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One Year into the TTIP Negotiations: Getting to Yes

By Simon Lester

In early 2013, the Transatlantic Trade and Investment Partnership (TTIP) negotiations were introduced with great fanfare in President Obama's State of the Union speech.[1] The world's two largest economic zones would be united in a trade and investment pact, which would generate new economic growth at a time when it was desperately needed. Negotiations began in July of that year,[2] with promises that this negotiation would not drag on endlessly, as some other trade talks have.

We are now just over one year into the process, with the sixth round of talks having just taken place July 14–18 in Brussels and the seventh round to be held from September 29 through October 3 in Washington. It is time for an evaluation of what has been achieved. Are the talks progressing as rapidly as hoped? Are the hurdles surmountable? Will this giant free-trade zone actually come to fruition?

This bulletin examines the current state of the TTIP talks relative to expectations and in the larger context of the world trading system. It describes some of the main stumbling blocks that have arisen and makes suggestions for moving the process forward.

The Bold Beginning

When the TTIP was announced, there was great excitement in the trade establishment, which saw an opportunity for success where other negotiations had stalled or failed. Typically, U.S. trade negotiations face domestic opposition from those worried about competition from producers in countries with low wages. But with Europe's high wages, that would not be an issue here. With good reason, then, many observers felt that the TTIP would have an easier time in the domestic political process than some other trade agreements have experienced.[3]

Wary of trade initiatives that had dragged on for years, government officials on both sides proclaimed that this initiative would move quickly, to be completed on "one tank of gas."[4] Given the common ground of the European Union and the United States on many issues, it seemed plausible that the TTIP could avoid some of the more contentious points that had held up other talks. Some government officials projected that the agreement could be finished before the end of 2014.[5]

In terms of its substance, the report of the U.S.–EU working group examining a potential agreement set out the following scope:

> A comprehensive agreement would include ambitious reciprocal market opening in goods, services, and investment, and would address the challenges and opportunities of modernizing trade rules and enhancing the compatibility of regulatory regimes. An agreement of this kind could generate new business and employment by significantly expanding trade and investment opportunities in both economies; pioneer rules and disciplines that address challenges to global trade and investment that have grown in importance in recent years; and further strengthen the extraordinarily close strategic partnership between the United States and Europe.[6]

As for its potential economic impact, one economic study estimated that "an ambitious and comprehensive TTIP could bring significant economic gains for the EU (€120 billion) and the US (€95 billion)," representing "a 0.5% and 0.4% increase in EU and US GDP respectively by 2027 relative to their levels without the TTIP in place."[7]

Beyond these specific economic gains, there was also a broader goal. As EU Trade Commissioner Karel de Gucht put it, the TTIP "will be an important way for us to shape regulations, norms, including on investment, and ultimately values that govern economic exchange worldwide."[8] Thus, the TTIP was about laying out a framework for a new, modernized vision of the world trading system.

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Reality Sets In

Not surprisingly, however, the reality of a U.S.–EU trade negotiation was much more complex and difficult than the early cheerleading suggested. A number of problem areas quickly arose. Even before negotiations started, there were some issues where it was clear that progress would be difficult. For example, U.S. food producers and government officials continued their efforts to attack strict EU rules on approval of genetically modified foods, but the Europeans made clear they would not change their stance.[9] And Europe maintained its long-standing position that "cultural" products should be excluded from the negotiations.[10] In addition, some important issues were excluded from the outset by mutual agreement, including agricultural and aircraft subsidies, which have been the source of long-running trade disputes.

Other contentious issues arose after negotiations began:

- The European Union pushed for the United States to liberalize its financial services markets, but the United States (led by the Department of Treasury) resisted, on the grounds that it needed to maintain strong domestic regulation.[11]
- The European Union argued for stronger protections for its "geographical indications," such as French champagne, while U.S. groups objected to the EU demands.[12]
- U.S. efforts to contest EU data privacy protections were undermined by the NSA spying scandals, which caused resentment throughout Europe and threatened to derail the talks entirely.[13]
- The investor-state dispute settlement mechanism caught fire as an issue in the European Union, forcing the European Commission to begin an internal public consultations process.[14]

