B Brief

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July 28, 2016

Negotiators Advance TTIP Agenda but Several Key Issues Remain

by Michael McKeon

The 14th round of negotiations of the Transatlantic Trade and Investment Partnership (TTIP) concluded earlier this month with an air of uncertainty, as U.S. and EU negotiators committed to continue the process of resolving differences and consolidating texts without concrete plans for when or where the next round will take place. Negotiators tabled a record number of text proposals this round and made progress on important technical details related to market access, regulatory issues and trade rules. However, the parties remain deadlocked on several critical elements of the agreement, including market access for services, government procurement and investment protection. U.S. Trade Representative Michael Froman and EU Trade Commissioner Cecilia Malmström met again in Brussels earlier this week for a post-round stocktaking. They maintain their stated goal of reaching at least a political agreement – a nearly complete, agreed-upon framework missing technical details – by the end of 2016, a prospect that seems increasingly unlikely as the United States gears up for elections and anti-trade sentiment continues to rise on both sides of the Atlantic.

The EU and United States had aimed to conclude the 14th TTIP round in an advanced state of negotiations, with the expectation that each side would have put forward proposals for all chapters of the agreement. The parties came close to reaching that goal, with only a few texts outstanding and a plan to exchange additional proposals in the coming weeks. In a July 15 press conference, Chief EU TTIP negotiator Ignacio García Bercero stated that the parties now know that TTIP will have up to 30 chapters, most of which are in some stage of consolidation.

Much of this round was focused on **regulatory cooperation**. By the end of the week, the parties had tabled nearly all proposals in this area of negotiations. The EU put forward a text on Institutional, General and Final Provisions, which provides for the creation of a Transatlantic Regulators' Forum to track and review regulatory practices, identify and facilitate future cooperation, and encourage input from public stakeholders in the regulatory process. The United States agrees, in principle, on codifying regulatory cooperation in TTIP, but the administration of U.S. President Barack Obama has been reluctant to establish such an institutional mechanism, for the ostensible reason that it does not want its agencies to be subject to international political pressures that might interfere with their discretion to regulate. Regardless of the form that a regulatory cooperation framework might take, the United States is keen to open the EU process to input from stakeholders on both sides of the Atlantic, through a practice akin to the U.S. notice and comment procedure, or public consultations on the potential impact of proposed rules and regulations. U.S. government and industry sources argue that input from diverse stakeholders leads to better regulations, and that notice and comment procedures provide opportunities for potentially affected parties to point out unforeseen shortfalls or offer recommendations for improvements. Both the European Commission and the European Parliament are resistant to this proposal, however, claiming that such a procedure would give undue influence over regulations to business interests and subvert the role of legislative institutions in advancing regulation. The EU and United States continue to work out these differences in text consolidation, with both fundamental principles and technical details still up in the air.

The parties made significant strides in **sectoral regulatory cooperation** negotiations. The United States and EU are discussing cooperation in nine specific industry sectors: chemicals, cosmetics, engineering, medical devices, pesticides, information and communications technology (ICT), pharmaceuticals, textiles, and motor vehicles. The EU submitted new regulatory cooperation proposals for five of these sectors, along with an annex proposal for a sixth. Although the United States does not make its proposals public, officials announced that U.S. negotiators had also tabled several regulatory texts during this round, including a proposal on ICT. The EU has not yet submitted a proposal for the ICT sector because the European Commission is still evaluating the potential impact that the newly devised Privacy Shield – a legal and regulatory framework for trans-Atlantic data transfers – might have on these provisions. EU officials expect to put forth a proposal in this area before late September, when Malmström and Froman meet for their next major stocktaking session.

Negotiators continued to plod through discussions on **technical barriers to trade** (TBT) and **sanitary and phytosanitary** (SPS) issues. The parties are working off of consolidated texts for both of these chapters, but face major hurdles in rectifying differences in conformity assessments – which include procedures such as product testing, inspections and certifications – and in measures related to food safety and plant and animal health. The treatment of genetically modified organisms, or GMOs, remains particularly contentious, both because of the complex, technical nature of approval processes and because of political sensitivities in the United States and EU.

Negotiators are making incremental progress on **market access** discussions related to tariffs. Before the 14th round, the parties had agreed to eliminate 97 percent of duties, the majority of which would zero out upon the agreement's entry into force. Much of the work this round focused on moving tariff lines that are currently slated for extended phase-out periods of up to seven years into the category of tariffs that will be eliminated immediately. The remaining 3 percent of tariffs that are not yet designated for elimination primarily cover a range of industrial and agricultural goods. Here, too, U.S. and EU negotiators are seemingly at an impasse. The EU has requested that the United States eliminate within seven years the industrial tariffs that currently have no defined phase-out period, but U.S. negotiators insist on maintaining these reservations until the EU does the same with its sensitive agricultural tariffs. U.S. officials continue to push for full elimination of trans-Atlantic duties, but Trade Commissioner Malmström and other officials have stated publicly that the EU will likely keep some agricultural tariffs off the table.

