

TTIP: STATUS OF NEGOTIATIONS AFTER THE 11th ROUND

TTIP reset

The 11th round of TTIP negotiations took place from 19-23 October at the Hyatt Regency in Miami, Florida against a backdrop of skepticism. By all accounts, TTIP negotiations had been lagging. According to the EU, this was due to the US focus on TPP to the detriment of TTIP. The US countered that the EU was to blame as it was holding back in the negotiations, especially over procurement and agriculture, and waiting to see the TPP agreement.

The 11th round was meant to be a fresh start of sorts. At a September 22 meeting, EU Trade Commissioner Cecilia Malmstrom and US Trade Representative Michael Froman agreed to jumpstart negotiations through an ambitious revision of tariff offers. With the TPP concluded, the US has shown reenergized interest in TTIP. During his visit to Spain ahead of the 11th round, Secretary of State John Kerry called on Europe to “come together around the TTIP”. After the 11th round Froman stated that the conclusion of TPP had led to an “even greater focus” on accelerating TTIP negotiations, with the TPP agreement providing a template approach to certain common issues, including labor and environmental standards, SOE disciplines and digital economy data flows.

Meanwhile, at the beginning of October the EU launched a new “Trade for All” strategy in response to fears that TTIP would undermine EU public interests and to mounting criticism about the process’ democratic deficit. The strategy is based on the three core values of *effectiveness* (support fair trade, responsible supply chains, the European Globalisation Adjustment Fund, and SME provisions), *transparency* (public release of documents and engagement with the European and national parliaments) and *values* (improvement in consumer, environmental, social and labor protection, sustainable development, human rights, and anti-corruption measures). The strategy is to be applied to TTIP, the FTA with Japan and BIT with China, as well as planned future negotiations with Australia, New Zealand, the Philippines, Indonesia, Hong Kong, and Taiwan; the modernization of agreements with Mexico, Chile and Turkey; and the revisiting of the FTA with Korea.

While initial plans to complete a consolidated TTIP agreement by the end of this year are no longer feasible, and no specific timeline beyond Obama’s term has been offered, in order to reach this goal negotiations will need to intensify in the coming months. The Miami round represented the first step of a renewed momentum.

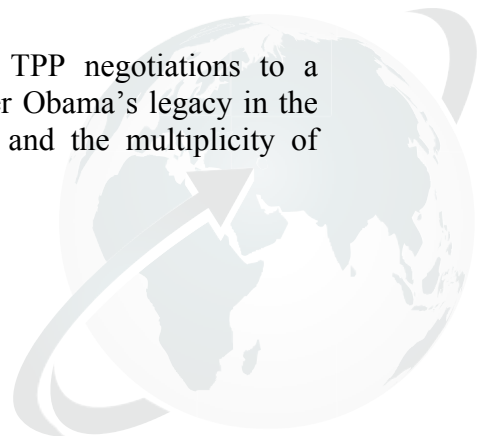
As the USTR demonstrated at the Atlanta talks that brought the TPP negotiations to a conclusion, it can be resourceful and determined in its efforts to bolster Obama’s legacy in the trade area. It was able to use the very complexity of the issues and the multiplicity of

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participants to fashion a broad compromise on TPP. How successful that effort will be in satisfying political requirements in the US and other key TPP countries remains to be seen. By contrast, however, the structure of the TTIP limits the scope for bilateral dealings and promotes more zero-sum calculations. The EU will have to agree to the terms on behalf of all 28 member states. The results will have to be approved by unanimity in the European Council and by a majority of the European Parliament. If the agreement is considered to be “mixed”, i.e. include shared competences, then it will also have to be ratified by all member state national parliaments and might be subject to a referendum in several states, including France, the UK, Poland and Greece. The lack of European cohesion in response to the large influx of refugees may foreshadow significant end-game complications on the European side as well.

The balance of this paper summarizes the current status of talks in each of the 24 areas currently under discussion. In addition to official information, we have combed through a number of leaks, all from the EU side.

