

TACD Positive Consumer Agenda: New Rules for the Global Economy

Trade agreements — their scope, transparency and legitimacy — must now be reimagined. This paper outlines a consensus position of the Transatlantic Consumer Dialogue (TACD), a coalition of more than 75 European and US-based consumer organizations. It is intended to be an initial vision on how trade agreements should be limited to trade matters, regulatory issues should be dealt with outside of trade agreements, and both processes should be more transparent and serve the interests of consumers, rather than undermining them.

TACD provided constructive critiques of the process and the contents of the Transatlantic Trade and Investment Partnership (TTIP) negotiations since they began in 2013. In a series of public letters and [policy statements](#), we also outlined our recommendations on a range of TTIP issues affecting consumers. We noted early on that TTIP was not mainly about the traditional business of trade negotiations — namely, cutting tariffs and opening quotas to expand trade. And that indeed, tariffs between the US and Europe already are quite low, with some notable exceptions. Rather, TTIP focused on setting expansive rules on non-trade matters and posed the risk of adverse impacts on the democratic, accountable policymaking processes that are essential to creating and maintaining consumer protections on which we all rely.

European and US consumer organizations were not alone in raising serious concerns about both the process of TTIP negotiations and its emerging substantive rules. Broad opposition to TTIP grew in European civil society and the general public in many European countries. Similar concerns among civil society and the public in the United States and other countries involved in negotiations on TTIP's sister deal, the Trans-Pacific Partnership (TPP), resulted in years of delay in that deal's conclusion and then, ultimately, an inability to obtain majority support in the US Congress in the year after the final deal was signed.

Now that the TPP is dead, and the TTIP and the Trade in Services Agreement (TiSA) are in the freezer, TACD urges policy makers and negotiators to take a step back to re-evaluate the premise and objectives of those negotiations. The US and the EU must seize on the important opportunity provided by this pause to understand why the negotiations were unsatisfactory from a consumer perspective and why public mistrust in trade is still on the rise.

Consumer organizations do not oppose trade expansion, rather we understand its value. Nor do we oppose the notion of establishing new trade agreements. At issue are the specific terms included in such pacts. Negotiations on TTIP, were launched in a high degree of secrecy. While transparency improvements were made in the EU, the opacity remained high in the US. Moreover, the talks were significantly influenced by private interests. They have been used as a venue to try to impose an array of non-trade policies, including many that face such broad controversy domestically that promotion of this non-trade agenda has derailed the cause of actual trade liberalization. To pave the way to a successful enhancement of transatlantic ties that consumers will want to support, it necessarily requires a reflexion on the failure of the past approach and development of a new model. Taking a pro-consumer approach in transatlantic commercial relations is critical beyond the benefits it would deliver to those living within Europe and the United States. Indeed, getting the rules right in a transatlantic context would have global implications. Not only would other countries' products and firms have new incentives to raise consumer standards so as to

gain access to our enormous markets, but such an approach could offer a new model for commercial rules that other countries and multilateral processes could adopt.

In the recommendations that follow, TACD proposes how regulatory cooperation measures outside of trade agreements can improve transatlantic markets for consumers and how, and with what broad objectives, any resumption of trade negotiations should be pursued if they are to be supported by, and to benefit, the public. The paper represents an initial vision statement, and will likely be followed by additional TACD work on particular aspects of agreements and public concerns. To further illustrate the necessity for a change, we highlight in the annex of this paper some common scenarios of challenges faced by transatlantic consumers.

A New Approach to Ensure Closer Transatlantic Ties Benefit Consumers

TACD believes that one critical change in policy architecture and one critical change in the process of negotiating closer US-EU commercial and regulatory ties cooperation are essential to success.

A New Policy Architecture

EU and US regulators should work together outside the context of any trade negotiations to enhance transatlantic coordination on consumer protection issues. Separately, trade negotiators should work to eliminate remaining tariffs and other actual trade barriers with a role for regulators to ensure that trade rules do not undermine robust consumer protections and that trade occurs on the basis of an agreed floor of consumer protection.