Regulatory Hurdles

Beyond these specific disputes, the major issue everyone talked about in the TTIP was its effort to address regulatory, or nontariff, trade barriers. This, people said, was where the real gains from a U.S.–EU trade deal lay.[15] One widely cited study suggested that in a scenario where around 50 percent of nontariff measures and regulatory divergences were dealt with, EU GDP could be 0.7 percent higher in 2018, representing an annual potential gain of €122 billion ($158 billion), and U.S. GDP could see a 0.3 percent gain per year in 2018, representing an annual potential gain of €41 billion ($53 billion).[16]

What they did not say, though, was how these barriers could be addressed. As it turned out, the U.S. and EU negotiators seemed to have different ideas in mind. For the European Union, this was mostly about regulatory cooperation, in which existing and new regulations are made more compatible. For example, car producers in both countries could be subject to the same safety tests, rather than different tests for each market. The European Union proposed an institutional mechanism to address these issues. By contrast, the U.S. negotiators focused more on improvements to the regulatory process, such as having the European Union adopt a "notice and comment" procedure for draft regulations, as is used in the United States.[17]

This clash of visions has left some doubt as to whether anything can actually be achieved in this area. It is no doubt true that there are large economic gains to be had from addressing regulatory trade barriers. But before any progress can be made, both sides need to agree on a focus and assess what can realistically be achieved.[18] The European Union is right to point out inefficiencies from regulatory divergence, and to propose institutions to address these problems going forward. But certain U.S. regulators have voiced objections to cooperation between regulatory agencies, and not all may be willing to go along.[19] On the other side, the United States makes strong arguments for more transparency in the EU system. But expecting one-sided change from the European Union in this area may be asking too much. As a result, a middle ground is hard to find in all of this.

The Larger Picture: The TTIP and the World Trading System

But the TTIP is not just about U.S.–EU trade issues. It is also about the functioning of the world trading system as a whole. If the United States and the European Union go their own way through the TTIP, what are the implications for everyone else? If they set a new standard, what happens to the existing standard?

One view of this issue is that a successful TTIP might be bad for multilateralism, as it would lead to trade diversion and fragmentation. In this view, bilateral trade liberalization undermines the multilateral system. Conversely, a TTIP failure might provide a jump-start for governments to take WTO talks more seriously. Having looked for an easy way out with bilateral and regional talks—and not finding one—governments might be forced to turn back to the WTO and make tough choices, such as cutting agriculture subsidies.

Another view, though, is that success in the TTIP could pave the wave for expanding this new model beyond just the United States and European Union. In this way, it could provide the impetus for multilateral trade liberalization as the TTIP and other free-trade agreements get folded into the WTO system.

Ultimately, the impact of the TTIP on the WTO is hard to predict. To some extent, it depends on the precise form the TTIP takes. The TTIP negotiators must recognize that the WTO provides a solid framework for global, nondiscriminatory trade rules, and this should not be undermined.

Current Prospects and Recommendations for the TTIP

Focusing on the narrow issues of when and whether the TTIP will be finished, current projections are now for completion by the end of 2015.[20] Experienced trade observers may see such an extension of the deadline as similar to the endless delays in the WTO's Doha Round. And in the trade community, many people are looking at the U.S. trade agenda, and prospects for trade liberalization generally, with a good deal of skepticism these days.[21] No action from Congress on Trade Promotion Authority is expected before the 2014 mid-term elections, and even afterwards there are doubts about how serious the Obama administration is with regard to trade policy. It is conceivable that trade negotiations of all types will mostly stagnate until the next administration.

But despite the delays and doubts, we should not consider the TTIP a failure at this point. There are substantial hurdles, but they can be resolved. On some issues, compromise might be in order. The U.S. and EU trade negotiators need to identify a reasonable agenda and push hard to conclude it. This means making choices about what can and cannot be accomplished; and for those issues that will be addressed, making concessions and finding a middle ground. In this regard, this bulletin offers the following recommendations.

