encryption Principles in preempting unnecessary regulation that could be a significant barrier to trade and have a major impact on the industry given the ubiquity of encryption and its use in everyday life.

As recommended by the WSC, the GAMS also agreed to help ensure global markets remain free from discrimination by encouraging the adoption of international voluntary standards and norms, including algorithms, which are essential to avoid fracturing the global digital infrastructure and create unnecessary obstacles to trade. In the limited circumstances where regulation may be necessary, the GAMS regions agreed to advocate for transparency and non-discrimination in any regulatory requirements, either in force or being developed concerning encryption in semiconductors used in domestic commercial markets, including the conformity assessment procedures used to demonstrate compliance with those requirements.

In brief, Intel recommends that the Parties incorporate the WSC principles into the TTIP as binding commitments and promote their adoption by other governments. These legal commitments are consistent with those already made by the U.S. and EU GAMS representatives, and would help ensure other GAMS members do not ignore the Encryption Principles.

E. ***Pursue Global Health IT Standards.*** In a memorandum of understanding, the Parties already have "recognize[d] the importance of health-related information and communication technologies (eHealth/health IT) in promoting individual and community health while fostering innovation and economic growth; wish to facilitate more effective use of health-related information and communication technologies in health care delivery including disease-prevention and health-promotion services; and intend to strengthen their relationship and support global cooperation in the area of health related information and communication technologies."[22]

Two goals of immediate importance pursuant to Section 6 of the Health IT MOU are:

1. The "Development of internationally recognized and utilized interoperability standards and interoperability implementation specifications for electronic health record systems that meet high standards for security and privacy protection"; and

2. "Strategies for development of a skilled health IT workforce and of eHealth/health IT proficiencies in the health professional workforce such that these clinicians can fully utilize the technology's potential to enhance their professional experience and performance."

[21] Governments and Authorities representing each of the six WSC regions (China, Chinese Taipei, Europe, Japan, Korean and the United States) meet annually at the Government Authorities Meeting on Semiconductors (GAMS) to review the WSC Joint Statement and Recommendations and take subsequent action.

[22] Memorandum of Understanding between The United States Department of Health and Human Services and The European Commission on Cooperation Surrounding Health Related Information and Communication Technologies (December, 2010) [hereinafter "Health IT MOU"].

The first goal can effectively be accomplished by incorporating by reference into TTIP the Health IT MOU and committing the Parties to promote such standards and specifications internationally. Intel also suggests that the newly developed Transatlantic eHealth/health IT Cooperation Roadmap, which helps implement the Health IT MOU, also be incorporated into the TTIP by reference. The 18 month roadmap is a concrete action plan that will use e-health science and technology to empower individuals, support care, improve clinical outcomes, enhance patient safety and improve the health of populations. While we are pleased with the roadmap for cooperation, Intel recommends that the exchange of records include not only the electronic clinical records, but also the patient generated data which is becoming more and more critical to assessing an individual's health status. This information is typically provided by mobile or home based monitors and provides real time patient biometric data including blood pressure, glucose readings, pulse oximeter readings, stethoscopes, weight scales and more. We have great confidence that the U.S. and EU working together will improve the data capture, relevancy and accuracy of this important source of patient data and request that this objective be added to the current roadmap, as incorporated into the TTIP.[23]

The second goal can be more easily achieved by ensuring the free flow of highly skilled workers pursuant to Intel's request made in Section I and Annex 1. More flexible worker mobility rules for highly skilled health workers will enable the sharing of knowledge, best practices, etc. The two Parties already have demonstrated a commitment to standards and workforce development to ensure the accurate, timely and comprehensive exchange of medical health records across borders while protecting the security and privacy of these records.

Lastly, we suggest that the Parties commit to (i) promoting the MOU outside of the transatlantic area; and (ii) setting up a task force under the ICT Regulatory Dialogue to review progress in complying with the MOU, and refining or updating it when necessary.

IV. Promote Policies that Allow Open access to Trade in Digital Services and Cross-Border Data Flows, and Enable Greater Broadband Deployment

ICT services, and in particular cloud services, are by their nature global, and technology is moving quickly towards further international expansion. A lack of consistent and coherent domestic and international policies and regulation is having a chilling effect on expansion of digital services generally, and the uptake of global cloud services in particular.

A. ***Enable Digital Goods and Services Over the Internet.*** The U.S. and EU should maximize opportunities for ICT service suppliers to provide computer and related services, telecom services or other services over the Internet on a cross-border and technology-neutral

[23] The value of patient generated data will address one of the shared goals of the U.S. and EU governments, which is to ensure that our growing aging populations can retain independence for additional years of their lives. The TTIP provides an opportunity to find common solutions to treat our aging populations, not as dependents as we came to view this demographic in the 20th century, but as parts of a 21st century global economic growth and prosperity strategy. We note how the S&P Global Aging Report in 2010 characterized global population aging as the most seminal of 21st century challenges: "No other force is likely to shape the future of national economic health, public finances, and policymaking as the irreversible rate at which the world's population is aging." Enabling the widespread use of technologies in health care through U.S./EU cooperation can alter the welfare and livelihood for the growing number of seniors in the transatlantic economy.

basis. The TTIP should also specifically prohibit requirements to locate servers or data in-country as a condition for market access, as they undermine the very definition of cross-border services. On a related note, the U.S. and EU should agree to increased cooperation to enable innovation in the interconnectivity of physical goods (the "Internet of Things") while avoiding divergent policy approaches.

B. ***Ensure Cross-border Data Flows and Transfers of Information.*** Among the Administration's objectives for the TTIP, cited in a May 20th letter notifying Congress of its intent to enter into negotiations for the TTIP, are to "seek to include provisions that facilitate the movement of cross-border data flows."[24] We commend the Administration for making this issue a priority given its importance to so many types of services, such as those provided by the financial sector. Restricting international data flows as a means of protecting access to data or ensuring security is ineffective and inefficient. The primary effect of that approach is to slow the expansion of trade in all internet-dependent services, and cloud services in particular, at precisely the time when innovation in these services is growing exponentially. We already have discussed how the U.S. and EU can use TTIP to bridge differences in approaches to privacy and cyber security (see Sections III.B and C).

The Parties should thus establish a framework in the TTIP E-Commerce chapter that establishes strong and binding provisions to support the cross-border flow of data, which enables service suppliers, or customers of those suppliers, to electronically transfer information internally or across borders, store or access publically available information, and/or access their own information stored in other countries. These TTIP provisions should set global principles for the free flow of information across borders without requirements to locate or store data in-country.

