

Negotiating the Transatlantic Trade and Investment Partnership

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*Henry M. Jackson School of International Studies
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Executive Summary | *By Katherine Garbe*

Trade and investment across the Atlantic is the backbone of the world economy, with the United States and European Union accounting for almost half of the world GDP and a staggering 30 percent of global trade. This dynamic interconnection goes beyond trade in goods to include services, investment, and mutual interests and values.

The Transatlantic Trade and Investment Partnership (TTIP) currently being negotiated between the United States and the European Union stands to be the largest free trade agreement ever created. The comprehensive trade and investment agreement is an opportunity to modernize trade rules and strengthen the strategic partnership between the U.S. and the EU. This can be accomplished through enhancing trade, finance, and investment opportunities that will in turn foster job creation, economic growth, and international competitiveness.

The most notable characteristic about TTIP is the magnitude of the issues being addressed and the focus beyond traditional barriers to trade, which require innovative and creative approaches. These include both enhancing the compatibility of regulatory regimes and topics that have never been as extensively included in a free trade agreement, such as intellectual property rights, environmental standards, and competition policy.

This task force provides a framework for U.S. negotiators to achieve a comprehensive, mutually beneficial agreement while maintaining our high standards. While there are some areas of contention, innovation in TTIP on areas that have not been previously addressed will create significant benefits for both sides of the Atlantic that far outweigh any costs. This report takes into consideration key stakeholders, including business, environmental, consumer, labor and other representatives. Our main objectives in this report are:

- Elimination or reduction of conventional barriers to trade in goods, such as tariffs
- Elimination, reduction, or prevention of barriers to trade in goods, services and investment
- Enhanced compatibility of regulations and standards
- Greater cooperation for the development of rules and principles on global issues of mutual concern and achievement of global economic goals

TTIP presents the United States with the chance to create significant and innovative responses to the changing global economy to meet needs that have never before been fully taken into account. Our efforts to provide a framework for negotiations take into consideration the substantial obstacles that stand in our way. However, the opportunity to come to mutual agreement on standards will have a lasting effect on our role in the global economy and allow for the U.S. and EU to take the lead in these new areas. Furthermore, TTIP is designed to evolve over time, with the goal of substantially eliminating existing barriers to trade and investment while establishing mechanisms that enable further deepening of economic integration.

SECTION I: Introduction to United States and European Union Trade Policies

Chapter 1. Interests, Expectations, and Moving Forward | By Riley Zollars

Introduction

The United States and the European Union have the largest trade relationship in the world, a relationship that produces approximately 47% of total global trade. The EU is the largest merchandise and services trading partner of the U.S., accounting for \$459 billion and \$530 billion in U.S. exports and imports respectively. Over \$1.5 trillion was exchanged between these major trade partners in 2012 alone.¹ While there have been periods of tension and disagreement, the two entities already lay claim to the most open free-trade policies in the world. The Transatlantic Trade and Investment Partnership (TTIP) currently being negotiated between the United States and the European Union speaks to the commitment both sides have in seeking ways to promote both their economic relationship and global trade standards.

The Transatlantic Trade and Investment Partnership is a ground-breaking free trade agreement because of the scope of the issues it will encompass. TTIP will eliminate most of the already minimal tariff barriers remaining between the U.S. and the EU, but much of its focus lies in making unprecedented headway in non-tariff barriers to trade (NTBs). By improving the compatibility of regulatory systems, TTIP could expand reciprocal market openings in goods, services, and investment, generating new opportunities for economic growth on both sides of the Atlantic. The harmonization of rules and regulations that TTIP hopes to achieve within multiple areas of trade and services has the potential to strengthen the partnership between the U.S. and the EU by

further integrating the economies of the world's two largest trading partners. TTIP also provides a plausible avenue to set global trade standards by proactively addressing trade changes in today's global economic landscape, including the rise of intra-firm trading and the decline of multilateral trade leaders. Because of this, both the United States and the European Union have taken confidence-building steps to demonstrate their seriousness towards reaching an agreement. However, in order to guarantee that the United States Trade Representative (USTR) will be able to continue TTIP's negotiation process, the United States Congress should first grant Trade Promotion Authority to the executive branch of the United States Government. This measure would help ensure that the Europeans continue to cooperate and have faith in the legitimacy of U.S. participation.

TTIP is an opportunity to take groundbreaking strides in the world of trade and regulation and would provide a *framework* for other countries to follow, as it will develop innovative mechanisms for reducing several trade complexities in various economic sectors.

U.S. Interests

Following the economic crisis of 2007-08, the U.S. saw domestic unemployment rise from 4.7% in the early stages, to a peak of 10% in 2009.² While recovery is underway, it remains shaky and job growth has remained weak in many areas. With an unemployment rate of 6.7% and nearly 50 million Americans living in poverty, the damage has yet to be fully repaired.³ TTIP should therefore be viewed as one potential solution to assist in solving a pattern of slow U.S. economic growth as it would promote economic development within numerous business sectors.

Business Interests

Proposed GDP growth scenarios of a TTIP agreement show the U.S. standing to gain between \$66 billion and \$128 billion in GDP over the next several years, a figure equal to between 0.21% and 0.39% of current GDP.⁴ This would translate into higher income and lower unemployment levels in many sectors of the economy. According to a report compiled by the Atlantic Council, the U.S. could see a net employment gain of almost 750,000 jobs from TTIP over the course of the next decade.⁵ Employment gains could be realized in all 50 states across a variety of business sectors. California, for example, burdened with one of the highest unemployment rates in the nation, could gain over 75,000 new jobs directly attributed to TTIP.⁶ Similarly, Washington, already one of the largest U.S. exporters to the EU, could see exports to the EU increase by a yearly 25.8%.⁷ On average, state-by-state exports to the EU are approximated to increase by an annual 33% as a result of TTIP.⁸

It is also estimated that the average American household may gain an additional \$865 annually due to the lowered costs of trade coupled with the increased amount of job growth.⁹ Spread throughout all 50 states, this additional income could potentially act as an economic stimulus measure.

The U.S. Chamber of Commerce has thus been highly supportive of the TTIP negotiations, reflecting the view of many private American firms, both large and small.¹⁰ With expectations of substantial benefits from expanded trade, many firms and business organizations, including the American Automotive Policy Council, the American Chemical Council, and the National Chicken Council, have voiced support of forging ahead with TTIP.

Moving Forward

The job growth coupled with the overall economic improvement projected to occur as a result of a finalized TTIP agreement will likely benefit many U.S. economic sectors – ultimately benefitting the U.S. as a whole. While the USTR should not anticipate reaching *full* agreement on all points of TTIP, as divergence of opinion will undoubtedly arise, there is substantial opportunity to lower current trade barriers across a wide variety of areas. The potential for strategic economic gains should thus be cause for the U.S. to move forward in the negotiation process.

EU Interests

In a similar fashion to the 2007-08 economic crisis experienced in the U.S., the Eurozone underwent a financial crisis beginning in 2009 and is still dealing with many of the related issues therein. Unemployment in many countries remains much higher than in the United States and austerity measures remain a deeply-divisive issue. While the financial problems at the heart of the economic crisis are different than those in the U.S., the need for economic growth within the EU is just as vital to their recovery, if not more so. Many economic sectors within the EU are in support of the TTIP negotiations as they recognize the opportunity for economic growth that TTIP offers.¹¹ According to a survey done by the Marshall Fund, Italian (87 percent), British (84 percent), French (82 percent), and German (71 percent) residents support harmonization of national regulations on goods and services exchanged by the U.S. and EU.¹² The potential economic growth within the EU as a result of TTIP's reduction of tariff and non-tariff barriers would likely

lead to a bettered body of member states and is perhaps one of the most viable options to address the current economic conditions.

Projected Economic Improvement

An annual GDP increase of \$162 billion within the EU is expected to follow a finalized TTIP agreement.¹³ According to a report compiled by the European Commission, this equates to a 0.5% rise in overall GDP per year, an accomplishment that would take over a decade to reach without TTIP. EU exports to the United States would in turn rise by 6%, benefitting European businesses and investment firms and increasing trade activity by as much as \$600 billion.¹⁴ This sizable amount of additional economic activity, in combination with the potential for cheaper access to goods and services, stands to benefit EU member states by allowing all of them to trade with the U.S. under the same guidelines outlined in TTIP. As an example, should agreements reducing current barriers between each party's automotive sectors be reached, car manufactures in Germany and Italy would both be able to export their vehicles to the U.S. without each individually having to make separate trade agreements with the U.S.

As economic activity increases, the amount of jobs available to workers within the EU will also increase. Over time, this could realistically create well over one million jobs, as every billion euros of trade in goods or services supports around 15,000 EU workers.¹⁵ It is also projected that wages for both skilled and un-skilled labor throughout the EU would increase by approximately 0.5% as a result of TTIP.¹⁶ A TTIP agreement should therefore significantly contribute to the EU economy and may assist in alleviating some of the strain the current economic crisis has caused.

European Union Expectations

The European market is awaiting an invigorating measure to bring it out of a slow-moving economy. TTIP is perhaps one of the most feasible measures to fulfill such a role. The economic progress the EU is anticipated to see as a direct result of TTIP is noteworthy, as it has the opportunity to facilitate growth within multiple sectors of the economic sphere. TTIP is expected to result in a GDP increase that may otherwise take a substantial amount of time to realize. TTIP will also promote the EU's further integration with its largest trading partner, the United States. The benefits of such interests should consequently lead to the further engagement of the European Union's participation in the TTIP negotiation process.

Summary and Proceedings

TTIP stands to advance numerous sectors within U.S. and EU business and investment firms, promoting bi-lateral economic growth. It simultaneously offers multiple economic sectors the opportunity to assist in reinvigorating their domestic economies. A finalized TTIP agreement will bolster and rejuvenate ties that have already historically laid claim to some of the world's most significant economic accomplishments.

The USTR should bear in mind that the negotiating European Council speaks for 27 individual sovereign nations within the EU. This may make negotiations difficult in certain areas as EU member states will each have their own interests at stake. However, while push-back on certain trade-related issues such as GMO use within the U.S. agricultural sector should be anticipated, the EU clearly recognizes the positive economic

impacts a TTIP agreement will have and should thus be expected to forge ahead with the negotiation process.

Though much of TTIP's potential success lies in the abundant amount of economic benefits expected to be achieved, the fundamental framework within TTIP would also set a global free trade precedent for the rest of the world to follow as both the U.S. and the EU seek to lower non-tariff barriers to trade. It is herein where innovative global free-trade standards may be realized as the two negotiating parties develop new procedures regarding the mutual recognition of safety, health, and environmental standards within their economic sectors.

Chapter 2. TTIP's Impacts on Global Trade | By Justin Loustau

Impacts on the Multilateral Community

WTO's difficulty in achieving its comprehensive trade reform goals has encouraged global trade leaders such as the United States and European Union to develop regional free trade agreements (FTAs), including TTIP, to address shifts in global trade and spur economic growth. While WTO members negotiated trade barrier reductions in several key industries shortly after launching the Doha Development Agenda (DDA) in 2001, developed and developing countries grew divided over issues including service tariffs and domestic agriculture subsidization, stalling progress in recent years.¹⁷

Although the 2013 Bali Package addressed trade facilitation, agriculture, and least developed country (LDC) agreements, these less polarizing DDA resolutions will have a limited impact on global growth.¹⁸ TTIP will contribute to more substantial trade barrier reduction efforts that address new global economic trends including the rise of multinational firms and loss of multilateral trade leadership.

TTIP Responds to Global Economic Changes

Global supply chains that utilize intra-firm trading to exploit the comparative advantages of various markets have expanded over the past decade. TTIP's reduction of import and export barriers, modeled in part on the U.S. and EU's respective FTAs with Korea¹⁹, addresses barriers to growth witnessed by multinational firms that rely on the unrestricted trade of intermediate goods. Recent press leaks emanating from the EU demonstrate the scale of these proposed reductions; the Europeans expect nearly 95 percent of trade between the U.S. and EU to be barrier-free as a result of TTIP.²⁰ The

U.S. and EU's negotiation of TTIP around central business interests has led to unprecedented trade barrier reduction goals that could contribute to significant economic growth in both economies.

While developed countries, notably the United States, Great Britain, and Germany, were able to pioneer GATT negotiations from the 1980s until the late 1990s, the rapid development of Brazil, Russia, India, and China (BRIC) has undermined the ability of first countries to underwrite new trade agreements.²¹ The decline of developed countries as leaders in international trade since the turn of the century has led to a drop in the number and size of bilateral and multilateral trade liberalization efforts currently underway. TTIP allows the U.S. and EU to expand their current trade partnership despite a gridlocked multilateral system. In fact, TTIP has already inspired WTO negotiations and will continue to provide third countries with an example of a comprehensive, next-generation agreement that addresses new changes in the global economy.

TTIP Advances the Multilateral Community

Some analysts argue that FTAs help “fragment” the global trading system as countries maximize their respective gains from preferential trade liberalization without considering their agreements' impacts on the multilateral community.²² However, the Trans-Pacific Partnership (TPP) and TTIP have already pushed WTO members to develop an agreement ending the Doha impasse.

