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Student Comment: TTIP: A Free Trade Agreement That Strengthens the International Trade Environment and Enhances the Regulatory Powers of the WTO

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TTIP: A Free Trade Agreement That Strengthens the International Trade Environment and Enhances the Regulatory Powers of the WTO

Suzanne De Deyne

ABSTRACT:

“Power Politics is Back, Multilateralism is Dying”
– Zaki Laidi¹

This comment discusses the Transatlantic Trade Investment Partnership (TTIP or the Partnership), a bi-lateral trade agreement between the United States and the European Union, in relation to the World Trade Organization (WTO). TTIP pushes the world towards greater trade liberalization, and if implemented, such a trade agreement would affect trillions of dollars in existing trade. When trade barriers are reduced, a significant amount of new possibilities open up, especially in regards to potential markets for exports, growth and improvement of competitive products, and reduction in the losses associated with the complicated clearance processes and regulations at the border. Since its establishment, the WTO has sought to establish an agreement between its members to reduce tariffs and facilitate free trade. However, it has failed to fulfill its role as a rule-maker, particularly via trade agreements, due to multi-polarity and a decline in United States hegemony. The analysis provided discusses how the Partnership could advance the function of the WTO because the implementation of an international bilateral trade agreement removes the rule-maker duty from the WTO and, instead, allows the WTO to focus on the area of dispute resolution, thus taking on a more “soft-law” approach within international trade, and ideally, returning to its full potential.

1. Larry Cata Backer, *The Trans-Pacific Partnership: Japan, China, the U.S., and the Emerging Shape of a New World Trade Regulatory Order*, 13 WASH. U. GLOBAL STUD. L. REV. 49, 58 (2014).

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Introduction

The Transatlantic Trade Investment Partnership (TTIP, or the Partnership) is a major free trade and investment agreement that is currently being negotiated, in secret, between the United States (U.S.) and the European Union (EU).² It is being heralded as the biggest trade deal ever negotiated and if adopted, tariffs on all products exchanged across the Atlantic will be cut or eliminated.³ The central focus in the TTIP negotiations is to eliminate non-tariff barriers to trade by mitigating differences in regulations without disrupting the domestic purposes of the regulations.⁴ To seek trade liberalization, TTIP pinpoints three central components – market access, regulatory coherence, and international standards.⁵ By addressing these three components, the Partnership agreement hopes to create an opportunity for a significant boost to the U.S. and EU economies, as well as the overall global economy.

Naturally, there are arguments for and against this multinational trade agreement. One widespread concern is that TTIP will detrimentally affect the World Trade Organization (WTO). The WTO is a global international organization that aims to help producers of goods and services, exporters, and importers conduct their businesses.⁶ The purpose of the WTO is to ensure that international trade flows as freely, smoothly, and predictably as possible.⁷

A well-constructed TTIP would not necessarily conflict with the WTO. The WTO is currently at a stalemate, and the Partnership could advance the aims of the WTO because it is an international bilateral trade agreement that creates the opportunity for the WTO to transition and focus on dispute resolution, thus taking on a more “soft-law” approach within international trade, and as a result, return to its full potential.

2. SHAYERAH ILIAS AKHTAR & VIVIAN C. JONES, CONG. RESEARCH SERV., R43158, PROPOSED TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP (T-TIP): IN BRIEF (2014).

3. *Id.*

4. Joseph Francois et al., *Reducing Transatlantic Barriers to Trade and Investment: An Economic Approach*, CENTRE FOR ECON. POL’Y RES. (Mar. 2013), http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150737.pdf.

5. AKHTAR & JONES, *supra* note 2.

6. *Id.*

7. *Id.*

Background

A. TTIP's History

In 1995, Klaus Kinkel, former Foreign Minister of Germany, put forward the main idea of the Partnership – the need for a transatlantic free trade area.⁸ In 1998, Leon Brittan, then EU Commissioner for Trade, pursued this idea by getting the European Commission to approve a plan for a “New Transatlantic Marketplace.”⁹ Then, in 2007, the U.S. and the EU agreed to the “Framework for Advancing Transatlantic Economic Integration between the United States of America and the European Union,” which created the short-lived political body known as the Transatlantic Economic Council (TEC).¹⁰ Finally in 2012, German Chancellor Angela Merkel publically asked dignitaries to revive the negotiations regarding a transatlantic free trade area.¹¹ President Obama echoed this statement in his 2013 State of the Union address.¹²

With two prominent international figureheads in support of a transatlantic free trade agreement, TTIP negotiations rose to the forefront. The negotiations began in 2013 and are still underway today. Currently, TTIP negotiators in Washington and Brussels seek to tackle technical issues, such as regulatory cooperation in specific industry sectors.¹³ Negotiators will most likely wait to address political issues until late 2015.¹⁴

Additionally, it should be noted that much of the controversy regarding the TTIP negotiations is focused on a provision for investor-state dispute settlement (ISDS). This provision would allow

8. Hansjoerg Hepp, *TTIP – New Thrust for the Transatlantic Alliance*, 19 *LAW & BUS. REV. AM.* 441, 442 (2013).

9. *Id.* at 442-43.

10. *Id.* at 443. TEC’s main purpose was to advance economic integration between the EU and the U.S. by overseeing and accelerating government-to-government cooperation.
Id.

11. *Id.*

12. *Id.*

13. *U.S., EU Defer Dealing with Majority Political Issues in TTIP until Mid-2015*, *INSIDE U.S. TRADE* (JAN. 30, 2015), https://wtonewsstand.com/index.php?option=com_ppvuser&view=login&return=aHR0cHM6Ly93dG9uZXZzc3RhbmQuY29tL2NvbXBvbmVudC9vcHRpb24sY29tX3Bwdi9JdGVtaWQsNDQ1L2lkLDI0OEdyMTcv.

