



September 22, 2016

Trans-Atlantic Trade at the Crossroads: Prospects for TTIP in 2016 and Beyond

by Michael McKeon

Trade ministers from European Union member states will convene in Bratislava, Slovakia later this week to discuss the fate of the Transatlantic Trade and Investment Partnership (TTIP). The goal of the summit is to assess whether negotiations are in an advanced enough state to enter the so-called end-game, in which the United States and European Union would resolve remaining differences and agree upon final texts. EU Trade Commissioner Cecilia Malmström and U.S. Trade Representative Michael Froman maintain that successful conclusion of the agreement is possible within the final months of Barack Obama's presidency, but a number of complex, interrelated political and procedural factors increasingly suggest otherwise.

After three years of negotiations, TTIP is at a critical juncture. If the agreement is not concluded this year, the results of upcoming elections on both sides of the Atlantic will unquestionably disrupt its course – either stalling negotiations or halting them altogether. EU and U.S. negotiators' flexibility in TTIP is hampered by the uncertain status of other, recently concluded mega-trade deals, namely the Trans-Pacific Partnership (TPP) and the EU-Canada Comprehensive Economic and Trade Agreement (CETA). The unclear effects of a British exit from the EU complicate and inject a new dimension of urgency into the process, as they will likely recalibrate U.S. interests and EU leverage in negotiations over time. Instability and threats in other parts of the world – from Moscow's kinetic and cyber aggressions to Pyongyang's recent nuclear tests – highlight the need for meaningful trans-Atlantic cooperation, a trust that TTIP's success could cement or its failure could fracture. TTIP supporters and opponents alike recognize that the coming months may definitively determine the agreement's prospects, and both sides are pushing their agenda to advance or end negotiations.

For TTIP to succeed, negotiators must resolve a number of critical points of disagreement, and political leaders must effectively communicate what TTIP is and what its actual effects might be. In Europe especially, popular opinion must see significant change. Such a shift is unlikely in the near term, though, given that public opposition is so widespread and its sources so diverse. This week's summit in Bratislava presents an important opportunity for EU trade ministers to formulate a clear assessment of the state of negotiations, an honest valuation of their interests in a trade deal with the United States, and a realistic approach to seeing it through.

Current State of Negotiations – Major Challenges Remain Ahead

Given the complexity of TTIP and the relatively short time that negotiations have been underway, the United States and European Union have made meaningful progress on many of its chapters. Having agreed to eliminate 97 percent of trans-Atlantic tariffs, the parties have only the most sensitive duties on agricultural and industrial goods left to sort out. Text consolidation is moving forward in several areas of the agreement's regulatory pillar, which stands to have the greatest economic impact on U.S., EU and world markets. In particular, mutually agreed-upon standards and testing processes for automobiles, pharmaceuticals and medical devices are, at this point, very likely to be included in the final agreement. The European Union and United States have put forth proposals related

to labor and the environment that go beyond commitments they have made in other trade agreements to date, and are in an advanced state of negotiations for areas such as customs and trade facilitation, small- and medium-sized enterprises, and intellectual property protection.

For all of these points of convergence, there are many areas that remain gridlocked, all of which are economically consequential or politically sensitive. Negotiations on market access for services have yielded little progress, even though each party has tabled two offers over the past three years. The United States and EU also continue to disagree on the most efficient and judicious way to resolve investment disputes. The European Commission calls for the establishment of a standalone court with a small roster of permanent judges and an appeals mechanism. The Obama administration is reluctant to accede to a precedent-setting international court, though, and maintains that the current Investor-State Dispute Settlement (ISDS) system is effective and should not be substantially changed. Another point of contention is the protection of geographical indications (GIs), which has been a major offensive interest of the EU since the start of negotiations. Both in the EU and United States, the agricultural industry has outsize political influence, and European producers of goods such as wine, cheese and cured meats want the names of their products be protected in the EU and U.S. markets. The United States argues that its trademark system is sufficient for the protection of EU intellectual property, pointing out that many European producers successfully navigate it and are highly competitive in both markets. Malmström has publically signaled in the past several months that the EU may scale back this demand – in a July speech, she said the EU was “willing to work within the U.S. legal system,” and in a recent letter to the European Wine Companies Committee she effectively wrote the same.