C. ***Preserve Current Internet Governance System.*** The U.S. and EU should affirm in the TTIP their commitment to multi-stakeholder governance of the Internet via the Internet Corporation for Assigned Names and Numbers (ICANN)/Internet Governance Forum (IGF) to ensure the Internet ecosystem remains open to innovation and commerce globally. Moreover, the Parties should agree to include similar provisions in future free trade agreements with other parties. In other words, the Parties should commit in the TTIP to work together to:

1. *Resist calls for unfavorably altering current Internet governance, whether at the International Telecommunication Union or elsewhere; and*

2. *Expand their outreach to other countries around the world to demonstrate how an unfettered Internet free of government interference has provided significant economic and other benefits to stakeholders around the globe.*

Tampering with the current approach to Internet Governance could result in significant risks to innovation, job creation and consumer freedom. It is widely acknowledged that the current approach has provided a predictable technology foundation on which innovation has occurred and investment has been made, thus spreading economic benefits around the globe.

[24] Letter from Acting United States Trade Representative Demetrios Marantis to Hon. John Boehner, March 20, 2013.

D. ***Enhance Allocation of Spectrum.*** Access to high-bandwidth broadband networks provide a platform for productivity increases and innovation, while the lack of broadband or low-bandwidth networks limit applications, productivity and network efficiencies. More robust network infrastructure can be more flexible in adapting and allowing for new applications such as health IT, education through technology, telecommuting, and entertainment. The TTIP should promote the principle that governments should adopt limited, market-based regulatory policies to make affordable, high quality broadband widespread where necessary using only targeted, competitively-neutral subsidies.

Spectrum is a limited, and increasingly scarce, resource. The allocation of spectrum for commercial purposes should be carried out in an objective, timely, transparent, and non-discriminatory manner, with the goal of fostering competition and innovation. The U.S. and EU telecom regulators should enable open and innovative use of spectrum by committing to:

1. *Expeditiously allocate and assign all available spectrum using impartial, market-based mechanisms on service-flexible, technology-neutral terms;*

2. *Regulate interference using reasonable, objective, output-oriented parameters;*

3. *Eliminate regulatory and legal barriers to entry;*

4. *Assign large, long-term, aggregatable licenses;*

5. *Free government-used spectrum for private commercial uses where possible;*

6. *Give existing licensees service and technology flexibility to create incentives to move spectrum to new, more highly valued uses;*

7. *Avoid undue limitations on applications and technologies that use spectrum, other than as necessary to mitigate harmful interference; and*

8. *Refrain from imposing spectrum or other fees on private licensees*.

Ideally, the Parties would also promote globally the need for (i) high band-width broadband infrastructure and penetration to bring the benefits of digital services to more people; and (ii) the effective allocation of spectrum to foster competition and innovation.

V. Promote Robust IP Protection and Enforcement Globally to Protect Innovation and Ensure Incentives for Innovators to Continue to Invest in R&D

Effective protection and enforcement of intellectual property rights (IPR) is essential to foster innovation because it creates a climate in which innovators are (i) incentivized to invest in the research, development, and commercialization of leading-edge technologies, and (ii) more likely to transfer technology voluntarily to others, knowing that the terms on which they do that will be respected and effectively enforced if necessary.[25] The U.S. semiconductor industry, for

[25] "The Economic Value of Intellectual Property," Robert J. Shapiro & Kevin A. Hasselt, p. 8 (Oct. 2005); available: http://www.sonecon.com/docs/studies/IntellectualPropertyReport-October2005.pdf. For an example of

example, relies heavily on U.S. law to protect its IP, which is critical to its global technology leadership. Last year, R&D investments by the U.S. semiconductor industry totaled $32 billion or 22% of its total sales. In brief, the IP generated from R&D investments in our industry is extremely valuable.

TTIP negotiators already know that they should not spend time and resources trying to fully harmonize their IP systems. Instead, as the HLWG report notes, the Parties are willing to address several issues of common concern that "would not only be relevant to bilateral commerce, but would also contribute to the progressive strengthening of the multilateral trading system." Along these lines, "the EU and the United States are committed to maintaining and promoting a high level of intellectual property protection, including enforcement, and to cooperating extensively."

There are three IP issues, especially in emerging markets, which could be effectively addressed by committing the Parties to enhance and/or promote the relevant high standards on IP protection and enforcement that exist in the U.S. and EU. A fourth issue involves incentivizing increased cross-border collaboration on government funded research. The TTIP should include an IPR chapter that addresses these common concerns and issues of major importance to innovative industry sectors, which are summarized below and covered in more detail in Annex 5.

A. ***Strive to Implement a Robust, Model Trade Secret Protection System.*** Although Some of a company's most valuable assets can be embodies in trade secrets, this type of IP often is subject to the weakest legal protections as compared to other types of IP. The entire economic value of a trade secret stems from the competitive advantage conferred by the confidential nature of the information. Once disclosed, trade secrets cannot be recovered because this form of IP does not give its owner an exclusive right to use the information (in contrast to a patent, for example).[26] Cyber theft is on the rise due to greater global competitiveness and a significant increase in digital devices that process data on a nearly constant basis, which in turn increases the targets for cyber attacks. Moreover, because ICT products and services are now ubiquitous and integrated in so many facets of our lives, they are more regulated and increasingly subject to government requests for excessive confidential information as a condition of market access.

Intel urges the Parties to strive toward developing a comprehensive model trade secret protection system that can be promoted globally. This system should effectively (i) address trade secret theft; (ii) increase government to government cooperation to minimize cross-border incidences of trade secret theft; (iii) minimize increasing government requests for excessive trade secrets as a condition of market access, and (iv) address inadequate government procedures to protect the confidential information they receive.

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this consensus, see D. M. Gould and William C. Gruben, "The Role of Intellectual Property Rights in Economic Growth," *Journal of Development Economics,"* Vol. 48, No. 2, 1996).

[26] Trade secrets do not prevent another company from developing that same knowledge independently. Instead, they merely safeguard the often substantial investment by one company from unfair theft and deliberate misuse by another.

Both the U.S. and EU governments are currently reviewing their respective trade secret laws to determine how they could be improved and Intel is participating in such efforts.[27] The exercise to identify the basic elements of a model trade secret law and promote it globally is especially important because the relevant TRIPS obligations in Article 39 require only minimum levels of protection for trade secrets.

As Annex 5 indicates, separate from model legislation effectively addressing trade secret theft, a comprehensive trade secret protection system also should contain elements that require governments to justify requests for disclosure of trade secrets as a condition of market access.