- *ISDS should be removed from the negotiations*

One of the most controversial issues in the TTIP talks is the investor-state dispute settlement (ISDS) mechanism, which combines substantive international legal principles with a mechanism for foreign investors to challenge national government action in an international tribunal. In defending the inclusion of ISDS in the TTIP, proponents of ISDS have made two main arguments. They have referenced problems with treatment of foreign investment in some Eastern European countries, arguing that despite the sophistication of U.S. and EU courts, special protections are still needed; and they have expressed concerns about the implications for investment treaties with other countries, such as China, of not having ISDS in TTIP, suggesting that exclusion from TTIP would undermine ISDS in other treaties.

These arguments are not sufficient to justify insistence on having ISDS in the TTIP. First of all, there are serious questions about the usefulness of ISDS in any context, as the evidence for its value in promoting foreign investment is weak. In the U.S.–EU context, it seems even less important.[22] Furthermore, a bilateral investment treaty (BIT) with China is fairly speculative at the moment and should not be a factor in the TTIP talks.

Even if the United States and European Union could agree on the content of ISDS, which will be a challenge, the controversy it has caused in the European Union (and may cause in the United States if and when the TTIP goes before Congress) could easily derail the whole deal.[23] An issue that is of marginal value at best should not be allowed to undermine the clear benefits of removing protectionist barriers.

- *Disagreements over geographical indications cannot be resolved*

For many years now, the European Union has pushed for special protections for foods and beverages with links to a particular place of origin.[24] For example, in the view of the Europeans, the word Feta should only be used to describe cheese made in Greece. Americans have generally rejected EU demands, arguing that these terms have become part of general usage, and thus do not deserve special protection.

Both the United States and European Union strongly believe that the other side's approach to geographical indications constitutes a trade barrier.[25] From one perspective, too little protection of geographical indications is a trade barrier; from another perspective, too much protection is a trade barrier. In this situation, it is difficult to see a solution; trade negotiations do not really have an answer to this debate. We may just have to agree to disagree. Thus, taking this topic out of the TTIP negotiations is for the best.

- *Regulatory issues can be dealt with in a separate process*

As noted, much of the talk about the TTIP has focused on how the real gains will come from addressing regulatory trade issues, but this is not a new issue. It has been on the U.S.–EU agenda for over a decade, and, as noted above, the United States and European Union still do not agree on an approach.

It may be useful to have the TTIP push the debate forward on this issue, but the reality is that this is a long-term problem that is unlikely to be solved in the normal trade negotiating process. Thus, tying conclusion of the TTIP to resolving regulatory issues may prevent the TTIP from being finished. To be clear, there are economic gains to be had here, and we should pursue them. But if we require that this issue be completely resolved in the TTIP, we may be waiting 10 years or longer.

Negotiators need to make a judgment quickly on this issue. If they cannot realistically reach agreement soon, it may be better to shift this issue outside the TTIP to allow more time for working through it.

Conclusion

Narrowing the scope of the TTIP negotiations will be criticized by those who say a modern, 21st-century trade agreement must cover all of these issues. But such an argument oversimplifies the substantive issues under debate. Including additional issues does not necessarily make an agreement any more beneficial. The scope should be determined not based on marketing terms, but on the value of the specific provisions being discussed. The ISDS mechanism is a newer, more modern, issue than tariff cutting, that is true; but its relative youth does not tell us anything about its value. Also, political realities need to be recognized. For example, trade friction would be reduced if the United States and European Union could agree on their geographical indications policies, but they cannot, so let's not drag down the whole process while they bicker and fight.

Note that none of the new issues represent traditional trade liberalization, such as tariff-cutting and anti-protectionism provisions, which are the core of trade agreements. Thus, a more limited agenda in this sense would not necessarily be a big loss, as the core would still be in there. By contrast, excluding entire product and service sectors, such as financial services, from liberalization would undermine the whole exercise. We should continue to push for the broadest possible tariff cuts, services liberalization, and opening of procurement markets. That is where the focus should be. Some argue that these are 20th-century issues and not worth the effort. They are wrong. The trade liberalization project remains unfinished, and there is still plenty of work to be done. The TTIP is a place to get started.

Notes

1. State of the Union Address, February 12, 2013, http://www.whitehouse.gov/the-press-office/2013/ 02/12/president-barack-obamas-state-union-address. President Obama stated: "I am announcing that we will launch talks on a comprehensive Transatlantic Trade and Investment Partnership with the European Union–because trade that is free and fair across the Atlantic supports millions of good-paying American jobs."

