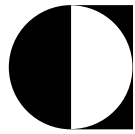




# **LOCKED IN OR LEFT OUT?**

## **Transatlantic Trade Beyond Brussels and Washington**

**Sinan Ülgen**



**CARNEGIE**  
EUROPE

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**Transatlantic Trade Beyond**  
**Brussels and Washington**

Sinan Ülgen

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## About the Author

**Sinan Ülgen** is a visiting scholar at Carnegie Europe in Brussels, where his research focuses on the implications of Turkish foreign policy for Europe and the United States, particularly with regard to Turkey's regional stance and its role in nuclear, energy, and climate issues.

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Ülgen has served in the Turkish Foreign Service in several capacities: in Ankara at the United Nations desk (1990–1992); in Brussels at the Turkish Permanent Delegation to the European Union (1992–1996); and at the Turkish embassy in Tripoli (1996).

He is a regular contributor to Turkish dailies, and his opinion pieces have been published in the *International Herald Tribune*, the *Financial Times*, the *Wall Street Journal*, *European Voice*, and *Le Figaro*. He is the author of *The European Transformation of Modern Turkey* with Kemal Derviş (Centre for European Policy Studies, 2004) and *Handbook of EU Negotiations* (Bilgi University Press, 2005).



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## Summary

Many countries are interested in the Transatlantic Trade and Investment Partnership (TTIP) that Brussels and Washington are negotiating. But the United States and the European Union (EU) began talks without devising a way to involve their main trade partners. This approach, understandable given the complexity of the negotiations, could produce a bilateral agreement that is difficult to multilateralize. To influence the negotiations, third countries interested in eventually joining TTIP should pursue an agenda centered on the accession mechanism, the elimination of nontariff barriers, and dispute settlement.

### Enlargement Paths and Challenges

- Brussels and Washington have said that after TTIP is concluded bilaterally, interested third parties will be invited to join, but it is unclear how accession or association will be engineered.
- To move closer to TTIP, countries could conclude their own free trade agreements with the United States, the EU, or both. A more advanced option is to conclude “bridge” agreements between TTIP and the pertinent regional trade agreements. But in these scenarios, third countries would not be part of TTIP and would not play a central role in setting new norms.
- To genuinely solve the enlargement problem, a specific provision for accession needs to be included in the TTIP agreement.
- The way in which the agreement eliminates nontariff barriers will have significant consequences for countries aspiring to join the partnership because different approaches will have different impacts on the economies and competitiveness of candidates.
- The design of a dispute settlement mechanism matters because TTIP’s enlargement will add a new layer of rulemaking to the arrangements in existing regional trade agreements, which could create competing jurisdictions and conflicting remedies.

### Recommendations for Third Countries

**Help design an accession process that can resist politicization.** Establishing a committee of experts tasked with the technical review of the level of preparedness



of candidate countries and developing a decisionmaking process that makes it impossible for one country to prevent another's accession are important steps.

**Promote the principle of mutual equivalence to eliminate nontariff barriers.** This approach would allow existing regional trade agreements to be used as the building blocks in the new international trading regime set up by TTIP.

**Encourage the design of a flexible dispute settlement mechanism.** New members should be fully represented in the process, and a rule of precedence for TTIP, the World Trade Organization, and other regional trade agreements should be established.

**Form a TTIP caucus or a joint platform to directly interact with Washington and Brussels.** Such a platform will allow third countries to work together to determine their positions and influence the outcome of negotiations.

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## Introduction

Faced with the prospect of a relative decline in their global economic influence, the world's two largest economies have decided to create a seamless transatlantic marketplace. The Transatlantic Trade and Investment Partnership (TTIP) initiative has been welcomed on both sides of the Atlantic as a grand plan for revitalizing economic growth and enhancing international competitiveness. Expectations from TTIP are significant—it could bring annual economic gains of about €119 billion (\$164 billion) to the European Union (EU) and €95 billion (\$131 billion) to the United States.<sup>1</sup>

However, interest in TTIP is not limited to Brussels and Washington. Many other capitals follow developments on TTIP closely and have displayed a willingness to eventually be included in this economic endeavor, for both political and economic reasons.