B. ***Limit Compulsory Licensing of IP to Ensure Compliance with TRIPS.*** Intel is concerned with increasing efforts to force IP licensing of both trade secrets and patents in ways that are not consistent with TRIPS and that could undermine innovation if not restricted. The TTIP provides an opportunity to promote globally the existing high standards on IP licensing that are shared by the U.S. and EU.

China, India, and South Korea have recently promulgated proposed or final licensing guidelines that would compel dominant companies to license their intellectual property[28] to competitors if the IP is "essential" to compete and innovate. These compulsory licensing provisions are far broader than what U.S. and EU law currently allow, *even ifs applied* only *in the market in which the owner's dominance is the basis for the licensing demand* Although their intent may be to enable or create more competitors such licensing provisions, based on an outdated "essential facility" concept that has never been applied to IP in the U.S., will undermine the incentive for successful companies to continue to invest and innovate.

Moreover, we note that TRIPS makes no allowance for compulsory licensing of trade secrets, most likely because that would destroy their value. And applying the essential facilities concept to patents would significantly undermine the fundamental right to exclude others that is provided in TRIPS Article 28. In brief, the exercise of IP rights to unconditionally exclude others typically should not be considered "anticompetitive," as reflected in the proposed language of Annex 5.

C. ***Respect Cross License Agreements in Bankruptcy.*** At the heart of the semiconductor industry is a thicket of patents that requires manufacturers to secure numerous licenses to obtain the "design freedom" needed to develop and to sell innovative new products without risking patent infringement claims and injunctions. Semiconductor firms on both sides of the Atlantic depend on cross-licensing agreements to protect their massive investments in research, development, and manufacturing. By reducing risk and uncertainty, these cross-

[27] Intel recently made a submission in response to the United State Intellectual Property Enforcement Coordinator's Request for Comments on Trade Secret Theft Strategy Legislative Review, Docket number IPEC-2013-06226, and has responded to the European Commission's recent surveys that were designed to understand the value and necessity of developing an EU-wide trade secret law.

[28] South Korea's Guidelines on Undue Exercise of Intellectual Property Rights, issued in 2010, only apply to the licensing of patents. China SAIC's proposed draft Rules of the Administration for Industry and Commerce on the Prohibition of Abuses of Intellectual Property Rights for the Purposes of Eliminating or Restricting Competition, issued this month, and India's draft National Competition Policy issued in 2011 apply to both patents and trade secrets.

licenses encourage investment in the development and production of new technologies that benefit consumers in the U.S., Europe, and around the globe.

Under U.S. law, an intellectual property licensee may elect to retain its rights under existing contracts in bankruptcy cases, and the bankruptcy trustee, or any subsequent purchaser of the intellectual property, is required to honor the licensee's existing rights. (*See* 11 U.S.C. §365(n)). Other countries such as Germany take a different approach, allowing the bankruptcy trustee to reject the existing license agreement and either renegotiate the license agreement or sell the intellectual property, unencumbered by the existing license agreement, to a buyer who, in turn, could seek to enforce the patents or seek a new license agreement. Under this rule, the licensee not only has to pay twice to license the same technology, but will be forced to pay far in excess of what the parties would have agreed to when the original cross-licensing agreement was reached because, at the time of design the innovator had a number of implementation options, but after the design is in production, switching to an alternative is more difficult and costly. Given the billions of dollars necessary to develop and to manufacture new products in the semiconductor industry, chilling of research and development would be inevitable. Companies would also be deterred from adopting industry standards, which likewise depend on secure and irrevocable patent licenses.

Transatlantic trade is promoted by the certainty provided by respecting license agreements in bankruptcy. In passing the U.S. law, Congress noted that such agreements play "a substantial role in the process of technological development" and are "fundamental" to the "creative process that has nurtured innovation in the United States." (S. Rep. No. 100-505, at 3 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3200).

Allowing unilateral rejection of patent cross-licenses when one of the parties to that license becomes insolvent leads to 1) unnecessary litigation, 2) the possibility of the licensee having to pay twice to practice the patents subject to the agreement, 3) added uncertainty to technology investment decisions and joint transatlantic technology development agreements; and 4) an overall chilling effect on R&D.

For the foregoing reasons, the Parties should commit in the TTIP to respect patent cross-license agreements that become the subject of bankruptcy proceedings in either jurisdiction.

D. ***Increase Cross-Border Collaboration for Government-Funded Research*****.**
Innovation and the resulting intellectual property are the lifeblood of any successful modern economy. In today's global economy, however, innovation is increasingly a cross-border effort, with geographically distributed product development teams collaborating to produce leading edge technologies and services for world markets. In light of this fundamental shift in how products today are developed, it is important that IP laws be reviewed to ensure that they do not unnecessarily restrict such mutually-beneficial cross-border collaboration. Not only should restrictions on workers with STEM backgrounds be relaxed (see *supra* section I.C), but the knowledge that they have and the innovation that results from it also needs to be easily transferable between separate legal entities across country borders within an organisation, in a manner that ensures full protection but without any unnecessary regulatory restrictions.

We recommend that the Parties review U.S. and EU statutory R&D programs (e.g., Horizon 2020 / DARPA) to determine how to increase cross-border collaboration and remove unnecessary regulations and restrictions. A simple first step would be to include permission for companies participating in U.S. or EU programmes to freely transfer ownership and access rights for foundational IP to affiliates across and between the EU and U.S. A second step would be to consider more flexible transfer of foundational IP among joint venture partners located on opposite sides of the Atlantic Ocean.

We also recommend that the Parties consider developing a bilateral R&D participation model. For example, permitting US entities (commercial and academic) to participate on equal terms as those applied to EU entities in Horizon 2020 (by appropriate arrangements) and reciprocally by allowing EU entities similarly participate in U.S. programmes, will bring greater state of art 'ideation', competency synergy and collaboration that will lead to increased economic value. Once a bilateral R&D participation model is established, it could serve as a fruitful mechanism to coordinate pre-competitive research by leveraging the different strengths and knowledge base possessed by universities and research institutions in the U.S. and EU.

ANNEX 1
Enabling the Transatlantic Flow of Workers With STEM Degrees

The following changes in workforce mobility rules will help U.S. and EU ICT businesses better meet their needs and compete globally by allowing them to quickly and regularly deploy key employees to sites in the United States and Europe.

A. Expand and Clarify Business Visitor Activities

The Parties should expand and clarify the scope of permissible business visitor activities by allowing any activity up to 90 days, at least for employees who have been hired because they have a STEM degree. The Chinese government, for example, allows any and all employees to visit for up to 90 days for work activities including meetings and trainings.

