



European
Commission

Transatlantic Trade & Investment Partnership Advisory Group

Meeting report, 10 November 2015

1. Update and forward look

The Chair provided an update on the 11th round of negotiations held in Washington and Miami from 14-23 October. This marked the start of a more intensive phase of the negotiations. The EU's objective is still to conclude with the Obama Administration, which will require very significant work in 2016. He also set out the rough timetable for high level political contacts to take place between now and the next negotiating round, which is likely to be in February 2016.

The following points were raised in discussion:

- Investment protection and Investment Court System. The Chair described progress on the proposal, and agreed to share with advisors a summary of the recent changes to it. There was no discussion on this with the US during the 11th round. In response to questions the Chair explained again that no kind of investment agreement can compel a change of regulation, but only compensation if the investor wins the case. The purpose of explicitly including the right to regulate in the EU text is to reinforce the point that the act of regulating cannot be considered a breach of investment protection standards. This limits the risk to the state of an obligation to compensate when there has been a regulatory measure. The Chair noted that comments are still welcome on the proposal, and agreed that a further discussion could be held at the next meeting in January 2016. Advisors asked for an explanatory note of the changes between the former and the latest version of the text.
- Regulatory cooperation. The Chair explained that the EU would be looking to refine its proposals on good regulatory practices and regulatory cooperation in advance of the next round. One member asked to what extent this would take into account the new EU Better Regulation package. The Chair explained that the proposals would need to be the appropriate level for an international agreement: any commitments need to be balanced and need to work with the existing systems in the EU and the US. This could be discussed at the next meeting in January 2016.
- Public health. One member noted that while tariffs may not be intended to protect public health, the removal of tariffs on unhealthy products (such as alcohol, tobacco and unhealthy food) would result in a price reduction and there could be negative public health consequences. Trade policy should contribute to better health, therefore tariffs should not be reduced on these products. Concerning wines and spirits, it will also be important to ensure that health advice can be included in relevant policy processes, especially on product labels, as previously discussed with experts. The Chair explained that there is high domestic production of both alcohol and tobacco in the EU. Increasing or maintaining tariffs on imported products merely increases consumption of domestic products. A tariff is therefore not the right instrument to discourage consumption. The Chair agreed to seek an update on the progress of the Wines & Spirits discussions with regards to health interests.

- Competition. Several members expressed interest in the negotiations on competition, in particular subsidies and a possible link with the raw materials chapter. The Chair took note.
- Agriculture. One member asked for further detail on the agricultural discussions. The Chair noted that there would be further consultations led by DG AGRI on the issue of US butter duties.
- Access to documents. Some members asked for an update on access by Member States and the European Parliament to TTIP consolidated texts, following the new US transparency system deriving from Trade Promotion Authority. The Chair explained that the Commission is working towards wider and more efficient access to TTIP documents for Member States and the European Parliament.

2. Sustainable development

Mónika Hencsey, Head of Unit and TTIP lead for Trade & Sustainable Development, introduced the EU proposal as published¹. This is a direct follow-up to the recent "Trade for All"² publication. It goes further than any of the EU's past agreements with other partners in both breadth and depth. For example, it includes extensive thematic articles on core labour rights, and commitments on waste chemicals, which has not been done before. The EU expects to enter into more detailed discussions with the US side when they make their own proposal. Ms Hencsey explained that the Commission would still welcome further input from the advisors.

The following points were raised in discussion:

- Sustainable Development Goals (Agenda 2030). Some members asked what relationship there is between the proposal and the UN Sustainable Development Goals (SDGs) agreed recently in September 2015. Ms Hencsey explained that it would be unlikely to be effective to reference every SDG in trade agreements.
- Public health. One member expressed disappointment at the absence of provisions to protect public health in the proposal, suggesting (as noted in written submissions to DG Trade) that it should recognise existing international legal instruments on the control of tobacco, alcohol and unhealthy foods. Whilst the EU proposal refers to Agenda 2030 it does not elaborate further on its public health target in the text, covering only environmental and labour aspects. Furthermore the article on Anti-Microbial Resistance (AMR) now proposed by the EU for the Sanitary and Phytosanitary (SPS) chapter mentions several times the importance of AMR for sustainable development demonstrating that sustainability has a

¹ <http://trade.ec.europa.eu/doclib/html/153923.htm>

² <http://trade.ec.europa.eu/doclib/html/153846.htm>

public health perspective. Ms Hencsey noted that health is taken into account in the labour and environmental commitments in the proposal, as well as specifically in the context of waste chemicals and occupational health and safety.