The progress made in TPP and TTIP negotiations throughout 2013 spurred the multilateral community to go “into overdrive” and make the “important and reasonable compromises” that led to the finalization of the Bali Package by the end of that year.²³ As

was observed in the Uruguay Round following the formation of NAFTA, the development of FTAs alongside DDA led to more substantive multilateral negotiations on trade barrier reduction. The ongoing negotiation of TTIP should continue to drive WTO action in the future.

Impacts on Current Trade Partnerships and Developing Countries

In addition to pushing the multilateral community beyond DDA, TTIP can have a positive impact on current U.S. and EU trade partners and developing countries. An ambitious TTIP could stimulate the global economy with nearly \$135 billion and stimulate growth in markets beyond the United States and European Union.²⁴

Impact on Current Trade Partnerships

Experts have criticized TTIP because it will alter the current levels of trade between the U.S. and EU's closest trade partners, notably Mexico, Canada, Japan, and Turkey.²⁵²⁶ While this is true, such a critique fails to account for the global trade independence that Mexico, Canada, Japan, and Turkey have established since their respective agreements with the U.S. and EU began. Since NAFTA's enactment in 1994, Mexico and Canada have negotiated more than thirty of their own respective FTAs with partners including the European Union and several Latin American countries. Together, Japan and Turkey have negotiated FTAs with more than twenty partners including the Association of Southeast Asian Nations (ASEAN) and Switzerland since 2002. Mexico, Canada, Japan, and Turkey's diversification of FTAs means that the success of their respective economies is no longer directly tied to U.S./EU imports and exports.

Moreover, Mexico, Canada, and Japan have been actively engaged in TPP negotiations while the EU plans to achieve a “preferred partnership” with, if not fully accede, Turkey.²⁷²⁸²⁹ The U.S. and EU’s involvement of current partners in new trade agreements mitigates potential losses from TTIP; in fact, it promotes the adoption of similar liberalization reforms and growth in existing partner countries.

Impact on the Developing World (BRIC & Asia)

a. Brazil, Russia, India, and China

Skeptics have predicted that BRIC will “find their long-standing advantages of low-cost labor and production slipping” as the U.S. and EU work to meet more of their own import and export needs.³⁰ In reality, an increase in trade between the US and EU would have a minimal impact on the competitiveness of BRIC economies. Reducing trade barriers between the U.S. and EU will in no way reduce the labor costs of the developed world. More importantly, demand for goods currently produced in third countries (textiles, etc.) will be largely unaffected by the proposed expansion of U.S./EU trade in the agricultural, automotive, medical device, pharmaceutical, and services sectors. The following table indicates the potential growth that developing economies could realize as the U.S. and EU harmonize their trade policies within TTIP.

Table 41 Total effects on GDP for rest of the World (in million euros and per cent), 2027 benchmark, 20 per cent direct spill-overs

	Less ambitious		Ambitious	
	Million euros	Per cent	Million euros	Per cent
European Union	68,274	0.27	119,212	0.48
United States	49,543	0.21	94,904	0.39
Total Other Countries	46,636	0.07	99,171	0.14
<i>Whereof:</i>				
Other OECD, high income	15,942	0.08	36,322	0.19
Eastern Europe	1,019	0.14	2,328	0.33
Mediterranean	237	0.02	1,063	0.08
China	3,810	0.02	5,487	0.03
India	946	0.02	2,338	0.04
ASEAN	15,081	0.45	29,834	0.89
MERCOSUR	624	0.01	1,545	0.03
Low Income	1,064	0.09	2,366	0.20
Rest of World	7,913	0.05	17,887	0.12

Source: CGE modelling.

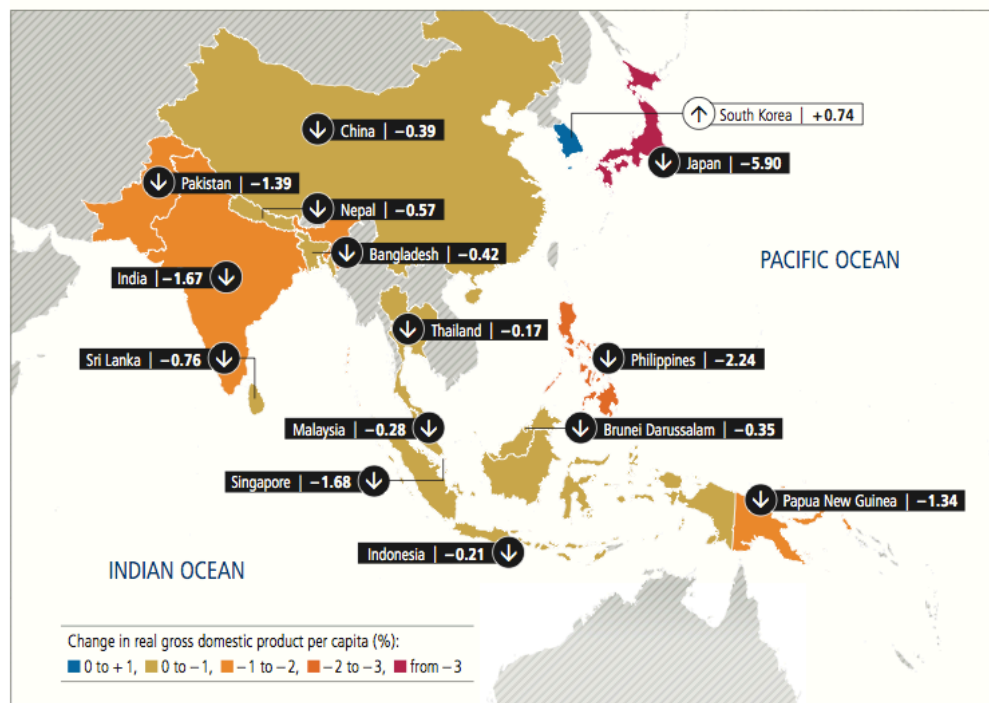
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Even with a less ambitious TTIP, developing economies could stand to gain more than \$30 billion. Of that \$30 billion, China and India could reap nearly \$5 billion, Eastern Europe \$1 billion, and MERCOSUR, of which Brazil is a member, more than \$500 million. With a more ambitious TTIP, developing economies could gain more than \$60 billion, of which China could gain \$5 billion, India and Eastern Europe \$2 billion, and MERCOSUR \$1.5 billion. These projected gains are attributed to third countries' adoption of similar trade liberalization reforms as primary developing U.S./EU trading partners (i.e. Mexico and Turkey) push for similar reforms with their respective partners.³²

b. Asia

Despite the encouraging numbers on ASEAN growth provided above, some analysts have suggested that TTIP will not be as beneficial for Asia as for other regions. The following figure outlines the consensus that welfare loss will be witnessed in much of Asia as a result of TTIP.

Figure 5: Changes of the real gross domestic product per capita following a comprehensive transatlantic free-trade agreement



Source: ifo Institut

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While the numbers reported above imply that TTIP will have an adverse impact on Asian economies, the study fails to assess the impact of the simultaneous negotiation of TPP. A significant portion of the countries outlined above will witness a substantial boost in economic growth as they turn to develop their own trans-Pacific trade partnership with the United States. While these numbers may provide a realistic glance at TTIP's impacts on Asia, they are not representative of the entire future of Asian trade. The U.S.' commitment to negotiating with both its European and Asian allies will contribute to worldwide growth. The United States should enter negotiations with the EU wholeheartedly with the knowledge that a significant reduction in barriers to trade between the two economies will have positive global ramifications.

SECTION II: Market Access

Chapter 3. Tariffs | *By Jared Stevens*

Chapter Summary

Issue

Part of a finalized TTIP agreement will be the reduction or outright elimination of tariffs between the EU and U.S.

Background

While average tariffs between the U.S. and EU are already very low, between 5-7% on average, there is potential for gains. This is due to the vast size of the U.S. and EU economies, which make even the most incremental reduction of tariffs produce economic gains for both sides. Reductions are particularly attainable in sectors that have historically high tariffs due to their sensitive nature. Two examples that will be examined in more detail are agriculture and automotive sectors.

U.S. Interests

The elimination of all tariffs between the U.S. and EU would lead to initial gains from reduced costs on international trade equal to \$20 billion and secondary gains from increased competition and productivity projected to equal between \$135-181 billion.

Recommendations

Our negotiators should strive for the elimination of tariffs in every sector that the EU will adequately reciprocate. Even sensitive sectors like the automotive industry and agriculture should not be exempt from this reduction in tariffs, although the outright elimination of tariffs on agriculture will likely be impossible.

Background on Bilateral Tariffs

The consensus among most experts is that tariff reduction between the U.S. and EU is likely the least contentious issue on the agenda for negotiations. The U.S. and EU have already significantly reduced tariff barriers through previous agreements. Average duties on transatlantic trade are between 5-7%.³⁴ However, the magnitude of trade between the U.S. and EU is such that further reduction or elimination of tariffs would produce marked gains for both sides. Widespread integration between the U.S. and EU through foreign direct investment (FDI) suggests augmented gains from the reduction of tariffs due to the high of volume trade between parent companies and their affiliates located across the Atlantic. Approximately 50% of all U.S. foreign affiliates operate within the EU. The corresponding figure for EU affiliates in the U.S. is approximately 75%.³⁵ It has been estimated that approximately 40% of all transatlantic trade is between parent companies and their affiliates.³⁶ With the removal of tariffs, these multinational firms would be able to internally transfer components and goods more efficiently, improving productivity.

Gains from tariff reduction can be divided into two measurements: immediate gains and gradual gains, of which the latter will be greater. Immediate gains are constituted by the increased manufacture and consumption associated with reduced costs associated with sales abroad. Factors that contribute to gradual gains are the reduced costs of intra-firm shipping between parent companies and affiliates abroad and increased competition between firms within similar industries (particularly those with nearly reciprocal trade).³⁷ These factors contribute to increased worker productivity, reducing prices and improving quality.

Reduction or elimination of tariffs would also increase the value of bilateral trade between the U.S. and EU. Exports to the EU are projected to increase 17%, with a value of \$53 billion. Imports are projected to increase 18%, with a value of \$69 billion.³⁸ If all remaining tariffs were eliminated, immediate U.S. GDP growth would increase 0.15% more than it would otherwise, an increase of slightly more than \$20 billion. The immediate EU GDP growth would increase 0.1%, equal to about \$14 billion. However, gradual gains projections suggest U.S. GDP would increase between 0.99-1.33% (\$135-181 billion) and EU GDP would increase 0.32-0.44% (\$46-69 billion).³⁹

The potential gains from the elimination of all tariffs are clear, yet there are certain sensitive sectors that may prove problematic. Historically, the highest tariffs between the U.S. and EU have been in the agricultural and automotive sectors, giving rise to the opportunity for gains in both of these areas through TTIP negotiations. This is particularly attainable in the automotive sector, where there is the real possibility of eliminating tariffs in a previously challenging area.

Agriculture Tariffs

Background

Agriculture only accounts for 5.6% of U.S. imports from the EU and 4.5% of exports to the EU, yet it is arguably the single most contentious issue in tariff negotiations. Current tariff levels are unusually high, with the EU imposing an average 18.6% duty on U.S. agricultural products. The U.S. has an average tariff of 9.7% on EU agricultural products, but the rate increases to 22% on most vegetables, 30% on meat, and

139% on dairy.⁴⁰ The source of this contention is philosophical differences in the methodology of producing safety standards, namely the EU precautionary principal. The EU does not recognize the scientific evidence suggesting the safety of GMOs and hormone infused animal products, which leads to further issues to be discussed in Chapter 14.

U.S. agricultural firms and lobbies, particularly grain producers, are alarmed at recent agreements the EU has made with Canada and Ukraine. Canada recently finished a treaty with the EU through which all grain tariffs will be eliminated over a 7-year timeframe. Ukraine also finalized discussions on a hitherto undisclosed treaty with the EU affording Ukraine preferential access to EU grain markets. Pending Ukrainian ascension to the EU and uncertainty such as whether their agreement with the EU will still be implemented, the potential competition from a major grain producer like Ukraine is disconcerting to U.S. grain producers.

U.S. Interests

While the tension between the U.S. and EU regarding genetically modified organisms (GMOs) and hormone infused meat will likely prevent complete elimination of agricultural tariffs, there are promising key issues wherein TTIP negotiation can deliver significant progress on this complicated issue. Due to EU trade liberalization with Canada and Ukraine, U.S. lobbies representing grain producers have expressed support for an agreement to eliminate EU tariffs on U.S. grain.⁴¹ The elimination of tariffs on grain is projected to lead to an estimated \$165 million in gains for the U.S.⁴²

Beyond grain, there is the potential to eliminate tariffs for numerous non-GMO agricultural products. Lead negotiators from both the U.S. and EU have expressed this sentiment.