This change would support common business needs for short visits when there is no meaningful entrance into the U.S. workforce that should require a work or training visa. Some of the specific benefits that would result include:

- No need to analyze the scope of every short visit
- Can travel on quick notice
- Some activities such as training, rotations and troubleshooting would no longer require expensive and slow training and work visas

B. Create Treaty Visa Akin to NAFTA TN

The Parties should create a treaty work visa, such as the TN for Canada and Mexico, and allow beneficiaries to apply for permanent residence while in that visa category.

A treaty work visa would allow hiring year round. Currently there is only a brief window to hire people with an H-1B because of the H-1B quota. Allowing application for permanent residence would eliminate the need for the artificial and wasteful step of changing to H-1B before getting permanent residence.

C. Streamline the L-1B for Intra-Company Transferees with Specialized Internal-Company Knowledge

Intra-company transferees with specialized internal knowledge that may need to be shared at different company sites present a unique case.

1. The Parties should allow all who qualify to apply for the visa at the Consulate without first petitioning the United States Citizenship and Immigration Service (USCIS). Currently only people with Bachelor's degrees may bypass USCIS. This would save several weeks for people without degrees who nevertheless have specialized knowledge about the company. When that specialized internal-company knowledge exists, it is not possible for a U.S.

worker to be hired to fill the position. So, public policy should favor the L-1B and allow all those who qualify to be fast-tracked as much as possible.

2. The Parties should exempt L-1B beneficiaries from the Labor Certification requirement for permanent residence. The Labor Certification requirement is a lengthy and expensive process to show that a U.S. worker is not available to be hired for the position. By definition a position that uses specialized internal-company knowledge cannot be filled by hiring a U.S. worker. Labor Certification already is not required for L-1A managers and executives, even though management hires are sometimes external.

D. Improve Family Treatment

Obstacles for dependents of employees are a disincentive to accept employment in the U.S. and a hardship for those who do. Intel suggests that the following improvements be made:

- Spouses should be able to work in the new treaty visa category described above, and without the superfluous step of needing to apply for an Employment Authorization Document

- Domestic partners and their children should be issued derivative visas and periods of stay coterminous with that of the principal, as well as the ability to legally study in the U.S. and work

- Children of work-eligible age should be allowed to work incident to status

- Children over the age of majority should be accorded derivative status if still dependent on the principal

E. Allow the J-1 Two-Year Home Residency Requirement to be fulfilled in any EU Country

People who have been in the U.S. in exchange programs often must return to their home country for two years before being eligible for a U.S. work visa. Requiring them to return to a specific EU company is outdated in an era of EU economic integration.

ANNEX 2
Good Regulatory Practices

A. Alternatives to Regulation

There are many alternatives to technical regulations that the Parties may consider to avoid market access issues, unnecessary costs and other burdens. These alternatives, in rough order of ascending stringency and burden, include:

- **Status Quo:** Regulation and other alternatives may not always result in an outcome that is better than the status quo.

- **Education Programs:** Education improves the functioning of the market by allowing individuals to make decisions that better match their requirements through improved knowledge. Education programs can improve outcomes while still preserving consumer choice. Governments can obtain critical information for consumers. It is far easier to provide information to consumers than to gather all of the information that would be required for the government to substitute its own judgment about when and how goods should be used.

- **Economic Instruments:** Economic instruments (e.g., taxes, user charges) seek to influence market behavior by altering the relative prices of goods, allowing individuals to make their own cost-benefit trade-offs in pursuing certain behavior. Therefore, they can achieve desired regulatory outcomes in a way that imposes the least cost.

- **Product Liability Laws:** Robust, unambiguous and transparent liability laws create strong incentives for manufacturers or suppliers to reduce or eliminate risks associated with their products.

- **Legal Remedies:** Governments can rely on statutory or common law remedies to ensure appropriate behavior by individuals and businesses. By providing access to legal remedies, parties can enforce their rights rather than relying on government action.

- **Voluntary Standards:** Government endorsement of, or support for, a voluntary standard can achieve the desired result without the compliance costs associated with regulations. Voluntary standards that are aligned with international standards and established with the consent of all the stakeholders have proven to be an effective alternative to regulation.

    - **Codes of Practice:** Voluntary schemes established by a private body or group of private bodies in the form of codes of practice can cover issues such as compliance with standards, information requirements, and even non-binding dispute resolution mechanisms. Codes of practice can be effective tools for building consumer confidence, and providing effective communication between consumers and suppliers. Codes of practice are often developed by consensus between those who will be applying them and those with a good knowledge of market conditions. As a result, they often are better suited to economic and competitive conditions than technical regulations.

- **Industry Self-Regulation:** Arrangements in which an organized group (such as an industry association) regulates the behavior of its members are more likely to be observed if they are developed by members of the group. Updating such arrangements to keep pace with technology can be more rapid than revising regulations, and the alternative is cheaper for the governments because the group bears the costs of regulating. Government oversight may be needed to ensure that the public interest is being protected, rather than just the private interests of the regulated group.

- **Technical Regulation:** A technical regulation specifies product characteristics (e.g., packaging for milk jugs must be recyclable) or the outcome that is required (e.g., minimum gas mileage required for cars). By their very nature, technical regulations have an effect on the type of products that can be manufactured, and those that are prescriptive may even require the use of specific technologies.

This "regulatory hierarchy" is based on efforts to establish good regulatory practices in the OECD and APEC.[29]

B. Case Study Involving EU F-Gas Regulation

In the late 1990s, before any significant discussion on the need for climate change regulations were being held, the semiconductor industry, via the WSC, announced an ambitious voluntary goal to reduce absolute Perfluorocarbon (PFC) emissions by 10 percent by 2010. A number of years ago, the existence of the WSC agreement convinced the European Commission not to regulate PFCs.

In 2011, the WSC announced that it far surpassed this reduction goal and achieved a 32 percent reduction.[30] Building on this success, the WSC announced a new PFC 2020 goal based on the implementation of best practices at new chip factories (fabs). We anticipate that the implementation of these best practices will result in a Normalized Emission Rate (NER) based on PFC emissions per square centimeter of silicon wafers produced of 0.22 $kgCO_2e/cm^2$, which is equivalent to a 30 percent NER reduction from the 2010 aggregated baseline. This new goal will also include of "Rest of World" fabs (this refers to fabs located outside the WSC regions that are operated by a company from a WSC association) in reporting of emissions and the implementation of best practices for new fabs.[31] The WSC announced progress toward this new goal based on the data reported in 2011,[32] and it will release our progress for 2012 on May 23.