14. *Id.*

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companies to sue foreign governments over claims for unfair treatment and, if successful, be entitled to compensation.¹⁵ Critics argue that including the investor-state dispute settlement provision will undermine the power of national governments because governments will not be able to execute certain measures necessary to act in the best interests of their citizens.¹⁶ Specifically, opponents of ISDS generally worry that if corporate companies are able to sue foreign governments before an international tribunal, the sovereignty of domestic courts will dissipate.¹⁷ Although this fear addresses a legitimate concern, the central focus at hand here is the regulatory effect of TTIP and the potential rule-making capability of the Partnership in relation to the WTO's survival.

B. WTO's History

The WTO was established in 1995 and is the successor to the General Agreement on Tariffs and Trade (GATT), which was founded in the Bretton Woods Agreement post-World War II.¹⁸ Under GATT, trade rounds were held to discuss what is now the WTO's overriding objective: to keep trade moving smoothly, freely, fairly, and predictably.¹⁹ The WTO achieves this goal by administering trade agreements, hosting trade negotiations, settling trade disputes, renewing national trade policies, assisting developing countries in trade policy issues, and collaborating with other international organizations.²⁰

With about 160 members, the WTO accounts for about ninety-five percent of world trade.²¹ Typically the entire membership makes decisions by consensus – a unique and sometimes detrimental factor

15. Leala Padmanabhan, *TTIP: The EU-US Trade Deal Explained*, BBC NEWS (DEC. 18, 2014), <http://www.bbc.com/news/uk-politics-30493297>.

16. *Id.*

17. Alex Lawson, *EU Trade Chief Calls for Realistic Approach to Reboot TTIP*, LAW 360 (2014).

18. *The WTO in Brief: Part 1*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr01_e.htm (last visited Feb. 15, 2015).

19. *The WTO in Brief: Part 2*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr02_e.htm (last visited Feb. 15, 2015).

20. *Id.*

21. *Id.*

in comparison to other international organizations.²² The WTO's governing structure consists of four sectors.²³ The WTO's top-level decision-making body is the Ministerial Conference and this body meets at least once every two years.²⁴ Below the Ministerial Conference is the General Council, who meets several times a year at headquarters located in Geneva, Switzerland.²⁵ Reporting to the General Council are the Goods Council, Services Council, and Intellectual Property (TRIPS) Council.²⁶ If necessary, specialized committees, working groups, or working parties are created for individual agreements and specific research concentrations, such as the environment.²⁷

The WTO consists of a Secretariat, which is located in Geneva, consists of approximately 640 staff members, and is headed by a director-general.²⁸ Because WTO decisions are member-driven, the Secretariat's main duties are to supply technical support, provide limited legal assistance in the dispute settlement process, and advise governments who wish to become members of the WTO.²⁹

i. Consensus Voting at the WTO

World Trade Organization negotiators conducted a careful analysis of the consensus decision-making process and defined consensus ruling as, "rules [that] generate information on state preferences [and] make it possible to formulate legislative packages that favor the interest of powerful states, yet can be accepted by all participating states, and generally considered legitimate by them."³⁰ The consensus decision-making process is more formally explained in Section IX:1 of the *Marrakesh Agreement*, which established the World

22. *Id.*

23. *Id.*

24. *Id.*

25. *WTO in Brief: Part 2*, *supra* note 19.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. Richard H. Steinberg, *In the Shadow of Law or Proper? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 156 INT'L ORG. 339, 342 (2002), http://www.jstor.org/stable/3078608?seq=4#page_scan_tab_contents.

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Trade Organization.³¹ Section IX:1 states that the WTO practice is to “arrive at decisions by consensus; that, except as otherwise provided, a vote is only taken when it has not been possible to reach a consensus; and that a consensus is reached if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision.”³²

In terms of trade facilitation at the WTO, and taking into account today’s modern globalized world, consensus voting is no longer a practical or productive method for reaching decisions and establishing new rules.³³ The consensus voting system has created a deadlock where members are unable to respond legislatively to a disagreement with a panel or to an Appellate Body’s legal interpretation, which enhances the already substantial amount of inefficiency.³⁴ Furthermore, consensus voting does not provide every member the same ability to maintain vetoes and this inherently favors the status quo and makes it extremely difficult to achieve change and establish equality in regards to decision-making and practical influence at the WTO.³⁵

C. Free Trade Agreements

Free Trade Agreements (FTAs) are usually created as a treaty between two or more countries to establish a free trade area where goods and services can be exchanged across borders without tariffs, quotas, or other governmental impediments to international trade.³⁶ The reduction of trade barriers and creation of a transparent trading environment makes it easier and cheaper for participating countries to

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31. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1869 U.N.T.S. 379 [hereinafter *Marrakesh Agreement*].
 32. *Id.* In 1995, the General Council of the WTO agreed that consensus-based decision-making would apply to WTO accessions, unless a member requested a vote or consensus could not be reached. *The Basic Rules*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/acc_e/cbt_course_e/c2s2p1_e.htm (last visited Mar. 30, 2015).
 33. Claus-Dieter Ehlermann & Lothar Ehring, *Decision-Making in the World Trade Organization*, 8 J. INT’L ECON. L. 51 (2005), <http://jiel.oxfordjournals.org/content/8/1/51.short>.
 34. *Id.*
 35. *Id.*
 36. Douglas A. Irwin, *International Trade Agreements*, LIBR. OF ECON. AND LIBERTY, <http://www.econlib.org/library/Enc/InternationalTradeAgreements.html> (last visited Feb. 15, 2015).