Automotive Tariffs

Background

Automotive tariffs in the U.S. and EU have historically been contentious, but such sentiments are now overshadowed by enthusiasm for potential gains. Most automotive companies in both the U.S. and EU support the reduction of tariffs, as well as the removal of nontariff barriers (to be discussed in Chapter 9).⁴³ There is a 2.5% duty imposed on EU car imports to the U.S., and the rate increases to 25% on pickup trucks, commercial vans, and other vehicles of such scale. The EU imposes a 10% tariff on all U.S. imported vehicles.⁴⁴

U.S. Interests

According to projections, the U.S. automotive sector would gain \$4 billion. This would also benefit U.S. consumers by the reducing costs of expensive parts for Volkswagen, BMW and other foreign companies.⁴⁵

Policy Recommendations

This is an opportunity to eliminate a historically significant barrier to trade that is now unnecessary and mostly unwanted. U.S. negotiators should strive to eliminate all tariffs between the U.S. and EU. This includes the elimination of tariffs pertaining to automobiles and agriculture wherever possible. However, we should only reduce tariffs

where the EU is willing to reciprocate. Based on recent statements by EU Commissioner Karel De Gucht, the EU will not reduce tariff protections on beef, poultry, and pork.⁴⁶ Despite this philosophical divergence, there is opportunity to promote trade liberalization in grains and other non-GMO products. Tariffs on grain between the EU and Canada are scheduled to gradually phase out over 7 years; we should aim for a shorter timeframe to increase the competitiveness of U.S. grain producers.

Chapter 4. Investment in TTIP | *By Jared Stevens*

Chapter Summary

Issue

The U.S. and EU need to decide how to set forth protections and regulations that encourage investment by protecting prospective investors while maintaining state sovereignty.

Background

The U.S. and EU already enjoy the economic benefits of being highly integrated through foreign direct investment (FDI), and further investment would be mutually beneficial. States agree to terms for investment protection in either bilateral investment treaties (BITs) or specified chapters within free trade agreements (FTAs). This protection contains both rules to protect investment and remedies in case investor rights are infringed upon. Investment protection is crucial to attracting investors, and has been actively sought by policy makers in both the U.S. and EU.

However, recent cases have shown shortcomings and loopholes in existing BITs and FTAs that allow corporations to bring states to arbitration when states impose legitimate regulations concerning the public health, labor practices, the environment and the national interest. Both the U.S. and EU have taken note of these developments, and have drafted nearly identical models for future BITs and FTAs that balance investment protection with state sovereignty.

U.S. Interests

A new balance must be found between protecting investment to promote economic growth and maintaining a state's right to autonomy, especially regarding contentious regulatory issues. There is no single international framework on investment, but because the challenges facing the U.S. and EU are similar, proposed solutions are also similar. This is an area where the U.S. and EU need to cooperate in order to overcome shared challenges and develop a global framework on investment to use as a model for future agreements.

Recommendations

Negotiators should include a chapter on investment protection based on the 2012 Model BIT. The Europeans should be in agreement with this, as their recent BITs have followed similar guidelines and the measures will be mutually beneficial.

Background on Investment

As the world economy continues to integrate, foreign direct investment (FDI) is becoming a major driver of economic growth.⁴⁷ However, there is no overarching regulation on investment through the World Trade Organization (WTO). Therefore, regulation is largely in the form of over 3000 bilateral investment treaties (BITs) and FTA agreements with regulations on investment.⁴⁸ BITs were historically made to promote investment by developed states into developing states by reducing risks associated with weak, unpredictable governments. However, there is precedent for investment regulation between wealthy states as well, such as the investment regulations found in NAFTA.⁴⁹⁵⁰

Regulatory measures in BITS can be divided into two subcategories: substantive obligation and dispute settlement. Substantive obligations are the legal requirements that the host state is required to extend to investors. There are four main obligations that most BITs have in common. First is the extension of national treatment and most favored nation status. Second is the right to transfer profit to an investor's home country in the form of hard currency. Third is the prohibition of performance requirements. Fourth, the host nation must quickly compensate an investor for direct or indirect expropriation.⁵¹

A dispute resolution is the second common component of BITs, yet it is often controversial despite its prevalence. Dispute resolution is the mechanism of enforcement that an investor can utilize if the host state violates some part of the agreement. It can take the form of either State-State Dispute Settlement (SSDS) or Investor-State Dispute Settlement (ISDS). The more contentious of the two is ISDS, through which a firm can

bring a case against the host state to arbitration in an attempt to receive a settlement payment.⁵²

The frequency of ISDS cases has increased rapidly over the past five years, with over half of cases initiated by European corporations.⁵³ Corporations take advantage of the loosely defined protections from expropriation and fair treatment to respond to legitimate regulations that would cause them reduced profits. For example, Vattenfall, a Swedish energy company, has brought a case against the German Government after it began to phase out nuclear energy due to safety concerns in the aftermath of the Fukushima nuclear disaster.⁵⁴ Vattenfall claims this is a form of indirect expropriation. A tobacco company, Philip Morris, has brought the Australian Government to arbitration after Australian lawmakers legislated that cigarette packages must be plainly designed and have a health warning prominently displayed.⁵⁵ Philip Morris' case is also based on their claim that the legislation constitutes expropriation. In light of these events, a consensus is developing among most countries and academics that the ISDS provision has been abused due to a lack of specificity in the wording of previous agreements.

Although the U.S. has yet to lose a case through arbitration, there is recent backlash against the practice of ISDS by NGOs and on the Internet in the U.S., as with the EU.⁵⁶ Because some firms have successfully brought cases against host states for implementing regulations regarding health, labor, or environmental sustainability, some NGOs regard ISDS as a method for firms to rob states of their autonomy and tax revenue.⁵⁷ However, the U.S. and EU have not given into demands that a completed TTIP agreement should not include ISDS measures due to the importance thereof to attracting investment.

Both the U.S. and EU have programs through which they prioritize certain issues and develop new strategies for future BITs and FTAs. The U.S. has a long-standing Model BIT program that it updates periodically to account for new challenges as they arise. The most recent edition was released in 2012 after President Obama commissioned a task force to draft an update in response to the increased frequency of ISDS cases.⁵⁸ It contains specific definitions of expropriation and national treatment, as well as explicitly defending the U.S. Government's right to regulate in the interest of public health, labor standards, environmental protection and the national interest. In 2013 the European Commission released summary of their objectives when negotiating investment regulation that essentially mirrored the 2012 U.S. Model BIT.⁵⁹

The EU gained the competence to negotiate investment regulation in 2009 through the Lisbon Treaty. Individual EU member states have a combined total of 1400 BITs that are currently active.⁶⁰ A chapter on investment regulations in TTIP would override existing BITs between the U.S. and individual EU member states.

U.S. & EU Interests

FDI is very important for the U.S. and the EU; with over half of all U.S. FDI headed directly to the EU and with 75% of all EU FDI destined for U.S. markets.^{61,62} Foreign companies operating in the U.S employ approximately 5% of the U.S. workforce and these employees earn wages that are on average 25% higher.. These jobs also comprise 40% of domestic manufacturing. More generally, FDI allows access into foreign markets, which promotes competition and worker productivity. The U.S. and EU enjoy the mutual benefits of integration through extensive FDI on both sides of the

Atlantic. By reducing the risk involved with investing in foreign states, an agreement on investment regulation through the TTIP negotiations would promote FDI between the U.S. and EU. Financial experts claim that this would lead to economic gains.⁶³ This is particularly true in the manufacturing, financial, insurance and information sectors.⁶⁴

The U.S. is in agreement with the EU that investment protection is important and rather than eliminating it from trade talks, both sides seek to address the problems that have arisen and create a more comprehensive mechanism for investment protections. The problems and suggested solutions are nearly identical between a relevant European Commission Report from 2013 and our 2012 Model BIT.⁶⁵

The fact that European companies initiate the majority of ISDS cases demonstrates the need to revise our current BITs with EU member states. Because ISDS is necessary for the enforcement of substantive obligations, it is critical that we ensure ISDS cannot be used against us underhandedly. Further, it would provide a template for countries like Australia that have essentially foresworn future BITs, coaxing them to continue the process of promoting FDI.

The EU now has the authority to negotiate new agreements on behalf of all 28 member states in keeping with the strategies outlined in their 2013 report, negotiators are eager to establish newer agreements to protect themselves from previous issues with ISDS and promote investment.⁶⁶ A new agreement would replace previous BITs that individual states hold with the U.S.

Policy Recommendations

Negotiators should make every effort to establish a section on investment regulation based on the 2013 report by the European Commission and the 2012 Model BIT, including the controversial ISDS provisions.⁶⁷ We need to ensure that substantive obligations and dispute resolution capabilities are encompassing enough to attract investors, yet do not infringe on U.S. and EU political interests.

Negotiators should be more specific when defining two of the substantive obligations: national treatment and indirect expropriation. Particularly, U.S. negotiators should make sure expropriation is restricted to direct seizures of assets by the government or the seizure of a directly necessary factor of production. These are the two areas that are easiest for firms to exploit, because the wording in previous versions was vague.

The U.S. and EU should create a non-exhaustive list of items that are exempted from dispute resolution measures so as to maintain national sovereignty. Applicable sectors include legislation on health standards, environmental sustainability, labor standards and national interest, such as financial services.⁶⁸

Chapter 5. Financial Services | *By Jared Stevens*

Chapter Summary

Issue

The U.S. and EU need to agree whether or not to include the regulation of financial services in TTIP negotiations.

Background

The financial sectors in the U.S. and EU comprise more than half of the globe's combined financial market, so any agreement pertaining to financial regulation would have global ramifications. The EU is insistent that financial services be included as part of an eventual trade agreement. However, the U.S. has been reluctant to include financial services in the negotiations due to ongoing implementation of increased financial regulation and oversight entailed in Dodd-Frank.

U.S. Interests

U.S. negotiators should have limited goals in this area relative to their EU counterparts, who are seeking to compel the U.S. to accept EU financial regulations as adequate for their firms in the U.S.

There are calls for the U.S. to adopt the IFRS accounting system, despite the significant costs the transition would incur. Because of the significant costs involved, it is better to wait until we are sure such a change would be beneficial.

We want (1) to continue discussions on financial regulations in alternative forums and (2) improved transparency.

Recommendations

While convergence and harmonization between the U.S. and EU are important, such as adoption of the IFRS system, this is neither a suitable time nor the correct forum.

However, there are two ways in which financial regulation should be discussed in TTIP:

1. First, we want to continue discussions on financial regulatory convergence in pre-existing, alternative forums such as the Basel Committee for Banking Supervision and United States – European Union Financial Markets Regulatory Dialogue.
2. We should reaffirm the importance of independent regulatory bodies in order to promote transparency and honest financial reporting.

Background on Financial Regulation

Both the U.S. and EU are in the process of revising their regulatory practices and bodies as a response to the 2008 global financial crisis.⁶⁹ The U.S. has been more ambitious with regards to structural reform in financial regulation than our EU counterparts. For example, the U.S. is planning to increase the leverage ratio from 3% to 5-6%, which puts limits on the amount banks can borrow relative to their balance sheets. The Volcker Rule, a crucial component of Dodd-Frank, limits proprietary trading by large banks. The majority of European reform so far has been the reduction of CEO bonuses.⁷⁰

There are calls from governmental and business groups from both the U.S. and EU for the U.S. to adopt the International Financial Reporting Standards (IFRS) accounting system. The IFRS is designed as a common global language for business affairs so that financial reports will be able to transcend national boundaries. It has already been adopted in 113 countries, including all EU member states. The Securities and Exchange Commission (SEC) and United States Council for International Business have been particularly vocal in their support for the adoption of this system.⁷¹ However, there would be significant initial costs during the transition from our current system, the Generally Accepted Accounting Principles (GAAP).⁷²

The EU strategy for TTIP negotiations is not to harmonize regulation, but to promote mutual recognition of financial regulatory standards. EU banks, like Deutsche Bank, have not had to conform to U.S. regulations resulting from Dodd-Frank, such as increased capital requirements. This has given them a competitive advantage over U.S. financial institutions in recent years. Recent moves by the Federal Reserve towards

forcing compliance for foreign firms have unnerved the EU.⁷³ European banks are subject to relatively low domestic regulatory oversight, which leads to financial instability in the EU.⁷⁴ Financial regulation within the EU is largely relegated to individual member states, some of which are quite lax in their legislation. While there have been political moves towards comprehensive regulative policy, there is no guarantee that they will be successful.

The EU is concerned by three potential outcomes from Dodd-Frank. First, it is likely that the U.S. will force EU firms to abide by higher U.S. regulatory standards. For example, the U.S. has higher capital requirements for banks than the EU. A bank that is considered well financed in the EU might be below the legal standard in America. To maintain U.S. operations, the EU would need to undergo a costly restructuring process and establish holding companies in America.⁷⁵ Second, U.S. regulators would have the discretion to decide whether firms are likely to fail, and compel them to undergo bankruptcy procedures or restructure in the event of failure. Finally, the Volcker Rule limits proprietary trading, the practice whereby a bank invests its own money rather than customer funds. Proprietary trading leads to volatile profits and is generally considered to be less safe than non-proprietary trading. This could potentially limit the activities of EU financial affiliates based in the U.S.⁷⁶

U.S. Interests

While there is support among governmental and business groups, we are still not entirely convinced that converting to IFRS is in the national interest due to the costs of transition.