Despite this interest on the part of their leading trade partners, Brussels and Washington have opted to start TTIP negotiations without devising a formal solution for the direct or indirect involvement of third parties. The current EU-U.S. stance is that once TTIP is concluded bilaterally, interested third parties will then be invited to join. This exclusionary behavior is justified on the grounds of the complexity of the envisaged negotiations. The EU and the United States argue that it is not even known at this stage whether current differences between Washington and third countries on many topics can actually be bridged. So both sides have resisted the inclusion of additional partners to avoid compounding an already challenging negotiating environment.

This approach has a certain merit, but it also conceals a danger. The risk is that the United States and the EU may end up concluding an essentially bilateral deal that, even with the best of intentions, would be difficult to transform into a truly multilateral agreement. A purely bilateral pact would undermine future efforts to open TTIP up to the accession of interested third parties. In other words, negotiating a bilateral trade agreement from the start is very different from working toward a multilateral deal for which an initial EU-U.S. agreement is only a stepping stone.

The EU and the United States have an interest in devising, from the outset, a TTIP that can be multilateralized to minimize any potential political friction when other Western countries join in the future. Such an approach would be compatible with the current positions of Brussels and Washington and would confirm that TTIP is open to the accession of interested third parties.

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**The Transatlantic Trade and Investment Partnership has been welcomed as a grand plan for revitalizing economic growth and enhancing international competitiveness.**

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Retaining the prospect of accession is indispensable to safeguard the cohesion of the transatlantic community and to prevent new divisions from emerging.

This political commitment to an “open door” policy for TTIP should also be reflected in the structural provisions of the agreement. While the onus for this task is on the original TTIP members, this stipulation should also form the basis of a new strategy of engagement for countries interested in eventually joining TTIP.

Instead of securing an uncertain commitment about the prospect of their eventual accession, third countries should focus their efforts on a few critical areas of TTIP that might constitute barriers to the agreement’s enlargement or raise the cost of acceding to it. The three critical issues that will have a bearing on the multilateralization of TTIP are accession, elimination of nontariff barriers, and dispute settlement.

## A Justifiable Interest From Third Countries

There are legitimate political and economic considerations that in tandem have kindled the interest of third countries in joining TTIP. A changing geopolitical landscape, together with an assertive Russia that has become an adversary of the West, generates a new dynamic for strengthening the transatlantic alliance. TTIP increasingly appears to be the economic backbone of such a revitalized relationship. Limiting TTIP’s membership to the EU and the United States would therefore be tantamount to introducing new and unwanted divisions within the

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Western alliance—a “fortress TTIP” approach. Preempting this outcome has become the political objective of non-EU members of the North Atlantic Treaty Organization (NATO) like Norway and Turkey, which consider TTIP membership indispensable to preserve their status within an evolving and deepening transatlantic community.

There are also important economic considerations behind the desire of third countries to be part of TTIP. If they are left out of this emerging transatlantic market, third countries will be faced with economic losses. There are three categories of such losses.

The first set of potential losses derives from the phenomenon of preference erosion. TTIP will make U.S. exporters more competitive in EU markets and EU exporters more competitive in the U.S. market. As a result, third countries will lose their tariff advantages and therefore some of their competitive edge in the U.S. or EU markets vis-à-vis European or American exporters respectively. According to estimates by the Ifo Institute for Economic Research, Canada’s economic losses could reach 10 percent of its national income. For Turkey, the predicted figure is 2.5 percent of national income, or about \$20 billion.<sup>2</sup>

The second category of losses relates to trade diversion, which stems from asymmetries in market access. This scenario applies specifically to Turkey,

which, unlike all of the EU's other trading partners, has a customs union with the EU. Following the conclusion of TTIP, U.S. exporters will enjoy tariff-free access to the Turkish market, but Turkish exporters will not benefit from the same ease of market access in the United States.

A third set of losses for third countries is linked to service liberalization and the harmonization of nontariff barriers under TTIP. These processes can lead to significant trade diversion within TTIP, to the detriment of nonmembers. The more exposed third countries' exports are to TTIP regulations on standards, services, government procurement, and intellectual property rights, the larger these losses will be.

More generally, the impact of TTIP on nonmembers will depend on the nature of their current trade relationship with the United States or the EU. Countries that already have a free trade agreement with the original TTIP parties benefit from an insurance policy against potential losses from trade diversion. By creating a prior degree of policy convergence in areas like standards and regulation of services, these countries' existing preferential agreements would minimize the problems of market access due to differences in regulatory and nontariff barriers between them and TTIP members.