export goods and services to their trading partner markets. By reducing the trade restrictions, countries that are partners in a free trade agreement are at a competitive advantage. For example, if Mexico wishes to sell bicycles to the United States for sixty dollars and Japan wishes to sell bicycles to the United States for fifty dollars, both face a twenty-dollar tariff.³⁷ However, the tariff is eliminated for Mexican goods because it is a party to the North American Free Trade Agreement (NAFTA).³⁸ As a result, Japan must pay the twenty-dollar tariff, increasing the cost of each bicycle to seventy dollars. In this specific example, U.S. consumers are able to save ten dollars per bicycle by purchasing the bicycle from the Mexican producer.³⁹ Although the U.S. government does not receive tariff revenue from the goods being exchanged, economists have shown that the benefits of this trade diversion exceed the costs because it increases overall trade.⁴⁰

D. TTIP's Asia-Pacific Counterpart – TPP

The United States is negotiating a similar free trade agreement to TTIP with Asia, known as the Trans Pacific Partnership (TPP). The following countries are parties to TPP: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam.⁴¹ The three main objectives of TPP are to increase markets for exports, provide a basis for broad Asia-Pacific regional economic integration, and increase the competitiveness of the participating states.⁴² According to the U.S. Trade Representative (USTR), TPP consists of five features that will make it a landmark free trade agreement.⁴³ First, TPP will include a provision for comprehensive market access by eliminating tariffs and other barriers to trade.⁴⁴ Second, TPP's structure will create full regionalization by including the internal development of production and supply chains among its

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. Joseph Laroski, *Trade Negotiations: What was Accomplished This Year*, LAW 360 (Dec. 17, 2013), <http://www.law360.com/articles/495559/trade-negotiations-what-was-accomplished-this-year>. China is not party to TTP and its negotiations. *Id.*

42. Backer, *supra* note 1, at 53.

43. *Id.*

44. *Id.* at 54.

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members.⁴⁵ Third, TPP will focus on inter-agreement coherence.⁴⁶ Fourth, TPP will help develop trade in emerging technologies, such as green and digital technologies.⁴⁷ Finally, TPP is structured as a “living-agreement” where it is meant to be a work in progress and the scope is meant to be fairly comprehensive.⁴⁸

Combined, the nations involved in TPP and TTIP negotiations, constitute ninety percent of the worlds’ current trade deficit with the United States and it is estimated that in 2013 the absence of these agreements cost the global economy at least 3.3 million jobs.⁴⁹ Both of these calculations indicate that partnerships, like TPP and TTIP, will have major benefits in the international trading system because they allow for sustainable trade growth, a relevant missing trading factor over the past few decades. For international organizations, such as the WTO, TPP presents an opportunity to revert back to best practices by establishing an alternate framework where smaller groups of individual states can work together to create a common scheme, with agreed upon principles, and represent the major priorities for those within the practice of international trade.

E. Dispute Resolution at the WTO

At the World Trade Organization, a dispute arises when one country adopts a trade policy measure or takes some action that one or more fellow WTO members considers to be in violation of or in non-compliance with one or multiple WTO agreements.⁵⁰ Recently, during the Uruguay Round agreement, more concrete and defined procedures for the dispute settlement process were established.⁵¹ The most notable change regarding this process is that rulings are now automatically adopted unless there is a consensus to reject a ruling;

45. *Id.*

46. *Id.*

47. Backer, *supra* note 1, at 54.

48. *Id.*

49. Terrance Stewart, *Trade Imbalances Must be Addressed in Trade Negotiations*, LAW 360 (2014) <http://www.law360.com/articles/511462/trade-imbances-must-be-addressed-in-trade-negotiations> (stating that approximately 3.7 million jobs were lost in 2013 through trade deficit in goods).

50. *Settling Disputes*, WORLD TRADE ORGANIZATION (JULY 2011), https://www.wto.org/english/thewto_e/whatis_e/tif_e/utw_chap3_e.pdf (stating that a third group of countries may declare an interest in the case and enjoy some rights).

51. *Id.*

meaning, if a country wants to block a ruling it must persuade all other WTO members, including its adversary, to share its view.⁵² The Uruguay Round agreement also recognized that prompt settlement is essential for the WTO to function effectively, and as a result, methods other than court or tribunal, such as consultation and mediation, are preferred methods of dispute resolution.⁵³ Under this system, to correct its fault, the WTO member in violation must offer compensation or suffer a suitable penalty.⁵⁴ Dispute settlement is the central pillar of the WTO and functions as an important contributor to the stability of the global economy.⁵⁵ TTIP would strengthen the WTO by allowing it to focus on its central pillar; and set a stronger precedent to enforce rules that continuously make the trading system more timely, secure, and predictable.

Issue

A. Understanding U.S.-EU Regulatory Differences and TTIP

Regulatory principles are methodologies for structuring regulations that provide frameworks for regulatory decision-making.⁵⁶ Each regulatory principle prioritizes certain values over others. For instance, the cost-benefit analysis prioritizes economic benefits whereas precautionary analysis prioritizes health and safety concerns.⁵⁷ Trade-related regulatory principles include revenue collection, safety and security, environment and health, consumer protection, and trade policy.⁵⁸

Executive Order 12866, issued by President Clinton, indicates that the primary regulatory principle in the United States is the cost-

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. T. Sandra Fung, Note, *Negotiations Regulatory Coherence: The Costs and Consequences of Disparate Regulatory Principles in the Transatlantic Trade and Investment Partnership Agreement Between the United States and the European Union*, 47 CORNELL INT'L L.J. 445, 448 (2014).