The U.S. Government has already made clear that TTIP should not be a Trojan horse through which IFRS should be implemented.⁷⁷ Furthermore, U.S. accountants and financial advisors would need to learn the new standards, and businesses would need to acquire new reporting methods. This will be particularly damaging for small and medium enterprises unable to afford accountants.⁷⁸ U.S. business groups and regulatory bodies already have established alternative venues to discuss the possible transition towards IFRS.

U.S. interests would be better served by continuing debates in alternative forums, such as the Basel Committee for Banking Supervision and United States – European Union Financial Markets Regulatory Dialogue.⁷⁹ Furthermore, the U.S should seek the improvement of transparency through enhanced regulatory oversight that would promote financial stability by reducing unwittingly risky investments on either side of the Atlantic.

Policy Recommendations

Recognizing that other organizations, such as the Basel Committee for Banking Supervision or United States – European Union Financial Markets Regulatory Dialogue, are effective forums for continued discussions regarding the implementation of regulations would prevent the EU from increasing pressure on the U.S. regarding Dodd-Frank applying to EU firms. These forums could eventually lead to harmonization on key issues, such as IFRS, without the constrained timeframe or publicity surrounding the TTIP negotiation.

Reaffirming the importance of regulatory bodies such as the SEC, Federal Reserve and FDIC would promote transparency and increase confidence in the financial sector. In particular, both the U.S. and EU should acknowledge the importance of independent regulators without affiliations to either government.

Chapter 6. Government Procurement | By Daniel Stack

Issue

How USTR should approach the EU on government procurement in the TTIP negotiations.

Background

Government procurement accounts for a substantial portion of both EU and U.S. GDP, with 18% of EU GDP and 19% of U.S. GDP in government procurement transactions. However barriers between U.S. and EU procurement markets are high, primarily because of legislation in both the U.S. and the EU granting domestic firms preference over foreign competitors in procurement purchases. The TTIP negotiations will provide negotiators from both the U.S. and the EU an opportunity to reduce these barriers to each other's government procurement markets.

U.S. Interests

Resolving market access issues to EU procurement markets could result in \$1.2 annually for the U.S. As a signatory party to the GPA, the U.S. is obligated to nondiscrimination in its government procurement markets by all other GPA signatory parties, including the EU. Because of its obligations to nondiscrimination, the U.S. may have to allow for increased competition from EU firms in U.S. procurement markets before it is able to gain increased affluence in European procurement markets.

Negotiating Instructions

TTIP negotiators should seek expanded U.S. access to all levels of EU government procurement. U.S. negotiators should also use these TTIP negotiations as an opportunity to increase the transparency of EU procurement transactions. This data in particular is crucial as it reports the public purchases of all entities who procure under the WTO Agreement on Government Procurement (GPA).

Recommendations

1. The USTR should lower minimum thresholds for procurement covered by the GPA to EU levels. This would remove any unfair price barriers to U.S. procurement markets and increase EU access to U.S. procurement markets. In exchange, the EU has already stated it will provide the U.S. with reciprocal levels of market access to European procurement markets.
2. U.S. negotiators should also ensure that the EU is providing annual reports on procurement of all entities under the disciplines of the GPA, as is required per Article XIX:5 of the WTO GPA.

Overview

The TTIP high-level working group (HLWG) states that TTIP should seek to improve access at all levels of government and on the basis of national treatment. This section specifically will focus on the reduction of barriers to U.S. government procurement (GP)—also known as public procurement (PP). GP is a massive market in both the U.S. and the EU, accounting for 18% of U.S. GDP and 19% of GDP in the EU.⁸⁰ In spite of both the U.S. and the EU being members of the WTO GPA, several barriers limit both parties' access to each other's procurement markets. This paper will identify these barriers and suggest potential solutions to overcome them.

The Agreement on Government Procurement (GPA)

The Agreement on Government Procurement (GPA) is a WTO plurilateral agreement negotiated with the Uruguay Round in 1994. The agreement was designed to regulate the government procurement of goods and services by signatory entities on a basis of openness, transparency, and non-discrimination. Together the Committee on Government Procurement, made up of the parties signatory to the GPA, drafted rules for fair and competitive bidding in international procurement under WTO oversight. The GPA only applies to government contracts above a certain price threshold. In addition, only entities included under each party's list of commitments (annexes) are obligated to procure in accordance with the WTO GPA. The GPA was enacted in 1996 and had 15 signatory parties, including the U.S. and the EU.⁸¹

U.S. Interests

The USTR has stated two goals for negotiating government procurement regulation in these talks. The first is to “expand market access opportunities for U.S. goods, services, and suppliers of goods and services to the government procurement markets of the EU and its Member States.”⁸² The second is to ensure that U.S. producers of goods and services are provided with equal favor as producers of “domestic and other foreign goods, services, and suppliers in the EU and its Member States.”⁸³

The U.S. stands to gain upwards of \$1.2 billion per year if it can gain expanded access to EU procurement markets.⁸⁴ The two factors listed below are currently the most prominent NTMs limiting U.S. access to EU procurement markets.

1. Transparency

The majority of barriers the U.S. pertain to a lack of transparency from the EU, with a lack of EU data making it difficult for the USTR to assess actual levels of U.S. participation in EU procurement markets.⁸⁵ This lack of transparency conflicts with the EU’s obligations to public purchase transparency under Article XIX:5 of the GPA. The last time the EU submitted public procurement data to the WTO was in 1992.⁸⁶

2. Non-discrimination

Utilities Directive 2004/17, passed in the EU in 2004, discriminates against foreign bids with “less than 50 percent EU content that are not covered by an international or reciprocal bilateral agreement.”⁸⁷ U.S. firms, primarily in transportation and postal services, have complained that this provision has made it particularly difficult

to compete against European firms. To increase U.S. access to EU procurement markets, these discriminatory barriers will need to be overcome.

It is unlikely that the U.S. will be successful in gaining increased access to EU procurement markets unless it is willing to open its own markets in return. The EU has complained about having particularly limited access to U.S. procurement markets. Only 3.2% of the U.S.'s GP market is covered under the auspices of the GPA. Conversely, 15% of the EU's PP market is obligated to GPA disciplines.⁸⁸ Provided TTIP negotiators are able to tackle the NTMs to U.S. procurement markets, the EU is projected to gain \$12.7 billion per year.⁸⁹ Thus the EU has expressed strong desire to expand its access to all U.S. GP markets. The two factors listed below are the most prominent barriers limiting EU access to U.S. GP markets.

Overall Lack of Reciprocity

The EU complains that the U.S. does not abide by several of its obligations of nondiscrimination under the GPA. While all 28 EU countries are listed under the EU's GPA obligations, only 37 U.S. states are included, and many of these states make further exemptions for their industries under separate annexes. While these exemptions are permitted under the GPA, they severely limit foreign firms' access to U.S. procurement markets. Furthermore, the U.S. has higher thresholds for central-government bids than any other party to the GPA. EU firms complain that these relatively high thresholds further discriminate against foreign producers, granting American firms unfair domestic preference for bids for U.S. public works projects.⁹⁰

The Buy America Provision

The Buy America provision, passed with the 2009 American Recovery and Reinvestment Act, restricts procurement for all steel, iron, and construction goods for U.S. public works projects to American producers. This includes \$48 billion for public transportation projects and \$30 billion in infrastructure improvements.⁹¹ These obligations for domestic production preference can be waived if relevant American goods are of an “unsatisfactory quality,” or if incorporating American materials would drive the project price up by more than 25%.⁹² EU firms complain that Buy America discourages U.S. “bidders”, primarily the Federal Transit Authority and Federal highway Administration, from incorporating EU goods into U.S. public works projects.⁹³

Recommendations

It is essential to the success of these negotiations that both parties abide by their respective obligations to the GPA. If the USTR allows EU firms expanded access to American procurement markets, the EU has stated it will allow the U.S. reciprocal expanded access to European GP.⁹⁴ Considering the U.S.’s obligations to nondiscrimination under the GPA, the USTR should lower U.S. thresholds for central government procurement to match EU levels for all commitments. The U.S. adopted a similar method when negotiating government procurement agreement under KORUS.⁹⁵ Equal thresholds would allow for fairer competition for EU firms in U.S. procurement markets, and in return, will provide the U.S. firms increased access to EU government procurement.

After extending provisions for expanded EU access to U.S. procurement, U.S. negotiators should seek exemption from Utilities Directive 2004/17, or should seek to lower the 50%-included European materials provision under the directive. U.S. negotiators should also seek increased transparency of data for all EU entities covered under the GPA. Because annual reporting of all entities procuring under GPA disciplines is required under article XIX:5 of the GPA, U.S. negotiators should ensure too, that the EU is abiding by its own obligations to the GPA.⁹⁶

Lastly, EU negotiators will also likely seek expanded access to state procurement markets and exemptions from discriminatory provisions under Buy America. Because the USTR does not have direct authority over the trade of all 50 states, it is unlikely that much can be done in the course of these negotiations to increase EU affluence in state procurement markets not already covered under the auspices of the GPA. Furthermore, because Buy America provisions are tied up in legislation and domestic law, it is unlikely that much can be done during the course of these negotiations to allow the EU exemptions from Buy America provisions.

SECTION III: Regulatory Issues

Chapter 7. Trade in Telecommunication Services and ICT | *By Travis Galloway*

Chapter Summary

Issue for Decision

How to increase access to U.S. and EU markets in telecommunications services through TTIP negotiations.

Background

The U.S. and EU dominate the global market in telecommunication services, yet significant barriers to trade between the U.S. and EU persist. The European Commission restricts the flow of data, especially personal information, to the U.S. from the EU and does not believe that U.S. data protection standards are adequate. The Federal Communications Commission (FCC) restricts foreign ownership of telecommunications companies to 25%, while in Europe ownership requirements are inconsistent among member states. Also, “encrypted products and cryptographic technologies” face inconsistent import and export requirements in the EU, which increases costs to U.S. companies that excel in the production of such technologies. EU member states have inconsistently implemented the EU Common Regulatory Framework for Electronic Communication Networks and Services (CRFECNS), which increases costs to U.S. companies participating in EU telecommunications markets. The U.S. and EU agreed to a number of principles regarding liberalization of the Information and Communications Technologies (ICT) sector through the 2011 Trade Principles for ICT Services, but few of these principles have been included in trade agreements.

Interests

Reducing restrictions on data flows between the U.S. and EU minimizes costs to U.S. companies operating in the EU and vice versa. Costs can be lowered further by allowing a greater degree of foreign ownership of ICT companies in the U.S. and EU. The EU is most concerned about data security, and given the sheer size of the ICT sector on both sides of the Atlantic, the U.S. stands to gain from establishing trust and increased trade with EU partners.

Policy Options

The U.S. could urge the EU to recognize data security standards before moving forward with other negotiations in this sector. However, as the EU is skeptical of U.S. data protection standards, such an approach could cause setbacks in negotiations and possibly interfere in sectors other than ICT. The U.S. could impose data security requirements that meet European Commission standards. This would likely build trust with EU negotiators, but before the U.S. commits to a general agreement to strengthen data security standards,

it may be best to discuss with the EU how to develop a framework for data protection that is acceptable to both parties. One option is that the U.S. could reduce ownership restrictions in the U.S. ICT sector, while asking the EU to establish a common ownership rule among member states, effectively accomplishing the same goal. The KORUS and KOREU agreements, which increased U.S. and EU access to the South Korean telecommunications sector and vice versa, demonstrate that progress on this front is possible. The U.S. would also benefit from lower export costs associated with harmonization of EU-wide import and export requirements on “encrypted products and cryptographic technologies”.

Recommendations

- Establish a high level working group to discuss which of the 2011 Principles can be included in TTIP.
 - Focus on reducing barriers to foreign ownership and reducing requirements that companies establish a physical presence to provide services.
- Stress full implementation of the EU CRFECNS.
- Stress the necessity for the EU to harmonize import and export licensing regimes for encrypted products and cryptographic technologies.
- Establish a high level working group with the EU outside of TTIP negotiations to discuss data protection standards and harmonization of those standards.

Background

Telecommunications services in the United States and the European Union constitute nearly half of the world market in telecommunications, coming in at \$1.17 trillion and \$1.24 trillion respectively.⁹⁷ Continued liberalization of trade in this sector, such as reducing foreign ownership restrictions, would benefit both parties. The 2011 Trade Principles for Information and Communications Technology (ICT) Services (hereafter referred to as the Principles) between the U.S. and EU outlined how both sides would mutually benefit from an agreement that allows for greater foreign ownership of telecommunications companies and facilities.

The 2013 U.S. Section 1377 Review noted that restrictions on cross-border data flows can be an unnecessary barrier to trade in telecommunications services. As the Review states, although there “may be legitimate reasons for governments to impose certain restrictions on data flows, such as the protection of privacy, such restrictions can be overbroad, having the unintended consequence of unnecessarily restricting trade.”⁹⁸ The U.S. government and businesses seek free flow of data across borders as a way to cut costs and facilitate transfer of information to and from countries in which they operate. With the rise of cloud computing, businesses and consumers are more reliant than ever on the ability to quickly transfer information over the Internet. However, there isn’t a consistent global rule governing data flows. Some countries block access to particular websites, restrict intra-country storage and transfer of data, restrict interconnectivity of data networks, or require the construction of local servers in order to operate domestically.⁹⁹

The FCC currently restricts foreign ownership of U.S. telecommunications companies to 25% unless otherwise determined after a lengthy application process. Companies must also reapply whenever they seek to offer new services not included in previous applications.