- Labour rights. From a trade union perspective the proposal is broadly positive and reflects input to the Commission. However, it must be clear what the commitments mean at state level in the US. Some stakeholders would like to see the US sign up to ILO core labour standards. More broadly it would be helpful to mainstream principles of sustainable development into other chapters, such as public procurement. Ms Hencsey agreed that the EU would consider mainstreaming important, and that "Trade for All" includes a commitment to taking sustainable development into account in all relevant areas of free trade agreements. She recommended further discussions about the implications at US state level.
- Enforcement. Several members noted the importance of strong enforcement provisions, which are not yet included in the proposal (though Commissioner Malmström had referred to it in her communications). One member highlighted a recent written submission³ on enforcement issues, and asked about the relationship between enforcement and content in the negotiations. Ms Hencsey explained that the EU would not negotiate one for the other. The Chair agreed that the group should come back to examine enforcement issues in early 2016, when the topic is likely to be discussed by negotiators.
- Voluntary sustainability insurance schemes. One member explained that these schemes (set out in Articles 20-21) need to be third-party verified and science-based to be of value, and asked why certain schemes were recommended in the proposal. One member added that such schemes are not effective in comparison to proper regulation. Ms Hencsey explained that commitments on Corporate Social Responsibility (CSR) and voluntary insurance schemes are on top of respecting existing law and regulations. The reference to types of schemes (fair and ethical trade, eco-labels) is general and intended to provide examples: there is no recommendation for any specific scheme. The need to take science into account would be found elsewhere in the agreement.
- Health and safety at work. One member appreciated the inclusion of a commitment regarding health and safety at work in the proposal. The Chair confirmed that the regulatory part of the agreement would not cover health and safety at work.

³ <http://www.transportenvironment.org/publications/sustainable-development-and-%EF%BF%BCenvironment-ttip>

3. SPS

Ulrich Weigl, Deputy Head of Unit for Agriculture, provided an update on the Sanitary and Phytosanitary (SPS) negotiations covering food safety and animal and plant health. Negotiators have been continuing to work through the consolidated text to refine the language and remove brackets. He noted the EU proposal for an article on Anti-Microbial Resistance (AMR).

The following points were raised in discussion:

- Pesticides. Mr Weigl explained that as part of the sectoral negotiations, negotiators are discussing ways for the Environmental Protection Agency in the US and its counterparts in the Commission and Member States to cooperate effectively. The EU does not wish to duplicate work already done in other fora such as the OECD or Codex. However, it may be interesting for both sides to explore the scope for cooperation on minor uses, exchange of data and related matters.
- AMR. Several members welcomed the proposal for the AMR article. One hoped that the US would support this as they have done in the G7, but noted that this article alone will not solve the problem of AMR. One member felt that while TTIP should increase trade of agricultural products and could thus increase the use of antibiotics, it is not clear whether this proposed article can properly tackle that issue. Mr Weigl confirmed that the G7 attention was a useful backdrop. Engagement with the US on AMR would be an important signal to third country trading partners.
- Precautionary principle. One member noted that the EU and US approaches to science and risk are often perceived to be very different, and asked for more detail on the negotiations in this area. Mr Weigl agreed that there are differences, but the discussion with the US is about how to make process of using science in decision-making more open and transparent, with involvement of all stakeholders. For the EU, it is important to keep the distinction between risk assessment and risk management clear, and to maintain the balance of the WTO SPS Agreement.
- Standards. One member asked for clarity on international standards in SPS. Mr Weigl explained that for the EU and for the WTO-membership, international standards in this field mean first and foremost the Codex Alimentarius, the OIE and the IPPC which are internationally agreed standard setting bodies. These are a valid reference for setting domestic measures in compliance with WTO.
- Specific trade concerns: exports of beef, fruit and vegetables, Grade A dairy. Some members asked for updates on these issues regarding EU exports to the US. Mr Weigl noted that the Commission is considering ways to group and therefore speed up the approval of

applications by Member States for beef exports, for Grade A dairy exports, and for a number of other commodities.

The Chair suggested an expert-level discussion on the progress of the SPS chapter in spring 2016, subject to interest from members.

4. TBT

Pablo Neira, TTIP lead for Technical Barriers to Trade (TB), provided an update on the negotiations. He explained that the basis of the discussions is the WTO TBT Agreement, and the objective is to make commitments that go beyond this. The EU and US have fundamentally different approaches to standards and conformity assessment, for example the interpretation of what is an "international" standard. The EU is aiming to achieve substantially increased cooperation between EU and US standard-developing organisations (SDOs), increased use of international standards (meaning ISO, IEC), and removing conflicts of interest between SDOs and conformity assessment bodies (CABs). On conformity assessment, the EU is aiming for a reduction in the costs of mandatory third party conformity assessment in the US, especially for components needing to be certified a second time when part of a product. The EU is also seeking to ensure that conformity assessment procedures are less burdensome wherever possible.