Regulatory dialogues in areas such as e-commerce, telecommunications, product safety, food safety, safety and approvals of medical devices and pharmaceuticals, financial services, chemicals, and enforcement of consumer law, car safety and fuel emission could be useful. But such transatlantic dialogues can and must be addressed outside of trade agreements, by experts of the respective sectors with the competence and mission of improving consumer safeguards. Such dialogues should be focused on the exchange of information and best practices. They could also focus on coordination, for instance on antimicrobial resistance. Any cooperation among regulators should establish effective floors on protections, while allowing domestic governments to implement higher levels of protection as needed and demanded by their population.

The primary goal of any EU-US trade negotiations should be to advance consumer well-being, including an enforceable floor of substantive labour and human rights, environmental rights and standards and consumer protection standards. Global commerce, in the absence of a floor of minimum enforceable international labour and environmental standards, can produce a race to the bottom between nations in wages, working conditions, and environmental and health safeguards. Globally accepted consumer, labour and environmental standards exist but lack implementation and effective enforcement. But agreements achieved through regulatory dialogues could provide a floor of transatlantic consumer and public protections, on which trade and commerce between the US and EU could be based.

Trade negotiations that consumer groups can support would ensure that the content of resulting agreements do not undermine governments' ability to protect the public interest. As explained further below, certain elements under discussion for TTIP that risk undermining consumer protections should be eliminated altogether, such as investor-state dispute settlement (ISDS) or an Investment Court System (ICS). There is also the risk that regulatory coherence disciplines could strengthen industry's ability to exercise undue influence over regulatory protections and safeguards. Furthermore, rules regarding intellectual property and disciplines regarding personal data transfers do not belong in trade agreements. In any case, rock solid safeguards on data protection must be included if data transfers are negotiated in

trade agreements. To the extent easing Customs regulations could facilitate more efficient trade flows, border safety inspection and compliance provisions must be strong. Furthermore, consumers should see tangible benefits in this new policy architecture. These benefits would be materialised by, for example, a more consumer friendly telecom market, a reduction in geo-blocking practices and easier access to redress options.

In our new vision for our transatlantic ties, effective standards of enhanced consumer protection would be the basis on which trade agreements would be conditioned.

Transparent, Open and Inclusive Procedures for Negotiations and Implementation

Any regulatory dialogue or trade negotiation must be developed in a transparent, open and inclusive manner. Legislators, stakeholders and citizens must be able to monitor what is on the table and provide input. This will require public access to proposed texts and the draft texts that emerge from regulatory dialogues and trade negotiations. And any resulting rules must be implemented with similar levels of openness and public participation to avoid regulatory capture and ensure consumer confidence.

Detailed TACD Recommendations for a Transatlantic Pro-consumer Agenda

1. Address regulatory issues outside of trade negotiations and agreements.

Trade agreements have not been appropriately limited to addressing trade topics. EU and US officials both have pushed for provisions that extend far beyond reducing tariffs and Customs frictions, but rather have focused on a host of “behind-the-border” regulatory policies in deals like TPP, TTIP, EU-Canada trade agreement (CETA) and TiSA. On both sides of the Atlantic we saw similar consequences: strong public concern about losing current and future levels of consumer protection for the sake of facilitating commercial interests’ goals. This industry-skewed focus in trade negotiations ultimately led to wide opposition movements and the subsequent failure or pause in some of these negotiations.

In some areas, global standards can help create a safe environment for consumers. But these standards must be developed by regulators themselves with the aim of improving consumers’ lives—and not developed through the lens of increasing trade flows or making life easier for regulated industries. And such regulatory dialogues must be conducted within a more transparent, inclusive and democratic framework than applies currently to trade agreements.