Also, the EU import and export licensing regimes for “encrypted products and cryptographic technologies” are inconsistent across member states.¹⁰⁰ The market for hardware encryption, just one portion of this market, was expected to be \$14.86 billion in 2013, and increase to \$166.67 billion by 2018.¹⁰¹ U.S. companies, especially in the Silicon Valley, are competitive in the market for these products and technologies.

Implementation of existing telecommunications agreements within the EU has also been inconsistent. For example, several member states have still not followed through with the EU Common Regulatory Framework for Electronic Communication Networks and Services (CRFECNS), which established a greater degree of harmonization and liberalization of data services.¹⁰² Member states still have not implemented parts of the agreement relating to “the provisioning and pricing of unbundled local loops, line-sharing, co-location, and the provisioning of leased lines.”¹⁰³

Interests

The EU is concerned about data security, especially protection of private information transmitted electronically. The EU will not discuss reductions to restrictions on cross border data flows until privacy concerns have been addressed.¹⁰⁴ The Administration is still discussing executive and legislative options to improve data protection standards.¹⁰⁵

Creating a uniform standard within the EU regarding imports and exports of encrypted products and cryptographic technologies would lower costs to U.S. companies seeking access to EU markets, and would simultaneously lower costs to EU consumers for these goods. Companies also gain access to valuable encryption technologies that enhance data protection.¹⁰⁶

EU data can only be transferred to third countries if the European Commission (EC) believes that the third country provides an “adequate level of protection” to data transmissions.¹⁰⁷ The EC recognizes only select U.S. data protection standards such as the U.S.-EU Agreement on the Transfer of Air Passenger Name Records and the U.S.-EU Safe Harbor Framework.¹⁰⁸ The Safe Harbor Framework is a voluntary agreement for companies “but the rules are binding on signatories.” For data transfers not covered by agreements deemed adequate by the EC, companies must seek exemptions by independently proving that their standards meet EC criteria.¹⁰⁹

Recommendations

USTR should establish a working group outside TTIP to discuss how data protection can be improved to an adequate level that allows negotiators to move forward with reducing data restrictions. This working group should discuss data storage practices and how U.S. companies are working with the government to ensure that they are not needlessly collecting data, and should keep the EU updated as U.S. legislation and executive actions enhance security.

USTR should establish a working group with the Europeans to discuss which elements of the Principles can be included in TTIP. The working group should focus on discussing ways to dismantle current restrictions on foreign ownership in the U.S. and

EU. Using the KORUS and KOREU agreements as an example of aligned interests, the U.S. negotiating team should be prepared to offer full foreign participation if the EU will reciprocate.¹¹⁰ A productive discussion of how TTIP can eliminate the requirement that firms establish a physical presence in order to provide services over the Internet would allow greater competition in U.S. markets, give consumers a greater range of choices, and increase access to markets in the U.S. and EU.¹¹¹ Furthermore, the USTR should stress the full implementation of the CRFECNS because it creates consistency across the EU and would make doing business easier for U.S. companies.¹¹²

Finally, U.S. companies would benefit from a single EU-wide import and export regime for encrypted products and cryptographic technologies that reduces the barriers to trade. As the Telecommunications Industry Association noted, doing this could actually increase data security since consumers would have greater access to data protection products and technologies.¹¹³

Chapter 8. Trade in Transportation Services | *By Travis Galloway*

Chapter Summary

Issue for Decision

How to reciprocally increase access to transportation services markets while maintaining U.S. domestic interests.

Background

The U.S. market for air and maritime transportation is largely restricted to U.S. companies while the EU market, at least for air transportation, is largely open. U.S. law restricts foreign ownership of U.S. air transport companies to 25%. The U.S. and EU have established an Open Skies Agreement that permits transportation of goods and persons between U.S. destinations, but the agreement has been inconsistently implemented among EU member-states. The Jones Act and Passenger Vessel Services Act, which govern maritime transport, impose strict cabotage rules that prohibit foreign carriers from transporting goods or persons between U.S. ports. Exemptions to Jones Act and PVSA rules are difficult to obtain.

Interests

The U.S. aviation industry employs approximately 500,000 Americans. About 74,000 jobs are directly attributable to the Jones Act, and both the Jones Act and PVSA play a role in U.S. national security by ensuring that the U.S. government has access to vessels in times of national emergency. Tampering with any of these policies will be politically controversial. Increasing competition in the U.S. air and maritime transport sectors could lower costs to consumers across the board. Reducing restrictions on foreign ownership of U.S. aviation companies, while ensuring citizen control, has the potential to reduce costs to consumers and provide much needed capital to a struggling domestic industry.

Policy Options

It is important to maintain the Jones Act by excluding maritime transportation services from TTIP. This would be supported by Congress and consistent with Administration policy to this point. However, since these are markets to which the EU seeks greater access, we should consider the possibility that cooperation in air and maritime transportation could increase leverage in other sectors. The U.S. could push the EU to ensure full implementation of the Open Skies Agreement; we can stress this as a confidence building measure before other agreements will be considered (i.e. loosening air and maritime transportation restrictions on foreign companies operating in the U.S.).

Recommendations

- Press the EU to fully implement the Open Skies Agreement among member states.
 - Suggest that this could build trust in other negotiating areas.
- Allow increased foreign ownership stakes of U.S. aviation companies.
- Stand by the Jones Act and PVSA, but begin discussion with the EU regarding ways to reduce transportation restrictions on foreign companies operating in the U.S. without jeopardizing American jobs.

Background

The General Agreement on Trade in Services (GATS) excludes air and maritime transportation from World Trade Organization (WTO) policy and does little to encourage liberalization of existing trade policy. As a result, state actors must negotiate bilateral agreements to liberalize these specific sectors.¹¹⁴ Trade in transportation services between the United States and the European Union is limited by U.S. laws that restrict access to domestic markets, while the EU market is significantly more open to foreign companies.

The EU has consistently attempted to include language to loosen air transport and ownership restrictions in trade agreements, but opposition in Congress and domestic aviation lobbying has prevented progress. The civil aviation industry alone accounts for approximately 5.3% of U.S. GDP, thus any negotiation of the aviation industry will attract significant attention.¹¹⁵ Notwithstanding previous attempts to change U.S. regulations, the U.S. and EU have established an Open Skies Agreement that allows transportation of “passengers, baggage, cargo, and mail” between locations in the U.S. and EU, and between locations within the U.S. and EU by carriers of either origin. These agreements also include mutual recognition of most safety and security measures.¹¹⁶

Regarding maritime transportation, there are two important laws that restrict foreign operation in the U.S.. First, the Passenger Vessel Services Act (PVSA) imposes a \$300 per passenger fine on foreign-registered, owned, or built vessels that transport passengers between U.S. ports. In order to transport passengers between U.S. ports, vessels must be “coastwise-qualified.”¹¹⁷ And second, the Merchant Marine Act of 1920, or the Jones Act, limits transportation of cargo between U.S. ports to U.S.-registered, built and owned vessels.¹¹⁸

The Jones Act significantly increases the cost of products shipped between U.S. ports. For example, the cost to ship a barrel of oil from the Gulf Coast to the East Coast is \$5-6; the same barrel of oil can ship to Canada on a foreign ship for about \$2.¹¹⁹ Currently, to be granted exemption from Jones Act, a vessel must obtain a waiver from the Department of Homeland Security (DHS) or Transportation (DOT). Waivers are granted only if the case at hand demonstrates a clear threat to national security. Waivers are rarely granted; as a recent example, oil shipments from foreign carriers were permitted in the Gulf States following Hurricane Katrina. However, after extreme winter weather in the Northeast U.S., a waiver was denied to ships carrying salt destined to cities in New Jersey to aid with post-storm cleanup issues.¹²⁰ To be exempted from PVSA requirements, Congress must pass special legislation on a case-by-case basis.

Interests

The domestic aviation lobby in the U.S. Congress is unlikely to support any agreement that reduces foreign ownership restrictions in the domestic aviation market. However, reducing these restrictions would increase competition, resulting in lower costs to consumers. The domestic aerospace industry employs approximately 500,000 workers, and opening the market in air transport services could be politically contentious. As long as increased foreign ownership of aviation companies does not lead to job losses, American interests are maintained. Permitting foreign ownership could inject capital into a struggling domestic industry.

The Transportation Institute estimates that 74,000 U.S. jobs are directly attributable to the Jones Act, thus weakening the Act would be politically

controversial.¹²¹ The Jones Act and PVSA protect American jobs and have been determined important to national security since they ensure that the government has access to domestic vessels “in times of war or national emergency.”^{122 123}

Recommendations

The USTR should strongly encourage the EU to fully implement the existing Open Skies Agreement among its member states. Successful negotiation of TTIP would also include an agreement to reduce foreign ownership restrictions in the U.S. aviation industry. As a confidence building measure, this could establish the basis for negotiations in the future to discuss further liberalization of domestic transportation.

USTR should continue to support the Jones Act. TTIP should not immediately alter current policy toward ownership in the maritime sector, and should not alter current cabotage restrictions. Modifying the waiver-granting process for the Jones Act and PVSA is an example of possible progress.

Chapter 9. Automotive | *By Travis Galloway and Daniel Stack*

Chapter Summary

Issue

How U.S. negotiators should approach U.S.-EU vehicle safety and environmental standards under the framework of TTIP.

Background

Safety Regulations: The U.S. and the EU have the highest standards for vehicle safety in the world. In 1958, the EU joined the United Nations Economic Commission for Europe (UNECE), an agreement for the harmonization of technical and safety standards of motor vehicle production for all signatory states. Finding this agreement unfit for its own standards, the U.S. crafted the Federal Motor Vehicles Safety Standards (FMVSS), a similar set of statutes spelling out the U.S.'s standards for automotive safety. To carry out automotive testing, The U.S. developed the National Highway Traffic Safety Association (NHTSA) sets auto safety standards in the U.S., and the EU created the European New Car Assessment Program (NCAP), which sets testing regulations for automobiles built or sold in the EU. Because of differences in these regulatory bodies, and despite very similar safety standards, automotive trade between the U.S. and the EU has become an onerous and expensive endeavor.

Environmental Regulations: EU emissions standards are still lower than U.S. standards. The recent transition from Euro 5 to Euro 6 emissions standards indicates that EU standards are slowly converging with U.S. Environmental Protection Agency (EPA) emission requirements.

U.S. Interests

In 2012, the U.S. exported \$7.9 billion in automobiles to the EU, with another \$5 billion in automotive parts. Eliminating NTBs in automotive trade could lead to anywhere from a 207% to 347% increase in automotive sales to the EU. USTR negotiators need to stand firmly by EPA emissions standards that are supported by the U.S. Congress and central to the Administration.

Negotiating Options

Safety Regulations: Negotiators should seek to establish grounds for mutual understanding in respect to each other's automotive safety requirements. Regulators from both the EU and the U.S. have already begun creating a list for mutual recognition of similar regulations under the FMVSS and the UNECE. Furthermore, negotiators should

seek increased cooperation between EU and U.S. regulators to ensure convergence of automotive safety standards.

Environmental Regulations: Maintain our current domestic emission standards.

Recommendations

Safety regulations: TTIP negotiators should seek to reduce NTB's to automotive trade building grounds for mutual recognition between U.S. and EU auto safety regulators. Negotiators should build a forum for continued convergence talks after TTIP talks end. Negotiators should also seek an increased harmonization of U.S. and EU regulators to ensure that future safety standards reflect the safety standards of both the U.S. and the EU.

Environmental Regulations: Negotiations should support existing Administration policy and acknowledge strong support in Congress regarding emissions standards by stressing that the EU needs to strengthen their emissions standards to meet EPA standards.

SAFETY ISSUES

Background

The foremost barriers to trade between U.S. and EU automotive markets arise from divergences in regulatory practices set by the U.S.'s National Highway Traffic Safety Association (NHTSA) and the EU's European New Car Assessment Program (NCAP). NHTSA and NCAP regulations differ substantially in testing methodology, certifying processes, and data tracking.¹²⁴ These divergences produce costly barriers to transatlantic auto trade, driving prices upwards of 26% on all U.S.-EU auto transactions.¹²⁵

NCAP

NCAP dictates safety regulations motor vehicle and auto parts producers must meet to sell in EU markets. NCAP regulations must meet United Nations Economic Commission for Europe (UNECE) standards under the EU "Framework Directive."¹²⁶ Under the Framework Directive, the EU sets specific rules designed to ensure that automotive products sold in the EU comply with EU legislation for that specific product. To meet these standards, manufacturers must meet production requirements throughout the product's development. NCAP can recall a product if it is found non-compliant with Framework Directive safety regulations.¹²⁷

The NHTSA

Finding UN regulations unsatisfactory for U.S. safety requirements, the NHTSA developed the Federal Motor Vehicle Safety Standards (FMVSS) under the National Traffic and Motor Vehicle Safety Act of 1966 (the Safety Act), which defines all safety regulatory standards that motor vehicles and automotive parts produced and/or sold in the

U.S. must meet.¹²⁸ The NHTSA does not conduct inspections at manufacturing sites. Instead, automotive producers pledge that their products meet FMVSS. If a product is found in non-compliance with FMVSS, the NHTSA often “persuades” the producer to recall its defective product.¹²⁹

Interests

If the EU and U.S. are able to reduce NTBs to automotive trade, estimates project a 207% to 347% increase in American automotive sales to the EU by 2017.¹³⁰

Furthermore, if TTIP is successful and transatlantic market access is liberalized, the EU auto sector is expected to experience more gain than any other European sector.¹³¹

Automotive industries has voice their strong support of the reduction of NTB through TTIP negotiations.