I. Opening Access to the US and EU Markets

Chapter 1: Trade in Goods and Customs Duties

11th round discussions focused on the US and EU revised tariff offers to increase the number of products subject to duty elimination. The final goal is eliminate all tariffs but to offer special treatment for sensitive products. The goal for first offers, exchanged in 2014, was to eliminate duties on 97% of tariff lines. The EU's initial offer included 96% of tariff lines, of which 85% would be subject to immediate duty elimination, while the respective figures for the US initial offer were only 88% and 69%. Revised tariff offers brought the US tariff line coverage up to the EU level, indicating the US renewed commitment to accelerating TTIP negotiations. Both offers now cover 97% of tariff lines.

For the EU sensitive areas subject to a longer phase-out, i.e. more than seven years, include agricultural products such as beef, pork and chicken. US industry sources have expressed a willingness to accept a reduction of at least 6% on these products. EU sensitive industrial products include, according to a leaked European Commission (EC) report, energy-intensive chemicals. US sensitive agricultural products include sugar and canned tuna; sensitive industrial goods include athletic shoes, ball bearings, ceramics, glassware, and titanium used in defense and aerospace manufacturing. Sensitive areas will not be subject to further discussions until the end of negotiations.

Chapter 2: Services

Negotiators discussed the revised services and investment market access offers exchanged in July. A leaked EC round report on the 10th round indicated that the US revised proposal had not improved upon its initial proposal, especially with regard

to state-level access. It also indicated the US was defensive on maritime services, air services and the mobility of professionals. The US and EU have agreed that professional mobility will be addressed in a parallel agreement after the conclusion of TTIP since the US views it as an immigration issue. SEA Europe, the European ships and maritime equipment association, is pushing hard for an exemption for European ships to the Jones Act requirements¹ and removal of trade barriers such as the 50% tariff on ships repaired outside the US.

The US is pushing for greater market access for financial services, while the EU is focusing on securing a carve-out for prudential financial regulation. The EU is withholding its financial services market access offer until the US agrees to a new venue for deepening cooperation on financial services regulations. The US has offered tweaking forums like the Financial Market Regulatory Dialogue, but no progress on this issue has been achieved yet. In advance of the 11th round the American Insurance Association, Insurance Europe and the American Council of Life Insurers renewed their call for the full inclusion of insurance and other financial services in TTIP.

The American Federation of Teachers released a statement during the 11th round calling for greater transparency in negotiations and guarantees that local communities will maintain the ability to deliver services such as education as they see fit, echoing the concerns raised by European public interest groups, especially in Germany.

US stakeholders have also expressed concern over the European Court of Justice's ruling on October 6 that the framework of the US-EU Safe Harbor Agreement on data transfers is illegal.

Chapter 3: Public Procurement

Negotiators broached discussions on public procurement and agreed to establish a framework understanding of public procurement by January and to exchange initial offers in February. The EU is pushing for the inclusion of state-level procurement and a loosening of Buy America rules. The EU has indicated that tariff cuts for sensitive items would be made contingent on concessions in this area. The EU also identified three priority areas for greater procurement access: energy, transportation and environmental services. The EU has dropped efforts to eliminate US preferences for small and minority businesses.

Chapter 4: Rules of Origin

The US and EU exchanged proposals for product-specific rules of origin for industrial products. No details have been public, either officially or through leaks.

¹ The Jones Act requires all vessels transporting merchandise between US ports to be built and registered in the US, and owned and operated by US citizens.

II. Enhancing Regulatory Cooperation

Chapter 5: Regulatory Coherence

The leaked EC round report on the 10th round indicated little progress in this area, citing US intransigence. The US also failed to provide feedback on the EU's proposal for more regulatory cooperation modeled on the Transatlantic Economic Council. The leaked document indicated this area is a priority for France and Spain.

The European Commission recently released a proposal for greater intra-EU regulatory convergence that calls for more transparency and opportunities for notice and comments. These might be used as a springboard for TTIP negotiations.

During the 11th round the EU presented a "Better Regulation Agenda", while the US presented an Office of Management and Budget "Circular" on good regulatory practices. Basic misunderstandings still plague this area. During the round Deputy US Representative Michael Punke reiterated that the US expected the EU to implement a regulatory process akin to US Administrative Procedure Act procedures, even though the EU has already rejected this as impossible under EU regulations.

Chapter 6: Technical Barriers to Trade (TBT)

The US tabled a proposal on TBTs during the 11th round, as it did in the previous round, and negotiators made progress on completing a consolidated text. According to leaked EC documents, TBT is a priority for France and Spain.