57. *Id.* at 449.

58. Andrew Grainger, *Customs and Trade Facilitation: From Concepts to Implementation*, 2 WORLD CUSTOMS J. 17, 18 (2008), http://www.worldcustomsjournal.org/media/wcj/-2008/1/customs_and_trade_facilitation_from_concepts_to_implementation.pdf

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benefit analysis.⁵⁹ As a result, the American regulatory scheme favors economic benefits and is predetermined to value market factors and monetary costs and benefits.⁶⁰ Conversely, the European Union implements the precautionary principle when establishing regulations and pays close attention to the potentially dangerous effects of a product where levels of scientific uncertainty trump quantitative analysis.⁶¹

Despite the difference in regulatory principles, Michael Froman, a U.S. Trade Representative and head U.S. advisor on TTIP negotiations, stated concern over this difference is “largely anachronistic” in relation to the Partnership.⁶² Froman notes that strict reliance on each principle is an oversimplification of both U.S. and EU regulatory schemes.⁶³ A modified regulatory scheme that recognizes both U.S. and EU regulatory principles is therefore possible and allows TTIP to come to fruition. Cecilia Malmström, EU Trade Commissioner and head EU advisor for TTIP negotiations, reiterated that the most valuable aspect of the Partnership would be in the regulatory form.⁶⁴ She stated, “I would include ways to encourage EU and U.S. authorities [to] talk to each other as they set new rules that will have a Trans-Atlantic impact, right from the beginning of the process . . . and ways to help them cooperate on developing international rules.”⁶⁵

Both the U.S. and the EU acknowledge how important collaboration is in order to rectify the differences in the rulemaking processes and that a solution emerges by facilitating the free flow of commerce, through TTIP. Congressman William R. Keating, representative of the ninth district of Massachusetts, reiterated this important economic concept at the Terrorism, Nonproliferation, and Trade Subcommittee hearing on *National Security Benefits of Trade Agreements with Asia and Europe*. He stated, “Since this agreement is between two economies that share a strong commitment to the rule of law, transparency, and free markets, it can help elevate health, safety, labor, and en-

59. Fung, *supra* note 56.

60. *Id.*

61. *Id.* at 450.

62. *Id.* at 452.

63. *Id.* at 448.

64. Lawson, *supra* note 17.

65. *Id.*

vironmental standards worldwide.”⁶⁶ Congressman Keating’s statement further exemplifies the strategic big picture implications of the Partnership.

B. The WTO’s Failure as Rule-Maker

The weakening of the WTO has been attributed to multi-polarity, which resulted in massive changes to the power structure within the WTO.⁶⁷ When the WTO was created at the conclusion of the Uruguay Round Trade Negotiation, overall power was in the hands of the QUAD countries – United States, the European Communities, Canada, and Japan.⁶⁸ However, the BRICS countries, Brazil, Russia, India, China, and South Africa, now have more economic influence and are recognized as global economic players.⁶⁹ Moreover, both the EU and the U.S. have suffered major economic downturns, and the U.S. bears the additional domestic burden of the aftereffects of the Iraq and Afghan Wars.⁷⁰

At WTO negotiations, the BRICS and the developed countries, primarily the U.S. and EU, have not met eye-to-eye. The confrontations have made trade negotiations and compromises extremely challenging.⁷¹ Furthermore, the increased WTO membership makes reaching a consensus difficult, as there is an increase in dissimilar interests among the membership.⁷² The WTO cannot continue to govern the international trading system in today’s diversified economic and political system. The range of national interests and functions of each WTO member state has made it too burdensome for the WTO as an international organization to expand trade liberalization or update

66. *National Security Benefits of Trade Agreements with Asia and Europe Terrorism: Hearing Before Terrorism, Nonproliferation, and Trade Subcomm. on Foreign Affairs*, 114th Cong. 3 (2015) (statement of Congressman Keating, Minority Ranking Member [hereinafter *Congressional Hearing*]).

67. Mitsuo Matsushita, *A View on Future Roles of the WTO: Should There be More Soft Law in the WTO?*, 17 (3) J. INT’L ECON. L. 701 (2014). Australia is also sometimes considered relevant in terms of “QUAD” countries and will therefore sometimes be involved with these negotiations. *Id.*

68. *Id.* at 702. The QUAD countries constitute the four biggest traders within the WTO and are examined approximately once every two years. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 704.

72. *Id.*

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trade rules. Therefore, bilateral free trade agreements, like TTIP, are a smart solution to fulfill the role of rule-maker in international trade.

C. U.S. Hegemony and Multipolarity

A hegemon is a dominating power that is historically linked to the international economic infrastructure.⁷³ Since liberal economic world order was established in 1945 through the Bretton Woods Agreement, the United States has been the underlying hegemon.⁷⁴ However, when the United States' economic crisis occurred in 2008, developing countries, specifically the BRICS, were able to catch up with the West in both economic and political terms.⁷⁵ The decline of U.S. hegemony has affected the entire system of the WTO because it relies on American supremacy and its ability to produce political and economic capital.⁷⁶ This theory is known as the "hegemonic stability theory."⁷⁷ Under this theory, if the U.S., in its role as hegemon, is in relative decline, then the trading system will naturally fragment because the U.S. is not accomplishing its prerogative to provide for the public good in an open, stable, and international economic order.⁷⁸ The field of international relations is constantly in flux, and power structures shift over time. As new actors have entered into the trade arena, the WTO has struggled to maintain influence. This world disorganization is illustrated by the fact that the WTO's most recent trade rounds and conferences – 'Doha' and 'Bali' – led to a stalemate.⁷⁹

i. Doha Development Round

The Doha Development Round, often referred to as the Doha round trade talks, launched in 2001 and is the most recent cycle of

73. Gordon Wong, *The Beginning of World Trade Disorganization?*, THE DIPLOMAT (Jan. 15, 2015), <http://thediplomat.com/2015/01/the-beginning-of-world-trade-disorganization/>.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. Wong, *supra* note 73.