Recommendations

- To further reduce barriers to transatlantic automotive trade, NHTSA and NCAP should seek the eventual convergence of UNECE and FMVSS safety regulations. However, because safety regulations set by both the NHTSA and NCAP are wrapped up in legislation and stipulate for different methods of testing, convergence should be treated as a long-term goal, particularly considering the NHTSA’s historical resistance toward universal recognition of safety standards under the UNECE.
- If manufacturers meet the safety standards of one party, it should be assumed that the manufacturer meets equal safety standards of the other. Thus negotiators

- should seek for provisions that mutually recognize U.S. and EU testing and certification processes, as well as data tracking for all automotive transactions.¹³²
- A more realistic goal for the interim would be for negotiators to seek mutual acknowledgement of FMVSS and UNECE standards for transatlantic automotive trade. Many safety standards for stipulated auto components are virtually the same under both FMVSS and UNECE.¹³³ Thus regulators have already begun compiling a list of similar regulations for mutual recognition.¹³⁴
 - Due to the limited timeframe for TTIP negotiations, negotiators should develop a process to continue harmonization talks after negotiations end. In a recent report to the USTR, GlobalAutomakers suggests that negotiators create a forum that requires meetings between U.S. and EU regulators, incorporating input from auto manufacturers throughout the process.¹³⁵

ENVIRONMENTAL ISSUES

Background

Current emissions standards for automotive vehicles in the United States are much more stringent than in the European Union. In January 2014, the EU adopted Euro 6 legislation that outlined the new restrictions on automotive emissions for all European member states. As Table 1 shows below, European standards appear to be converging with U.S. standards. However, by comparing the Euro 5 to the Euro 6, we are able to see that the EU is making incremental steps towards U.S. standards and still have a long way to go. Meanwhile, the EPA standards have continued to become even stricter and include more requirements such as fuel efficiency.

Table 1 Euro 4 and Euro 5 emission requirements and the emission requirements in Japan and the United States (COM, 2005)

		Passenger car Petrol		Passenger car diesel		Light commercial vehicles ^{c)}	
		Particulate matter	Nitrogen oxides	Particulate matter	Nitrogen oxides	Particulate matter	Nitrogen oxides
		<i>mg/km</i>					
Euro 4	2005	-	80	25	250	25 / 60	80 / 390
Euro 5	2008/ 2009 ^a	5 ^{b)}	60	5	200	5	60 / 310
Japan	2009	5	50	5	80	7	50 / 150
USA	2004/ 2009	6	40	6	40	6 / 10	70 / 120

a) Assuming political decision making in 2006.

b) For lean burn direct injection.

c) Low values: light commercial vehicles operating on petrol; high values: heavy commercial vehicles operating on diesel.

Interests

The U.S. has historically championed the reduction of green house emissions and currently leads the world in the highest emissions standards. With support from Congress, the Administration and NGO's, USTR negotiators need to stand firmly by its position that it will not accept the reduction environmental standards as a viable outcome of trade negotiations. Recognizing Euro 6 standards jeopardizes U.S. position regarding public health and the reduction of CO2 emissions. The U.S. has a strong interest in holding automotive imports to the highest emissions standards.

Recommendations

USTR should press the EU to strengthen its emissions standards, especially regarding nitrogen oxide emissions from diesel engine vehicles. By adopting EPA

emission standards the EU will simultaneously be upholding its commitment to being a responsible stakeholder through addressing climate change while increasing its access to U.S. automotive markets.

Chapter 10. U.S. Energy Exports | *By Adam Wambold*

Chapter Summary

Issue

How the U.S. negotiators should approach EU demands for energy exports, crude oil and liquid natural gas (LNG) in TTIP negotiations.

Background

Crude: Current U.S. policy restricts crude oil exports, mostly as a result of oil embargo era legislation which is now outdated. These 3 policies are: the Mineral Leasing Act 1920; Energy Policy and Conservation Act 1975; and Export Administration Act 1979. These pieces of legislation require the U.S. to retain U.S. crude oil within its borders with some exception to Canada and out of Alaska. Over the last decade, an unexpected amount of crude oil has been extracted and will continue to be extracted from the U.S. using new technology. However, most U.S. refineries are unable to process this relatively higher-quality crude. Therefore, this presents an advantageous opportunity for U.S. exporters if restrictions are removed or overcome to allow the exportation of crude.

LNG: The U.S. now has large amounts of natural gas reserves within its borders and many domestic industries rely on natural gas to manufacture their final products. However, Congress revised the Natural Gas Act in 1992 in response to NAFTA to allow for expedited imports of Canadian natural gas. This legislation mandates that the Department of Energy automatically approve any LNG exports to nations that the U.S. has a free trade agreement with. When this legislation was passed, the U.S. did not know about the amount of natural gas it possessed or the process with which to extract it. Though most of Europe is highly reluctant to extract its own natural gas reserves through the hydraulic fracturing process, it is interested in importing hydraulically fractured natural gas as LNG from abroad.

U.S. Interests

Crude: With a limited ability to refine U.S. crude within its borders, the U.S. could gain substantially in net economic benefit from increased crude oil exports. For the vast majority of the oil industry and for some in the current administration, increased crude exports is understood to be very beneficial.

LNG: The U.S. stands to gain substantially from LNG exports and could become one of the world's leading exporters of LNG. However an increased exportation of natural gas abroad, with Europe in particular, would cause the price of natural gas to increase significantly in the domestic market. This could negatively affect other domestic manufacturing industries that rely on cheap natural gas to produce their products. The U.S. could benefit greatly from LNG exports if these exports are limited and regulated to a level that benefits the interests of other U.S. industries.

Negotiating Options

Crude: The U.S. can include a provision in a TTIP agreement that would authorize open exports in crude oil to the EU. The U.S. could also hold discussions with the EU regarding crude oil exports in a separate forum outside of TTIP while USTR and other government bodies attempt to change U.S. legislation restricting crude oil exports.

LNG: The U.S. TTIP negotiators could follow through with the requests for open access of LNG to the EU and gain from the increased trade. The TTIP negotiators could also include the authority of the U.S. Government to regulate the trade in LNG to the EU in order to maintain stable prices in the domestic market.

Recommendation

Crude: U.S. negotiators should attempt to include a provision in TTIP that allows for the open export of crude oil to the EU to attempt to bypass existing but outdated legislation. This could set a precedent that would force Congress to review oil export restrictions. USTR should also attempt to ease potential EU restrictions on carbon emissions under FQD in either treaty text or outside of TTIP negotiations.

LNG: U.S. negotiators should include vague reference to LNG exports in a treaty text that would allow LNG exports based off of U.S. law, which could be subject to change in the future. Outside of TTIP, USTR, Department of Energy, manufacturing industries, etc. should continue to put pressure on Congress to grant the DoE authority to monitor and regulate LNG exports in the future to protect other domestic industries.

U.S. Crude Oil Exports

The oil import dependent EU is likely to pursue increased access to the U.S. crude oil market during these negotiations in order to further wean themselves off of other global oil exports, such as those from the OPEC and Russia. Over the last decade, U.S. production of crude oil has grown at a rate that Americans never could have predicted during the 1970's, when Congressional legislation passed in response to the OPEC oil embargoes in order to retain the then limited amount of U.S. crude in the country. Now however, the U.S. crude output is one of the largest in the world, producing approximately 100,000 barrels per day (b/d) as of March 2013. This number is up from nearly zero in 2007 and has the potential to increase five-fold by 2017.¹³⁶

There are 3 different pieces of legislation that were passed by Congress over the last century that restrict crude oil exports from the U.S.: the Mineral Leasing Act of 1920; the Energy Policy and Conservation Act of 1975; and the Export Administration Act of 1979. These policies are under the administration of the office of Export Administration Regulations (EAR) of the Bureau of Industry and Security, an agency in the Department of Commerce.¹³⁷ Using these policies, EAR has the authority to accept or reject export license applications from U.S. oil firms according to its own open-ended definition of the "national interest". In addition, the general opaqueness of the process for export approval licenses discourages exporters from applying due to the lack of legal clarity and fear of inconsistent regulation from EAR.¹³⁸ All crude oil exports from the U.S. must be licensed with small exceptions to exports from Alaska and some to Canada.

Another obstacle to possible oil exports to the EU could be the European Fuel Quality Directive (FQD) that will be up for vote in the European Parliament in May 2014. In short, the

FQD would place carbon emission limits on fuels that would discourage the EU from importing oil extracted from oil sands in Canada and the U.S. because of the relatively high carbon emissions that come from oil sands crude. Trade Representative Michael Froman and the Obama Administration have already been pressing the EU to alter its treatment of oil sands oil in the proposed FQD in an effort to ensure that FQD will not hinder TTIP negotiations.¹³⁹ In addition Canada and the U.S. have brought up their joint disapproval of the issue at the WTO (Canada has much more to lose given the great amounts of crude extracted from oil sands in Alberta). TTIP negotiators should approach the FQD issue by requesting that the EU give special provisions to oil sands in the FQD. The U.S. should push for treaty text that raises the amount of carbon emissions permitted by oil sands to allow for open export markets for the U.S. and, by effect, Canada.

Outside of negotiations, USTR and the Administration along with our Canadian partners should continue to press for an easing of FQD requirements. This effort should proceed with caution because the environmental precedent that FQD carries has been lauded by the international community and even by the United States senators, among others.

The main argument against opening U.S. crude to international exports is that it will dramatically raise domestic prices, a position which is heavily championed by the few refineries in the middle of the country which are able to process American crude.¹⁴⁰ Most U.S. refineries cannot process U.S. crude because they were constructed to refine lower-quality crude imported from Latin America. Facilities with the capacity to process high-quality crude are located in places where the cost of shipping the crude to the refinery greatly diminishes the value of the crude, creating inefficiencies in the process. Given the small market of domestic buyers, U.S. crude producers must decide to either pump the crude at depressed prices or leave it in the

ground resulting in artificially low prices due directly to the regulations by EAR.¹⁴¹ Refineries and pipelines currently under construction in the U.S. will solve some market distortions in the long-run, assuming they are completed in a timely and operational manner. However it would be a much simpler and more cost-effective solution to allow U.S. crude exports, which would not raise gasoline prices since the exported crude is largely unable to be refined in the U.S. oil industry executives estimate that if the ban on exports were lifted today, exports would likely surpass 500,000 b/d by 2017.¹⁴²

For those that argue that increased global exports of U.S. crude would raise domestic gasoline prices or that U.S. production could fall short of current speculations, the Council on Foreign Relations claims that, “U.S. crude exports are self-limiting: if the supply gains expected do not materialize, the market will induce producers to keep the oil at home rather than to send it abroad.”¹⁴³ Therefore if the export market is liberalized, it will respond to market principles and regulate itself in the interest of crude producers.

Therefore, it is our opinion that these oil embargo era policies administered by EAR are out-of-date and need to be revised in order for both the U.S. and the EU to fully benefit from trade negotiations in energy. Our view reflects that of the majority of the U.S. crude industry, the U.S. Energy Secretary Ernest Moniz, members of Congress from both parties, and the Obama Administration.¹⁴⁴ In order for this matter to be solved in TTIP, negotiators can include a provision that grants U.S. exporters rights to export U.S. crude within the EU alone without having to go through the hurdles presented by EAR. If U.S. crude exports are liberalized entirely, it could add upwards of \$15 billion of annual revenue by 2017. The first step of such liberalization should be made within the parameters of a TTIP agreement, which can be done with little cost to U.S. industry.

Recommendations

TTIP negotiators should pursue including a provision within the FTA to open U.S. crude exports to the EU. Given the EU reliance on other oil sources and its desire to diversify its oil sources, the EU should support increased U.S. energy exports. In later negotiating stages, U.S. negotiators could also, if possible, leverage the EU interest in open crude access to receive gains in other challenging sectors. Regarding FQD, the negotiators should push to include treaty text that eases the allowable amount of carbon emissions for oil sands to allow for the most beneficial export levels.

Outside of TTIP, USTR along with the Department of Energy, supporters in Congress, and the Obama administration, should directly pressure the Department of Commerce and the whole of Congress to revise the outdated policies enacted during the oil embargo years in order to promote liberalized U.S. crude exports to the EU and subsequently the global market. USTR along with the Canadian government should also continue to push for changes to the EU FQD that would give more beneficial emissions requirements to oil sands in the legislation itself.