The EU put forward a proposal on **financial services** during the 14th round, departing from its previous stance of withholding market access provisions until the United States would agree to consider regulatory cooperation for the sector in TTIP. The EU proposal coincides with changes in the Financial Markets Regulatory Dialogue, a forum wherein U.S. and EU officials have discussed regulatory issues since 2002. In its new incarnation, dubbed the Joint EU-U.S. Financial Regulatory Forum, the body serves to "improve transparency, reduce uncertainty, identify potential cross-border implementation issues, work toward avoiding regulatory arbitrage and toward compatibility, as appropriate, of each other's standards, and, when relevant, promote domestic implementation consistent with international standards." However, neither party has moved from its original position on financial services regulatory cooperation in TTIP – the EU calls for its inclusion and the United States maintains that it is better addressed in an outside forum. U.S. and EU negotiators will work toward consolidating market access offers in the coming months, with the expectation that an agreement on the appropriate place for regulatory issues will be reached during the so-called end game of negotiations.

Negotiations on **government procurement market access** have not moved substantially since the United States tabled its offer during the 12th TTIP round in February. Chief U.S. negotiator Dan Mullaney asserts that the current proposal is the most ambitious procurement offer the United States has made in any trade agreement to date, including the Trans-Pacific Partnership (TPP). The EU insists that the offer is insufficient, and warns that without further concessions, the parties will not be able to enter the negotiations' end game. In particular, the EU is seeking access to procurement opportunities at the Federal Aviation Administration (FAA) and in rail transportation, including Amtrak, and to sub-federal contracts that utilize "flow-down funds," or federal money allocated to states for local projects. The EU continues to push for greater access to procurement at all levels of government (i.e. federal, state and local) and for waivers to procurement preference rules such as Buy America. The United States will be hard-pressed to meet these demands, however, given the political sensitivity of preference programs and constitutional limitations regarding federal mandates on state practices.

TTIP negotiators met to discuss **services market access** during the week of July 18th, in part because U.S. and EU services specialists were in Geneva for negotiations on the plurilateral Trade in Services Agreement (TISA) during the official TTIP round. Meaningful movement in this negotiating area is critical to the success of TTIP, given that services account for the majority of economic output in both the United States and the EU. Negotiators have exchanged two sets of offers over the past three years, but have not made significant headway in opening their respective markets. The chief U.S. and EU negotiators have publicly emphasized the need for an ambitious outcome in services, but have bemoaned the lack of progress in negotiations thus far.

The results of discussions on **trade rules** have been mixed, with meaningful progress in chapters on **customs and trade facilitation**, **small and medium-sized enterprises** and some aspects of **intellectual property rights (IPR)**, and with slow movement in provisions on **investment** and **geographical indications (GIs)**, among others. The EU submitted a new proposal on **energy and raw materials**, which includes provisions that promote energy sustainability, establish rules on the diversification of energy supply, and guarantee the liberalization of trade in energy, namely liquefied natural gas (LNG). U.S. officials maintain that a discrete chapter on energy is unnecessary, because LNG exports are de facto facilitated through any U.S. free trade agreement, or FTA, and because provisions on goods and services in this sector can effectively be addressed elsewhere in the agreement.

The United States and EU have put forth proposals on **sustainable development** (or **labor and the environment)** that go beyond commitments the parties have made in other bilateral trade agreements or at the World Trade Organization. During the chief negotiators' press conference on July 15th, García Bercero stated that the parties had had "very intensive discussions…with the hope to achieve a very ambitious outcome" in this chapter. During the 14th round, the EU updated its sustainable development proposal with provisions to address climate change. The United States is limited in commitments it can make on issues related to greenhouse gas emissions because of guidelines set forth in the Bipartisan Congressional Trade Priorities and Accountability Act of 2015, also known as Trade Promotion Authority, or TPA, but the EU proposal seems to be in line with commitments the United States made in the 2015 Paris Agreement on climate change. A remaining point of contention in the proposed TTIP chapter on sustainable development is enforcement. The United States uses measures such as sanctions to address failure to uphold commitments on labor and the environment in its FTAs, but the EU is reluctant to agree to such enforcement provisions. TTIP proponents point to this chapter as a standard-setter for global rules, and negotiators are aware of the weight it will carry when legislators in the United States and EU vote to ratify the agreement.

TTIP negotiations have taken place against an unpredictable, and at times, tumultuous backdrop this year. Anti-trade sentiment has risen on both sides of the Atlantic in response to economic changes brought on by globalization, and political candidates across countries and parties have capitalized on the trend, often decrying trade as a negative disruptive force. The result of the United Kingdom's referendum on EU membership, or Brexit, has complicated TTIP for both negotiating parties. The EU and United States continue to push for a comprehensive, ambitious agreement and, if possible, its timely conclusion, but each party's leverage and calculus in negotiations may change without the UK in play. Great Britain is a principal trade and investment partner of the United States and generates an outsize share of the EU economy. It is the United States' fourth largest market for goods and services – after Canada, Mexico and China – and accounts for over 60 percent of the EU's net exports in financial services alone. EU member state trade ministers will meet in Bratislava, Slovakia at the end of September to assess the state of TTIP negotiations and determine whether they are in an advanced enough state to progress, and the European Council, made up of European heads of state, will convene in October for the same purpose. The coming months are critical to the fate of TTIP. Although negotiators have committed to continue consistent, diligent work through August and September, real political will at the highest levels of government and meaningful concessions from both parties will be necessary to bring the agreement to a successful conclusion.

Michael McKeon is project manager for transatlantic relations at the Washington, DC-based Bertelsmann Foundation. Michael.McKeon@bfna.org