79. *Id.*

WTO trade negotiations.⁸⁰ The WTO has held a total of nine rounds of multilateral trade talks since the end of the WWII, but the Doha Round is the first to focus on helping developing countries join the global marketplace, in hopes of boosting their overall economies.⁸¹ Essentially, the goal of the Doha round trade talks is to “make it easier for goods and services to be bought and sold across national borders.”⁸² To reach this goal, the Doha Round specifically focuses on tariffs (*i.e.* import taxes) placed on a variety of consumer and non-consumer products, such as cars and wheat.⁸³

The Doha round trade talks also take into consideration that when decreasing or eliminating tariffs, restrictions may be implemented to promote fairness in the marketplace. Specifically, the Doha round trade talks discuss the use of subsidies to restrict countries from lowering taxes and regulatory barriers that affect the cross-border trade in services, such as banking and consulting, and negotiating new intellectual property rules on things such as drugs and copyrighted works.⁸⁴

The Doha Round negotiators represent all WTO members, where about two-thirds of the members consist of developing nations.⁸⁵ These negotiators have made little to no progress over the past few years because trade officials negotiated under the single premise that “nothing is agreed until everything is agreed,” resulting in frequent deadlocks.⁸⁶

ii. Bali Ministerial Conference

The Bali Ministerial conference, emanating out of the Doha round trade talks, occurred in December 2013.⁸⁷ At first glance, the talks seemed promising because the Trade Facilitation Agreement

80. *Doha Round Trade Talks - Explainer*, THE GUARDIAN, <http://www.theguardian.com/global-development/2012/sep/03/doha-round-trade-talks-explainer> (last visited Mar. 29, 2015).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* EU, US, China, and India tend to dominate the talks.

86. *Doha Round Trade Talks*, *supra* note 80. Doha round was set to conclude in Geneva in July 2008 but after ten days of talks, negotiations broke down over a dispute between the U.S. and India, in regards to rules governing trade in agricultural goods. *Id.*

87. *Id.*

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(TFA), a trade deal that would be a first for the WTO since its creation, was set to pass.⁸⁸ The Trade Facilitation Agreement mostly benefitted developing countries because it created roughly twenty-one million jobs and boosted developing countries' GDP by \$523 billion, without cutting tariffs.⁸⁹ However, just before ratification, the trade talks fell through, and India withdrew its support.⁹⁰

This WTO trade negotiation failure further supports the increasingly regarded notion that the WTO is a divided forum that cannot successfully advance.⁹¹ Multi-polarity has caused the WTO to fail but a return to capitalism, through agreements like TTIP, provide the WTO a lifeline. The Partnership allows states to define their own advantageous gains from trade in a balanced, negotiated manner that benefits all parties.⁹² In turn, countries keenest to promote trade will reap the positive effects and tangible outcomes of the free trade agreements.⁹³

Analysis

A. Factors Affecting TTIP's Implementation

The delay in TTIP negotiations has largely been due political changes in leadership on both sides of the Atlantic Ocean. Since TTIP negotiations began in 2013, all key leadership positions in the EU have been filled by new representation and some time is required

88. *Bailing out From Bali*, THE ECONOMIST (Aug. 9, 2014), <http://www.economist.com/news/finance-and-economics/21611088-indias-scuppering-latest-trade-talks-leaves-no-one-better-bailing-out>. The Trade Facilitation Agreement is currently the only deal that has been concluded and awaits ratification by two-thirds of the WTO members. Douglas Lippoldt, *Progress on Trade in 2015*, HSBC (Mar. 2, 2015), <http://www.hsbc.com/news-and-insight/2015/progress-on-trade-in-2015>.

89. *Bailing out From Bali*, *supra* note 88.

90. *Id.*

91. *Id.*

92. Wong, *supra* note 73.

93. *Bailing out From Bali*, *supra* note 88.

to adapt to TTIP and its negotiation process.⁹⁴ Although former Trade Commissioner Karel De Gucht, European Council President Herman Van Rompuy, European Commission President José Manuel Barroso, and High Representative Catherine Ashton unanimously supported and promoted TTIP,⁹⁵ it may be too soon to express unanimous consent in support of the Partnership under the new leadership. Moreover, by the time the European leadership is comfortable in its new role, the U.S. political landscape will be focusing on the 2016 Presidential campaign. The recent midterm elections in the U.S., in which the Republican Party took over majority-rule in both chambers of Congress, clearly affected TTIP's negotiations because the re-election process focused mainly on domestic concerns and not on international matters such as TTIP.

Despite the effects of political adjustment, negotiations are likely to swiftly resume in 2015. Both the U.S. and the EU, consistently acknowledge that trade is an important and a relevant factor in the global economy and an agreement like TTIP can only advance economic growth.

i. The European Union Demonstrates its Commitment to TTIP

The EU proved its dedication to the negotiations by placing top trade experts at the forefront of the discussions and negotiations. The EU has permanently placed Ignacio Garcia Bercero, Director in the Directorate General for Trade in the EU Commission, Director General Jean Luc Demarty, and other key officials presiding in the working groups in charge of conducting TTIP negotiations on behalf of the EU.⁹⁶

ii. The United States Demonstrates its Commitment to TTIP

The U.S. has labeled 2015 as a “fresh start” for TTIP talks under the new leadership of the European Commission.⁹⁷ To prove that in-

94. Jean De Ruyt, *Major Changing of the Guard at European Commission*, LAW 360 (2014), <http://www.law360.com/articles/562195/major-changing-of-the-guard-at-european-commission>.

