

## **TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP: STATUS OF NEGOTIATIONS AFTER THE 12<sup>th</sup> ROUND**

### **SUMMARY**

The 12<sup>th</sup> round of formal TTIP negotiations held in Brussels last week focused on regulatory coherence and investor-state dispute settlement. The technical complexity and controversial nature of the issues involved make progress difficult and slow. Many changes made to address problems raised in previous rounds failed to satisfy either the other side, stakeholders and/or civil society groups.

Negotiators vowed to intensify inter-sessional talks to increase the pace of negotiations and make an agreement by the end of President Obama's term possible. It is unclear whether the next administration would pursue TTIP. Only one candidate – Marco Rubio – has vowed to do so. The window of opportunity may be closing in the EU as well with coming changes in EU- and national-level leaderships, which will have a full plate of pressing challenges and crises.

This report updates the status of negotiations chapter-by-chapter and on each chapter and analyzes the overall outlook for TTIP based on official documents and statements, insider sources and leaks.

### ***Mixed signals on US commitment***

The 12<sup>th</sup> round of formal TTIP negotiations took place from 22-26 February in Brussels amid mixed signals on the US commitment to concluding an agreement before President Obama leaves office. Since the beginning of TTIP negotiations U.S. officials have professed this goal, warning that negotiations might fall into limbo if TTIP is not concluded this year. In January, European Commissioner for Trade Cecilia Malmström asserted that the EU had the willingness and political and human resources to do so, but was unsure the US was “prepared to commit.” The same month U.S. Ambassador to the EU Anthony Gardner stated that reaching agreement under the Obama administration was still possible. When meeting with Italian President Sergio Mattarella on February 8, Obama reiterated the importance of concluding TTIP, but did not specify a timeframe.

The next day, White House Press Secretary Josh Earnest surprised many by breaking with the official line and being the first administration official to publicly state “I do not believe that we’re going to reach a TTIP agreement before the president leaves office”. Assistant White House Press Secretary Brandi Hoffine then backtracked in an email that claimed Earnest was referring to the Congressional approval process, and that the administration remained committed to its original timeline. The Office of the US Trade Representative (USTR) also reconfirmed this goal, as USTR Michael Froman and US Secretary of State John Kerry launched a full-court press in Europe.

Whether Earnest blundered or simply misspoke, Europeans initially seized on his comment as an indication of the true state of affairs. As EU agriculture commissioner Phil Hogan put it,

the US “may have let the cat out of the bag in terms of the ambition of the American negotiators.” Europeans point to the US failure to table negotiating texts for each of the agreement’s chapters as further evidence of foot dragging. Froman pushed back in the run-up to the round, claiming the administration was “prepared to make every effort” to achieve an agreement provided the EU matched its “political will.” After the latest round, an EU Commission source told us they were inclined to accept the American explanation but remained skeptical that a deal can be struck before Obama leaves office.

### *Status of chapter negotiations*

The 12<sup>th</sup> round focused on two sensitive issues, further limiting the prospects for significant progress, let a breakthrough. Once again, the pace of negotiations will need to intensify in the coming rounds, and in between them, to reach the current goal of completing a bracketed consolidated agreement by the end of the 14<sup>th</sup> round in July. The current status of talks in each of the 24 areas currently under discussion, based on official documents, insider sources and leaks (all from the European side), is summarized below.

## **I. Opening Access to the US and EU Markets**

### ***Chapter 1: Trade in Goods and Customs Duties***

The European Union’s second tariff offer was leaked during the 12<sup>th</sup> round negotiations, revealing new details on phase-out and reciprocity goals. Most significantly, the EU is ready to eliminate its duties of 10% on passenger cars and 22% on light duty trucks – provided the phase-out period is longer than seven years – without seeking a reciprocal phase-out from the US.<sup>1</sup> However, the EU is seeking reciprocal phase-outs on agricultural goods, which along with some plastics account for most of the tariff lines with phase-outs exceeding seven years, and on some industrial goods like textiles. Proposed textile products subject to a seven-year phase-out include cotton t-shirts (12% duty), textured yarn (45%) and plastic-coated textile (8%). Finally, the EU tariff offer suggests “other treatment” for agricultural products like beef and chicken, most likely tariff-rate quotas.

### ***Chapter 2: Services***

Negotiators discussed the mutual recognition of professional qualifications.