How to achieve a consumer-protection focused framework for cooperation among regulators:

- ***Establish dialogues between EU & US regulators aiming at protecting and benefiting consumers:*** This could be based on the example of the Transatlantic Economic Council (TEC). The TEC has not been as successful as expected, but this can be overcome with sufficient political will outside of a trade agreement. The recent developments on e-health and SMEs¹ prove that useful outcomes are possible. TACD commits to contribute to encourage regulators to work together, for instance by inviting them at our annual meetings to present their progress and to promote domestically proposed improvements in consumer protection.
- ***Structure the dialogues per sectors:*** As a framework, the dialogues could be organised by sectors such as: e-commerce, telecoms, food safety, product safety, pharmaceuticals, medical devices, chemicals, financial services and competition. Cross-cutting issues, such as enforcement of

¹ Transatlantic e-health/health IT cooperation [roadmap](#), 28 July 2016 and [joint statement](#) on SMEs, 2 June 2016

consumer law, could also benefit from a dialogue between regulators. Member State and US state-level regulators need to be included, particularly in policy areas in which these sub-central governments share competence or are primary regulators.

- **Work towards positive actionable outcomes of such dialogues:** A non-exhaustive list of outcomes that would be beneficial for all, includes: creation of a systematic and effective transatlantic rapid alert system for unsafe consumer products and consumer protection, along the lines of the EU RAPEX system; effective processes for sharing emergency information related to food safety risks detected on either side of the Atlantic; cooperation on antibiotic resistance and related protections, a very serious issue for public health internationally; and achieving more effective redress mechanisms for consumers wronged during e-commerce transactions.
- **Prevent any regulatory chilling effect:** Transatlantic regulatory dialogues and trade agreements should not saddle regulators with overly cumbersome processes under the guise of “notice and comment procedures” that require endless impact assessments and can be overwhelmed by regulated industry, leading to delays (“paralysis by analysis”) and weakening of needed protections to prevent public harms. Nor should trade agreements impose specific requirements about the ways in which regulators should assess risks or with respect to economic impact assessment. Such impediments to the timely development of robust consumer safeguards were being promoted in the TTIP negotiations. Efforts to require regulators’ accountability towards stakeholders should not be used as a means to delay or derail the issuance of safeguards and they should be accompanied by guarantees to prevent delays and weakening of standards by regulated industry.
- **Make regulatory cooperation transparent:** These dialogues should be conducted on a fully transparent and balanced multi-stakeholder basis, with adequate resourcing from government to facilitate the participation of under-resourced stakeholder representatives. For instance, meaningful agendas and minutes of the meetings could be published on a joint website. This would notably help to reduce public concerns about possible lowering of standards.
- **Pave the way towards enhanced multilateral regulatory dialogues:** The ultimate goal of increased bilateral regulatory cooperation should be to extend the process to the multilateral level. Global regulatory dialogues could be even more effective and should be preferred if occurring in the sectors covered by transatlantic regulatory dialogues.

2. Focus trade negotiations and agreements back on trade and ensure that agreements do not undermine governments’ ability to protect the public interest.

Free trade agreements of the new generation are criticised because they go far beyond the realm of trade. They have become enforceable governance agreements negotiated by trade experts behind closed doors involving significant corporate influence and lacking proper public participation or scrutiny. This must change. Regulatory cooperation and governance issues should be dealt with outside of trade fora, as explained in recommendation one. **In our new vision for our transatlantic ties, improved consumer protections derived from dialogues among regulators would be the first focus, with such standards used as a tool to develop the regulatory floor undergirding trade agreements.** The link between both levels would be similar to the relation between the political, trade and cooperation pillars of the EU association agreements. They are complementary, but dealt in different legal texts and implemented through different institutional frameworks. To the extent that conflicts might exist, the consumer protection provisions would take precedence.

2.1. Advance of consumer well-being, including enforceable and substantive protection standards

In addition to removing provisions from trade agreements that limit consumer protection, we encourage the US and EU to refocus trade agreements back to trade and to condition increased market access on satisfying a floor of improved consumer protections and labour, environmental and human rights.