95. *Id.*

96. *Id.*

97. Alex Lawson, *International Trade Developments to Watch in 2015*, LAW 360 (Jan. 2, 2015, 1:45 PM), <http://www.law360.com/articles/605633/international-trade-developments-to-watch-in-2015>.

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ternational trade and corresponding negotiations are at the forefront of its agenda, the White House and Congress reinstated the Trade Promotion Authority (TPA), colloquially known as fast-track negotiating authority.⁹⁸ TPA allows Congress to “craft a blueprint for all U.S. trade agreements in exchange for holding amendment-free votes on those pacts once they are completed by the White House.”⁹⁹ To further assist international organizations, like the WTO, the U.S. is paying close attention to smaller sectoral-agreements, like those aimed at cutting tariffs on environmental goods and liberalizing trade in services.¹⁰⁰

Furthermore, Russian sanctions, enforced due to recent and ongoing turmoil in the Ukraine, have influenced trade talks because investors and exporters are bracing for the newly passed Ukraine Freedom Support Act of 2014.¹⁰¹ Russia’s invasion of the Ukraine places an unwanted risk on the trans-Atlantic alliance between the U.S. and the EU. However, being parties to the TTIP negotiations strengthens the U.S.-EU relationship and reinforces the united front that the U.S. and the EU have maintained throughout the Ukraine crisis.¹⁰² TTIP highlights the virtues of the Western model and sends a powerful signal to Russian President Vladimir Putin, and other authoritarian regimes that the U.S. and the EU remain as unified as they ever were.¹⁰³ This type of connectivity promotes prosperity for democratic principles and international stability.¹⁰⁴

iii. TTIP Timeline and Economic Effects

TTIP would help the EU economies bounce back from the global recession. A study conducted at the European Commission suggested TTIP could add roughly \$142 billion to the EU economy and roughly \$112 billion to the U.S. economy.¹⁰⁵ In terms of GDP, this is equiva-

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Congressional Hearing, supra* note 66 (statement of Congressman Keating, Minority Ranking Member).

103. *Id.*

104. *Id.*

105. *Trading Places*, THE TIMES (LONDON) (Jan. 15, 2015), <https://www.thetimes.co.uk/tto/opinion/leaders/article4323540.html>.

lent to adding 0.5 percent to Europe's GDP and 0.4 percent to America's GDP.¹⁰⁶ The Partnership will provide Europe with the economic boost it needs because, by collaborating with the U.S. on a trade deal that grants market freedom and guarantees fair and legal procedures when transferring goods, European businesses will have more opportunity to export goods at a much lower cost. EU Trade Commissioner, Cecilia Malmström, reiterated how important passing TTIP sooner rather than later is for Europe when she explained that an ideal TTIP agreement eliminates duties on the vast majority of goods as soon as TTIP becomes good law.¹⁰⁷

B. Benefits of WTO Change in Leadership

In 2013, Roberto Azevedo assumed the position of Director General of the WTO.¹⁰⁸ When Azevedo accepted his role as Director General, he was aware the WTO was in need of some adjustments. Azevedo and his team must find a way to make the WTO stay relevant. The WTO can do this by advancing a multilateral agenda (*i.e.* Doha Development Round), focusing on trading nations and not parties to partnerships, and achieving a breakthrough in plurilateral negotiations that have WTO focus, such as the Trade in Services Agreement (TISA) and the Information Technology Agreement (ITA).¹⁰⁹ In addition, the WTO provides beneficial and necessary technical assistance to least developed countries (LDCs) as well as the Aid-for-Trade program, both of which have been important to many WTO members and are likely to continue to support the world's least developed economies.¹¹⁰ New leadership at the WTO also affords the organization a chance to redistribute its focus in an area where it has a proven success record: dispute resolution.

C. Reviving the WTO vis-à-vis TTIP

The WTO is at a stalemate. The current Doha Development Agenda (DDA) has failed to bring about innovative ideas to generate

106. *Id.*

107. Lawson, *supra* note 17.

108. Terence Stewart, *Some Thoughts as New WTO Team Takes the Helm*, LAW 360 (Sept. 5, 2013).

109. *Id.*

110. *Id.*

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new avenues for rule making in areas such as agriculture, investment, competition policy, and origin rules.¹¹¹ The creation of TTIP would fill the gap as rule-maker and allow the WTO to narrow its focus and excel at dispute settlement.

i. WTO and Dispute Settlement

WTO dispute settlement has compulsory jurisdiction over the settlement of trade disputes that occur among WTO members.¹¹² For an international organization to implement rebuttable multinational trade agreements and ascertain rule of law due to an effective dispute, settlement mechanism is an important accomplishment within the field of international trade. In less than twenty years, more than 500 dispute cases have been filed with the WTO Dispute Settlement Body and Panels and about 300 cases have been decided by the Appellate Body.¹¹³ Because the WTO relies on legal rules to resolve trade disputes, members cannot resort to economic and political power.¹¹⁴ By evaluating the legitimacy of the legal claims, parties to the dispute prevail not on the superior bargaining power in terms of size and influence, but on the merits of the case.¹¹⁵ Most members continue to use the WTO dispute system and generally comply with its adverse rulings.¹¹⁶ This system presents an advantage to developing nations that lack bargaining power with larger trade entities, such as the United States and the European Union, and institutes stability and predictability in international trade.¹¹⁷ A preferential free trade agreement, like the Partnership, can provide trade rules in areas where the WTO has failed.¹¹⁸

ii. WTO's New Role as Coordinator

Instead of acting as negotiator, the WTO must take on the role of coordinator when governing the international trading system. The WTO achieves this role by monitoring not only TTIP's activities but

111. Matsushita, *supra* note 67.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Some Thoughts as New WTO Team Takes the Helm*, *supra* note 108.