A group of thirteen US and EU financial trade associations issued a joint statement calling for comprehensive coverage of financial services in TTIP, including regulatory coordination and market access. The groups argue that despite high standards in both markets, differences between the two systems can make it impossible to comply with both, leading to market fragmentation that other fora such as the EU-US Financial Markets Regulatory Dialogue and G20 have failed to address. The groups endorsed three key elements TTIP should include: (1) consideration of cross-border issues at the beginning of the policymaking process, (2) an exclusive focus on future regulations rather than changes to current ones, (3) a carve-out for prudential financial regulation (a key EU demand). The statement’s signatories include the Association for Financial Markets in Europe (AFME),

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<sup>1</sup> Currently, the US has a 2.5% duty on passenger cars and 25% tariff on light duty trucks. The US agreed to 25-year and 30-year phase-out periods for passenger cars and light-duty trucks respectively under its TPP deal with Japan.

BritishAmerican Business (BAB), British Bankers Association (BBA), Bundesverband der Wertpapierfirmen (BWF), European Banking Federation (EBF), European Services Forum (ESF), Financial Services Forum (FSF), Financial Services Roundtable (FSR), Institute of International Bankers (IIB), Institute of International Finance (IIF), Securities Industry and Financial Markets Association (SIFMA), TheCityUK, and the Trans-Atlantic Business Council (TABC).

### ***Chapter 3: Public Procurement***

Offers on public procurement were exchanged on Monday, February 29. Having already made concessions on US preferential treatment of small and minority businesses, the EU is pushing hard for the elimination of federal government “flow down” restrictions in order to allow EU companies to bid on local procurement conducted with federal money that is currently restricted to US companies. The EU is also demanding that sub-federal procurement be covered, but does not expect the US offer to do so (the US maintains it would need permission from the state and local levels to extend coverage). Our Commission source sounded somewhat exasperated by the inflexibility of the US position.

### ***Chapter 4: Rules of Origin***

Negotiations on textile tariff reductions detailed in a leaked EU document (see chapter 1) include a rules-of-origin dimension: the US is promoting a more restrictive “yarn forward rules” while the EU has a “fabric forward” approach, whereby two “substantial processes” suffice to establish origin. The EU also uses very liberal standards for certain textiles, like bed sheets, which only need to be printed in a given location to qualify as originating there.

## **II. Enhancing Regulatory Cooperation**

### ***Chapter 5: Regulatory Coherence***

Both the EU and US tabled proposals on regulatory cooperation during the 12<sup>th</sup> round. The US proposed establishing a regulator-to-regulator dialogue and reiterated requests that the European Commission (EC) publish legislative drafts for public comment before proposing them to the European Parliament (EP) and Council. The EU revised draft fell short of meeting this demand but did include a notice-and-comment requirement. As part of its “Better Regulation Agenda”, implemented last summer, the EC publishes delegated and implementing acts, which are subject to a public comment period, but not draft regulations and directives. Rather, the EC publishes legislative “roadmaps” – an approach it is seeking to maintain in TTIP. Another element from the “Better Regulation Agenda” in the EU’s tabled proposal is retrospective legislative reviews. Finally, the EU proposal includes requirements for social, economic and environmental impact assessments of regulations, as well as transparency and consultation provisions. According to EU chief negotiator Ignacio Garcia Bercero, the goal of the EU’s regulatory proposal is to “cut unnecessary costs without cutting corners”.

The biggest difference between the US and EU proposals is that the former seeks to create a dialogue between regulators, while the latter envisions a more formal and political “institutional set up for implementation”. An annex to the EU’s proposal leaked in Europe reveals plans to establish a ministerial-level process to push regulators to consult with each

other when developing measures that might impact US-EU trade, especially duplicative processes. The process would be subject to political oversight, include a “coordination structure” to identify which issues should be covered, and provide opportunities for input from a broad range of interested parties. The proposal also specifies that sector-specific provisions (chapters 8-16) would supersede this mechanism. Finally, this “coordination structure” would have no implementation power and would fully respect the US and EU “right to regulate”, addressing concerns raised after the EU proposed a similar “Regulatory Cooperation Body” in April 2015. The prospect of private sector and US government input in EU regulatory processes had elicited strong criticism from European TTIP opponents on the grounds that it would be antidemocratic and sovereignty infringing. The US was also not keen on the first proposal because of the political capital it would need to spend on prodding independent regulators to cooperate. The full text of this annex is to be tabled before the next round.