2. "EU and US Conclude First Round of TTIP Negotiations in Washington," European Commission, July 12, 2013, http://trade.ec.europa.eu/doclib/press/index.cfm?id=941.

3. As the *Washington Post* editorial board put it: "U.S. unions and environmentalists, which have objected to past trade agreements with Mexico and Colombia, would seem to have fewer reasons to oppose a deal with green, high-wage Europe." "Time for EURAFTA? A European Union-American Free Trade Agreement," *Washington Post*, February 10, 2013. http://www.washingtonpost.com/opinions/time-for-eurafta-a-european-union-american-free-trade-agreement/2013/02/10/b5187258-7234-11e2-a050-b83a7b35c4b5_story.html.

4. U.S. Trade Representative Michael Froman stated: ". . . we also know that there is strong political will at the highest levels on both sides of the Atlantic determined to stay focused and get this done on one tank of gas. I have every confidence that we can achieve this goal." Remarks by United States Trade Representative Michael Froman at the Transatlantic Trade and Investment Partnership First Round Opening Plenary, Office of the United States Trade Representative, February 10, 2013, http://www.ustr.gov/about-us/press-office/speeches/transcripts/2013/july/amb-froman-ttip-opening-plenary.

5. Robin Emmott, "EU Trade Chief Hopes to Clinch U.S. Trade Deal by Late 2014," Reuters, February 27, 2013, http://uk.reuters.com/article/2013/02/27/us-euro-summit-trade-idUKBRE91Q0QM20130227. "[EU Trade Commissioner Karel] De Gucht . . . said while there [was] no deadline, November 2014 represented a good target for a U.S. accord because his term as trade commissioner ends then and the United States holds midterm elections."

6. Final Report of the U.S.–EU High Level Working Group on Jobs and Growth, February 11, 2013, http://www.ustr.gov/about-us/press-office/reports-and-publications/2013/final-report-us-eu-hlwg.

7. European Commission, Transatlantic Trade and Investment Partnership, *The Economic Analysis Explained* (September 2013), p. 6, http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151787.pdf. According to UK Prime Minister David Cameron, the deal "could add as much as a £100 billion to the EU economy, £80 billion to the U.S. economy, and as much as £85 billion to the rest of the world," as well as "2 million extra jobs." Remarks by President Obama, U.K. Prime Minister Cameron, European Commission President Barroso, and European Council President Van Rompuy on the Transatlantic Trade and Investment Partnership, June 17, 2013, http://www.whitehouse.gov/the-press-office/2013/06/17/remarks-president-obama-uk-prime-minister-cameron-european-commission-pr.

8. Karel de Gucht, "EU Trade Policy as a Means to Influence Globalization," Europa.eu, May 22, 2014, http://europa.eu/rapid/press-release_SPEECH-14-405_en.htm.

9. "US Wants 'Science' to Settle GMO Debate in Trade Deal with EU," EurActiv.com, June 18, 2014, http://www.euractiv.com/sections/trade-industry/us-wants-science-settle-gmo-debate-trade-deal-eu-302876.

10. "EU Reaches Deal on French 'Cultural Exception,'" France 24, June 15, 2013, http://www.france24.com/en/20130615-eu-deal-french-cultural-exception-usa-trade/.

11. As Shawn Donnan of the *Financial Times* noted: "Washington argues including [financial services] could undermine tighter US regulations introduced after the 2008 crisis and that any transatlantic co-operation is better dealt with in a separate forum." Shawn Donnan, "EU Threatens to Cut Financial Services from Trade Deal," *Financial Times*, June 13, 2014, http://www.ft.com/intl/cms/s/0/924b9f80-f31a-11e3-a3f8-00144feabdc0.html?siteedition=intl#axzz37AbISQSk.; Benjamin Fox, "EU and US Aim for 2015 Trade Deal, Exclude Financial Services," euobserver, May 16, 2014, http://euobserver.com/news/124159.

12. "US Senators Shocked by EU's Cheese-name Claims," EurActiv, March 12, 2014, http://www.euractiv.com/cap/us-senators-shocked-eu-cheese-na-news-534077.