- **Commercial terms conditioned on meeting a floor of consumer protection:** On a global level we have the recently updated UN Guidelines for Consumer Protection, though they have been poorly implemented and are not enforceable. But the agreements achieved through the regulatory dialogues could provide a floor of transatlantic consumer protection on which trade and commerce between the US and EU could be based. For instance, provisions that ensure a guaranteed highest level of protection for consumers could enhance consumer trust online, as one example, by ensuring proper consumer information, contractual rights information and redress options.
- **Enforceable and substantive labour and environmental rights and standards:** Global commerce absent a floor of enforceable international labour and environmental standards can produce a race to the bottom between nations in wages, working conditions, and environmental and health safeguards. Globally accepted labour and environmental standards exist, but they lack effective enforcement. An efficient way to address this problem is to change the sequencing: Rather than enacting a trade agreement with a future commitment to enforce labour and environmental standards, any benefits to partner countries in terms of market access must instead be conditioned on a confirmation that labour and environmental rights are not only provided on paper through changes to those countries' laws, but are being enforced with real changes on the ground before the deal takes effect, with benefits being halted if conditions deteriorate.
- **Protect access to knowledge:** Any trade agreement should include obligations on member states to provide sufficient exceptions for research and favorable access and management of patents on inventions that benefited from government funded or subsidized research and development. Governments should commit to reforming the international obligations concerning the protection of copyright, in order to enable creativity, innovation and access to knowledge.
- **Better assess impacts on consumers:** Impact assessments generally disregard impacts on consumers, apart from the hypothetical impact on prices. Worse, econometric models, such as those employed to project economic gains from TTIP, presume consumer protections are non-tariff trade barriers, the elimination of which are calculated as economic gains. The costs that would result from elimination of such safeguards are never considered (e.g. health, labour, financial stability, environment etc.). Impact assessments should also present data on consumer choice and benefits in consumers' everyday life, and identify more clearly the impact on right to regulate. Furthermore, the ex post evaluations of trade agreements have to be strengthened as well in order to give a better overview of the factual effects trade agreements had (e.g. on consumer prices, product choice and health and safety).
- **Ensure negotiating mandates explicitly state that the goal of the agreement is to enhance consumer well-being and secure current and future levels of consumer protection:** Trade agreements must be designed for all. The vision of trade agreements tailor-made for companies and investors to boost their own profitability by eliminating consumer and environmental safeguards, and imposing new protections and privileges for themselves, is outdated. This old

model of trade deals is no longer politically viable for the simple reason that citizens rightly feel that they are not being taken care of in these agreements. For instance, we must assure that health, safety, and environmental effects of products are disclosed to consumers. That trade agreements' primary goal is to promote consumer well-being and protect current and future levels of protection should be set in stone in negotiating mandates.

2.2 The following must also be kept out of trade negotiations

Refrain from using investor-state dispute settlement in any form – whether it is based on the US Model Bilateral Investment Treaty or the European Commission's 'Investment Court System' (ICS) proposal: ISDS systems have proven harmful to consumers and the public interest, as foreign investors have used investor-state dispute settlement provisions around the world to challenge and undermine consumer protections. Famous examples of ISDS cases include claims related to requirements for providing affordable and safe drinking water in Argentina, and related to a ban on a toxic fuel additive in Canada. An ISDS or ICS regime in TTIP poses unprecedented risks in this regard, as it would newly empower approximately 80,000 corporations and subsidiaries on both sides of the Atlantic to attack consumer safeguards in the US-EU context. Critical consumer safeguards simply should not be vulnerable to such extra-judicial challenges, much less challenges by only one class of interests – already powerful commercial entities. Investors should not be empowered to sue governments to enforce the agreement in secretive private tribunals, and to skirt the well-functioning domestic court systems and robust property rights protections in the United States and European Union. There is no empirical link between such systems and investment flows.² Nor is there any evidence that the already robust transatlantic flow of investment is being thwarted by the absence of additional protections for investors. If transatlantic investors believe that they need additional protections because of concerns with a specific government or project, then they should purchase risk insurance and bear the cost of their decision, rather than imposing that cost on the Treasuries of sovereign nations that are the liable parties in the ISDS system of socialized risk insurance for private sector investors.