The United States and EU remain at a serious impasse over government procurement. After three years of negotiations, the parties do not agree on the relative openness or potential accessibility of each other’s markets. The EU maintains that meaningful U.S. concessions at both the federal and state level are critical to the agreement’s progress, and the Commission has linked its interests in this area to U.S. demands in others, such as tariff-free access to the EU for U.S. agricultural goods. In the last TTIP round, which took place in Brussels this summer, the United States put forward its first government procurement proposal, selling it as the most ambitious offer it had made in a trade agreement to date. However, the EU insists that the proposal is far from sufficient, as it provides little, if any, access to purchases covered by Buy America provisions, maritime services, federal aviation and ground transportation, or state-level contracts.

The U.S. administration is rather limited in what it can offer on government procurement, though, for procedural, political and strategic reasons. Procedurally, the federal government cannot dictate to states how to use their own funds for procurement within their borders. Although states may voluntarily open their procurement markets to non-U.S. bidders, few do so in a meaningful way. Increasing competition among goods and services providers by taking bids from the EU may make economic sense, but it incurs a political risk that few governors or state legislators are generally willing to take. Politically, U.S. purchasing preference systems such as the Buy America Act and Jones Act, which encompasses a range of maritime services, are widely considered by politicians to be off-limits. A TTIP agreement that would scale back either of these laws would arouse intense congressional scrutiny, at best, and never reach the Senate floor, at worst. Strategically, the United States is reluctant to offer substantially more on procurement to the EU than it has to its 11 trading partners in TPP, so long as that agreement lingers unratified by the United States and other signatories. Canada, in particular, has sought greater access to the U.S. procurement market since the days of negotiations for the North Atlantic Free Trade Agreement (NAFTA), and the United States is wary of doing anything to further complicate TPP’s already narrowing prospects. The European Union reasonably argues that a comprehensive trans-Atlantic trade agreement should liberalize the largest procurement market in the world, but the United States will be hard pressed to meet this challenge. To move beyond this impasse, the U.S. administration and European Commission must balance a range of competing interests, domestically and abroad, and effectively adjust market access expectations.

Anticipating the Potential Complications of Brexit

The British referendum on EU membership, or Brexit, has prompted a recalculation, even if unofficially, of the interests and demands of the negotiating parties in TTIP. As the European financial center and the primary gateway for foreign investors into the EU, the United Kingdom has traditionally been an important, economically liberalizing force within the bloc, cautious of overly burdensome regulation and supportive of free trade. The yet-undetermined

economic effects of Brexit span a range of possibilities. The UK hopes to maintain an open trade and investment relationship with the EU, but the benefits of the single market are linked to – and perhaps even contingent upon – the free movement of people. Migration was one of the main drivers of the vote for an exit, so a settlement that is economically and politically palatable to both the UK and EU will be difficult to reach. Any separation of the UK from the EU will weaken the latter's TTIP negotiating position vis-a-vis the United States, given the size and influence of the British market for U.S. goods and services within the EU. The EU and United States are moving forward with negotiations as planned, but Brexit unquestionably changes the cards on the table and will only complicate TTIP as time progresses.

Public Opinion – Volatile and Consequential

Public opinion toward TTIP varies significantly between the United States and the EU, among EU member states, and even within national and state borders. In the United States, public awareness of TTIP is quite low overall. Many people have never heard of the agreement and relatively few can describe its content, what negotiators aim to accomplish, and what its potential effects might be. To the extent that the public is versed on trade issues, many focus on the NAFTA and TPP, currently the subject of public political debate and presidential campaign rhetoric. Multiple surveys show that, while Americans are generally unaware of TTIP, many support deeper trans-Atlantic trade relations with the EU in principle.