If successfully concluded, TTIP will create an almost hegemonic pole of global standard setters. The parties' ability to set global standards on trade, intellectual property rights, investment protection, and similar fields would give their economies a sustainable competitive edge. Third countries will want to be part of this global standard-setting exercise instead of staying on the sidelines—they want to be rule makers rather than rule takers.

### **Developing an Effective Accession Mechanism**

The assumption in Brussels and Washington that third countries will be able to join TTIP at some point in the future has not been fleshed out, and it is currently unclear how such accession or association will eventually be engineered. But if TTIP is to be multilateralized, the negotiating parties should agree on the specific procedure for TTIP enlargement during their current talks. Postponing this decision until the time of actual enlargement will create unwanted difficulties and possibly unnecessary political friction. From the outset, the original TTIP partners should clearly determine the conditions under which TTIP accession can take place and the specific rules that will guide the process of enlargement.

Bringing clarity to the issue of enlargement will enable Brussels and Washington to better withstand pressure from third countries to be directly involved in the ongoing TTIP negotiations. Addressing current uncertainties surrounding TTIP's potential enlargement will also enhance the political credibility of TTIP's open-door policy.

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### Various Approaches

One accession option that has been articulated is for interested countries to conclude their own free trade agreements with the United States and the EU. For countries that already enjoy an advanced degree of economic integration with either of the parties—for instance, Mexico and Canada (members of the North American Free Trade Agreement, or NAFTA), Norway and Switzerland (members respectively of the European Economic Area, or EEA, and the European Free Trade Agreement, or EFTA), or Turkey (which has a customs union with the EU)—this would mean concluding a free trade agreement with the other TTIP partner. So, Mexico and Canada would seek to sign a more comprehensive deal with the EU, while Norway, Switzerland, and

Turkey would strive to initial a similar agreement with the United States.

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**Devising supplementary free trade agreements would merely create a web of such deals. It would not actually result in the third countries becoming part of TTIP.**

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The drawback of devising supplementary free trade agreements is that it would merely create a web of such deals. It would not actually result in the third countries becoming part of TTIP.

A more advanced version of this approach is to conclude “bridge” agreements between TTIP and the relevant regional trade agreements, for example between TTIP and NAFTA and between TTIP and EFTA. TTIP enlargement would then take place through these bridge agreements, which would allow some of the mutual concessions negotiated under the TTIP umbrella to be extended to the countries party to the regional trade agreement.

One potential complication of the bridge approach relates to the harmonization of the rules of origin between TTIP and the regional trade agreements. If TTIP and NAFTA cannot harmonize their rules of origin despite a bridge agreement between them, this can impact trade flows. Given existing differences between NAFTA and EU rules of origin, this is more than a purely theoretical discussion.<sup>3</sup>

Conditioning the bridge agreements on the harmonization of rules of origin may be necessary to ensure free trade. But this conditionality would amount to forcing NAFTA and EFTA to adopt the same rules of origin if separate bridges were to bind both NAFTA and EFTA to TTIP. This would in turn require an overhaul of the complicated rules of origin adopted by these regional trade agreements.

Even if these challenges could be overcome, the network of bilateral transatlantic free trade agreements would not offer a genuine solution to the challenge of TTIP accession. The proliferation of partnerships would allow only limited scope for third countries to redress the adverse impact of being excluded from TTIP. A system of bridge agreements would permit third parties to equalize their competitive disadvantage but would not give them a place at the table where the new global norms are formulated.

In the case of Norway, after concluding a free trade agreement with the United States, the country would gain preferential access to the U.S. market. It would therefore be able to eliminate its competitiveness gap vis-à-vis the EU in the U.S. market due to prevailing tariff preferences. But Norway's free trade deal with the United States would not allow the country to benefit from TTIP's various institutional provisions, including the ability to contribute to the design of new global standards for trade and investment.

Thus, without an option of outright accession, third countries would need to accept a permanently reduced role in this new world of trade policy norm setting. A genuine solution would require the TTIP agreement to contain a specific provision for accession by nonmember countries.

### A Complex Process

The workability of TTIP's eventual accession mechanism will depend on how the agreement's original partners decide to address the inevitable politics of its enlargement.