The Chair emphasised that this is an area in which the EU has important offensive interests. EU companies frequently find that they cannot rely on international standards (as interpreted by EU) in the US. Third party conformity assessment in the US is generally more common and often mandatory, with the exception of cars. Even if in theory, EU CABs can provide services in US, in fact the costs of conformity assessment in the US are very high especially in machinery and engineering. So this is a very important area for the EU, and a pragmatic way forward needs to be found. The CETA text is a helpful guideline to the EU's approach.

The following points were raised in discussion:

- Labelling. One member expressed some concerns regarding how the article on marking and labelling in the EU's proposal on TBT would work. Mr Neira explained that the EU is trying to build on the WTO TBT Agreement to make sure any marking and labelling is not more trade restrictive than necessary to achieve the desired objective. At the moment there are sometimes complaints that rules can be set essentially to protect domestic manufacturers.
- Stakeholder engagement. One member recommended close contacts with EU SDOs and CABs as an agreement in TTIP could affect their business models.

5. Any other business (AOB)

Consumer protection law and TTIP

One member asked for clarifications on how TTIP would affect EU consumer protection law. Norel Rosner, legal officer of DG JUST, gave some explanations regarding the functioning of the EU's Rome I regulation on consumer protection in the context of transatlantic trade. There are three possible scenarios for disputes:

- a) EU consumer travels to US and buys goods from shop established in US. In case of a complaint, the applicable law would be designated by the conflict of law rules of the seised court. An EU court would apply Rome I to decide what law is applicable to the contract. In this case, it depends either on the choice of the parties, or the law of the seller (therefore US). Given the consumer chose to travel, and was therefore active, it is very unlikely that EU law would apply.
- b) US subsidiary established in EU. In situations involving a conflict of laws, in the case of offline sales choice of law applies. If the consumer is deemed to be passive, the applicable law is subject to mandatory provisions of consumer law in the Member State where he has his habitual residence, assuming these offer higher protection to the consumer than the law chosen. In the case of online sales, it would be the same if the consumer is deemed to be passive. This is the case when a consumer is clearly targeted, e.g. if a website directs activities to the consumer's Member State of habitual residence. If the consumer is active, then the protection afforded by Rome I does not apply.
- c) Website based in US, no EU subsidiary. If the consumer is clearly targeted and therefore passive, then the consumer enjoys Rome I protection. One should also consider in what court the dispute might be judged. Until recently, defendants based outside EU could only be sued based on national law. Now consumers can bring a case against non-EU defendants in accordance with EU law on the matter, the Brussels I regulation (recast). Accordingly, if the consumer is passive then the case may be brought before an EU court. In this case choice of law is still possible, but subject to mandatory provisions of the consumer's home Member State. However, if the consumer is not targeted, and is therefore active, then the protection afforded by Rome I does not apply.

The Chair explained that it should be clear that TTIP will not change the existing situation with regards to consumer protection law and transatlantic transactions. The Commission has never said nor wished to imply that EU consumer protection law would apply to all transatlantic transactions after TTIP. We should be careful not to mis-advertise TTIP's benefits for consumers by suggesting that TTIP will extend EU consumer protection to US.

Regarding the practice of "forced arbitration", Mr Rosner was clear that the EU Directive⁴ on unfair terms in consumer contracts refers to such clauses as examples of terms which may be regarded as unfair, since it restricts consumers' right to legal action by taking a case straight to arbitration. TTIP will not change this.

CETA and new Canadian administration

One member asked for an update on the status of CETA, now that the new Canadian government is in place. The Chair explained the Commission awaits the view of the new government on CETA and the issue of investor-state dispute settlement. Legal scrubbing on EU side is well advanced, and of course the Commission is in regular touch with the Canadian authorities. In terms of next steps, significant parts of the text still need to be translated on the EU side before the procedures for ratification can begin. Some members emphasised the importance of rapid implementation of CETA to allow the benefits to start accruing to the EU economy.

⁴ 93/13/EEC.

Attendees

Members of the TTIP Advisory Group

BERGELIN Erik (Manufacturing, alternate for Ivan Hodac)
CATELLA Eleonora (Business, alternate for Luisa Santos)
DE POUS Pieter (Environment)
FEDERSPIEL Benedicte (Consumers)
GOYENS Monique (Consumers)
HINZEN Louis (Food and drink, alternate for Mella Frewen)
KERNEIS Pascal (Services)
LOGSTRUP Susanne (Health)
MASSAY-KOSUBEK Zoltán (Health, alternate for Nina Renshaw)
NELISSEN Guido (Labour and trade union)
PETIT Arnaud (Agriculture, alternate for Pekka Pesonen)
TOUBEAU Cecile (Environment, alternate for Jos Dings)

Commission officials

GARCIA BERCERO Ignacio	Chair, TTIP Chief Negotiator
DAWKINS Miranda	Official
NEIRA Pablo	Official
WEIGL Ulrich	Official
HENCSEY Mónika	Official
TALKO Wojtek	Official
KOBER Klemens	Trainee