In the last several years, criticism of international trade, in general, has been on the rise in the United States. U.S. manufacturing of products from cars and televisions to lamps and clothing has declined over the past decades, and trade is often blamed for this shift. Although international trade has certainly played a role, other factors, such as automation of manufacturing, corporate tax policy, the development of complex international supply chains and the rise of internet commerce, have contributed as much, if not more, to changes in the U.S. manufacturing landscape. Reasonably upset and unable to alter the course of globalization, people mobilize against international trade, attributing changes in the domestic economy to seemingly unfair advantages of countries like China and Mexico.

In the European Union, public opinion toward international trade and TTIP is diverse and complex. Support for the agreement is high in countries like Denmark, Sweden, Ireland and the Netherlands, where economies are supported primarily by exports, and myths about TTIP that are popular in other parts of Europe have not quite taken hold. Eastern European countries such as Poland are enthusiastic to have improved access to the U.S. market and attract American investment, and many welcome greater Western presence in their country to balance against Russian influence. The UK has been one of the most active proponents of TTIP to date, as a relatively liberalized economy and the number one source of foreign direct investment in the United States. Brexit – which by most public accounts will move forward – has significantly weakened the UK's weight in the EU bloc, so its traditional support for free trade may no longer be relevant. In nearly all EU member states, public support for TTIP remains above 50 percent. Although reaching a comprehensive agreement in a reasonable timeframe will be difficult, TTIP seems to have promising prospects for eventual passage across the EU.

In France, public opinion of TTIP has steadily declined over the past year or more. The French are particularly concerned about the introduction of American genetically modified organisms (GMOs) into the EU market and the threat of costly lawsuits, made possible through ISDS, and the associated loss of regulatory independence. France is perhaps the primary proponent of extending the protection of European GIs to the U.S. market; although many of its proprietary names are already protected, others, such as Burgundy and Chablis, are not. The French government's opposition to TTIP has become increasingly vocal, with recent statements from President François Hollande and Minister of State for Foreign Trade Matthias Fekl calling for a complete suspension of negotiations.

Perhaps nowhere is public opinion toward TTIP more charged than in Germany. As the world's third largest exporter, the country has experienced particularly positive economic benefits through international trade. Despite the good fortune that Germany has reaped, though, opposition to TTIP is high and present throughout society. In October 2015, approximately 150,000 people gathered in Berlin to protest the agreement, and just last weekend, more than 100,000 rallied in cities across Germany to do the same, with a wider focus on TTIP, CETA and globalization. Many fear that TTIP will lower standards related to consumer protection, health, labor and the

environment, under the common, but inaccurate assumption that standards in the United States are, across-the-board, lower than those in Europe. Like in France, Germans are wary of ISDS mechanisms, particularly after several high-profile cases related to energy production resulted in ongoing arbitration and millions of euros in legal and procedural fees. According to public and private sector stakeholders on both sides of the Atlantic, a degree of anti-Americanism runs through the TTIP opposition movement as well. Mistrust of Washington's intelligence-gathering actions and anxiety about the reach of American multinational corporations translates, for some, into a general antipathy to deeper relations with the United States.

A sentiment increasingly prevalent not only in Germany, but across the EU as well, is that Brussels makes difficult policy decisions while member states bear the burden of their execution. Some feel that European integration toward an "ever-closer union" has gone too far, and that important issues that would otherwise fall under national jurisdiction are decided by unelected bureaucrats in Brussels. Frustration is particularly acute in Germany, which served as financier during the sovereign debt crisis and has absorbed more migrants and refugees from the Middle East and Africa in recent years than any other EU member state. Some view TTIP as yet another top-down order from Brussels, and are therefore resistant to see it implemented in Germany. The agreement will directly affect each member state's economy and society, and these stakeholders are anxious about not having a say in its content and reach.