Chapter 7: Sanitary and Phytosanitary issues (SPS)

The leaked EC round report on the 10th round indicated the US was too reluctant for any progress to be achieved in this area. Most of the controversial issues in this area will not be resolved until the end of negotiations. These include tariff reductions on sensitive meat and dairy products and regulatory issues surrounding the use of hormones in beef production and poultry sanitary washes. Regarding the latter, the U.S. Department of Agriculture has just submitted an application to the EU seeking the approval of peroxyacetic acid as a poultry wash. The EU currently only authorizes water. However, the EC has expressed interest in peroxyacetic acid washes as a means to fight campylobacter.

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

Discussions on sectoral cooperation were held in Washington DC before the beginning of the 11th round. The EU has produced at least one position paper for each of these sectors while the US has only issued one on textiles, preferring to

emphasize horizontal regulatory cooperation. Both US and EU regulators are reluctant to pursue sectoral regulatory cooperation as part of TTIP.

III. Creating New Trade and Investment Rules

Chapter 17: Trade and Sustainable Development (TSD)

The EU tabled a TSD offer during the 11th round even though the US did not reciprocate. The EU's offer had been ready since July, but EU negotiators did not table it then citing the absence of a proposal from the US. The EU TSD proposal was leaked after the round's conclusion. It includes a placeholder on enforcement that none of its publicly released position papers have included: "institutional aspects, including civil society participation, and dispute settlement aspects shall be developed at a later stage". Regarding labor, the EU proposal calls for the implementation of work councils, in line with an EU directive and AFL-CIO requests. Regarding the environment, the proposal includes a requirement that parties comply with seven multilateral environmental agreements (MEAs) (versus three out of seven in the TPP), including the Convention of International Trade in Endangered Species of Wild Fauna (CITES) and that obligations under these MEAs be subject to dispute settlement (in the TPP only CITES obligations are subject to dispute settlement). Unlike the TPP environmental obligations, the EU proposal does not prohibit fisheries subsidies. The EU proposal also includes a placeholder for an article on climate change that would take into account the results of the upcoming UNFCCC Conference of the Parties in Paris.

US and EU environmental groups have criticized the leaked proposal for inadequately protecting environmental regulations and called for environmental regulations to be explicitly shielded from any TTIP provisions, including state and ISDS challenges, even if they affect trade and consumption. EU environmental groups ClientEarth and Transport & Environment have suggested a "clean hands clause" to protect governments that implement environmental protection measures such as the EU's Emissions Trading Scheme coverage of aviation and Renewable Energy Directive's biofuels provisions; the US has challenged both. Similarly, the Sierra Club, Friends of the Earth Europe and Power Shift suggest a "carveout" to prevent the initiation of trade disputes against governments over environmental protection issues. Environmental groups would also like to see environmental obligations covered by state-to-state dispute settlement and trade sanctions, with an avenue for individuals and civil society organizations to request the initiation of dispute settlement over violated environmental obligations in TTIP. In recent FTAs the US has agreed to allow individuals to submit claims of environmental violations to a bi-national secretariat, but these claims do not automatically trigger dispute settlements.

Chapter 18: Energy and Raw Materials (ERMs)

According to the leaked EC round report, access to energy is a priority issue for Poland, Lithuania and the Czech Republic. Negotiations in this area have been difficult and remain general. The EU is pushing for specific provisions in a separate energy chapter, while the US is reluctant to do so.

Chapter 19: Customs and Trade Facilitation (CTF)

The US tabled a CTF proposal during the 11th round.