117. Matsushita, *supra* note 67.

118. *Id.*

also all other relevant and pertinent free trade agreements, like TTIP's counterpart in Asia. The WTO can coordinate the activities of the participating members to the free trade agreements and administer advice, perhaps in the form of advisory opinions and reports, thus ensuring the success of these agreements through a "soft law" approach.

Fortunately, the WTO already has a mechanism in place to function as coordinator. The Trade Policy Review Mechanism (TPRM) is a mechanism incorporated in the WTO to collect and distribute data with the intent of forming recommendations for WTO members to improve their trade systems and achieve greater transparency by understanding the trade policies and practices of other members.¹¹⁹ This notion is formally incorporated in Annex 3 of the Marrakesh Agreement.¹²⁰ The Trade Policy Review Body (TPRB) was created under the TPRM to publish non-binding reports and recommendations that may not be used for dispute settlement procedures.¹²¹ Specifically, part G of the Marrakesh Agreement, entitled "Overview of Development in the International Trading Environment," requires the TPRB to generate "an annual overview of developments in the international trading environment that are having an impact on the multilateral trading system."¹²² Conclusively, to maximize the success of both TTIP and the WTO, the TPRM can substitute multilateral agreements for bilateral agreements and promote compatibility and cooperation between the U.S. and the EU, both WTO members, as the TPRB oversees the rule making process in its role as coordinator for the WTO.

D. Significance of Reducing Non-tariff Barriers to Trade

The Partnership allows for a significant reduction in non-tariff barriers to trade (NTBs) between the U.S. and the EU. Under TTIP,

119. Marrakesh Agreement Establishing the World Trade Organization, art. 1 1869 U.N.T.S. 379 [hereinafter *TPRM*].

120. *Id.* The Marrakesh Agreement defines the scope, functions and structure of the WTO and provides a comprehensive set of rules designed to make it easier to compete in today's global marketplace. All WTO members are parties to this agreement. U.S. Dep't of Commerce, *Marrakesh Agreement: Establishing the World Trade Organization*, TCC, http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/WTO_Marrakesh_guide.asp (last visited Mar. 29, 2015).

121. Matsushita, *supra* note 67.

122. *TPRM*, *supra* note 119.

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aligning domestic standards, cutting costs imposed by bureaucracy and regulations, and liberalizing trade in services and public procurement will reduce NTBs.¹²³ Early reports of the negotiations indicate that the proposal is ambitious. The mandate seeks to eliminate 25% of NTB costs and 100% of tariffs between the United States and the European Union as well as achieve a 10% reduction in trade costs from NTBs and a removal of 98% of tariffs.¹²⁴ Nevertheless, the reduction of NTBs with regulatory modification, under TTIP, will benefit the U.S. and EU economies by increasing job opportunities for both as trade moves more freely.

E. TTIP's Effects on Third Parties and Third Party Nations

i. Advantages

TTIP is able to address many of the trade imbalances that have affected trade relationships amongst WTO members. For instance, a large trade deficit between the U.S. and the EU is in part due to the WTO's differential treatment between direct and indirect taxes.¹²⁵ The current practice allows the EU to rebate taxes, which have value added taxes (VATs) of fifteen to twenty-seven percent, on goods exported to the U.S. and assess these taxes at the border on imports.¹²⁶ In turn, the U.S. does not have remedies for the large subsidies provided by the EU on exports because the U.S. has no federal indirect tax system and the rebate associated with indirect taxes on exports has been excluded by the GATT, as well as from the WTO subsidy disciplines.¹²⁷ Additionally, because U.S. exporters face large taxes on importation,¹²⁸ many businesses cannot sell within the market they wish to profit in. The Partnership can eliminate these differential treatments. By removing penalization in trade, TTIP will add millions of manufacturing and agriculture jobs for both the U.S. and the

123. Reid Whitten, *The Race for Riches in US-EU Trade Begins*, LAW 360 (Apr. 18, 2013, 5:09 PM), <http://www.law360.com/articles/433752/the-race-for-riches-in-us-eu-trade-begins>.

124. *Id.*

125. Stewart, *supra* note 49.

126. *Id.*

127. *Id.*

128. *Id.*

EU.¹²⁹ Even though the Partnership is specifically tailored to the trading relationship between the U.S. and the EU, TTIP will have a positive ripple effect on third party nations, like other WTO members, due to undeniable globalization at the international trade level.

ii. Disadvantages

Because TTIP is a partnership between the U.S. and the EU, the majority of WTO members are not included. With most of the developing world shut out, critics worry these countries will be denied a voice during negotiations.¹³⁰ Additionally, with the exception of China, all BRICS countries—India, Brazil, and South Africa—have not been invited to participate in TTIP’s counterpart – TPP.¹³¹ However, if the WTO is able to reignite enthusiasm for its global free trade talks then lesser-developed countries have an opportunity to have a seat at the free trade expansion table.

There are also critics who fear that TTIP negotiations no longer address protectionism but protection.¹³² Critics define protection as “promoting the interests of transnational capital by downgrading the defense of human health, the natural world, labor rights, and the poor and vulnerable from predatory corporate practices.”¹³³ As a result, critics argue that this new state of “post-democracy” leaves the electoral and parliamentary system uninhabited by political power.¹³⁴ This critique lacks authority because the same critics define protectionism as the idea that free trade is promoted by removing trade tariffs,¹³⁵ which is exactly what TTIP seeks to provide for the U.S. and the EU to reach its goal of liberalizing trade successfully.