Liquid Natural Gas Exports to the EU

EU negotiators will likely be looking to gain free and open access to U.S. liquefied natural gas (LNG) exports as a main negotiating goal in TTIP. This would allow the EU to diversify its natural gas imports and lessen their dependence on Russia. This presents a unique opportunity for the U.S. to secure both short and long term economic benefits through increased LNG exports. Increased LNG trade with the EU would produce an immediate increase in GDP and create several thousands of jobs in the natural gas industry. However, open and unregulated

exports of LNG to Europe could increase domestic natural gas prices in the U.S., affecting consumers and several domestic manufacturing sectors. This could also result in large economic and environmental costs arising from increased natural gas production and transportation.

U.S. Natural Gas Act and Possible Implications to TTIP

The revision of the Natural Gas Act in 1992 was a response to NAFTA and Canadian natural gas imports. Congress passed the revision in order to speed up those imports and thus mandated that the Department of Energy automatically approve all LNG trade with American FTA partners.¹⁴⁵ Of course in 1992, the U.S. did not know of the large reserves of natural gas within its borders that are now exploitable through the process of hydraulic fracturing or “fracking”. Since the Department of Energy has no oversight as to the quantity of LNG exports to FTA countries, if TTIP was to pass without any mention of natural gas, then the EU would be free to import high quantities of LNG. This increased trade would provide the U.S. with increased exports and overall GDP growth and an increase in demand for LNG that could create several thousands of jobs. However according to many manufacturing sectors dependent on the relatively low current domestic natural gas prices, open European access to LNG would also cause increases to domestic prices for natural gas.¹⁴⁶ Therefore, the difference between LNG exports and crude oil exports is that in the event of a ratified FTA with the EU, the U.S. would be obligated to open the entire domestic natural gas market to the EU without government oversight or authority to restrict exports.

Increased natural gas prices in the U.S. could affect many domestic manufacturing industries that rely on natural gas in their line of production.¹⁴⁷ Natural gas is used by domestic manufacturing industries in several important chains of production: as a feedstock in products

such as fertilizers, plastics, and pharmaceuticals; as a heat source in metals and chemicals industries; and in electricity-intensive industries as well as the motor vehicle and agriculture sectors.¹⁴⁸ Therefore if large amounts of LNG production in the U.S. are directed toward exports and the price then increases due to an increase in overall demand, it will affect many domestic manufacturing sectors. These sectors are also export sectors, so if their production declines in response to an increase in cost of natural gas they will also see reduced export revenues.¹⁴⁹

However, if LNG is exported to the EU and a rise in domestic natural gas prices has a higher elasticity than expected, the limitation of LNG exports may not be as important as previously stated.¹⁵⁰ Some reports by the Energy Information Administration (EIA) claim that the prices of natural gas would rise substantially if U.S. demand is highly inelastic and foreign demand is highly elastic, which the EIA claims is unlikely.

If LNG was allowed to be exported without restraint to the EU, it would also require new networks of pipelines to transport the natural gas to ports and also require more facilities to turn the gas into liquid. This is a process that consumes high amounts of energy and creates environmentally harmful emissions.¹⁵¹ Remaking the natural gas transportation network to serve the high demand abroad would have high economic costs in both construction and energy consumption. Also, there would be potential environmental costs of having pipelines cut through ecosystems as well as property, none of which would be politically popular.

Arguments For Unlimited LNG Exports

There are many valid arguments in favor of opening the U.S. LNG market to the EU through these TTIP negotiations. From a geopolitical outlook, one argument states that if openness of LNG to the European market was approved, it could be a stepping-stone to including

Asian nations in the open LNG trade market shortly thereafter. This subsequent openness of U.S. LNG in Asia would solidify the perceptions of U.S. reliability to Asian allies and partners through energy security. This would also have the chance to add to the economic interdependence between the U.S. and China and would send a significant message to other Asian and Middle Eastern suppliers of LNG that could make the global market more competitive and diversified.¹⁵²

There are also many economic studies into the consequences of general openness of the U.S. LNG market. One study commissioned by the U.S. Department of Energy studied the potential outcomes of several different scenarios in which there are different amounts of U.S. LNG exports globally. Its overall finding is that U.S. economic welfare increases as the amount of LNG exports increases. Furthermore, although domestic natural gas prices would increase as a result of LNG exports, the value of the exports also rises, creating a net gain for the U.S. economy based on real household income and real GDP. The report also claims that the cost to consumers and down-stream industries having to incur higher cost are “more that offset” by the increase of export revenue and wealth transfers from abroad received for liquefaction services. Thus the “net result is an increase in U.S. households’ real income and welfare.”¹⁵³ In addition, the report claims that wages would decrease slightly in the short-term for natural gas related sectors but there would be little affect on initial job loses besides the normal rate of turnover in those sectors as the benefits of open trade begin to become more prominent there will be job creation.

Therefore, this study and others claim that the economic side effects of open LNG exports would indeed affect domestic markets but it would have little effect on jobs or wages. As the potential for the LNG market expands from the EU to the global market, the competition will

keep prices at reasonable levels. In addition, the initial increase in domestic prices could produce innovations to make domestic industries more efficient. Also remember that for the purposes of this discussion, the potential result of LNG exports being included in a TTIP agreement would be limited to Europe and not subject to the scale of global speculation. Since LNG exports as a result of TTIP would be limited to Europe, this would allow the U.S. to gauge the effects of increased international trade in LNG on a single, but large trading partner. Through this LNG trade with the EU, the U.S. could better estimate the effects of LNG exports if the U.S. were to open the industry to the global market in the future.

Therefore if the status quo of U.S. legislation is maintained after a successful TTIP agreement, then European open access to the U.S. LNG market could bring significant economic gains for the overall U.S. economy generally speaking with little down side to other related industries. In a final TTIP agreement, the U.S. should not specifically ensure that the EU will have open access to the LNG market. While the EU would have open access to LNG according to U.S. legislation, the U.S. Government may decide in the future that this is not serving American interests. Therefore if future legislation is passed that controls LNG exports, the U.S. should make sure that a TTIP treaty text no hinder such legislation.

Negotiating Recommendations

This subject is heavily tied to U.S. legislation that would be difficult if not impossible to change or revise through these negotiations. However, given the significant interest the EU has in securing increased and competitive channels for fossil fuels, specifically LNG, this report recommends the following to U.S. negotiators:

Through a final TTIP treaty, LNG exports would be granted to the EU according to U.S. legislation. However, since TTIP can't override Congressional legislation (Natural Gas Act 1992) the treaty text should have no specific mentioning of natural gas exports. It would be in the U.S. negotiators' best interest to assure their EU counterparts that the EU would be automatically given open access to the U.S. LNG market as a result of the Natural Gas Act 1992. There should be no reference in the text to what legislation this is associated with or a reference that ties gas to legislation current at the time of signing. This will leave the U.S. Government with the flexibility to change legislation in the future if it is determined that open LNG exports is not in the best interest of the U.S.

If U.S. negotiators at later stages of negotiations see it fit, the U.S. could also pressure the EU by requiring treaty text that the U.S. is not obligated to grant the EU with open access to the U.S. LNG market. This can be used to leverage the EU into negotiation in other areas that U.S. negotiators identify as possible areas of compromise.

If TTIP is then successfully concluded, the USTR along with the Department of Energy and domestic manufacturing industries effected by natural gas price increases should continue to lobby Congress and the Administration for another revision to the Natural Gas Act 1992. The goal would be to give authority to the Department of Energy or any other reasonable government agency to monitor LNG exports and confirm that these exports are in the "best interest" of American industries and overall economic well-being.

Chapter 11. Chemical Sector | *By Adam Wambold*

Chapter Summary

Issue

How the U.S. negotiators should proceed relieving regulatory divergence in chemicals trade within the framework of TTIP.

Background

The existing regulatory policy in the U.S. is the Toxic Substances Control Act (TSCA) passed in 1976. According to the U.S. chemical industry, TSCA fails to provide adequate scientific testing for many “existing” substances listed before 1979 and is an antiquated policy that many in the U.S. chemical industry want revised. The existing regulatory policy in the EU is the Registration, Evaluation, Authorization, and Restriction on Chemicals act (REACH) passed by the EU in 2007. It offers an updated regulatory system that relies on both the industry and the EU to provide evidence that a substance is not harmful to humans or the environment. TSCA differs from REACH in that TSCA restricts substances if there is a definite and reasonable risk to humans or the environment while REACH restricts substances if the evidence is inconclusive. The regulatory philosophy in the EU is highly precautionary while the philosophy in the U.S. is based on strict scientific proof of risk. The U.S. accuses REACH as being out of line with WTO mandates that require definite scientific evidence to ban a substance.

U.S.-EU Interests

Given the greater size of EU chemical exports, the EU would gain more from a simple reduction or elimination of tariffs. However, the U.S. would gain more from regulatory convergence and/or mutual recognition. U.S. chemical industry favors a reworking of TSCA legislation citing the fact that it is outdated. This would help the U.S. chemical industry to be more competitive in foreign markets.

Negotiating Options

Negotiators can simply eliminate all tariffs that benefit, to differing degrees, the chemical industry for both parties. The U.S. could also use tariffs as a negotiating tool to induce EU concessions on regulatory issues since the EU would gain more competitively through tariff elimination.

Recommendations

- U.S. negotiators should use the remaining tariffs as a negotiating tool to receive concessions from the EU on regulatory matters.
- The U.S. should include in treaty text assurance to revise TSCA as minimally as possible to receive EU recognition, such as reworking TSCA to better review “existing substances”.

- If this tactic fails, the U.S. should agree to *reduce* some tariffs and to continue discourse of regulatory issues in a separate forum at a later date.

Chemical Sector

The chemical sector will be a major sector for negotiations in TTIP due to the large size of the chemicals industry in both the EU and the U.S. With the reduction or elimination of tariffs alone, the industry can save \$2 billion in annual expenditures. Furthermore, the chemicals industry can save several billions of dollars by solving redundant regulatory hurdles in TTIP negotiations. As a result, both the American Chemistry Council (ACC) and the European Chemical Industry Council (CEFIC) support tariff reductions and the solving of regulatory differences through TTIP.¹⁵⁴

The chemical manufacturing sector is one of America's leading export markets, accounting for nearly \$189 billion annually and is approximately 12 percent of all U.S. exports. Of these numbers, \$51-\$139 billion came from two-way trade with the European Union in 2011.¹⁵⁵ In addition, this sector employs about 788,000 workers, of which 200,000 are directly dependent on exports.¹⁵⁶ Production and trade in chemicals also plays a key role in a wide range of other important manufacturing sectors including automobile, pharmaceuticals, electronics, and textiles.¹⁵⁷

The major barriers to trade that both parties should pursue in these negotiations should be to reduce or eliminate tariffs altogether and also find a way to reduce the inefficiencies associated with differing regulation requirements on both sides. According to the ACC, tariffs on chemical imports on both sides of the Atlantic is already extremely low at an average of 3 percent, the outright elimination of these duties could entail a modest estimate for savings of over \$600 million per year for intra-company trade alone.¹⁵⁸ In addition, CEFIC estimates that over \$2 billion annually would be saved by the industry if tariffs were eliminated.¹⁵⁹ However, the main obstacle that negotiators will need to address is the issue dealing with regulatory

differences between the U.S. and EU. Prior to the early 2000's, the EU generally followed the U.S.'s lead in establishing regulatory law for testing potentially harmful materials and authorizing them for commercial use.¹⁶⁰ However, since 2007, the EU established regulatory policy that is for the most part incompatible with U.S. regulatory policy.

The EU is currently the world's largest producer of chemical substances, accounting for nearly 30% of global output, with 25% of EU output coming from Germany alone.¹⁶¹ With the U.S. as the EU's largest chemicals trading partner, the elimination of tariffs alone would save the EU millions of dollars annually. However, the regulatory system in place in Europe is highly precautionary when evaluating substances and is often not fully reliant on scientific data. This precautionary principle in the EU makes it difficult for the U.S. chemicals industry to compete in Europe. With two-way tariffs on chemical products essentially equal between the U.S. and EU, the EU could stand to gain more from the elimination of tariffs because of the larger relative size of the European industry. Thus in a TTIP situation in which tariffs are reduced or eliminated but regulatory issues are not addressed, the U.S. chemicals industry would lose competitiveness relative to the EU industry. This would be the case because U.S. imports from the EU would face virtually zero barriers to trade, but many imports in the EU from the U.S. that don't pass EU regulations requirements would still be excluded from the market. This provides a strong argument for the inclusion of chemical regulatory issues in negotiating TTIP due to the mutual benefits from harmonization or mutual recognition of regulatory procedures.

Summary of Existing Chemical Regulation Legislation in the U.S.

The bulwark of U.S. chemical regulation policy is contained in the Toxic Substances Control Act of 1976 (TSCA) which is enforced by the EPA Office of Pollution Prevention and

Toxins (OPPT). The general operating procedure that the OPPT (under Section 8 of TSCA) follows when a “new” chemical is manufactured, imported, processed, or distributed, is to require the manufacturer or importer etc. to provide the OPPT with “information on any of their chemical substances or mixtures that reasonably supports the conclusion that such substances or mixtures presents a substantial risk of injury to health or the environment.”¹⁶² The OPPT seeks to acquire scientific proof that any given substance does not present an “unreasonable risk” to human health or the environment, with “unreasonable risk” being undefined.¹⁶³ However, if the data is inconclusive on a given substance, OPPT often clears it for use since it has not specifically shown that it can cause harm. This aspect of TSCA has become incompatible with current EU regulation policy due to the fact that the European Union follows a highly precautionary principle when regulating chemical substances. This means that the EU does not always make final decisions based on hard scientific evidence but often bans substances it feels could be potentially hazardous.