The EU’s revised proposal is unlikely to mollify TTIP opponents in Europe, who have linked regulatory cooperation efforts to the highly controversial issue of investor-state dispute settlement (ISDS). Their line of argument is that while ISDS threatens to dismantle democratically established regulations, regulatory cooperation processes would prevent these regulations from coming into existence in the first place.

#### ***Chapter 6: Technical Barriers to Trade (TBT)***

Negotiators have completed a consolidated text on TBT.

#### ***Chapter 7: Sanitary and Phytosanitary issues (SPS)***

Negotiators focused on ensuring more timely approval procedures and less regulatory duplication. They are consolidating the text, but the draft was not ready in time for negotiations during the 12<sup>th</sup> round.

Extrapolating the US position from the Trans-Pacific Partnership (TPP) SPS chapter, the Trans Atlantic Consumer Dialogue (TACD) has issued the following recommendations: 1) no provisions allowing imports of unapproved GMOs; 2) no low standard definition for use of scientific data; 3) ability to sue the other government if it fails to provide adequate resources for implementation and enforcement of SPS rules; 4) require publication of SPS audit results to enable third-party verification; 5) no pre-clearance for microbiologically high-risk imports like meat and seafood; and 6) binding animal welfare provisions.

#### ***Chapters 8-16: Chemicals; Cosmetics; Engineering; Medical Devices; Pesticides; Information and Communication Technology; Pharmaceuticals; Textiles; Vehicles***

Negotiators now have texts developed with regulators on sectoral regulatory cooperation and will begin negotiating on them in the next round. During this round negotiators identified objectives to promote regulatory alignment in all of these sectors, whether through equivalence, harmonization or shared approaches to new technology.

Given the reluctance of US and EU regulators to pursue regulatory cooperation within the TTIP framework, industry appears to be driving the agenda in many sectors. On pharmaceuticals, in a concept paper released on January 26 the European Commission adopted US and EU generics industry proposals for mutual recognition of clinical trials for “complex generics” (currently a US company would have to conduct a new trial to enter the EU market and vice versa). However, the FDA did not provide feedback in time to be discussed during this round.

On vehicles, U.S. and EU auto industry associations hope to help push for the mutual recognition of auto safety regulations by releasing a study in the next month that uses proprietary data from automakers to calculate the economic benefits.

On chemicals, US and EU pesticide producers are pushing for a common approach on endocrine disrupting chemicals (EDCs) to be developed under TTIP. In October, US and EU regulators held a first joint workshop in Brussels on EDCs including officials from the US Environmental Protection Agency (EPA), Department of State, Food & Drug Administration and National Institutes of Health on the US side, and officials from the directorates-general for the environment (DG ENVI), health and food safety (DG SANTE), and the internal market, enterprise, entrepreneurship and SMEs (DG GROWTH), Joint Research Centre, and European Chemicals Agency and European Food Safety Authority on the EU side. The US initially sought to link the workshop to TTIP negotiations but then backtracked.

Our EU Commission source noted that experienced negotiators were frustrated by the slow pace of progress in working through complex regulatory issues and procedures.

### **III. Creating New Trade and Investment Rules**

#### ***Chapter 17: Trade and Sustainable Development (TSD)***

The US tabled a proposal for two chapters – one on labor and one on the environment – that would be subject to dispute settlement. The EU's proposal was tabled during the last round and does not include a dispute settlement mechanism. Both proposals were discussed during this round. The European Parliament's International Trade Committee (INTA) Chairman Bernd Lange voiced support for a dispute settlement mechanism in this chapter as a last resort if all other resolution methods fail.

#### ***Chapter 18: Energy and Raw Materials (ERMs)***

There are no reports of any discussion of this chapter during the 12<sup>th</sup> round.

#### ***Chapter 19: Customs and Trade Facilitation (CTF)***

Negotiators have achieved a consolidated text on CTF that was discussed during the 12<sup>th</sup> round.

#### ***Chapter 20: Small and Medium-Sized Enterprises (SMEs)***

Negotiators have achieved a consolidated text on SMEs that was discussed during the 12<sup>th</sup> round.