The parties could treat TTIP like an international convention in which accession is linked to the agreement's ratification by third countries. This is the method adopted for many international accords, ranging from the Kyoto Protocol on greenhouse gas emissions to the Nuclear Non-Proliferation Treaty. In such cases, acceding states ratify the international treaty according to their own constitutional requirements and notify the international secretariat.

This formula is a workable solution for international conventions that do not impose on states already party to the agreement an obligation to extend concessions to new parties. When a new state accedes to the Kyoto Protocol, all other states party to the convention stand to benefit uniformly from its accession. Likewise, when a new state adheres to the Nuclear Non-Proliferation Treaty, the whole world is better off with a strengthened antiproliferation regime.

As intellectually appealing and functionally simple as this option may be, an accession mechanism that relies on the domestic ratification of acceding parties is not a politically acceptable solution for TTIP. This is because the accession of new parties will necessarily involve concessions that will inflict costs on specific groups in states that are already party to TTIP. Some of this impact will be negative: EU autoworkers may be adversely affected if and when Mexico, with its sizeable auto industry, becomes a TTIP partner. The distributional impact of these economic costs is important.

A more realistic possibility is to build in a procedure of approval by existing TTIP parties for any new entrant. This is a requirement that would raise no serious objections given that it is essentially the rule for existing multilateral and regional trade agreements. The accession of a new signatory to the World

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Trade Organization (WTO) requires the unanimous approval of the organization's existing members. As such, the WTO is different from the Kyoto Protocol or the Nuclear Non-Proliferation Treaty.

But this option, too, is problematic, as a unanimity-based principle risks politicizing TTIP's future enlargement. Once the right to veto prospective entrants is granted to every state that has acceded, TTIP partners can seek to use this power as leverage in their bilateral relations with states interested in accession. It has been claimed that Russia's WTO membership was made possible by the 2009 "reset" in the then strained U.S.-Russia relationship.<sup>4</sup> Had Washington not been interested in a new political engagement with Moscow, Russia's WTO membership, which required the unanimous approval of existing WTO members, would not have been finalized.

Granting the original TTIP parties the right to veto new accessions may be politically indispensable, but at the same time, it has the potential to open the

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partnership to the contagious effect of bilateral disputes. Under such a scenario, the sequencing of enlargement becomes of utmost importance because it has a bearing on whether bilateral disputes become an obstacle to further TTIP enlargement.

To take one example: Given the interest of both Turkey and Israel in becoming TTIP partners, which country should be given priority? If Turkey joins first, it can safely be argued—given current disagreements between the two governments—that Ankara will seek to use its

TTIP membership to encumber Israel's accession process. If Israel is admitted before Turkey, then it could seek to engage in similar obstructionist behavior. Furthermore, the underlying nature of such disputes may not necessarily be limited to politics. Veto behavior can also emerge for economic reasons, and less competitive countries might seek to block the accession of more competitive ones.

The services industry offers a clear example of the complexity of devising a fair and effective accession mechanism. Unlike the case of trade in manufactured products, the liberalization and multilateralization of trade in services under TTIP would require parallel tracks of negotiations between the candidate countries and existing TTIP members.

When it comes to industrial products, TTIP accession may require aspiring members to eliminate their tariff barriers. There may not even need to be full-fledged negotiations on the schedule of tariff dismantlement. For services, however, the issues are much more complex. If TTIP were concluded, the EU and the United States would have already negotiated their mutual concessions and commitments for the services industries in line with the General Agreement on Trade in Services, a treaty to which all WTO members are party. But this schedule of commitments would determine the conditions for

the liberalization of the trade in services only between the United States and the EU. Unlike the schedule for the elimination of tariff barriers for industrial goods, the U.S.-EU schedule of commitments for services cannot be transposed onto third parties without modification.

Both the United States and the EU would want to negotiate different clauses and provisions with countries aspiring to join TTIP. A good example would be the conditions related to the freedom of establishment for service suppliers. The EU may seek to impose limitations on the freedom of establishment for countries like Turkey that, for some states, present a threat of migration. The TTIP agreement would have to cater to this need by providing for specific negotiating committees for the services industry.

A final challenge related to the eventual TTIP accession mechanism is the politics of ratification of trade agreements in the United States. To conclude negotiations with the EU, the U.S. administration will need to request trade promotion authority from the U.S. Congress. This dispensation allows the administration to send the finalized deal to Congress for a yes/no vote. Having taken this step, Congress cannot then ask for changes to the negotiated text. This is also important for the trading partner, which will know that once trade promotion authority has been granted, any deal under negotiation with the U.S. administration will be the final version and will not be subject to further negotiations as a result of congressional ratification.