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[29] *See, e.g.,* "APEC-OECD Integrated Checklist on Regulatory Reform: A Policy Instrument for Regulatory Quality, Competition Policy and Market Openness" (APEC/OECD); "APEC Information Notes on Good Practice for Technical Regulation" (September 2000); "Principles and Features of Good Practice for Technical Regulation," APEC Sub-Committee on Standards and Conformance.

[30] See http://www.semiconductorcouncil.org/wsc/uploads/WSC_2011_Joint_Statement.pdf (page 6).

[31] See http://www.semiconductorcouncil.org/wsc/uploads/WSC_2011_Joint_Statement.pdf (page 6 and Annex 1 at pp. 13-15).

[32] (see http://www.semiconductorcouncil.org/wsc/uploads/Public%20WSC%202012%20Joint%20Statement-FINAL.pdf)

The U.S. Semiconductor Industry Association supports efforts to reduce the emission of fluorinated gases as part of national and international efforts to address global climate change. Intel is concerned, however, with a renewed and recent effort by the European Commission to regulate fluorinated gas (F-Gas) use in the semiconductor industry, which could needlessly harm advanced semiconductor manufacturing while doing little to advance our shared environmental goals. The F-Gas regulation includes a proposal to phase-down the importation and use of Hydroflourocarbons (HFCs). The major uses of HFCs are in refrigeration and air conditioning, and we express no views on whether the phase-down of HFCs is appropriate in that context. The semiconductor industry, however, uses small volumes of HFC compounds in certain critical applications in the manufacturing process, and there are no proven substitutes for our uses of these critical gases. Self-regulation through voluntary agreements monitored by the six governments that have WSC members in their regions has worked very well so far.

Intel recommends, accordingly, that the TTIP be used to clarify that the phase-down of HFCs exclude the use of HFCs as a process gas in the production of semiconductors. An exclusion is also warranted in recognition of the minimal emissions of these gases from the semiconductor industry and the industry's longstanding voluntary efforts to manage and reduce fluorinated greenhouse gas emissions.

Intel's request is aligned with USTR's TTIP objective to "seek opportunities to address environmental issues of mutual concern" that are "consistent with U.S. priorities and objectives."[33] Our request also is consistent with the U.S./EU High Level Working Group (HLWG) Report's recommendation that "the two sides explore new means of addressing these 'behind-the-border' obstacles to trade, including, where possible, through provisions that serve to reduce unnecessary costs and administrative delays stemming from regulation, while achieving the levels of health, safety, and environmental protection that each side deems appropriate, or otherwise meeting legitimate regulatory objectives."[34] Lastly, Intel's request is consistent with the GRPs or regulatory hierarchy it has proposed in Section I.F.

[33] Letter from Acting United States Trade Representative Demetrios Marantis to Hon. John Boehner, March 20, 2013.
[34] *See* Office of the U.S. Trade Representative, *Final Report of the U.S.-EU High Level Group on Jobs and Growth*, February 11, 2013 [hereinafter "Final HLWG Report"].

ANNEX 3
Minimizing Technical Barriers to Trade

To avoid technical barriers to trade in the transatlantic region and set an example of the type of TBT+ provisions that should be promulgated globally, Intel suggests that certain changes be made to the requirements contained in TBT chapter of the KORUS FTA, the latest U.S. bilateral agreement that should serve as a baseline for TTIP. The changes that we believe should be made to the actual TBT text replicated below are in redline.

A. Suggested Amendments to TBT KORUS Chapter[35] to Increase Transparency and Improve Stakeholder Participation in Developing Technical Regulations

To enhance the opportunity for persons and the other Party to be aware of, and to understand, proposed technical regulations and conformity assessment procedures, and to be able to provide meaningful comments on these regulations and procedures, a Party publishing a notice and filing a notification in accordance with Article 2.9, 3.2, 5.6, or 7.2 of the TBT Agreement shall:

(a) include a~~n~~ detailed explanation of the objectives the proposed technical regulation or conformity assessment procedure is meant to serve and how it addresses those objectives in a manner sufficient to enable stakeholders to understand the substantive changes from current law or practice made by the proposed regulation;

(b) identify the primary agency responsible for developing the regulation and the key decision-maker(s) within the organization;

(c) provide an explanation of how the decision will be implemented;

(~~b~~d) transmit the proposal electronically to the other Party through, in the case of a ~~Korean~~ European proposal, the U.S. inquiry point established in accordance with Article 10 of the TBT Agreement or, in the case of a U.S. proposal, the [TBD]~~Korean coordinator established in accordance with Annex 9-A~~, at the same time as it notifies ~~WTO Members of the proposal in accordance with the TBT Agreement~~ domestic stakeholders; and

(~~c~~e) make available to the public, preferably by electronic means, comments it receives from persons or the other Party on the proposed technical regulation or conformity assessment procedure and an explanation of why significant comments were not incorporated into the final regulation.

B. Suggested Amendments to TBT KORUS Chapter Conformity Assessment Procedures to Improve Mutual Recognition Between the Parties[36]

1. The Parties recognize that a broad range of mechanisms exists to facilitate the acceptance of the results of conformity assessment procedures conducted in the other Party's territory. For example:

[35] The base text is from the KORUS FTA TBT Chapter, Article 9.6.3.
[36] The base text is from the KORUS FTA TBT Chapter, Article 9.5.

(a) a Party may agree with the other Party to accept the results of conformity assessment procedures that bodies located in the other Party's territory conduct with respect to specific technical regulations;

(b) a Party may adopt accreditation procedures for qualifying conformity assessment bodies located in the other Party's territory;

(c) a Party may designate conformity assessment bodies located in the other Party's territory;

(d) a Party may recognize the results of conformity assessment procedures conducted in the other Party's territory;

(e) conformity assessment bodies located in each of the Parties' territories may enter into voluntary arrangements to accept the results of each other's assessment procedures; and

(f) the importing Party may rely on a supplier's declaration of conformity.

The Parties, shall ~~intensify their exchange of information on these and similar mechanisms with a view to facilitating the acceptance of conformity assessment results~~ follow one of the mechanisms listed in paragraphs (a) – (f) for assessing the conformity of ICT equipment with standards, except in unusual circumstances notified to the other Party prior to adopting or revising a standard.