#### ***Chapter 21: Investment Protection and Investor-State Dispute Settlement (ISDS)***

The two sides broached ISDS and EU's alternative proposal for an Investment Court System (ICS) for the first time during this round. Negotiators have not yet attempted to reconcile the two different models. EU chief negotiator Bercero claimed the two sides were "starting to identify areas of convergence", while chief US negotiator Dan Mullaney expressed a "full understanding of what the objectives are behind [the ICS]" but held back on any assessment.

ISDS is anathema to many Europeans and EU Trade Commissioner Cecilia Malmstrom has publicly "fully committed" herself to defending the ICS approach. Meanwhile, it would be difficult for the USTR to accept an alternative without undermining this part of the TPP agreement. Bernd Lange, chairman of the European Parliament's INTA, is "not very optimistic" that the US and EU can reach any agreement on ISDS given the strong opposition from the Obama administration and US business groups to the three key elements of the

EU's proposal: an appellate mechanism, enshrinement of the "right to regulate", and the public appointment of independent judges. Furthermore, the ICS has not placated ISDS opponents. Close to 300 lobby groups signed a petition calling for the elimination of any provision allowing businesses ability to sue governments. A group of 17 NGOs released a report labeling the ICS a "zombie ISDS". The EU's largest industry association, Business Europe is also not satisfied with ICS, which it sees as making it easier to protect state-owned companies and harder for businesses to launch complaints.

The issue has only become more controversial since the last round. Last month, TransCanada announced it was bringing a \$15 billion suit against the US under NAFTA's ISDS over the Obama administration's nixing of the company's planned Keystone XL pipeline. While the US has yet to lose an ISDS case, other governments have and, as Georgetown international law professor Robert Stumberg has put it, most cases are "a crap shoot" given the vagueness of the rules. Meanwhile, Michael Bowsher, a prominent British QC (Queen's Counsel) who formerly chaired the UK Bar Council's EU law committee, has concluded that TTIP represented a "serious risk" to the UK and other governments' decision-making authority over their public health services.

### ***Chapter 22: Competition***

Negotiators have achieved a consolidated text on SMEs that was discussed during the 12<sup>th</sup> round.

### ***Chapter 23: Intellectual Property (IP) and Geographical Indications (GIs)***

According to a leaked EU document, the EU has made many concessions on agricultural tariffs contingent on the US offering GI protection to more items, beyond wines and spirits.

### ***Chapter 24: Government-Government Dispute Settlement***

Negotiators have achieved a consolidated text on dispute.

## ***Growing stakeholder participation and mounting opposition in Europe***

Sixty-seven stakeholders presented during the stakeholder forum in Brussels on February 24 – double the number of presenters at the previous round. Presentations were organized into four groups: industrial goods and regulatory issues (19 groups, including three automotive associations); food and agriculture (14 groups, including U.S. dairy and sugar associations); services, investment and government procurement (18 groups, including AmChamEU); and rules issues (16 groups, including the U.S Chamber of Commerce).

European TTIP opponents met for three days during the talks (Feb. 22-24) to discuss strategies for defeating TTIP and secure a European Parliament rejection of the Comprehensive Economic Trade Agreement (CETA) between the EU and Canada. The meeting was organized by the Seattle to Brussels Network, European Digital Rights, European ATTAC Network, Transport & Environment and the Rosa Luxembourg Foundation. The groups' last meeting took place in July 2015. In a strategy shift, TTIP opponents plan to emphasize the agreement's pernicious effects for developing countries and multilateral trade. Meanwhile, Greenpeace EU held protests on the first day of negotiations, delaying a number of morning meetings. Its primary concern about TTIP is that it might undermine EU food safety, toxic chemical, healthcare and labor regulations. Dozens of protesters also interrupted Daniel Mullaney while he was giving a speech at a Transatlantic Business Council reception, surrounding him and singing a protest song from

the Les Misérables musical for 10 minutes. Opponents have collected over 3 million signatures against TTIP.

Opponents are targeting socialist & democratic (S&D) members of the European Parliament to oppose CETA and TTIP. S&D MEPS form the second largest group in the EP and are split over support for the TTIP.

Many MEPs were outraged at their continued lack of access to TTIP documents. At the beginning of December the US and EU agreed to open access to TTIP consolidated texts to all 751 members of the European Parliament in a secure reading room in the EP library. MEPs can take handwritten notes. Previously only EU member state officials could access the agreement in secure reading rooms at US embassies.

