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TTIP Negotiators Make Small Gains, No Major Breakthroughs in Final Round before US Elections

by Michael McKeon

U.S. and EU trade officials gathered in New York City during the week of October 3-7 for the 15th round of Transatlantic Trade and Investment Partnership (TTIP) negotiations. The round, which may have been TTIP's last for the foreseeable future, followed a consequential month of trade summits, protests and high-level gamesmanship on both sides of the Atlantic. For the first time since negotiations began in 2013, senior European Commission and U.S. government officials have publicly acknowledged that TTIP will not be concluded before the end of U.S. President Barack Obama's term. However, the United States and European Union remain committed to finalizing the agreement, and the parties now aim to advance negotiations as much as possible before the next U.S. president takes office in January 2017.

The new reality of TTIP's 2016 prospects shaped the 15th round, during which negotiators focused primarily on areas where text consolidation seemed most achievable. Chief U.S. negotiator Dan Mullaney reported in an October 7 press conference that more than 20 negotiating groups had made meaningful progress in resolving conceptual and technical differences in previously tabled texts. Although negotiators removed brackets from a number of chapters – that is, converged elements of EU and U.S. proposals into common texts – no major breakthroughs were made in the more contentious, politicized issues of the agreement, such as market access for services, government procurement and investment protection. With more or less official recognition that TTIP negotiations will carry into and perhaps beyond 2017, these issues will most likely be left to the next administration to resolve.

Negotiations for **market access** yielded mixed results in this round, with incremental, but important progress in some areas and continued gridlock in others. The United States tabled an offer on **rules of origin**, which determine how much of a good must be produced or processed in the United States or the EU to qualify for preferential trade treatment. Discussion of this chapter reflects forward movement in negotiations, as its scope and application are necessarily dependent on the establishment of other market access principles. Negotiators reportedly made progress in shortening phase-out periods for some **tariffs**, as well, but remain at odds over the elimination of sensitive duties for some industrial and agricultural goods.

Improved access to the U.S. **government procurement** market has been a primary offensive interest of the EU since TTIP negotiations began more three years ago. Last month, U.S. Trade Representative Michael Froman and EU Trade Commissioner Cecilia Malmström met in Brussels to discuss possible outcomes for the so-called endgame of negotiations, and the EU had expressed hope that the United States would make meaningful concessions in this area, in particular. Froman did not waver, however, and maintains that the current proposal on government procurement is both the most ambitious offer the United States has made to date and represents about as much as the U.S. government can ultimately do. The EU is seeking greater access to federal and sub-federal procurement opportunities, such as large-scale transportation and infrastructure projects and contracts that utilize “flow-down funds,” or federal money allocated to states for local projects. In this round, negotiators sought to narrow the gap between the proposals, without expecting to reach a settlement that would be acceptable to both sides.

Market access for services was another area where the European Commission had sought meaningful concessions from the United States during last month's Malmström-Froman bilateral meeting. Here, too, the parties are in disagreement over critical market access issues, such as mutual recognition of professional credentials and which services should be open to trans-Atlantic competition. Negotiators made limited progress in select areas, such as cross-border and financial services.

Negotiations for TTIP's ambitious **regulatory pillar** yielded particularly good progress during the 15th round. After the talks, Mullaney reported that negotiators had resolved conceptual and language differences in **regulatory cooperation, technical barriers to trade (TBT), good regulatory practices, and regulatory compatibility for the pharmaceutical, auto and medical devices** sectors. Mullaney's counterpart, chief EU negotiator Ignacio García Berceño echoed the claim that progress had been encouraging in these and other regulatory areas. Both negotiators emphasized that TTIP will not diminish the parties' regulatory protections for the environment, consumers, workers and public health and safety, and that the agreement should create a regulatory "race to the top" for the EU, United States and the rest of the world.

Although negotiators made progress on complex technical issues related to regulatory cooperation and coherence during the 15th round, there are several consequential elements of this pillar that remain problematic. Six of the nine specific sectors under negotiation – namely, **chemicals, cosmetics, information and communications technology (ICT), pesticides, engineering and textiles** – have seen little progress to date. The United States tabled its offer on textiles during this round and is still evaluating the proposal that the EU tabled in July. Perhaps the most significant point of disagreement in regulatory negotiations is the EU's proposal to create a **Transatlantic Regulators Forum**, a body that would have regulators meet annually to discuss potential cooperation across a range of sectors. According to senior U.S. officials, the United States is reluctant to support the creation of such an institution because it does not want regulators to be subjected to political pressure that might interfere with their discretion to act. During this round, negotiators focused on common provisions in the EU and U.S. proposals and other points of relatively easy convergence.

Progress in TTIP's broad **rules pillar** has consistently been incremental and mixed. During the 15th round, negotiators made forward movement in **customs and trade facilitation, state-to-state dispute settlement, energy and raw materials, small- and medium-sized enterprises (SMEs), and sustainable development** (also known as **labor and environment** provisions). The TTIP chapter on **competition** is reportedly near completion, according to a September 19 statement by EU Competition Commissioner Margrethe Vestager. This generally uncontroversial area of negotiations has made headlines in recent months, after the European Commission directed the Irish government to seek 13 billion euros in back taxes from American tech giant Apple. The decision drew criticism from a range of public officials and industry stakeholders on both sides of the Atlantic, and has raised concerns about potential impacts on TTIP negotiations.

Negotiators reportedly held brief and relatively inconsequential discussions on the treatment of **geographical indications (GIs)**. In recent months, Malmström has signaled a retreat from her previous, firm negotiating stance and has signaled a willingness to work within the U.S. trademark system and to scale back the number of GIs for which the EU is seeking protection. The question of GIs carries outside political weight in the EU, and, in any event, is an issue that will likely be settled only in the final stage of negotiations. Likewise, negotiators continued to search for points of agreement in TTIP's **investment protection** chapter, but did not make any significant breakthrough. The European Commission is seeking the establishment of an institution with a small roster of permanent judges and an appeals mechanism. The United States is reluctant to accede to such a court, and maintains that the current Investor-State Dispute Settlement (ISDS) system is effective and should not be substantially changed. Like GIs and government procurement, this area of the agreement will almost certainly be decided at the highest political level and during the endgame stage of negotiations.

The 15th TTIP round made relatively few headlines, but represented an important affirmation of the parties' will to continue negotiating in the face of an uncertain future. The United States and EU have not decided whether to hold another official round before the end of 2016, and the results of the upcoming U.S. elections could have game-changing ramifications for TTIP and broader U.S. trade policy. Negotiators aim

to continue working through intercessional discussions and informal meetings in order to sort out technical details and resolve fundamental conceptual differences. The inevitable delay that upcoming elections in the United States and several EU member states will create may weaken TTIP's momentum and lower the parties' ambitions. It is critical that both the European Union and the United States use the coming months to achieve as much as possible and lay the foundation for an ambitious, high-standards agreement that leaders on both sides of the Atlantic will be enthusiastic to adopt and conclude.

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