



TABC Updated Priorities for the Transatlantic Trade and Investment Partnership

**Submitted to DG Trade, European Commission
and
Office of the United States Trade Representative**

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As negotiations for a Transatlantic Trade and Investment Partnership (TTIP) move toward a possible conclusion in 2016, TABC would like to share its updated recommendations and key priorities on a number of issues being addressed.

Market Access

Tariffs

- Elimination of tariffs and export quantitative restrictions on all tariff lines, including on raw materials and agricultural products, with simple but effective rules of origin.
- Reasonable phase-out periods for tariffs and tariff rate quotas should be used, especially for economically or politically sensitive agricultural products, in order to conclude this chapter.

Customs/Trade Facilitation

- A single window within the territory of each TTIP party that enables traders to electronically transmit all customs or other data required by a government for the import, export or transit of goods.
- Submission and processing of import-related information (including security data) to enable pre-clearance of goods before their arrival at a port of entry.
- Separating the release of goods in customs custody from the payment of duties or other import charges.
- A unitary import clearance process which ensures that the inspection requirements of all government agencies with border-related responsibilities are met in the conduct of a single cargo release. In addition, clearance procedures across EU member states should be harmonized.
- A US/EU mutual recognition agreement that streamlines criteria and procedures for trusted trader programs through such means as: uniformity between the EU Economic Operator and US Customs-Trade Partnership Against Terrorism programs; a common web-based application process for participation in trusted trader programs between the EU and the US and among EU member states; assurance that program participants are “first-in-queue” when inspections are required; and enabling program participants to provide import documents to authorities after release of goods.

- Capability for the export documentation/declaration of one party to be used as the import documentation/declaration of the other party, while ensuring harmonization of data requirements.
- Commitment to an administratively easy and time-limited process for issuance of advance rulings.
- Establishment of an enduring transatlantic trade facilitation forum involving government and business stakeholders from both parties to ensure that progress is made on ongoing facilitation measures and that new facilitation efforts are pursued as warranted.
- Commitment to reasonable border compliance and enforcement practices, including consistent interpretation and enforcement of import laws and regulations, elimination of vague requirements, and use of penalty mitigation guidelines that take account of an importer's compliance record and internal procedures.

Services

- The text should reflect the recommendation of the EU-U.S. High Level Working Group on Jobs and Growth that both sides should “bind the highest level of liberalization that each side has achieved in trade agreements to date, while seeking to achieve new market access...”
- Market access commitments should be recorded on a negative list basis, with only a minimal number of non-conforming measures, which should be subject to timetables for full liberalization.
- New services that evolve organically or through technological innovation in the future and which can be provided across borders should be covered by the obligations of the agreement automatically.
- Comprehensive market access to public procurement for services should be provided, with low thresholds and substantive coverage of public institutions and entities.
- Foreign ownership limitations should be eliminated for EU and U.S. non-government service providers.
- EU providers should be exempted from prohibitions under the Merchant Marine Act of 1920.

Financial Services

The EU and U.S. capital markets are the world's largest and are crucial to supporting cross-border trade and expansion of economic activity and job creation in all sectors. There has been significant and constructive bilateral coordination with respect to financial regulation, but there remains multiple instances of inconsistent, conflicting, or duplicative rules between the EU and U.S. We believe the TTIP agreement must

provide a framework to engage and discuss, through respective regulatory agencies and departments, the development of financial services regulations at an early stage of development. On June 7, 2016, TABC joined with 13 other trade associations and business organizations in forming the Transatlantic Financial Coherence Coalition to reinforce this request that TTIP includes both market-opening measures and a framework for regulatory coherence in financial services.

Below is TABC's suggested approach, as previously outlined in a communication to both negotiating teams on December 13, 2013.