129. *Id.*

130. Barrie McKenna, *Sweeping Megaregional Deals Leaving Developing World Behind*, THE GLOBE AND MAIL (Feb. 8, 2015), <http://www.theglobeandmail.com/report-on-business/sweeping-megaregional-trade-deals-are-leaving-developing-world-behind/article22853075/>.

131. *Id.*

132. George Monbiot, *The TTIP Trade Deal Will Throw Equality Before the Law on the Corporate Bonfire*, THE GUARDIAN (Jan. 13, 2015, 3:46 AM), <http://www.theguardian.com/commentisfree/2015/jan/13/ttip-trade-deal-transatlantic-trade-investment-treaty>.

133. *Id.*

134. *Id.*

135. *Id.*

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F. Secrecy of TTIP negotiations

The Partnership is challenged politically by an increasing amount of interest groups, nongovernmental organizations, a substantial part of the public opinion, and politicians in countries within the EU.¹³⁶ Understandably, these various parties try to gain and request influence in the TTIP negotiations. To mitigate these concerns, key U.S. and EU representatives continuously release documents demonstrating transparency during the TTIP negotiations.

i. Significant Actions Taken by the European Union to Promote TTIP

In late November 2014, EU Trade Commissioner Cecilia Malmström circulated transparency proposals in an effort to give all European Parliament members access to important negotiating documents.¹³⁷ To incorporate civic engagement in Partnership negotiations, Commissioner Malmström made various documents available on the European Commission Directorate General Trade website.¹³⁸ A public list of relevant TTIP documents shared between European Parliament and the European Council are published on a regular basis as well as a list indicating who is meeting with political leaders and senior officials throughout the course of the negotiations.¹³⁹

In early January 2015, Malmström released eight TTIP negotiating texts including position papers representing the EU's positions on various areas, such as competition, food safety, and animal and plant health.¹⁴⁰ These fact sheets are written in laymen's terms so public stakeholders can easily comprehend the complex legal documents.¹⁴¹ With the release of new and additional documents, Malmström hopes that the increase in transparency will also transition into an increase

136. De Ruyt, *supra* note 94.

137. Alex Lawson, *EU Approves Proposals to Open Up Trade Talks with US*, LAW 360 (Nov. 25, 2014), <http://www.law360.com/articles/599332/eu-approves-proposals-to-open-up-trade-talks-with-us>.

138. *Id.* Website includes minutes with brief summary of meeting agenda and list of participants in attendance.

139. *Id.*

140. Alex Lawson, *EU Discloses Litany of Secret Texts in U.S. Trade Talks*, LAW 360 (Jan. 7, 2015), <http://www.law360.com/articles/609180/eu-discloses-litany-of-secret-texts-in-us-trade-talks>.

141. *Id.*

in public support for the massive trade deal.¹⁴² Alan Wolff, Senior Counsel at McKenna Long & Aldridge LLP stated, “[t]he attempt is to approach the drafting of TTIP as a world standard, or at least a standard that each can apply in further negotiations each has with others.”¹⁴³

ii. Significant Actions Taken by the United States to Promote TTIP

U.S. Trade Representative Michael Froman indicated promotion of transparency of TTIP and its negotiations for the U.S. when USTR released a “plain English” fact sheet that relayed the Obama administration’s interest and effort to cooperate with the newly Republican controlled Congress to pass TTIP and encourage public conversation regarding the negotiation process.¹⁴⁴ Froman stated:

We are always looking for new ways to engage the public and to seek views that will help inform and guide our trade policy, and enhancing transparency will remain a priority, consistent with the ability to deliver on our ultimate mission, which is to deliver agreements that achieve the maximum possible benefit for the American people...that’s our focus.¹⁴⁵

USTR has also enhanced transparency by providing congressional committees with a preview of every proposal prior to the proposal being negotiated during committee meetings.¹⁴⁶

Throughout 2015, Malmström and Froman have met multiple times to collaborate and advance TTIP negotiations and mitigate points of contention to bring ratification of this important trade deal to the forefront.¹⁴⁷

142. *Id.*

143. *Id.*

144. Joe Van Acker, *USTR Hits Back at Allegations of Secrecy in Trade Talks*, LAW 360 (Jan. 12, 2015), <http://www.law360.com/articles/610344/ustr-hits-back-at-allegations-of-secrecy-in-trade-talks>.

145. *Id.*

146. *Id.*

147. Alex Lawson, *US, EU Trade Leaders Prepare for New Round of TTIP Talks*, LAW 360 (Dec. 9, 2014), <http://www.law360.com/articles/602881/us-eu-trade-leaders-prepare-for-new-round-of-ttip-talks>.

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*UB Journal of International Law***Conclusion**

TTIP promotes true reciprocity in international trade and must be implemented for two main reasons. First, by opening up both U.S. and EU markets, consumers collectively have access to a greater spectrum of goods. Critics fear that the Partnership puts local businesses at risk and favors privatization of business, a neo-liberalist idea. However, when consumers have more choices as to which good to purchase, a healthy economy exists. TTIP negotiators recognize the importance of competitive market advantage and believe in the need for a modified and uniform regulatory system between the U.S. and the EU. Second, the Partnership allows the WTO to redistribute its focus by entertaining a “soft law” approach and capitalize on its strength: dispute resolution. TTIP is the future for international trade, and negotiations must continue to ensure the agreement passes and economic success for the global economy is secured.