It is assumed that the U.S. administration will receive trade promotion authority for TTIP before the end of the negotiations with the EU. But this authority is limited in time: the last time that Congress granted this authority, in 2002, it remained in effect for five years.

From the perspective of the multilateralization of TTIP, trade promotion authority remains a serious obstacle. The accession of additional countries to TTIP would be greatly facilitated while the authority remains in force. By the same token, the enlargement of TTIP would come to a virtual standstill once the dispensation expires. Countries that are late in negotiating their entry into the agreement would face the prospect of the U.S. Congress imposing new conditions and seeking amendments to the deal that had been negotiated.

So for all practical purposes, the length of the next trade promotion authority will also determine the window of enlargement for TTIP. Once the authority expires, further enlargement of TTIP will become a seriously difficult task.

### **Balancing Technicalities and Politics**

The TTIP partners should design the accession mechanism in full recognition of these difficulties. One approach that may alleviate some future uncertainty is to introduce a technical assessment procedure into the inherently political decision of accession.



This option would essentially task a special committee composed of experts from TTIP member states with assessing the level of preparedness of every state that has applied for TTIP accession. The committee could take the work of the WTO secretariat in relation to new accessions as a reference. TTIP member governments would then need to adopt the committee's assessment. Ideally, unanimity should not be required, and accession should be allowed to proceed on the basis of a qualified majority vote following a positive technical assessment.

Various methods of determining a qualified majority would be possible. Votes could be weighted arithmetically or on the basis of states' gross domestic product. The latter definition would eliminate the possibility of smaller countries blocking new accessions. The voting procedure could give member governments additional flexibility by allowing them to unanimously overrule a negative verdict of the assessment committee.

A combination of technical and political approaches would permit TTIP member states to retain their political privileges while eradicating the danger of bilateral disputes spilling over into TTIP and jeopardizing mutually beneficial future enlargements.

This technical "enlargement" committee would have a role in determining not only the viability but also the conditions of accession. It would be unrealistic to expect every new entrant to liberalize all trade in manufactured goods and services with existing TTIP members as of the day of its accession. Just as in major free trade agreements, each candidate country would seek to negotiate transition periods for some of its sensitive sectors. The TTIP committee could be tasked with negotiating these necessary periods with the aspirant countries and would allow such negotiations to proceed in a centralized manner. Without such an option, candidate countries would need to engage in parallel negotiations with all TTIP members.

## Eliminating Nontariff Barriers

Most studies that have aimed to quantify the economic gains of TTIP find that the lion's share of the estimated economic gains from TTIP will result from the elimination of nontariff barriers or behind-the-border obstacles. When the two large transatlantic economies decide to adopt compatible standards for tradable goods and convergent regulations for their service industries, the result should be lower trade costs and gains in the economies of scale of production.

A number of different approaches are available to eliminate behind-the-border barriers to trade. The EU has opted for a combination of regulatory harmonization and mutual recognition. In some policy areas, the EU has decided to adopt a core of legislation that binds all its members. In other areas, where there is no EU-level regulation, members states have agreed on the principle of

mutual recognition, which allows a good produced in any EU country to be exported to any other member state.

The final decision on how to achieve the goal of eliminating nontariff barriers in TTIP will have significant consequences for countries aspiring to join the transatlantic partnership. Different options for the elimination of these barriers are likely to influence the economies and eventual competitiveness of candidate countries in different ways.

### The TTIP Approach

From the outset, the TTIP partners have ruled out regulatory harmonization. The United States and the EU saw this approach as a politically impossible objective that would have required them to converge on an identical regulatory framework. Instead, the parties can achieve the aim of eliminating nontariff barriers by relying on the principle of mutual recognition or by opting for mutual equivalence.

Under mutual recognition, the TTIP partners would agree to recognize each other's standards and conformity assessment procedures. That would require both sides to trust the performance of the other party's institutions tasked with assessing conformity and to have a degree of confidence about its institutional ability to effectively enforce market surveillance. The effectiveness of this approach may be impeded by the need to determine how high the minimum degree of harmonization of standards and testing procedures should be. To become operational, this principle would require a specific and separate agreement setting out the sectors in which it could be applied.