We suggest categorizing financial services issues by means of four boxes. The first two boxes would represent trade domains and need not necessarily be dealt with within the framework of the FMRD, whereas the third and fourth box issues would be addressed within that framework. More concretely:

- (1) The first box would include traditional trade and investment provisions consistent with the four modes of delivery of services trade in the GATS.*
 - The EU and the U.S. should work towards strengthening the national treatment of financial institutions, a commitment to current levels of market access, and removing remaining restrictions to trade at the level of the EU and its member states and at the federal and state level in the U.S. (cross-border supply).*
 - The EU and the U.S. should work towards establishing and binding free access via foreign direct investment of EU and U.S. domiciled financial institutions across the Atlantic (commercial presence) as well as strong investment protection rules.*
 - The EU and the U.S. should improve current practical arrangements on the temporary movement of qualified persons by improving the status of qualified persons but also in financial services, by reducing administrative burdens and by providing mechanisms for business visitors (for more details see TABC's submission to USTR, May 2013, 'Workforce' section).*
- (2) The second box would include horizontal business issues that are of importance to financial markets. These include cross-border, intra-corporate use of data and the interoperability of legislation pertaining to data protection and security, cybersecurity and also consumer protection issues. European and U.S. global companies have a substantial economic need for cross-border data flows between countries and regions with very different privacy regimes. Facilitating responsible global information flows is thus key.*
- (3) The third box would include some financial regulatory issues which create difficulties in mutual market access and are, in principle, for legal, political and economic reasons, viable areas for on-going regulatory cooperation (for example, rule-making on derivatives and on trading of securities). All of these topics are presumably at issue in*

the FMRD which would be the right body to address these topics. In addressing these issues the FMRD should use the following principles as a guide:

- *Undertaking consultation involving industry input and a structured legislators' dialogue in advance of proposing and adopting legislation or regulation;*
 - *Avoiding to the greatest extent possible the imposition of extraterritorial requirements, and wherever possible, recognizing the equivalence of regulatory regimes that achieve similar outcomes and share objectives but that may in some instances differ in approach;*
 - *Using impact assessments when developing draft regulation(s) and their impact on international trade and investment; align with consultation and stakeholder outreach;*
 - *Adopting international standards and global best practices, and promoting the development of high quality international standards by global bodies;*
 - *Supporting closer coordination among regulators in the oversight of entities regulated in both markets to enhance oversight while avoiding overlap and duplication; and*
 - *Periodically review existing regulations to gauge regulatory compatibility.*
- (4) The fourth box would include jointly agreed prudential carve-outs of such provisions that cannot be subject to considerations of mutually assured market access. These issues would mostly be those clearly dominated by financial stability, investor and/or client protection considerations and which, due to insurmountable differences in constitutional or legal provisions on either or both sides of the Atlantic, cannot be bridged in the foreseeable future by either common standards, mutual recognition, "substituted compliance", "equivalence decisions" or similar legal methods. While accepting the pre-eminence of supervisory concerns on both sides of the Atlantic, even in these cases there is scope for progress to be made in further talks improving supervisory conditions and practices across the Atlantic, in particular with respect to an efficient division of labour between host and home regulators. In addition, there should be some consideration paid to the issue of proportionality of financial supervisory and market access considerations. The FMRD should pursue measures that would limit to the extent possible negative spill-over impacts of regulation.*

While issues in the first two boxes may not require continuous consultation with financial services firms, once brought into force, on-going regulatory cooperation may have to be based on a more elaborate consultation process involving industry input, a structured legislators' dialogue to determine whether general financial services legislation rather than financial regulation and rule-making are at issue, and high-level political oversight. Also, enhanced transparency of efforts to align regulatory approaches would be welcome, both in terms of work streams, schedules, objectives (in broad categories as described above), and progress to reduce the potential for regulatory fragmentation.

Concerning the third and fourth box, governments and regulatory agencies on both sides of the Atlantic should establish a working program to identify which types of issues should be put into which type of treatment, and how market access issues arising from inconsistent legislation or implementation can be rectified. The default, in all of these questions, should be that issues be treated in the third box with a view to achieving mutually agreed and compatible regimes. As a first step, this working program may need to agree on criteria for issues that would need a

prudential carve-out and develop related lists of general prudentially acceptable regulatory practices within financial services. For most financial services regulatory matters, there should be a rebuttable presumption that issues should be approached with a view towards achieving mutually agreed and compatible regimes.

