
INTERNATIONAL & NATIONAL SECURITY LAW

INTERNATIONAL TRADE: NEW INITIATIVES

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• James McBride, *CFR Backgrounder: The Future of U.S. Trade Policy*, COUNCIL ON FOREIGN RELATIONS (June 25, 2015), <http://www.cfr.org/trade/future-us-trade-policy/p36422>.

• Joshua Meltzer, *Pass Trade Promotion Authority and Enable Conclusion of the Trans-Pacific Partnership Negotiations*, BROOKINGS (April 9, 2015), <http://www.brookings.edu/research/opinions/2015/04/09-trade-promotion-authority-trans-pacific-partnership-negotiations-meltzer>.

I. INTERNATIONAL TRADE

International trade is not often thought of in the context of regulatory overreach—which is the primary focus of the series that includes this paper—but the sort of trade agreements that nations enter into, the manner in which trade accords are arrived at and made binding on signatory nations, and the ways in which they are implemented have enormous implications for national economies and also for the scope and impact of domestic regulation in each nation. Trade agreements can bolster inefficient regulatory approaches by “harmonizing” regulations in ways that reduce some inputs to competition among firms’ production in different nations. Conversely, trade agreements can reduce barriers to competition across borders, at least indirectly increasing pressure on regulators to adopt more efficient approaches. Choosing the right approach can make a significant difference to domestic economies and to the degree of liberty enjoyed in trading nations.

II. NEW TRADE INITIATIVES: TPP AND TTIP

After a series of global trade initiatives from the 1940s to the 1990s lowered trade barriers, especially tariffs on traded goods, efforts to advance further global multi-lateral agreements—notably, the World Trade Organization’s (WTO) Doha Round—have stalled. Many nations (including the U.S.) have turned to arrangements between smaller groups of nations as

vehicles for reducing trade barriers and expanding trade.

The two initiatives currently at the forefront of trade expansion hopes and fears are the Trans-Pacific Partnership agreement (TPP) and the Transatlantic Trade and Investment Partnership agreement (TTIP); both are still being negotiated, though they are substantially far along in the process. The TPP would provide lower trade barriers and agreed rules on trade-related issues for 12 Pacific Rim nations, while the TTIP would do similar (but not identical) things for the U.S. and the 28-nation European Union (EU).

Opponents complain that the agreements would reduce U.S. ability to secure American consumers’ and workers’ interests and to protect taxpayers against claims from foreign companies that feel disadvantaged, and that both agreements ultimately would hurt the U.S. economy and its most vulnerable workers—almost exactly the opposite of arguments made in favor of the accords. While our interest is primarily in the relationship between these potential agreements and regulation, we will touch on other arguments as well.

III. THE NEW TRADE AGREEMENTS: WHAT IS AT STAKE?

TPP negotiations have concentrated mostly on relatively traditional forms of trade opening, particularly lowering tariffs and reducing non-tariff barriers, although the negotiations also have included protections for investment and intellectual property rights as well as other issues that are either directly affected by trade or can be most efficiently addressed in the trade context. *Regulatory coherence*—a term used to connote promotion of more effective and transparent mechanisms for scrutinizing regulatory initiatives and for preventing regulations that (by design or not) unduly restrict trade—has not been a primary focus, but it has been added to the negotiating agenda.

Much of the work done by promotion of regulatory coherence also can be done within the TPP framework by restricting non-tariff barriers. Concerns over such barriers have been on the negotiating table under the rubric of agreements over *technical barriers to trade* and *sanitary and phytosanitary (health and food related) measures*. The goal for each of those parts of the agreement is to design rules that constrain protectionist

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regulations that lack substantial scientific support (for instance, a documented connection between a product and a health risk) and that especially limit competition by imports.

In comparison, a greater part of the TTIP negotiation aims at *regulatory cooperation*—coordination of different regulatory approaches to assure that the U.S. and EU regulations, even if different, do not pose cumulative hurdles to product development and sales—as well as *regulatory coherence*. TTIP also endeavors to lower tariff and other trade barriers (including on agricultural products, a long-running source of U.S.-EU trade frictions), but the greater focus on regulatory impediments reflects the fact that other barriers to U.S.-EU trade are already lower.

Further, as both the U.S. and EU have highly developed regulatory structures with extensive sanitary and phytosanitary rules, as well as technical regulations covering almost every imaginable industry and product class, it is likely that differences in approach or in standards may pose trade barriers that serve no significant public interest. In other words, differences may exist simply by virtue of the fact that different bodies have adopted the rules, even though there are many equally good approaches to protecting public interests and rules used on both sides of the Atlantic will be effective. While good faith differences will exist, there also is substantial opportunity for manipulation of the rule-creation and rule-administration processes to achieve protectionist ends—not all differences will be the result strictly of separate, good faith efforts.

At the simplest level, different rules and regulations, specifying different inputs to products or different certification procedures to assure compliance with regulators' concerns, frequently pose substantial, and unproductive, impediments to business. Two researchers looking at issues to be addressed in the TTIP negotiations gave one example that aptly illustrates the problem:

According to one U.S. trade association, a U.S.-based producer of light trucks found that a popular U.S. model the manufacturer wanted to sell in Europe required 100 unique parts, an additional \$42 million in design and development costs, incremental testing of 33 vehicle systems, and 133 additional people to develop—all without any performance differences in terms of safety or emissions. EU manufacturers face similar issues in reverse when selling an EU-designed model in the United States.¹

The problems of regulatory differences between the U.S. and EU also have been brought up by representatives of numerous other industries, each with its own horror story about needless costs and delays in selling into countries that have comparable protections for the public but incompatible regulatory standards.