Another noteworthy source of anti-TTIP sentiment is what many in both the EU and United States view as a lack of transparency in negotiations. Because the talks are not open to outside stakeholders, some claim that the parties might not be working in the public interest. However, trade negotiations must necessarily be carried out with a degree of confidentiality. Negotiations are a give and take process, with each party seeking the greatest gain at the lowest cost. The parties make incremental steps to reach a middle ground, ideally sorting out what is economically and politically feasible for a mutually beneficial agreement. Furthermore, confidentiality allows each party to take actions that might not be popular among particular constituencies, but benefit society and the economy as a whole. If the negotiations were entirely public, every industry and organized group of stakeholders would try to carve out exceptions to protect its interests, and TTIP would create little, if anything, new. Political leaders recognize the public's concerns, however, and try to address them through stakeholder engagement initiatives and multiple communication channels. Each TTIP round includes public stakeholder events, where civil society organizations and the media meet with negotiators to learn about TTIP's content and express their interests and concerns. The EU, in particular, has sought to inform the public of TTIP's development. At the end of 2015, the European Commission held public consultations on its approach to investment protection, and has since tried to incorporate its findings into negotiations. The Commission also publishes text proposals, position papers and chapter summaries on its website, as a further effort to engage the public on TTIP negotiations as they progress.

The Negative Feedback Loop of Trade and Elections

Anti-trade sentiment seems to reach its peak during election cycles, when politicians capitalize on economic woes that are attributed – sometimes simplistically – to trade agreements, and promise to rectify them if elected to office. Campaign rhetoric often mischaracterizes the effects of international trade, and in turn, exacerbates voters' opposition to it. National elections will take place in the United States this November, and in France, the Netherlands and Germany in 2017. Politicians in each country are railing against trade, in general, and against recently concluded agreements or those under negotiation, in particular. In the United States, Hillary Clinton and Donald Trump both decry TPP as a bad deal, and in Europe, politicians like Sigmar Gabriel of Germany will likely make the demise of TTIP a central pillar of their campaigns. Although trade is always a politically contentious topic, its current treatment seems especially bitter.

The particularly negative characterization of trade in campaign rhetoric may be reflective of wider populist sentiment in the United States and Europe. Or perhaps savvy politicians see the expediency of promising to navigate globalization better than Obama, Merkel and other leaders. Regardless, trade discussions in election campaigns do not bode well for TTIP's prospects in 2016 or 2017. TTIP is at a juncture both critical and precarious. Given the level of public scrutiny that comes with elections, the sensitive, gridlocked issues like government procurement and GIs will likely take on greater weight and complicate negotiations even further.

Paths Forward – 2016 and Beyond

Although Froman and Malmström continue to work toward a comprehensive trade and investment agreement by the end of 2016, the prospects of such an outcome are very slim. Even if the parties were to reach a high-level solution to the most contentious issues that remain, the technical work necessary for TTIP's regulatory pillar alone would take months to sort out.

A more realistic option would be a political agreement, much like what the EU concluded with Canada in CETA in 2015. The structure of the agreement would be determined, major points, such as market access for services and the treatment of GMOs would be agreed upon, and technical details would be left to negotiators to work through in the following months.

If a political agreement is not concluded during the Obama presidency, stakeholders should expect negotiations to stall in the first half of 2017 and face a high level of uncertainty in the second half of the year. Regardless of who wins the White House, the next president will have to appoint cabinet and other senior administration positions critical to TTIP negotiations – including U.S. Trade Representative and Secretary of Commerce – whose approval in Congress will undoubtedly take several months. Presumably, the new president will pause negotiations to take stock of their current state and develop a way forward with the stamp of the new administration. By the time the U.S. administration is ready to move forward, Europe may have a new political landscape that is significantly less favorable toward TTIP.

A new U.S. administration and European Commission – if both parties remain committed to a TTIP agreement – may decide to carry negotiations beyond 2017. Three years is a relatively short time for the creation of a major trade and investment agreement. By comparison, TPP took approximately eight years to finalize, and TTIP is arguably more complex both in content and procedure. If the United States and European Union take time to thoroughly address remaining challenges, create mutually agreeable convergence of their complex regulatory systems, and set global trade rules that are forward-looking and transferable to third countries, TTIP may end up – beyond a comprehensive trade and investment agreement – the foundation for a new period of positive and effective trans-Atlantic cooperation.

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