*Agreeing such a framework would not replace but rather formalize and facilitate regulatory coordination already established through the FMRD. **The FMRD should be an established body within the TTIP infrastructure.** This framework would be complementary to global regulatory coordination efforts of the G20, FSB, and other international standard-setting bodies because it would help to facilitate implementation of those agendas and ensure consistency on both sides of the Atlantic which would help drive consistency around the world.*

Cross Border Data Flows

Horizontal and binding commitments on all of the following principles related to the free flow of data should be included:

- The cross border free flow of data is essential across all industries to enhance economic growth, job creation and social prosperity.
- With the objective of enhancing trust of users and certainty of companies, and thus trade in goods and services, the agreement should note it is essential that businesses comply with all applicable laws and regulations related to data protection and data security.
- Restrictions on data flows and associated infrastructure create risks for global business that must be recognized and minimized. Any restrictions on data flows must be consistent with the provisions set forth in GATS Article 14.

Public Procurement

The TTIP discussions should focus on the original objective of achieving substantially improved access to government procurement opportunities. While establishing the current level of opportunities is part of the process of identifying improved access opportunities, progress should not be hung up on protracted disputes over statistical comparisons of current market access. With the goal of substantially improved opportunities in mind, TABC repeats its recommendations from May 2013 that a robust chapter on procurement should contain the following:

- agreement that neither party will adopt new measures restricting market access in procurement beyond measures already in place, regardless whether they may be consistent with obligations under the WTO GPA or other provisions of TTIP;
- increased coverage of central government procurement, based on a negative list approach;

- increased coverage of sub-central entities using financial assistance and other funds flowing from central governments; and
- measures to guarantee transparency and improved access to information in procurement opportunities, including a requirement that procuring entities maintain effective anti-solicitation compliance programs.

Regulatory Convergence

Break down duplicative and unnecessary regulatory barriers across industrial sectors, while respecting US and EU sovereignty and without sacrificing health, safety or environmental standards. Encourage convergence of existing technical regulations and standards and consider the potential for mutual recognition frameworks so far as the methods of conformity assessment are equivalent. Implement a joint regulatory interoperability process with the current TEC process as its starting point that promotes and facilitates the development and adoption of common future regulations without any *a priori* exclusions.

Automobiles

Support the joint AAPC/ACEA/Auto Alliance position on securing a high-ambition outcome on automobile safety regulatory convergence while maintaining high levels of auto safety performance in the U.S. and E.U. In addition, TTIP should ensure future regulatory cooperation between the U.S. and EU authorities to avoid divergence on new regulations. A strong and meaningful outcome in the automotive sector, especially on regulatory convergence, would expand trade, boost jobs, lower costs and improve choice for consumers.

Chemicals

Reduce Non-Tariff Barriers through improved regulatory cooperation without lowering the level of protection for human health and the environment. Mutual recognition or harmonization of the regulatory systems (TSCA in the US, REACH in the EU) is not anticipated. Regulatory cooperation possibilities within the existing legal frameworks should continue to focus on three areas:

- (1) Prioritization of chemicals for assessment and assessment methodologies;
- (2) Promoting alignment in classification and labelling of chemicals
- (3) Enhanced information sharing while protecting confidential business information
- (4) Mutual scientific consultation between regulators when introducing future regulations in order to prevent the implementation of divergences from the beginning should be enhanced.

ICT

- Endeavor to prevent the development of forced localization and other trade and market distorting policies that are based on the requirements to force localization of facilities, manufacture and/or use of locally developed intellectual property. Market access for ICT goods and services should not be conditioned on requirements to (i) invest in, develop, or use local R&D, intellectual property, ICT manufacturing or assembly capabilities; (ii) store, process, or manage data locally; (iii) transfer technology to another party involuntarily; or (iv) disclose unnecessary proprietary information as defined in Section III on IPR.
- Eliminate regulations that act as barriers to entry or disincentives to investment in broadband and next generation communications networks and support market-based broadband communications policies, including non-discriminating spectrum policies that enable efficient, technology-neutral spectrum allocation to effectively access high-bandwidth broadband networks. That includes the immediate allocation to commercial mobile services or applications of inefficiently-used or unused spectrum currently designated to government agencies.