The U.S. Chamber of Commerce and BUSINESSEUROPE have jointly identified this area as a priority, arguing that eliminating CTF barriers “could be up to six times more beneficial than removing tariffs”. They have proposed a series of measures they would like to see included in TTIP:

- 1) A single window for electronic submission of all the information needed to comply with customs and related government agency requirements
- 2) Joint development of future rules and standards, including the definition of “high risk”, screening methods and IT requirements
- 3) A US-EU Trusted Trade Program using a single online application and validation process
- 4) Common import and export data requirements
- 5) Simplified customs declarations requirements, including a “risk-based, multilayered approach” at the border for customs, a separation between the release of goods and payment collection, a “One Government at the Border” process for inspections, harmonized and minimal entry and exit summary declarations, and waivers for trusted traders
- 6) Use of the first sales rule to determine customs values, simplified rules for the determination of preferential and non-preferential origin, and use of last substantial transformation to determine non-preferential origin
- 7) A separate and expedited customs process for express shipments
- 8) A *de minimis* threshold of at least \$800 for duties, taxes and fees
- 9) Elimination of financially prohibitive restrictions on business-to-consumer flows between the EU and US
- 10) Customized customs clearance and self-assessment; ability to complete customs declarations collectively for goods at the end of the period of importation rather than one by one
- 11) Simplified processes for AEO or C-TPAT registered companies, including waived entry and pre-departure summary declarations, enabling of general prior risk analysis and declarations, and reduced financial and bureaucratic costs so that more SMEs can qualify
- 12) A “Transatlantic Business Facilitation Committee” including government officials and private sector representatives tasked with cutting red tape and facilitating supply chain connectivity in a forward-looking mechanism

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

The 11th round did not specifically address this chapter.

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

The EC has internally proposed an Investment Court System (ICS) that would replace ISDS and include:

- 1) a first instance and new appeal tribunal
- 2) publicly appointed, highly qualified judges
- 3) a more precise definition of issues over which investors may bring cases
- 4) stronger guarantees of states' right to regulate
- 5) greater transparency, with online postings of hearings and comments

US industry groups have voiced strong opposition to the replacement of ISDS, which has served US multinational corporations well, and argue that ICS would weaken investment protections.

However, the EU has not yet formally tabled the ICS proposal to the US. ISDS has thus far been excluded from TTIP discussions pending completion of the EU's internal deliberations. Now that this process has concluded the EU is expected to table the proposal shortly.

Chapter 22: Competition

Negotiators broached the subject of subsidies and SOEs during the 11th round.

The US remains concerned about the EC's probe into unfair competition in its e-commerce sector, initiated in May.

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

According to the leaked EC round report on the 10th round GIs are a priority issue for Italy, France, Greece and Poland. Negotiations in this area remain difficult. The EU is emphasizing greater protection of GIs while the US is focusing on market access.

Chapter 24: Government-Government Dispute Settlement

The United Steelworkers (USW) union has raised concerns about an internal EU memo that indicates the EU is considering granting China market economy status. In an email to Froman, USW president Leo Gerard argued that such a move would negatively impact US exports to the EU, that TTIP negotiations should address this, and that a change in the EU's treatment of China should be subject to dispute resolution and compensation for adverse effects on US producers and workers.

12th round outlook: achievement

The 11th round laid the groundwork for major advances negotiators aim to achieve during the 12th round, which is scheduled to take place late January/early February. In preparation for the round numerous inter-sessional and Froman-Malmstrom meetings are planned and a stocktaking meeting is to be held in December.

Transparent limitations

The EU has made a big commitment to transparency, posting its proposals online and engaging civil society and citizens in hundreds of public meetings. A group of 75 US organizations and academics sent a letter to Froman urging the US to match the EU's level of transparency by making its proposals publicly available and releasing consolidated draft texts after each round. The US has rejected the EU proposal to do the latter.

However, due to the series of leaked EU documents during and following the 11th round the EC announced it will no longer provide electronic versions of its round reports, which will henceforth only be available to review in secure reading rooms.

TTIP's window of urgency

In terms of larger strategic dynamics shaping the negotiations, TTIP is one component of a broader goal of reviving transatlanticism as a counterbalance to the US pivot to Asia, a complement to NATO and a boost for EU institutions. The latter have recently been buffeted by crises that have undermined European solidarity and stability, from Greece's economic meltdown to Russian military threats in Ukraine and the record influx of refugees. In this context TTIP presents an opportunity to stimulate the European economy while cementing and projecting shared US-EU values. The EU also faces the pressure of reaching agreement before 2017, when France and Germany will hold elections and the UK might hold a referendum on its EU membership. Meanwhile, the process for concluding the TPP has shown that the Obama administration will push very hard to achieve an agreement for legacy purposes, understanding that final political agreement is possible only after a new President and a new Congress have taken office.

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