

THE NATIONAL INTEREST

Drafting a Free-Trade Constitution

By: Simon Lester, *trade-policy analyst at the Cato Institute* – July 10, 2013

This week, trade negotiators from the United States and EU are meeting in Washington to begin discussions on the proposed Transatlantic Trade and Investment Partnership (TTIP). Even before negotiations have begun, issues such as protection for French films from well-financed Hollywood competition have generated significant controversy. There is little doubt that liberalizing trade between these economic powers, with all of their various interest groups, presents some challenges.

Beyond the traditional free trade versus protectionism debate, however, there is a larger issue. These talks are not just about free trade as it is traditionally understood. They are also about international rules that guide domestic policy making in a wide range of areas. In effect, the two sides are negotiating a "free-trade constitution," and that raises important issues that have not yet been fully addressed.

In fact, the U.S. government is in the process of drafting not one, but two, free-trade constitutions. Along with the TTIP, it is also working on the Trans-Pacific Partnership, which is being negotiated with a number of nations in the Pacific region. (And for good measure, there is already a global trade constitution in form of the World Trade Organization.) These competing existing and potential constitutions provide an opportunity to debate the issue of what should be in trade agreements and shape the future of global trade governance. Over the next several years, this aspect of trade talks should be just as prominent as the traditional issue of protection for domestic industries.

Unfortunately, for the most part, the actual debate has mostly emphasized the "yes or no" question of whether or not to support free-trade agreements in the abstract. The question is presented simply as whether one is for or against whatever trade rules are being proposed, with the details often obscured. This ignores important differences in the concept of what constitutes free trade.

Let's take some examples. Lower tariffs, removal of import quotas and a general principle of nondiscrimination in relation to foreign goods and services should be included in any trade rules. Without this, there would not be any free trade and thus no real free-trade agreement.

More controversially, however, there are various other issues that have been included in trade talks and agreements over the years. One example is intellectual property. To what extent should free-trade agreements protect intellectual-property rights? Intellectual property is a policy area that has been the subject of much debate in domestic legal systems, and this has now spread to the international arena. There have been many calls for loosening the domestic protection of patents and copyrights in recent years. At the same time, though, the U.S. government continues to push its trading partners to tighten their own protections.

Another example is the treatment of foreign investors. Some international agreements provide that foreign investors must be offered “fair and equitable treatment,” and be given a direct right of action to sue host governments in an international tribunal for perceived violations. Do these rules go beyond liberalization, and instead mostly offer up litigation opportunities for big multinational companies? Some countries, including Australia, have questioned the need for these rules, and there are differences in views between the United States and EU on the appropriate scope of these rules.

Labor and environmental protections have also been covered in recent trade agreements. Provisions in these areas promote the enforcement of domestic laws, and even incorporate legal principles from other international organizations.

Finally, some trade rules go beyond trying to identify protectionist laws and regulations. The rules seem to condemn some measures that are simply irrational or are not science-based, even though they are not protectionist. Should international trade rules try to make domestic regulation more effective in this way?

As the trade negotiations with the EU and with the Pacific region progress, remember that "free trade" as practiced in free-trade constitutions is not a uniform concept. There is a range of opinions on what should be covered. My own view is that free-trade rules should focus on the general principle of fighting protectionism. Broadening the trade regime into a general global-governance system goes too far.

But regardless of how one comes out on this issue, there is no need to accept that whatever terms are used in a particular agreement as it is presented for signing are the only option for free trade. In reality, we are in the midst of something like a constitutional convention for free trade. To get a free-trade constitution that works, everyone should take advantage of this opportunity to participate and to engage fully in the debate. It is not enough to be for or against free trade. A larger question also should be addressed: What vision of free trade are you for?