### *Continued low profile in the US*

By contrast to the extensive attention given to the fight over trade promotion authority and the conclusion of the Trans-Pacific Partnership agreement, the American media have played scant attention to the TTIP talks. For example, the New York Times made no mention whatsoever of last week's negotiations. Similarly, there seems to be minimal communication between the USTR and members of Congress regarding the substance of the TTIP talks.

Our analysis of all the presidential candidates' official websites and their written and oral statements show barely any mention of TTIP. Of all the presidential candidates only Marco Rubio has explicitly addressed TTIP in his platform, calling it a key to achieving American prosperity – one of the three pillars of his foreign policy doctrine (the other two pillars are strength and values). Rubio has consistently voiced public support for TTIP since 2013, in speeches, interviews and an article in Foreign Affairs. He supported granting TPA to President Obama for the purpose of finalizing TPP and TTIP.

Donald Trump, on the other hand, criticizes past and present trade agreements as “bad deals” and American negotiators as “idiots.” While he has not offered any specifics, his sweeping condemnation of the Washington establishment is a major part of his appeal to disgruntled elements regardless of ideology.

Trump's appeal to “Reagan Democrats” -- mainly workers in traditional industries heavily impacted by globalization who are socially conservative and strongly nationalistic and abandoned the Democrats in the 1980s to elect Ronald Reagan – is alarming many in the Hillary Clinton campaign. Part-time advisors of the Clinton campaign have told us privately this week that they are seeking a robust trade and economic policy response to limit and if possible reverse Trump's inroads among Reagan Democrats. They see this as key to her chances to be elected president and the party's chances to regain control of the Senate and – in the most optimistic scenario – the House of Representatives as well.

Her counterstrategy to Trump is likely to include a go-slow approach to all trade negotiations, a heavier emphasis on trade law enforcement, refusal to grant China market economy status, sidetracking the bilateral investment treaty negotiations with China, and strong measures to defend industries impacted by excess capacity such as steel and aluminum. The details are being worked out, mostly during meetings with senior campaign staff in New York, and there are reportedly some significant disagreements among the campaign staff. It is expected, however, that at least the outlines of this strategy will be revealed during the primary election campaigns in Michigan (March 8), Ohio (March 15) and Pennsylvania (April 26).

### ***13<sup>th</sup> round outlook: intensification***

At the end of the 12<sup>th</sup> round, US chief negotiator Dan Mullaney and EU chief negotiator Ignacio Bercero reiterated the goal of resolving outstanding issues by July and concluding the deal by the end of the year “if we can sustain our current intensified engagements” (Mullaney) and “provided the substance is right” (Bercero). In a sign of their commitment, they extended the 12<sup>th</sup> round into this week to resolve sensitive issues. While the round officially ended on February 26, negotiations are in fact continuing this week on public procurement and next week on rules of origin and intellectual property/geographical indications.

The next round is scheduled to take place in April, presumably after the scheduled meeting between President Obama, German Chancellor Angela Merkel and Commission President Jean-Claude Juncker at the Hannover Messe industrial technology trade fair. The leaders will likely provide a signal at that time on expectations for the TTIP negotiations. All outstanding issues would have to be resolved by July for the agreement to be concluded by the end of the year.

### ***TTIP's window of urgency narrows***

Despite the continuing American push for an agreement, TTIP's prospects will dim at the end President Obama's presidency and the Council's current Dutch presidency. The US political environment is unlikely to become any more favorable for the TTIP as election day approaches and could easily become hostile if the issue rises in importance. Meanwhile, the Council's next two presidencies may not prioritize TTIP. While the Netherlands placed TTIP back at the top of its trade priorities, the Netherlands, Slovakia and Malta presidency trio issued an 18-month strategic agenda listing TTIP as a goal but not a top trade priority: it was listed only fifth after the follow-up and implementation of Doha Round agreements, conclusion of WTO negotiations, China market economy status, and Canadian and Singapore FTAs. Another issue is how cohesive the EU can be while under such macroeconomic and political stress, which will only deepen in the near future. Finally, as our EU Commission source reminded us, there is in parts of Europe strong resentment toward the US over its Middle East and intelligence gathering activities.

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