While these complaints generally are advanced by businesses that face barriers to competition in other markets, the barriers to trade also affect broader national interests. Estimates of gains to GDP in the U.S. and EU from eliminating such barriers range from just under 1 percent of GDP to as much as 13 percent of GDP (an estimate taking account of dynamic gains in the economy from greater freedom to compete in many markets more efficiently, as well as from the direct gains from

eliminating special design changes and redundant regulatory permitting). Given the combined GDPs of the U.S. and EU, even at the lower end of the spectrum, gains would amount to tens of billions of dollars of gain annually, and higher estimates would equate to 3-4 trillion dollars of benefit each year.

IV. ANALYZING, FORGING, AND IMPLEMENTING TRADE ACCORDS

One set of arguments about trade policy has to do with international relations, including security concerns; a second set, which tends to dominate domestic debates in the U.S., focuses on economic issues. The short version of the international relations argument is that trade agreements help knit countries together: global trade accords facilitate and encourage trade across all borders, making nations more interdependent and less antagonistic, more likely to cooperate, less likely to fight.

There is doubtless some truth to this proposition (famously captured in the assertion that nations with Starbucks and McDonald's do not go to war against each other). But the evidence is less than compelling that the proportion of business done in trade is directly related to peaceful relations. Nations that fought in the first World War had economies far more integrated with fellow combatants than many that were on the sidelines. Still, at times conclusion of a preferential trade agreement signals—especially to those in less powerful, less populous, and less economically advanced nations—a degree of affiliation among the parties that can encourage better relations, facilitate more helpful accommodation on non-economic issues, and even tilt political debates in some of the partner-nations in a more favorable direction.

While national security and international political effects are important considerations, and increasing bonds are important likely byproducts of preferential trade agreements in particular (agreements of less than global reach, including TPP and TTIP), our focus is primarily on the economic effects of these accords, most of all on regulatory matters. Academic theorists for decades have developed analyses showing that reducing trade barriers does not always yield a “first best” economic result for each nation. This is true in special cases, but it almost always produces the best practical result, providing more goods and services of more quality options at better prices than more trade-restrictive alternatives. That insight is the same reason that we don't all make our own clothes, grow our own food, or build our own homes—or limit our effective options to products made by our friends and neighbors. Competition is economically beneficial, and competition among more potential creators and producers tends to expand the benefits to consumers and to nations.

Regulations can also be beneficial. They can limit opportunities for self-interested behavior that generates negative spillover effects, such as pollution that harms neighbors, acid rain that falls downwind, or water pollution that harms fish and ecosystems downstream. At the same time, regulations can be inefficient or ineffective; they can impose costs enormously in excess of their benefits; they can frustrate competition and reduce the range, quality, and affordability of products. Regulatory coherence should improve the way in which regulations are adopted, scrutinized, and justified. And regulatory cooperation should provide means of eliminating needless frictions among

regulations that ostensibly serve the same ends.

To the extent that happens, competitive forces will push jurisdictions to reduce regulatory costs, as these will make products from jurisdictions with higher regulatory costs (from rules that fail to produce better outcomes) less competitive. And lower regulatory drag also will increase the freedom of individuals and enterprises to research, design, produce, and distribute goods in the ways they think most conducive to success. Some observers worry that regulatory cooperation will reduce protections for consumers and punish producers in jurisdictions that are more responsible—those that police against harmful spillover effects, for example. The key consideration in treaties like TTIP is to reduce needless friction while keeping mutually agreed recognition of standards that enhance public health, safety, and well-being—without making it easy for less competitive businesses to use standards that advantage them (that rely on inputs others wouldn't use or specific product configurations that are peculiar to a particular location) as means of raising barriers to more globally successful rivals. Concentration on mutual recognition, rather than a single, agreed rule generally will better serve that end.

V. GUIDING PRINCIPLES FOR THE FUTURE

1. *Support Expanding Open Trade.* Because open trade tends to be politically, economically, and philosophically beneficial, administrations should start with the presumption that trade accords encouraging lower trade barriers should be favored.

2. *Reduce Regulatory Frictions.* Nations such as the U.S. and those comprising at least the core of the EU share broad commitments to similar goals, such as protection of the public against products that are dangerous for health and safety in ways that make it particularly efficient for well-conceived regulations to protect public interests rather than relying on individuals to protect themselves. Yet different regulatory approaches aimed at the same broad ends reduce competition, raise costs, and frequently make little or no difference in public health or safety. Input specifications and related standards should be eliminated where possible or their competition-reducing effects addressed. Primary attention should be devoted to this end.

3. *Support Mutual Recognition.* Administrations should prefer accords that allow different approaches to exist but that rely on agreed testing for compliance with standards by other national authorities or on mutually recognized certifications of compliance with similar regulatory requirements as sufficient. These approaches allow regulatory cooperation without the need for costly and often fruitless efforts to arrive at a single, jointly-approved regulatory approach.

4. *Favor Dynamic Gains Over Static Gains.* Approaches that generate more freedom over time for businesses to innovate, to find new and better ways of meeting concerns about public health and safety, and to compete as openly as possible—in as many markets and settings with as little risk of multiple, overlapping administrative requirements to gain entry into markets—should be favored over narrower agreements focused on approval of a specific, limited set of mutually accepted requirements. Narrower agreements may provide necessary starting points, but broader arrangements that allow reduced

regulatory cost and more competitive engagement over time should be preferred. These will tend to promote newer and better ways of accomplishing agreed-on ends, more efficient and effective regulatory regimes, and greater welfare for all partner-nations over the longer term.

Endnotes

1 Shayerah Akhtar & Vivian Jones, *Proposed Transatlantic Trade and Investment Partnership (T-TIP): In Brief*, at 8 (Congressional Research Service, June 2014).