[*Rest of Article 9.5 should be included but is intentionally omitted because no changes are needed*]

ANNEX 4
Promoting Global Cyber Security Standards and Principles

To provide a common foundation for policymaking in the area of cyber security, the Parties commit to:

1. *Ensure that any cyber security national regulation or policy is based on and consistent with the 12 recommendations made in the Global ICT Industry Statement: Recommended Government Approaches to Cybersecurity, which may be revised from time to time;*

2. *Refrain from restricting international trade in cybersecurity products and services or otherwise avoid any Europe- or U.S.-specific approaches to cybersecurity that fail to reflect cyberspace's borderless nature, including static, "check-the box" type national compliance regimes;*

3. *Avoid exercising any exemption to trade obligations for national security purposes using broad market access restrictions, including forced localization measures, on widely available commercial ICT products and services that are based solely on their geographical origin; instead, to invoke any such exemption, the Party is required to demonstrate legitimate security assurance concerns regarding the development, manufacture, use and/or maintenance of specific ICT commercial products or services; and*

4. *Jointly and individually promote these cyber security commitments to other governments through any and all available means, including other trade agreements*.

ANNEX 5
Protecting Trade Secrets and Minimizing Compulsory Licensing

Among other IP issues noted above, the TTIP IP chapter should establish a model trade secret protection system and prevent compulsory licensing of IP where inconsistent with TRIPS.

I. Establish a Model Trade Secret Protection System and Promote it Globally

A TTIP model trade secret protection system should contain two separate and distinct parts: (a) model legislation protecting trade secret misappropriation; and (b) model regulatory provisions that help minimize government requests for excessive trade secrets information in conjunction with product approval requirements.

A. *The Parties Should Improve Trade Secret Protection Domestically and Globally*

The Parties should exercise best efforts to ensure that their respective trade secret law(s) and those in other markets key to U.S. and EU businesses contain all of the following elements:

- Expressly recognizes trade secrets as a form of IP (per TRIPS Article 1.2)

- Define key terms clearly and in a way that enhances trade secret protection:

    - Defines the term "trade secrets" to include any information (i) that has economic value, actual or potential; (ii) is not generally known to the public; and (iii) for which the trade secret owner has taken reasonable measures to keep the information secret.
    - Defines the term "trade secret owner" to mean a person who has rightful legal title to the trade secret.
    - Defines the term "misappropriation" to mean (i) acquiring a trade secret, while knowing or having reason to know that the trade secret was obtained by improper means; (ii) disclosing or using a trade secret, while knowing or having reason to know that the trade secret was obtained by improper means.
    - Defines the term "improper means" to include theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means (so that new ways of misappropriation are covered under the law).

- Criminal Actions:

    - Intent/Knowledge: The law should make the misappropriation of a trade secret a criminal offense, if it is done intending or knowing (1) that the misappropriation will harm the trade secret owner, or (2) that the misappropriation will benefit any government, instrumentality, or agent, or the person who misappropriates the trade secret attempts, aids and abets another person, or conspires to do such an act
    - Penalties: The law also should impose criminal penalties for criminal offenses, in particular fines, compensatory damages to the trade secret owner, and/or imprisonment if the offender is a person, which are sufficient in nature to have a deterrent effect in most cases. In cases of repeated misappropriation, the judicial authorities should have the

authority to may impose additional penalties.

- Civil Actions:

  - Cause of Action: Any person harmed by the misappropriation of a trade secret should be able to bring a civil action against the alleged offender.
  - Preservation of Evidence / Discovery: Judicial authorities should have the authority to issue orders to seize and preserve relevant evidence, and to compel parties to produce relevant evidence, in the appropriate circumstances.
  - Damages: The judicial authorities should have authority to award damages against a person found to have violated applicable law. The damages should be based on the greater of (i) the actual loss caused by the misappropriation of the trade secret, or (ii) the amount by which the offender was unjustly enriched because of the misappropriation of the trade secret.
  - Injunctive Relief: The judicial authorities should also have the capacity to grant injunctive relief, including preliminary and final injunctions, where necessary to prevent actual or threatened misappropriation. Where appropriate, preliminary injunctions may be granted on an ex parte basis.

- Protecting Confidential Information Submitted During Litigation:

  - The judicial authorities must be able to take reasonable measures to preserve the secrecy of the alleged trade secret.
  - Such measures may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing filings or records, or ordering parties not to disclose the alleged trade secret without prior court approval.

- General Procedures, Evidence, Decisions and Remedies:

  - The procedures in trade secret misappropriation cases should not be unnecessarily complicated or costly, or entail unreasonable time limits or unwarranted delays. Remedies shall be expeditious to prevent misappropriation and sufficient to constitute a deterrent to further misappropriation.
  - All parties shall be entitled to substantiate their claims and to present probative evidence, regardless of whether the evidence is in written, oral, or other form. All parties shall be permitted to present testimony from qualified experts.
  - Decisions on the merits of a case shall be in writing where possible, and shall be made available without undue delay.

- Jurisdiction:

  - A Judicial authority should be able to exercise jurisdiction over offenders who misappropriate trade secrets committed wholly outside their jurisdiction -- regardless of whether they are foreign entities or individuals, residents of the jurisdiction, or companies organized under its laws -- so long as the misappropriation causes economic injury within its jurisdiction.

- This exercise of jurisdiction overseas should pertain equally to private rights of actions and government prosecutions.

The Parties should commit through the TTIP to (i) exercise best efforts to ensure their respective laws contain all of the above elements; (ii) promote this model trade secret law among other governments; and (iii) commission a joint report, to be distributed widely, which compares existing trade secret laws in key jurisdictions to the model trade secret law. In addition, the Parties should strengthen and broaden their ongoing collaborative efforts with each other and other like minded governments to minimize cyber theft.

B. *Governments should justify requests for proprietary information as a condition of market access and implement adequate procedures to protect such information*

As regulation of the ICT sector increases, another critical trade secret concern is the increasing number of overbroad testing or certification systems and other regulatory schemes being developed by foreign governments that require the disclosure of unnecessary proprietary information as a condition of market access (i.e., where the disclosure is linked to the importation and/or sale of goods). Examples in our industry include proposed broad product content disclosures as part of RoHS certification in China, and proposed source code disclosures as part of telecom certification schemes in both China and India. Other industries also have similar concerns in the same and other countries. The risk that the required sensitive information will leak to domestic competitors is compounded by the reality that many governments have inadequate procedures to protect such information.

We recognize that in certain circumstances some proprietary product information needs to be provided to governments, including ours, for legitimate health, safety, security and other reasons. In such cases, however, U.S. agencies have detailed procedures to protect confidential business information (*see, e.g.,* 40 CFR Part 2) which are enforceable against the officials that administer them (*e.g., id.* Section 2.211). TTIP could seek agreement from the EU and its Member States to emulate the protections embedded in such procedures to the extent they are weaker.