Life Sciences Regulatory Issues

Pharmaceuticals

An enhanced EU-U.S. relationship through TTIP represents a unique opportunity to seek even greater compatibility and to create streamlined processes and procedures between the EU and the U.S. To this end, specific regulatory compatibility proposals are to:

- Increase efforts to coordinate and avoid unnecessary duplication between the FDA and EMA, notably by mutual recognition of **manufacturing site (GMP) inspections**, as well as Good Clinical Practice (GCP).
- **Parallel scientific advice** should expand to be applicable to all medicines, and grant sponsors the right to receive it upon request.
- Harmonize approaches to post-approval variation submissions for manufacturing changes.
- Establish a harmonized standard for clinical trials results data fields.

Medical Technology

- Recognizing the significant gains and enhanced business opportunities that could result from a successful TTIP, the medical technology industry on both sides of the Atlantic have come together in support of the agreement with several

recommendations for enhanced regulatory cooperation between the U.S. and the EU.

- These recommendations include regulatory cooperation on:
 - Medical Device Single Audit Program (MDSAP): Single audit program for quality management systems (QMS) to reduce time and cost of inspection with a single audit rather than separate audits to satisfy each country's similar requirements.
 - Regulated Product Submissions (RPS): Common electronic platform to submit application materials to regulators that makes business sense for regulators and manufacturers alike. Any solution should take into account a full cost/benefit analysis.
 - Unique Device Identification (UDI) for medical devices: Similar unique device identification requirements and systems between regions to protect traceability and reduce time/cost of compliance.
- These recommendations are aligned with work being done in the International Medical Device Regulators Forum (IMDRF). IMDRF succeeded the Global Harmonization Task Force (GHTF), and its mission is to help accelerate global regulatory convergence. IMDRF includes regulators from Australia, Brazil, Canada, China, EU, Japan, Russia, and the U.S.
- In addition to the specific areas for regulatory cooperation identified above, the U.S. and EU medical technology industries view TTIP as an opportunity to fully enhance standards convergence, eliminate any existing tariffs on medical technologies, and create opportunities to engage third countries and promote greater convergence.

Life Sciences Market Access

Following precedents set with bilateral deals such as the KORUS and EU-Korea FTA, TABC urges the **adoption of a Pharmaceutical Annex**, including language promoting principles of access to innovation, transparency, fairness and timelines in pricing and reimbursement processes, and reflecting the value new medicines bring to patients, healthcare systems, and society.

Life Sciences Intellectual Property Rights

IPRs are fundamental to the life sciences sector's ability to operate. Effective protection and enforcement of intellectual property are essential for continued investment in the development of innovative pharmaceuticals. TABC sees the TTIP as an opportunity for the EU and US to lead the way in strengthening protection globally. To that end, the EU and U.S. should:

- **Expand current commitments to align U.S. and EU positions in multilateral dialogues**, to encourage robust third country protection of intellectual property,

including on issues such as patentable subject matter, incentives, and enforcement. The EU and U.S. should build upon their work in the Transatlantic IPR Working Group's Action Strategy and in the Transatlantic Economic Council by including similar commitments in TTIP.

- Ensure sufficient **IP incentives** for the development of pediatric medicines, orphan medicines, novel antibiotics to combat antimicrobial resistance, and Rx-to-OTC switches and other specific needs.
- Provide for **enforcement mechanisms** to prevent patent-infringing products from entering a market while a patent-infringement dispute is ongoing.

Other Issues

Accession

For TTIP to have a greater impact on the rules and conduct of the international trading system, provisions should be included in the agreement to provide for the accession of other countries to the agreement. Those provisions should clarify the applicable procedures and timelines.

Competition

Apply competition law in an open, transparent manner that provides procedural fairness to all parties. Governments must assure that state-owned enterprises (SOEs) compete in the marketplace on a level playing field, do not displace private company efforts, and do not enjoy unfair advantages over their private-sector competitors. We recommend inclusion of disciplines on SOEs similar to those included in the TransPacific Partnership agreement.