The principle of mutual equivalence represents a less onerous and more flexible approach to the elimination of behind-the-border obstacles. It relies on the assumption that the trade partners' legislation, even if different, is equally effective in achieving the goal of regulating health, safety, and consumer protection.<sup>5</sup> The TTIP partners would still need detailed discussions to fully operationalize this principle. Yet unlike the negotiations on mutual recognition, which would need to focus not only on the content of the regulation but also on the effectiveness of the assessment and market surveillance institutions, deliberations on mutual equivalence could focus on outcomes.

The elimination of nontariff barriers to trade will in any case require a well-functioning procedure to identify and remove the trade-restrictive aspects of the rules and regulations adopted by the United States and the EU. Negotiations on this issue should be permanent given the need not only to achieve regulatory equivalence for existing legislation (static regulatory equivalence) but also to maintain regulatory convergence for all future technical legislation that would affect tradable goods and services (dynamic regulatory equivalence). Discussions on

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eliminating nontariff barriers should therefore inform the domestic policy-making agendas of the transatlantic partners.

The establishment of this particular regime of dynamic regulatory equivalence is generally viewed as one of the most complex and difficult tasks in the process of setting up TTIP. That is why the EU's initial position paper on regulatory issues tends to favor an approach that aims to reduce the regulatory gap through institutionalized bilateral consultations.<sup>6</sup>

### **The Effect on Third Countries**

For third countries aspiring to join TTIP, mutual equivalence would constitute a far better solution than mutual recognition.

Under mutual recognition, each country joining TTIP would need to conclude a separate agreement with the existing TTIP parties. This would require detailed and extensive consultations on the technical legislation of the candidate country as well as an evaluation of the country's ability to enforce this regime. Until such an agreement is concluded, nontariff barriers to trade with the acceding member cannot be eliminated, and differences in standards and technical legislation will hinder exports from that country to existing TTIP members.

Mutual equivalence provides a shortcut for eliminating these difficulties. New entrants would not be required to adopt a heavy regulatory burden with potentially detrimental consequences for their competitiveness. Instead, they would need only to convince existing TTIP partners that their own technical legislation and market surveillance practices were satisfactory and provided a level of health, safety, and consumer protection assurance similar to those of the TTIP partners.

Countries that already have a preferential trade agreement with the United States or the EU that addresses the issue of harmonization or convergence of technical legislation could further contend that this commitment would enable them to be included in the scope of the mutual equivalence adopted by TTIP. For instance, Norway or Switzerland could assert that their commitments under the EEA or EFTA to harmonize their industrial legislation with the EU's should enable them to benefit from the principle of mutual equivalence once they join TTIP.

Mutual equivalence, unlike mutual recognition, would therefore allow TTIP to take advantage of all the hard work of harmonization and convergence that has been accomplished under other regional trade agreements. Mutual equivalence would allow other regional trade agreements to be used as the building blocks of the new international trading regime to be set up by TTIP.

In any event, the prospect of the multilateralization of TTIP would require the committees tasked with enabling regulatory equivalence to be designed in a way that is compatible with the future enlargement of TTIP. So even if the TTIP regulatory consultation committees were initially to operate bilaterally

between the United States and the EU, they should eventually allow for the participation of additional partners.

Another reason why the TTIP partners should opt for a lighter alternative to regulatory convergence and give priority to a more widespread application of the principle of mutual equivalence is that the enlargement of the regulatory consultation committees would complicate the already-difficult process of agreeing on a common approach for reducing regulatory gaps. This difficulty would be more pronounced as TTIP starts to incorporate countries with different levels of income. The adoption of mutual equivalence as the main method for eliminating behind-the-border barriers would have the benefit of easing these difficulties of TTIP enlargement.

If the TTIP regulatory consultation committees are not designed to cope with future enlargement, there is a risk that TTIP will become a forum in which the EU and the United States seek ways to reduce differences in their respective regulations without taking into account the views of other potential TTIP members. If new entrants cannot enjoy the same rights as the original founders in the TTIP committees, regulatory equivalence would operate as an exclusionary regime, creating a situation of policy dependency for all new entrants. In effect, a second-class membership would be created within TTIP. It is telling that in the EU's position paper, this process is defined in a section entitled "An effective bilateral cooperation/consultation mechanism."