13. Matthew Karnitschnig, "NSA Flap Strains Ties with Europe," *Wall Street Journal*, February 9, 2014, http://online.wsj.com/news/articles/SB100014240527023038745045793728323991686 8; James Fontanella-Khan, "Data Protection Ruled Out of EU-US Trade Talks," *Financial Times*, November 4, 2013, http://www.ft.com/intl/cms/s/0/92a14dd2-44b9-11e3-a751-00144feabdc0.html#axzz37AbISQSk.

14. Andrew Walker, "Business v State Investment Disputes in EU Spotlight," BBC, June 11, 2014, http://www.bbc.com/news/business-7635165.

15. One commentator noted: "Beyond free trade, however, the real gains from the deal would come from regulatory cooperation." Tyson Barker, "For Transatlantic Trade, This Time is Different," *Foreign Affairs*, February 26, 2013, http://www.foreignaffairs.com/articles/139027/tyson-barker/for-transatlantic-trade-this-time-is-different. Along the same lines, the U.S. Chamber of Commerce said: "the real gains from the TTIP will be realized by removing non-tariff barriers, or the behind the border regulatory differences." U.S. Chamber of Commerce, EU-U.S. Regulatory Cooperation, https://www.uschamber.com/sites/default/files/documents/files/EU%20US%20Reg%20Coop_2.pdf.

16. ECORYS, "Non-Tariff Measures in EU-US Trade and Investment: An Economic Analysis" (2009), p. xiv, http://trade.ec.europa.eu/doclib/docs/2009/december/tradoc_145613.pdf; "A New Era for the Transatlantic Trade Leadership," The German Marshall Fund of the United States, February 2012, p. 21, http://www.gmfus.org/wp-content/blogs.dir/1/files_mf/tatf_report_2012.pdf.

17. Simon Lester and Inu Barbee, "Will Regulations Sink EU-U.S. Free Trade?" *The National Interest*, October 15, 2013, http://nationalinterest.org/commentary/will-regulations-sink-eu-us-free-trade-9229.

18. Simon Lester and Inu Barbee, "The Challenge of Cooperation: Regulatory Trade Barriers in the Transatlantic Trade and Investment Partnership," *Journal of International Economic Law* 16, no. 4 (2013): 847–67, http://jiel.oxfordjournals.org/content/16/4/847.abstract.

19. "EPA, Consumer Safety Regulator Express Skepticism About TTIP Benefits," World Trade Online, June 27, 2014, http://insidetrade.com/Inside-US-Trade/Inside-U.S.-Trade-06/27/2014/epa-consumer-safety-regulator-express-skepticism-about-ttip-benefits/menu-id-710.html.

20. Fox, “EU and US Aim for 2015 Trade Deal.”
21. See, for example, Dan Pearson, “The Obama Administration’s Trade Agenda Is Crumbling,” Cato Institute Free Trade Bulletin no. 58, March 19, 2014.
22. See, for example, Simon Lester, “Liberalization or Litigation? Time to Rethink the International Investment Regime,” Cato Institute Policy Analysis no. 730, July 8, 2013; and Daniel Ikenson, “A Compromise to Advance the Trade Agenda: Purge Negotiations of Investor-State Dispute Settlement,” Cato Institute Free Trade Bulletin no. 57, March 4, 2014.
23. As of this writing, ISDS remains a contentious point in the Canada–EU trade talks that are further along than the TTIP. See, for example, B. J. Siekierski, “Germany Insists It Hasn’t Scuttled CETA: Report,” Politics, July 28, 2014, http://www.ipolitics.ca/2014/07/28/germany-insists-it-hasnt-scuttled-ceta-report/.
24. “Geographical Indications: A geographical indication is a distinctive sign used to identify a product as originating in the territory of a particular country, region or locality where its quality, reputation or other characteristic is linked to its geographical origin.” European Commission, http://ec.europa.eu/trade/policy/accessing-markets/intellectual-property/geographical-indications/.
25. Simon Lester, “Geographical Indications: When Is There a Trade Barrier?” International Economic Law and Policy Blog, March 13, 2014, http://worldtradelaw.typepad.com/ielpblog/2014/03/geographical-indications-when-is-there-a-trade-barrier.html.