Cybersecurity

The TTIP agreement should include provisions related to increased EU-U.S. cooperation on a range of cybersecurity issues that at a minimum match all references to cybersecurity in the TPP agreement and increase cooperation in the financial services sector as noted in our Financial Services comments above (see "second box" comments).

Investment

The investment chapter should reduce exceptions to the national treatment principle and include strong provisions for investment protection. Investor-State-Dispute Settlement (ISDS) is an integral part of any modern trade and investment treaty, should be included in TTIP, and should not exclude any industry from using the mechanism.

ISDS provides an efficient and neutral forum for the resolution of disputes arising out of foreign investment. ISDS and the substantive protections in an investment chapter in a trade agreement also greatly increase legal certainty and minimize risk when an investor is assessing whether to invest in a particular foreign market.

TABC supports transparency in the dispute settlement process using the United Nations Commission on International Trade Law (UNCITRAL) rules on transparency as described in Article 18. Yet, commercially sensitive or confidential information must be exempt from being publically shared in documents or with experts or third parties. Similarly, personal rights of people involved in cases must be observed.

With respect to the EU's proposal on Investment Protection and Investment Court System, TABC's views are provided below.

- The Commission's draft sets forth excessively broad language on the right to regulate, including general exceptions, such as "social protection", "public morals" and "protection of cultural diversity."¹ This proposed text does not clarify how to distinguish between the State's right to regulate, on one hand, and thinly veiled protectionist measures used to harm investors on the other hand. While it is important to ensure that States have the freedom to enact reasonable, non-discriminatory regulations, substantive investment protections must ensure that States do not enact unreasonable, discriminatory, or unduly harmful regulations.
- The "fair and equitable" (FET) standard should remain sufficiently flexible to allow future, unanticipated investor mistreatment to be addressed. TABC does not endorse the inclusion of a closed, exclusive list of State measures and actions. Overly narrow definitions limit the key strength of the FET standard, particularly as the American and European economies progress and grow.
- It is important that a TTIP investment chapter apply the same standard of protection for indirect expropriation as it does for direct expropriation. The TTIP's protection against indirect expropriation should encompass any covered investment, including intellectual property rights, without qualification. On the other hand, TABC fully recognizes that reasonable State measures or actions that regulate investment might not necessarily constitute an expropriation: a fact-specific inquiry is required for each instance.
- The selection of judges by the governments from a predetermined list established by the governments does not provide an impartial, neutral forum.

¹ Draft Investment Text, Article 3, para 5,
http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf

- A list of 15 judges does not provide adequate case-specific knowledge to deal with highly technical claims.
- Article 14 requires investors to withdraw from domestic proceedings before submitting a claim to ISDS (“no U-turn” approach) to avoid parallel claims. The objective to limit parallel awards is useful.
- TABC supports transparency in the dispute settlement process using the United Nations Commission on International Trade Law (UNCITRAL) rules on transparency as described in Article 18.
- TABC opposes the “loser pays” rule established in Article 28 but notes the Tribunal may decide not to implement this principle. Many cases are difficult and complex, and losing a case does not necessarily mean that the loser should bear all costs. We believe the better practice is to provide the tribunal with discretion to determine fees and costs.

Skilled Workforce

- Establish a fast track approach for expeditious processing of visa/work permit applications.
 - Expand this expedited, Consulate-only process to all employees—not just “professionals”—in other words, allow technicians to automatically qualify for blanket L-1B process.
 - Recognize “degree equivalency” for accredited universities (currently, some degrees awarded in Europe are not recognized as “equivalent” to U.S. degrees).
 - Exempt EU and US employees from prevailing wage standards for all visa types since they are already presumably being compensated at commensurate levels.
- Exempt EU nationals from H-1B cap or create a separate quota for them and allow them to apply directly at the Consular post rather than going through USCIS similar to H-1B1s for Chile and Singapore or the E-3 Certain Specialty Occupation Professionals visa which applies to nationals of Australia.
- In any instances where local labor market or volume quotas tests exist, such tests will not be applied to intra-corporate transferees.
- In the context of intra-corporate transferees, a simple notification should be required prior to beginning work in the US for EU nationals or in the EU for US nationals rather than submission of a visa application for prior approval (based upon for instance listing of trusted companies).
- In the context of intra-corporate transferees, the benefits of the provisions of a TTIP agreement should apply to employees of US or EU enterprises regardless of the nationality of the individual concerned.