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## Designing a Dispute Settlement Mechanism

The design of a dispute settlement mechanism is relevant in view of the multilateralization of TTIP by enlargement. Increasing TTIP's membership will add a new layer of rule making and dispute settlement onto the prevailing institutional arrangements embodied in existing regional trade agreements like EFTA, the EEA, NAFTA, or even the WTO. The challenge will be to ensure legal predictability and consistency for the settlement of disputes in a trading world increasingly characterized by overlapping institutional competences. The risk from the standpoint of TTIP enlargement is an emergence of competing jurisdictions and conflicting remedies.

Both the EU and the United States are party to other regional trade agreements, each with its own set of rules for dispute settlement. NAFTA has detailed dispute settlement provisions, while the EU's customs union with Turkey establishes a role for common institutions in resolving disputes.

The inclusion in TTIP of either U.S. or EU trade partners from other regional trade agreements would create parallel adjudication mechanisms for disputes. If Mexico or Canada were to join TTIP, any potential disagreement

between U.S. and Mexican or Canadian entities could be resolved through either TTIP's or NAFTA's settlement mechanism. Similarly, if Turkey were to accede to TTIP, it could rely on the provisions of its customs union with the EU to address possible trade disputes with the EU, or it could avail itself of the TTIP settlement mechanisms. Ankara could even consider making use of the WTO's dispute resolution procedure. This would allow parties to "shop" for what they believe to be the more lenient institution of dispute settlement.

A related problem is the potential divergence in remedies across different dispute settlement jurisdictions. Faced with a violation of trade rules, one settlement body may opt for fines, while another may insist on sanctions, as is the case in the WTO.

A possible solution would be to establish a hierarchy among the various dispute settlement bodies. For disagreements between TTIP states that are also party to a common regional trade agreement, the settlement mechanism of the regional agreement should take precedence. In the case of disputes between the United States and Mexico, NAFTA's jurisdiction should prevail, even after Mexico joins TTIP.

Additionally, parties to TTIP should recognize the primacy of its dispute settlement over that of the WTO. This principle could lead to the criticism that TTIP would be inimical to the multilateral trading regime underpinned by the WTO. But the TTIP parties would need to recognize an order of precedence to prevent the emergence of competition between the alternative resolution options provided by TTIP and the WTO—a situation that would ultimately be harmful from the standpoint of the international trading system.

There would need to be one exception to this rule. In the case of differences in the scope of policies covered by TTIP and the regional trade agreement, the TTIP dispute settlement body would apply for policy areas that are exclusively regulated under TTIP. So, for disagreements between the EU and Turkey on investment protection, the EU would refer to the TTIP dispute settlement procedure, as the EU-Turkey customs union does not cover investment protection. For disputes between TTIP countries that are not part of another regional trade agreement, the TTIP resolution mechanisms would apply. That would be the case for all disputes between the United States and the EU relating to trade and investment.

For this rule of precedence to gain widespread acceptance, new entrants must be convinced that their interests will be protected as effectively by TTIP's dispute settlement mechanism as by the resolution options available to them in the WTO. This would imply opening membership in TTIP's eventual dispute settlement institution to each new entrant to the partnership.

From the perspective of aspirant countries, the scope of TTIP's dispute settlement will also be important. TTIP is set to cover new policy areas such as investment protection and labor and environmental standards. In the global trading system, emerging countries have so far resisted attempts by

industrialized nations to establish direct linkages between trade and social or environmental standards. They have feared that such linkages could then be used for protectionist purposes.

For example, the United States could attempt to impose trade remedies on exports on emerging countries that have a lower level of social or environmental protection. Previous attempts to advance this agenda at the global level, especially under the Uruguay and Doha Rounds of trade talks, have failed. With TTIP, the United States and the EU may have a new opportunity to impose this conditionality on countries aspiring to join the partnership. The effect of TTIP may be to force emerging nations to accept a linkage between social and environmental norms and trade freedoms that they have long resisted at the WTO.

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## The Way Forward for Third Countries

Countries that are already members of regional trade agreements with the United States or the EU have a legitimate interest in wanting to become TTIP members. That is the only way that they can protect their economic interests and prevent a potential loss of welfare.