- ***Prevent rules or trade-offs that could limit consumer product protections:*** We must exclude rules and any pressure that would require us to import food and other products that do not meet domestic safety standards. We must also eliminate limits on border safety inspection and on labelling regimes that provide consumers with information they need to make knowledgeable choices in the marketplace. Rules must not allow claiming data on the health and safety of products as “confidential business information.” All products must meet a meaningful floor of consumer protection, but a ceiling must not be imposed.
- ***Patent and copyright protections:*** Trade agreements are not an appropriate instrument for requiring countries to establish “rent-seeking” protections for intellectual property rights. Given that the World Trade Organization already requires countries to enact lengthy patent and copyright protections, future trade agreements must not further limit the competition that brings down medicine prices and ensures affordable access to life-saving drugs. Nor should they limit the ability of governments to negotiate prices with pharmaceutical firms for bulk purchases of medicines (to be used through government health-care programs such as the EU national healthcare systems or the US Medicare and Medicaid programs). Similarly, extensions of copyright terms through trade pacts undermine access to information, and can undermine

² See World Trade Organization staff working paper, “More Stringent BITs, Less Ambiguous Effects on FDI? Not a Bit!,” by Axel Bergera, Matthias Busseb , Peter Nunnenkampc , and Martin Roy, 2010.

Internet freedom. Patents on genetically engineered lifeforms should not be required as a condition of a trade agreement.

- **Rules that limit financial regulation:** Inadequate oversight of financial markets was a widely recognized cause of the 2008 Great Recession. We must not allow trade agreements to undermine ongoing or future efforts to re-regulate the financial sector, and must therefore eliminate rules limiting financial regulation. Specifically, we must avoid bans on the use of capital controls and other macro-prudential safeguards, and must reject constraints on domestic regulatory policies that limit the size of financial institutions. Countries must also remain unhindered in their abilities to ban unfair and deceptive financial products or require firewalls to limit the spread of risk across financial products.
- **Rules that privatize public services and limit service-sector regulation:** Limits to federal, state, and local governments' abilities to maintain essential public services, establish new ones, and regulate services provided to consumers, must be eliminated. Trade pacts must include requirements that all service providers that operate within a country — whether domestic or foreign — comply with domestic environmental, land-use, safety, privacy, transparency, professional qualification, and any other applicable consumer-access laws and protections.
- **Rules related to data flows:** It is impossible to address the issue of personal data transfers (so-called data flows) when the data protection regimes in the US and EU are starkly different and imbalanced. Without adequate oversight and transparency, any attempts to include data protections in trade negotiations such as TTIP and TiSA could easily result in a significant weakening of consumer protections with little-or-no public input.

3. More transparent and inclusive processes

Decision-making and negotiating processes from the beginning stages of regulatory dialogues or trade talks through the implementation phases must be made open, transparent and inclusive of all who will be affected. Now trade negotiators hammer out agreements in private, with strict rules against releasing information or preliminary drafts to the public — including elected officials. While in the European Union there have been significant improvements in transparency and public interest involvement, no meaningful changes to improve transparency have occurred in the United States. Negotiators can meet with outside interest groups to hear their views and concerns, and they do, but these groups are rarely allowed to see the agreement in progress and thus have no way of knowing if their input is heeded. This must change.

- **Rethink the drafting of EU trade mandates and US trade authority:** In the European Union, a trade mandate is now a joint discussion between the Commission and the Council. But it should also involve the European Parliament as well as stakeholders and citizens. A public consultation could help in paving the way to a successful trade agreement. A mandate supported by the entire society will lead to a more consensual ratification process. In the United States, the “fast track” trade authority must be replaced to allow Congress to establish explicit criteria with which to select future negotiating partners, setting mandatory negotiating objectives based on the guidelines laid out above, and, rather than the executive branch unilaterally deciding when a “deal” is done, requiring Congress to certify that objectives have been met. A congressional vote on an agreement's text before it is signed and entered into is essential to ensuring an open public debate.
- **Increase transparency during negotiations:** Any regulatory cooperation dialogue and trade negotiation must be transparent. Agendas of the meetings and rounds must be made publicly

available well in advance as well as negotiating documents and minutes of meetings and rounds. For trade negotiations, negotiations should not begin until all parties agree to publish their textual proposals as well as consolidated negotiating texts after each round on publically available websites.