- There should be no home residency requirements (just like a TN can work even if subject).
- Make the visas be valid for at least 3 years initially but NOT subject to a cap, as in the TN context.
- Employees of acquired companies will immediately qualify for this visa—no need to wait for one year of L eligibility, for example, even if not a successor in interest.
- Harmonize and widen the scope of "allowable activities" under business visitor status and have more flexible treatment for duration of stay under short term business visas.
 - Visas and authorized stay should be for maximum validity allowed under that visa category.
 - The agreement should authorize in-country visa revalidation for these individuals.
 - Visas should allow for multiple entries within the validity of the visa.
- More liberal family reunification rights should be accorded in order to accommodate non-married spouses, children above the age of 18 as well as parents. Integration should be encouraged through provisions providing access to the host country job market for spouses and working age dependents.
 - Spouses should be able to work incident to status without an Employment Authorization Document.
 - Children of work-eligible age should be allowed to work incident to status.
 - Domestic partners should be issued derivative visas and periods of stay coterminous with that of the principal, as well as the ability to legally study and to work incident to status.
 - Children of domestic partners should be issued derivative visas and periods of stay coterminous with that of the principal, as well as the ability to legally study and to work incident to status if of work age.
 - Children over the age of majority eligible for derivative status should be accorded derivative status if still dependent on the principal and that status should be considered "dual intent".
 - Dependent visa or visa for family reunification should be processed along with the main applicant's visa.
- Current rights available under Mode 4 in the GATS agreement should be expanded to include additional skilled job categories such as researchers and technicians.
- A stand still clause should be imposed with respect to any new potential restrictive migration measures.
- Harmonize the provisions of bilateral social security tantalization agreements between individual EU member states and the US.
- Global Entry: For frequent travelers from the EU to the U.S. and also from the U.S. to the EU an expansion of the American Global Entry System and the

setup of the European Registered Traveler Program would be very helpful to reduce waiting times at the point of entering the respective country. The system should be expanded to also include non-immigrant visa holders and also frequent travelers from visa waiver countries.

- U.S. Immigration Preclearance: Consideration should be given to the expansion of the system of U.S. immigration preclearance at the airport of departure. Currently, the U.S. system of immigration preclearance is largely limited to airports in Canada and the Caribbean.

Energy

We do not see the need for a dedicated chapter on energy in the T-TIP; instead, we believe that energy-related WTO and market access principles (such as non-discrimination, lowering and eliminating tariffs, removing non-tariff barriers, including technical barriers to trade such as standards or conformity assessment programs, transparency, among others) can be sufficiently covered in chapters intended to apply horizontally across all sectors. We do recommend the following:

- Ensure the elimination of export restrictions on all energy sources, including crude oil, natural gas, finished oil products and feed stocks.
- Provide for the removal of internal regional and national barriers with respect to energy trade, including the transportation of crude oil, natural gas, and other energy goods.
- Ensure non-discrimination in the trade of energy goods by prohibiting the differentiation between different kinds of fuels based on arbitrary taxonomy.
- Seek to achieve alignment of energy efficiency objectives, compatibility between energy efficiency measurement approaches, alignment of energy labelling measurement methods for appliances and accounting treatment for energy efficiency investments.
- Promote to the extent possible extent possible, linkages and compatibility between disparate carbon policy approaches and carbon accounting systems.

Trade Secrets

In a separate transmission of June 30, 2016, we have shared with the EU and U.S. a very detailed comparison and analysis of the recent EU Trade Secret Directive and the Defend Trade Secrets Act of 2016 in the U.S. Below we provide “Suggested Common Principles in the US and EU (the “Parties”) regarding Trade Secrets, Their Protection and Misappropriation” that could be incorporated into the TTIP agreement.

In the event any language herein is be used in any governmental document or publication, consider the following caveat: Nothing in this summary of common principles in the US and EU regarding trade secrets, their protection or misappropriation shall be construed to modify, or otherwise affect the interpretation of, the US-DTSA, the laws of any US state, the EU-TSD, or any EU Member States’ laws relating to the EU-TSD.