If the TTIP is to effectively address emerging issues of common concern as the HLWG intends, then the Parties should help establish significant TBT+ procedural safeguards in the agreement to make it more difficult for the Parties (and by example other governments) to mandate the submission of unnecessary information and less likely that any necessary information submitted leaks out (intentionally or unintentionally) once received. In particular, we believe that the Parties should make four major improvements to conformity assessment information requirements to the WTO TBT procedures and disseminate them broadly.

1. Explain in writing with sufficient detail the reasons for any and all requested <u>product related information, and how and why it relates to showing conformity</u>

In the most important cases, the TBT Agreement requires WTO Members to "notify other Members ... of the products to be covered by the proposed conformity assessment procedure, together with a brief indication of its objective and rationale." (TBT Article 5.6.2.) This language, however, focuses on the products to be covered by the assessment – and not the

information to be submitted. And in line with the TBT's requirement of a "*brief* indication" of the conformity assessment's "objective and rationale," WTO Member explanations often are limited to one or two sentences about the general reason for the proposed conformity assessment, assuming notification is even made, and thus provide no basis for discussion with the regulated community on the purpose and scope of information requests.

The TBT Agreement also states: "Members shall ensure that . . . information requirements are limited to what is necessary to assess conformity and determine fees." (TBT Article 5.2.3.) This language is inadequate. A government can easily argue that the information it is requiring is necessary to assess conformity when that assessment is based on a unique technical regulation with no basis for comparison to other similar regulations and associated assessments. Article 5.2.3 does not require WTO Members to justify in writing the technical reasons for their information requests and/or explain why they cannot perform the assessment at issue without them.

Accordingly, TTIP should improve the foregoing WTO TBT provisions and modify the latest relevant U.S. FTA provisions (i.e., from the KORUS TBT chapter) as follows:

> Parties shall notify other parties "of the products to be covered and the types of information to be required by the proposed conformity assessment procedure, together with an ~~brief indication~~ explanation of its objectives and rationale" [*Based on and modifying TBT Art. 5.6.2*] and how the proposed assessment "addresses those objectives." [*KORUS Art. 9.6.3(a)*]. Each Party "shall ensure that . . . information requirements are limited to what is necessary to assess conformity" [*TBT Art. 5.2.3*] ~~and determine fees~~ by (i) requiring regulators to explain in writing why and how the requested information is essential to both showing conformity and fulfilling the objectives of the assessment [*Based on TBT Article 5.2.3*]; and (ii) allowing "persons of the other Parties to participate in the development of . . . conformity assessment procedures . . . on terms no less favourable than those it accords its own persons, including commenting on the appropriateness of information requests required to show conformity." [*Based on and modifying KORUS Art. 9.6.1*]

KORUS Article 9.6.7 also should be included in the TTIP with the following modifications:

> On request, each Party shall provide the other Party with additional available information regarding the objective of, and rationale for, a . . . conformity assessment procedure that the Party has adopted or is proposing to adopt. Such requests may include requests for information regarding the matter the . . . conformity assessment procedure and any associated information requests are ~~is~~ designed to address, alternative approaches the Party considered, and the merits of the particular approaches the Party chose, including any additional available detail on the reasons for any information requests that are deemed to include confidential business information by persons of the requesting Party. [*Based on and modifying KORUS Article 9.6.7*]

Unnecessary requests for confidential information can be reduced by allowing stakeholders to receive notification of proposed information requests with an explanation of why they are necessary and how they are essential to show conformity; comment on those proposed

information requirements; and request additional detail when the information requests involve confidential information.

2. Provide (i) affected persons of a Party the right to an expedited review of its complaint that a confidential business information request is unnecessary and a prompt appeal of any negative decision; and (ii) the Party of affected persons a right to consult with the requesting Party where multiple complaints involving the same confidential information requests are raised

The TBT Agreement requires WTO Member to ensure that "a procedure exists to review complaints concerning the operation of a conformity assessment procedure and to take corrective action when a complaint is justified." (TBT Article 5.2.8.) This language is too general to be meaningful or effective, does not provide for prompt review, and does not require an appeal process to quickly resolve a dispute about the nature or scope of an information request. As a result, companies are increasingly faced with having to make a time sensitive decision of whether to forego market access or submit proprietary information that, if made known to the general public, loses all of its competitive value.

An example of this dilemma occurred in India several years ago. The immense growth in sales of U.S. ICT products resulting from the rapid expansion of India's telecom came to a temporary standstill in 2010 when the government proposed requiring that foreign telecom equipment vendors submit source code and other sensitive design information as a condition of market access (i.e., selling to Indian telecom service providers). Almost all foreign equipment vendors refused to submit their proprietary information. The new license amendment was appealed, but it took months of negotiations to resolve the issue. In the meantime, billions of dollars of business was lost.[37]

To help resolve this issue, the TTIP should improve the relevant WTO TBT provision as follows:

> The TBT Agreement requires that "an effective procedure exists to review complaints concerning the operation of a conformity assessment procedure and to take corrective action when a complaint is justified," [*Based on and modifying TBT Article 5.2.8*] If the complaint involves the required submission of confidential business information that the submitter believes is unnecessary to show conformity, this procedure shall provide for expedited review of the complaint and a prompt appeal of any negative decision. At the request of any Parry, multiple complaints involving the same confidential information requests for a particular conformity assessment shall become a subject of discussion during the next [TTIP] TBT Committee meeting. [*New language added to 5.2.8*]

Without the ability to quickly and effectively resolve disputes over the necessity of submitting confidential business information to show conformity, a regulator can extract intellectual property as a condition of market access even if it is not necessary to show conformity.

[37] For a press article that captures only part of the story, see http://www.pcworld.com/businesscenter/article/204203/india_reviewing_telecom_equipment_security_rules.html.

3. Implement adequate protections that prevent external dissemination, and broad dissemination within the government, of confidential business information that governments receive as part of legitimate conformity assessments requirements

The TBT Agreement requires that "the confidentiality of information about products originating in the territories of other members arising from or supplied in connection with such conformity assessment procedures is respected in the same way as for domestic products and in such a manner that legitimate commercial interests are protected." (TBT Article 5.2.4.) This is largely a non-discrimination clause and too general to be effective, as it provides no detail on the type of procedures that would in fact ensure "legitimate commercial interests are protected." Accordingly we suggest that TBT Article 5.2.4 be improved as follows:

> The Parties shall ensure that "the confidentiality of information about products originating in the territories of other members arising from or supplied in connection with such conformity assessment procedures is respected in the same way as for domestic products." Moreover, such confidential information also shall be protected ~~and~~ in such a manner that legitimate commercial interests are protected"; this obligation shall include, at a minimum, that each Party establish a procedure to ensure that all information submitted as confidential is (i) clearly labelled as such; (ii) treated carefully and consistently by the receiving Party (for example, separated in secure files from non-confidential information); (iii) disseminated within the Party's government on a "need-to-know" basis only; and (iv) disseminated to private parties only with written permission from its owner. [*Based on and modifying TBT Article 5.2.4*]

Many governments in the developing world have inadequate procedures to safeguard trade secrets, creating a significant risk of intellectual property (IP) leakage. That risk increases among governments that have a national strategy to increase domestic IP. The suggested improvements to TBT Article 5.2.4 should help minimize these risks.