- ***Elaborate country positions through on-the-record public processes:*** If proposed texts and consolidated texts from regulatory dialogues and trade negotiations are made publicly available, the main official advantage of the corporate-biased trade advisory committee system in the United States — access to that key information — would disappear. Therefore, the US trade advisory system, which currently allows for undue influence of corporate advisors, should be eliminated. US positions on trade deals can be formulated the way other US federal regulations are: through an on-the-record public process established under the Administrative Procedure Act to formulate positions, obtain comments on draft texts throughout negotiations, and seek comments on proposed final texts. In the European Union, the Commission should open a public consultation when drafting negotiating mandates to mirror the legislative process.

Conclusion: Transatlantic ties should benefit and protect consumers

It is time to take a step back and think about the bigger picture: trade policy as we know it is not delivering to all, and citizens' trust is diminishing as a result.

The states of hibernation of TTIP and TiSA offer a unique opportunity to change the story. It is time to focus our trade agreements back on trade itself and to ensure that global rules are shaped in a more democratic, accountable and coherent way. ***The EU and the US should be leaders in showing that a consumer-protection focused framework for cooperation among regulators, better trade agreements that do not undermine consumer safeguards, and enhanced transparency and democratic decision-making are the way forward.***

Annex: Transatlantic Consumer Challenges

Consumers live in a globalised world. They rely on access to diverse affordable goods and services – and the consumer safeguards that ensure their health, safety, privacy and a healthy and sustainable environment. Here are some common scenarios in the current consumer transatlantic context:

Victoria, a US consumer from Vermont, visited Germany and was surprised to find many of her favourite childhood US cereal brands on sale at stores. At home, Victoria avoided these products because she had become aware that they contained GMO soya and corn. Even as she worked at home to get GMO labelling, she realized that large US agribusiness firms were managing to provide GMO-free commodities and products to Europe.

Bert is a Belgian consumer. His son wanted shoes he saw on a US television show. He found them on a US online retailer's website and ordered. The price was very competitive compared to EU offers. However, he ended up with an unfortunate surprise: when receiving the package he was asked to pay custom duties to the delivery company. But then his problems became much more expensive: the online US retailer was hacked because the US firm had sent its back office operation offshore to a country with no data privacy requirements. Bert's personal information and credit card data was sold to cyber criminals and used to buy thousands in jewellery in Russia. Now Bert is spending money and time trying to undo the damage of identity theft.

Jennifer, a mother from Iowa in the United States, was dismayed when she discovered that the label on the ground beef she buys at the supermarket no longer lists the country of origin of that meat. After doing some internet research, she learned that the US Congress repealed the requirement for country-of-origin meat labels to avoid having to pay \$1 billion per year in trade sanctions after the United States lost a trade case at the World Trade Organisation (WTO). She told her cousin in Germany, who now is worried that European country-of-origin labels could be next.

Marie from France required a mastectomy to overcome breast cancer and had reconstructive surgery. The doctor used a French company's silicone breast implant. She became very ill and was diagnosed with systematic toxicity relating to the implant, which had to be removed. As she recovered, she learned that the medical device company's US application for approval of the implant was rejected based on the US Food and Drug Administration's inspection of the firm's manufacturing plant, insufficient clinical and safety data and stringent post-market surveillance findings. The implant had been approved under the European regime and the systematic and serious problems it was causing had not been detected for an extended period.

Judith from Hungary had a negative experience after buying clothes on a trendy US website. When she accepted the terms and conditions of the company, she did not notice a crucial clause. This clause stipulates that she agrees to give up her right to legal redress in a court of law. Instead she has to rely on private arbitration. She was very surprised to discover this when she entered a complaint regarding a default. In addition, she thought that as she was European, she would be covered by her EU consumer rights. In the end she decided not to proceed with her complaint as she could not afford to go to San Francisco to defend her case.

The experiences of these consumers illustrate that upward harmonization and regulatory cooperation aimed at raising standards could be of value. It could enhance consumer trust in the transatlantic market. But these examples also reveal the risks posed by parts of the agenda that was being pursued in past TTIP negotiations, which reflected the demands of commercial interests and threatened to undermine the strongest existing consumer protections on either side of the Atlantic.