- A “trade secret” generally includes any type of information that meets the following requirements:
 - The owner or person lawfully in control of the information must have taken reasonable steps to maintain its secrecy;
 - The information must be secret in the sense that it is neither generally known to nor readily ascertainable by other persons who are within circles that normally deal with such information and who can obtain economic value from its disclosure or use; and
 - The information must derive economic or commercial value from its secrecy.
- The Parties recognize that trade secrets are a legitimate and often valuable form of intellectual property that deserve protection from misappropriation under US and EU Member State laws.
- Civil trade secret misappropriation, also known as the unlawful acquisition, use or disclosure of trade secrets, includes:
 - The acquisition of a trade secret of another, without the owner’s or lawful trade secret holder’s consent or authorization, by a person who knows or has reason to know that the trade secret was acquired by unlawful or otherwise improper means;
 - The disclosure or use of a trade secret of another, without the owner’s or lawful trade secret holder’s consent or authorization, by a person who--
 - Acquired the trade secret by unlawful or otherwise improper means;
 - Breached an agreement or duty to maintain the confidentiality of the trade secret;
 - Knew or had reason to know, under the circumstances and at the time of use or disclosure, that the knowledge of the trade secret was--
 - Derived or obtained from a person who had acquired the trade secret through unlawful or otherwise improper means or who was using or disclosing the trade secret unlawfully; or
 - Acquired under circumstances giving rise to a duty to maintain the secrecy of the trade secret or limit its use; or

- Derived or obtained through a person who breached any agreement or duty to maintain the secrecy of the trade secret or limit its use.
- Unlawful or improper means to acquire trade secrets include unauthorized and/or illegal access to, copying or appropriation of trade secret information, as further defined by EU or US laws.
- Unlawful or improper means to acquire trade secrets do *not* include: independent derivation, discovery or creation; or reverse engineering of a product or other object that is available publicly or otherwise lawfully in the possession of the acquirer, without any legally valid duty forbidding or limiting such reverse engineering.
- The Parties recognize that trade secret laws should include protections against liability for persons who acquire, use or disclose trade secrets innocently, including, for example, when a “downstream” customer or supplier produces, markets, imports or exports goods embodying trade secret information without knowledge, or reason to know under the circumstances, that the trade secret was acquired or used unlawfully or improperly.
- Exceptions to misappropriation liability also may be made for worker’s rights, union laws or other applicable state or national laws.
- The Parties recognize that limited immunity may attach for disclosure of trade secret information for the purpose of revealing or investigating suspected wrongdoing or illegal activity, and that the enacting Party may (or may not) in its discretion require any such disclosure to be made confidentially.
- Judicial authorities in misappropriation proceedings should allow measures, when justified by the trade secret owner or holder, to preserve the confidential nature of alleged trade secret information and restrict its disclosure to what is necessary for litigation purposes.
- Remedies for trade secret misappropriation may include, where appropriate under the circumstances and subject to applicable procedures, protections and limitations:
 - Provisional or precautionary measures against alleged misappropriators, including (i) the seizure of goods or other property necessary to prevent the dissemination of trade secrets and (ii) preliminary injunctive relief;
 - Compensatory damages, which may be measured by the trade secret owner’s or holder’s actual loss or prejudice, by the misappropriator’s unfair

profits or enrichment, or by a reasonable royalty for the acts of misappropriation;

- Potentially additional exemplary damages based on a misappropriator's willful, malicious behavior or moral prejudice to the trade secret holder;
 - Injunctive relief, including to halt or prevent misappropriation and to undertake affirmative actions or corrective measures to protect the trade secret; and
 - Other sanctions, where appropriate in response to claims or other litigation conduct initiated or pursued in bad faith.
- The Parties recognize that appropriate limitations periods and rules should be established to determine when misappropriation actions must be commenced.
 - The Parties further recognize the potential tensions between trade secret misappropriation laws and employee mobility and agree that certain exceptions may be made to ensure that employee mobility is not unduly restricted.