4. Impose on officials civil liability for inadvertent governmental disclosures and criminal liability for intentional disclosures of confidential information

As noted earlier, to provide deterrence, U.S. law imposes penalties on officials who fail to follow detailed procedures to protect confidential business information submitted to them. Trade agreements likewise should require that other national laws include provisions that penalize negligent or reckless disclosure of trade secret information by government officials.

The TBT Agreement does not impose any consequences for inadvertent or intentional disclosures of sensitive information by government officials. Likewise, we are not aware of any U.S. FTAs that impose such liabilities on government officials. The TTIP provides an opportunity to raise the standard. Moreover, if a TTIP Party fails to meet the procedures proposed in (i) or (ii), the regulatory measure requiring the submission of sensitive information should not be enforceable against affected entities until they are complied with. The ICT Regulatory Dialogue mentioned earlier could help determine compliance with those procedures where necessary.

II. Limit Compulsory Licensing to Ensure Compliance with TRIPS

We are concerned with increasing efforts in some jurisdictions to force competitors to deal with one another through compulsory licensing of IP, which are not consistent with TRIPS and which could seriously undermine innovation if unrestricted. TTIP provides an opportunity to promote globally common U.S. and EU standard on IP licensing.

Specifically, as noted in Section V, there have been recent regulatory and policy efforts in several jurisdictions to deem the unconditional refusal of dominant companies to license their critical patents or trade secrets as an abuse of IP. We believe that these initiatives are not consistent with the WTO TRIPS Agreement. TRIPS Article 39.2 requires WTO members to protect confidential information against disclosure and does not allow a government to force compulsory licensing of trade secrets in any situation, which makes sense because disclosure can extinguish the right altogether. TRIPS Article 28 grants patent holders the fundamental right to exclude others, and TRIPS Article 27 makes it clear that this right is not contingent on the nature, quality or market value of the patent involved. TRIPS Article 31 allows compulsory licensing only in very limited circumstances and only on a case-by-case basis, and TRIPS Article 40 addresses examples abusive licensing practices, none of which includes an unconditional refusal to license.

To ensure comprehensive and robust international protection of trade secrets and patents, we recommend that the following provision be added to the IP or competition chapter of the TTIP Agreement:

> *A Party may not deem it an abuse of dominance solely because a person unconditionally refuses to grant a license to a third party that needs access to the patent or trade secret to innovate and/or compete in the market in which the owner's dominance is the basis for the licensing demand. In addition, consistent with Articles 28 and 39.2 of the TRIPS Agreement, a Party may not compel new licensing of a patent or trade secret solely because its owner unconditionally refused to grant a license to a third party that needs access to the patent or trade secret to innovate and/or compete in the market in which the owner's dominance is the basis for the licensing demand.*
>
> *A "person" includes individuals and business entities.*
>
> *"Unconditionally" means that the refusal to license is not based on a counterparty's rejection of a proposed license condition that is independently anti-competitive or otherwise unlawful.*

This proposed language is consistent not only with TRIPS, but also with the limited circumstances in which a refusal to deal (i.e., license IP) is deemed anti-competitive under U.S. and EU law.

Under U.S. law, even a monopolist has no general duty to aid its competitors, IP has never been deemed an essential facility, and a party may be only compelled to share a competitively essential asset in circumstances in which it had shared that asset in the past and it

would be profitable for it to continue to do so.[38] The TTIP provides a great opportunity to clarify the boundaries between the legitimate exercise of intellectual property rights and their abuse.

Under EU law, the European Court of Justice has only in very narrow "exceptional circumstances," where strict limitations have been met, ever compelled access to IPRs under Article 82 of the EC Treaty[39] -- but never in a patent licensing context. The language we have proposed takes into account such "exceptional circumstances" by recognizing that the right to refuse to license one's IP only applies "*in the market in which the owner's dominance is the basis for the licensing demand.*" In other words, if a party seeking access to the essential IP proves that it either intends to sell a new product for which demand exists or to supply a different market, and the refusal to license would exclude all competition in the secondary market, then compulsory licensing would still be available under competition policy principles.[40]

The HLWG Report mentions that the TTIP should address issues of common concern to both U.S. and EU businesses, including IP and competition issues. The above language sets a standard, consistent with U.S. and EU law and TRIPS, which should be promoted globally to ensure that any broad theories of IP abuse included in newer competition laws that are enacted by inexperienced jurisdictions do not undermine fundamental IP rights.

The use of compulsory licensing (CL) to remedy IP abuse should not be confused with the circumstances where CLs have been issued in the "public interest," rather than based on alleged anti-competitive effects. The two are separate and distinct grounds for CLs under the TRIPS Agreement. Nevertheless, Intel also is concerned with this other trend to broaden the scope of the "public interest" supposedly justifying CLs to include not only patents on drugs for chronic diseases like HIV/AIDS, but also on drugs for all other kinds of health issues, as well as patents on environmental technologies.[41] Intel does not believe that TRIPS Article 31 allows such broad interpretations of the public interest ground for CLs and we would like to address this issue with USTR as well.

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[38] *See Verizon v. Trinko*, 540 U.S. 398 (2004).

[39] *E.g.*, *IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG*, [2004] All ER (EC) 813 (2004) (access may only be compelled where the IPR is essential to compete in the market and there are no feasible alternatives; an upstream market for the supply of the IPR exists; the party seeking access proves that it either intends to sell a new product for which demand exists or to supply a different market; and the refusal to license would exclude all competition in the secondary market). It is notable that *IMS Health* did not involve IPRs that reflect technical inventions but, instead, protected information regarding the boundaries of geographical blocks that were used for sales reporting purposes. Intel believes that such exceptional, limited circumstances do not warrant the draconian remedy of the essential facilities concept, and that such conduct can be addressed by other means. However, the proposed language drafted for the TTIP Agreement takes into account the ruling in IMS Health.

[40] *See id.*

[41] India's National Manufacturing Policy (NMP) encourages compulsory license grants for "the latest patented green technology" when a right holder refuses to license on reasonable terms or is not working the patent in India. NMP, Section 4.4.1-.3 (2011).