At the same time, the EU and the United States have a legitimate interest in wanting to keep these countries at arm's length during the challenging negotiations on the liberalization of transatlantic free trade. American and European negotiators do not want to compound their difficulties by allowing the concerns of third countries to overburden their already-ambitious agenda.

If TTIP is to be multilateralized at a later stage by the accession of third countries, Brussels and Washington should go beyond their declaratory policy of accepting the principle of TTIP enlargement. From the outset, they should infuse TTIP with the spirit of multilateralism. That means identifying possible barriers to TTIP's future enlargement.

The goal of making the TTIP framework conducive to enlargement should be the primary aim of third countries interested in eventually joining the partnership. Countries like Mexico, Canada, Turkey, Norway, and Switzerland that have already demonstrated their desire to accede to TTIP should reassess their strategy of engagement with TTIP partners.

Instead of demanding to be involved in negotiations or to be continually and comprehensively informed about their progress, third countries should refocus their efforts on a more streamlined agenda of selective engagement.<sup>7</sup> This agenda should be centered on issues of relevance and importance for the eventual enlargement of TTIP. Aspirant countries should identify these areas and determine their position to affect the outcome of the TTIP talks.

A key issue in this respect is likely to be the mechanics of TTIP accession. Potential candidate countries should engage Washington and Brussels with a

view to helping them design an accession mechanism that would be resistant to the politicization of accession. An important step would be the establishment of a TTIP committee of experts tasked with the technical review of the level of preparedness of candidate countries. This should be combined with a political decisionmaking procedure that precludes individual members from vetoing new entrants.

From the perspective of future members of TTIP, the approach adopted by Brussels and Washington for the mutual elimination of nontariff barriers will also be important in determining the cost of accession. The implementation of the principle of mutual equivalence, as opposed to mutual recognition, would allow third countries to leverage their existing preferential trade agreements with the United States and/or the EU. That would enable aspirant states to better overcome behind-the-border obstacles to trade in the enlarged transatlantic marketplace.

Third countries should also raise the issue of TTIP dispute resolution with Washington and Brussels. The aim should be to design a dispute settlement mechanism that would be compatible with the objective of TTIP's eventual multilateralization and therefore flexible enough to allow for the full representation of its new members. At the same time, TTIP should establish a rule of precedence regarding the functioning of its own dispute settlement procedure. That would eliminate the risk of overlapping jurisdictions and conflicting remedies among the dispute settlement bodies of the WTO, TTIP, and various regional trade agreements.

Aspirant countries would be better placed to achieve their goals if they were able to form a TTIP caucus or a joint platform to directly interact with Washington and Brussels. The establishment of such a caucus would be a strong signal that an enlarged TTIP would be not only desirable but also fully functional. And now, early in the negotiations process, is the time to send such a signal if third countries hope to ease the path to accession.

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## Notes

- 1 Center for Economic Policy Research, “Reducing Transatlantic Barriers to Trade and Investment: An Economic Assessment,” March 2013, [www.cepr.org/content/independent-study-outlines-benefits-eu-us-trade-agreement](http://www.cepr.org/content/independent-study-outlines-benefits-eu-us-trade-agreement).
- 2 Ifo Institute, “Dimensions and Effects of a Transatlantic Free Trade Agreement Between the EU and U.S.,” study commissioned by the German Federal Ministry of Economics and Technology, February 2013.
- 3 In the trade-sensitive sector of textiles, NAFTA’s rule of origin is the “yarn-forward rule,” which ensures that clothing made in a NAFTA member country using fabrics or fibers originating in a nonmember country does not benefit from tariff reduction. The EU uses the change-of-tariff-category rule, which requires only that the final garment be cut and sewn in that country.
- 4 Dominic Fean, “Decoding Russia’s WTO Accession,” Institut Français des Relations Internationales, *Russia.Nei.Visions* 64, February 2012, [www.ifri.org/downloads/ifrifeanrussiawtoengfeb2012.pdf](http://www.ifri.org/downloads/ifrifeanrussiawtoengfeb2012.pdf).
- 5 The EU operationalized this principle with its Services Directive of 2006.
- 6 EU-U.S. Transatlantic Trade and Investment Partnership, “Trade Cross-Cutting Disciplines and Institutional Provisions,” Initial EU Position Paper, [http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc\\_151622.pdf](http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151622.pdf).
- 7 Turkey is asking to be granted observer status in the TTIP negotiations.



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