Summary of Existing Chemical Regulation Legislation in the EU

The EU’s legislation, which entered into force 1 June 2007, is the Registration, Evaluation, Authorization, and Restriction on Chemicals (REACH). REACH’s goal is to streamline and improve on the former legislative framework on chemicals registration and regulation in the EU. Operated by the European Chemicals Agency (ECHA), REACH implements a framework where manufactures and importers of chemicals must explicitly identify and manage risks associated with chemicals. Under REACH, producers must take special actions to register the substance with the ECHA, allowing them to conduct evaluations on the substance as they see fit (REACH also seeks to minimize the amount of animal testing used

in experiments which is a vital gauge of whether or not a substance is safe for human use).

ECHA then must decide whether to authorize the substance and can place certain restrictions on its use. If ECHA decides that the substance is unsafe for human health or the environment or that there is not sufficient evidence to suggest that the substance is or will be safe for humans and the environment, ECHA can ban the substance altogether.¹⁶⁴

As seen in both TSCA and REACH, the U.S. and EU have differing standards and attitudes in regards to the philosophy of regulating chemical substances. On one hand, the EU is highly precautionary and requires concrete and complete proof that a substance *is not and will not* be harmful to human health and the environment. ECHA also strives to place restrictions on certain testing methods (such as animal testing) that can leave scientists and industry officials with insufficient data and can result in a substance being restricted or banned. On the other hand, TSCA in the U.S. compels the manufacturer to provide the OPPT with scientific evidence that a given substance is not harmful to humans or the environment, but if the scientific tests come up inconclusive, the EPA can still authorize the use of that substance. Prior to REACH, EU chemicals regulation policy had largely mirrored that of TSCA and other related U.S. policies.¹⁶⁵ Before and after the approval of REACH in the European Parliament in 2006, many stakeholders in the European and U.S. chemical industry along with the United States Government under the Bush administration strongly opposed the prospect of new regulations under REACH. The group of industry stakeholders that originally opposed REACH was made up of firms and organizations on both sides of the Atlantic including some of the largest chemical manufactures in Germany and the ACC.¹⁶⁶ The ACC still claims that REACH is unproven and if U.S. chemicals regulation policy is to be updated it shouldn't rely on REACH as an example.¹⁶⁷

American chemical industry stakeholders strongly support the TTIP negotiations and ask U.S. negotiators to attempt to reduce the barriers to trade with the EU that revolve around differences in regulation within the chemical sector. The ACC and Dow Chemical welcome a comprehensive agreement through these negotiations and claim that reducing the regulatory incompatibilities between the U.S. and EU can create thousands of jobs, foster increased innovation, improve industry competitiveness, and provide long-term growth for both blocs.¹⁶⁸ In addition, reduced regulation disagreements can result in millions of dollars of reduced costs for intra- and inter-company as well as inter-sector trade.

The ACC supports the claim of some inside and outside the chemical industry that the U.S. should consider looking to regulatory regimes abroad as a way to update and improve TSCA. To that regard the ACC states the following in their policy position,

“While the United States should learn from other jurisdictions, Congress must not jump to conclusions about the appropriateness of other chemicals management systems for the United States. For example, the European Union’s REACH program is often cited as a model, but its effectiveness has yet to be proven. Canada’s approach to prioritization and review may provide an effective model for some changes to TSCA.”¹⁶⁹

The major accomplishment of the Canadian regulation legislations, Canadian Environmental Protection Act 1999 (CEPA) and the Chemicals Management Plan 2007 (CMP), was a thorough review of the “existing chemicals” that existed before the enactment of chemicals regulations several decades ago. Like Canada prior to these pieces of legislation, the U.S., according to the ACC and EU, does not have sufficiently safe and comprehensive scientific testing and risk management requirements for pre-1979 “existing chemicals”. The U.S. could then possibly include in a treaty text, either explicitly or vaguely, illustrating that the U.S. will review “existing chemicals” in a way similar to that of Canada.

Also in these negotiations, the U.S. should refrain from, at least initially, removing some tariffs on chemical substances in order to get regulations concessions from the EU. CEFIC has stated in its official trade policy that it would most like to see the abolition of tariff barriers through FTAs, but it remains more illusive on regulatory issues, vaguely mentioning that CEFIC would like to see the elimination of NTBs.¹⁷⁰ This could possibly be because the EU has a trade surplus of approximately \$5.7 billion over NAFTA countries, thus if tariffs alone were eliminated both sides would benefit but the EU would gain more relative to the U.S.¹⁷¹ If non-tariff barriers such as regulatory differences achieve some sort of convergence through TTIP, the U.S. chemical industry would become more competitive in the EU, while such an effect would have a lesser effect for EU competitiveness in the U.S. In other words, NTBs in the form of regulation policy give the EU chemicals industry an advantage over the U.S. industry in the EU chemicals market. Thus if tariffs are removed, the EU having the larger chemicals sector would gain more relative to the U.S. Though the U.S. chemical sector would benefit from reciprocal tariff cuts, they could be put in a deeper competitive hole by the EU chemicals industry. Therefore U.S. negotiators should offer to eliminate tariffs for reciprocal concessions such as mutual recognition of certain U.S. regulations after U.S. assurance to review “existing chemicals” either through a result of TTIP treaty text or through separate legislative action

Environmental and consumer interests oppose changing chemical sector regulations out of fear that this could lower environmental standards and put consumers at risk. The Trans Atlantic Consumer Dialogue (TACD) recommends that the individual U.S. states and EU member states should have the ability to independently create their own regulation legislation using existing federal or EU legislation as a baseline. An example of this is California when it passed Proposition 65 in 1986, effectively requiring businesses to label goods that contained

substances that have the potential to cause cancer or other defects, which was not required by the federal government.¹⁷² However, this practice could result in higher costs for both consumers and producers.

Another possibility raised by TACD is to revise TSCA or create new legislation to mirror REACH. However, such a policy would most likely have to retain the U.S.'s non-precautionary standard for political reasons and it is unlikely that such a step can be achieved in TTIP. As stated above, the ACC has expressed interest in reworking TSCA in a similar fashion to foreign chemicals regulation legislation, citing the insufficient safety review of the approximately 61,000 "existing" substances, those substances that existed in chemical production before 1979.¹⁷³ Additionally, the U.S. could also seek to replicate the REACH regulatory regime. However, this option would not be politically feasible since it would require a significant change in U.S. legislation.

Negotiating Recommendations

Given the extent of two-way trade in chemical substances between the U.S. and EU, both parties could benefit from a further reduction or elimination of existing tariffs over a period of several years as in the KORUS, KOR-EU, and Canadian-EU FTAs. Since these successful FTAs reduce tariff levels over an average period of about 5 years, this should be how TTIP negotiators approach tariff reductions in the chemicals sector as well.

If tariffs are eliminated both sides will see net benefits, however, the EU would stand to benefit at a greater level relative to the U.S. because of the greater amount of EU exports to the U.S. That being said, U.S. chemicals industry would benefit more from having the regulations systems of the two parties coming into closer harmonization or mutual recognition. Therefore,

this report recommends that U.S. negotiators use existing U.S. tariffs on chemical imports as a negotiating tool to induce regulatory concessions from the EU. For regulatory concessions, the U.S. could seek to receive EU acceptance to a certain degree of mutual recognition for U.S. regulatory standards.

The U.S. can bring the EU into such an agreement by assuring the EU negotiators to include treaty text that the U.S. EPA will re-review those “existing substances” under TSCA perhaps based off a similar approach to Canadian policy, which the ACC has claimed to be open to. This text could either state that the review process will be a direct result of the treaty, or more vaguely, that the treaty text will initiate review of such a piece of legislation in Congress. In the end if no definite agreement can be reached regarding regulations, U.S. and EU negotiators should schedule the gradual reduction of tariffs reciprocally or allow for negotiators to hold further negotiations on regulatory issues in a separate forum at a later date.

Chapter 12. Pharmaceuticals | *By Adam Wambold*

Chapter Summary

Issue

How U.S. negotiators should pursue regulatory and intellectual property patent issues for the pharmaceuticals sector in TTIP.

Background

Since 2009 the Food and Drug Administration (FDA) and the European Medicines Agency (EMA) have cooperated in joint evaluations of target investigator sites, sponsors, and contract research organizations which conduct research on new drugs to be introduced to the market. This initiative aims to include the sharing of information on inspection planning, policy, and outcomes in collaborative inspections. In pharmaceuticals regulation, the European precautionary principle that will be a problem for U.S. negotiators in other sectors should not be a significant problem. This allows the U.S. more flexibility in negotiating pharmaceuticals harmonization or mutual recognition. IP agreements in KORUS FTA do not include reference to duration of patents on pharmaceuticals, but KOR-EU agrees to a 5 year market exclusivity.

Interests

For the pharmaceutical industry on both sides, a comprehensive agreement on regulatory matters would result in significant cost cutting measures, saving the industry time and money. Harmonization on IP issues such as patent durations is an interest of the U.S. and EU pharmaceuticals industry.

Negotiating Options

U.S. negotiators could seek either harmonization or mutual recognition in a number of areas. These areas include Good Manufacturing Practices (GMP), Quality by Design (QbD) evaluations, and terminology differences. With respect to IP protections, the U.S. can only attempt to achieve some degree of convergence or harmonize completely. Through TTIP, negotiators could also attempt to set up an outside working group on pharmaceutical issues including IP matters to achieve or expedite agreements made as a result of a successful TTIP.

Negotiating Recommendation:

- U.S. negotiators should work towards mutual recognition with the EU on Good Manufacturing Practice inspections to eliminate redundant and costly inspections requirements.
- The U.S. and EU should also seek to set up permanent joint practices for evaluating and approving Quality by Design applications from the industry.
- The U.S. should avoid IP discussions if possible, following the precedent set in KORUS placing priority on GMP and QbD issues. If the EU requires IP duration discussions then

the U.S. should begin with an 8 year market exclusivity limit and slowly work down to 5 years.

Pharmaceuticals

The main difference between the Food and Drug Administration (FDA) and the European Medicines Agency (EMA) is that the EMA is less centralized than the FDA, with member states still having limited authority on pharmaceutical regulation within their borders. Besides this, the FDA and EMA are relatively similar and have overlapping qualities in how new drugs are scientifically approved. For example, the FDA and the EMA have cooperated closely in order to bring their regulatory issues closer into line with one another through a cooperative partnership initiated in 2009. In addition, the pharmaceuticals industry differs from other sectors since the European precautionary principle is not a significant obstacle when discussing regulatory differences. Therefore reaching an agreement on pharmaceuticals issues in TTIP is relatively more achievable.

What a TTIP agreement should seek in the pharmaceuticals sector is to improve recognition of respective Good Manufacturing Practice (GMP), reinforce existing approaches for scientific advice and Quality by Design (QbD) applications, harmonize differences in terminology, and reach an agreement on equal intellectual property protections and durations on new drugs for human use. However, the IP issue should have a lesser priority for U.S. negotiators which will be explained below. Achievements in these areas as a result of TTIP would result in cost cutting changes to the pharmaceuticals industry of the U.S. and EU.

In TTIP, negotiators can agree to mutual recognition of each party's GMP inspections. This would allow for FDA and EMA to focus their attention on more high-risk areas outside of the EU and U.S. instead of spending resources inspecting facilities that have already been inspected by the other party.¹⁷⁴ A policy of this kind would result in significant saving for the industry as a whole. TTIP could also adopt a more flexible system based on "mutual reliance"

which, instead of legally binding mutual recognition, could include progressive targets of inspections and would contribute to bilateral confidence building.

Regarding scientific advice and QbD evaluation, the U.S. and EU could further consolidate a joint, harmonized approach expediting the R&D and approval processes. This can be accomplished through joint evaluation on QbD applications such as a shared list of questions and requirements for the applicant as well as a harmonized evaluation of responses.¹⁷⁵ QbD refers to the process of quality control on a developing pharmaceutical product throughout the process of its development. This differs from “quality after development” which presents safety hazards since quality control is not an ongoing process throughout development.

The U.S. pharmaceuticals industry wants longer and equivalent durations on IP protections on new substances as a result of TTIP. Currently, the duration of patent protection for a given substance is largely used up while the product is still in R&D and testing stages as opposed to while it is on the market. In the U.S., it is typical to have patent durations of 4 years for data exclusivity and 8 years for market exclusivity (starting after the substance is approved to be marketed) for a total of about 12 years in most cases.¹⁷⁶ In the EU, patents range up to 15 years total with no obvious distinction between data and market exclusivity. The U.S. industry would thus like the total data and market exclusivity in the EU to be 12 years maximum so as to be on a level playing field. However, the time it takes for a drug to be approved to enter the market should also be equivalent which would require harmonized IP policy. A possible approach would be to make a standard duration for both data and market exclusivity patents. As stated above, market exclusivity patents are normally 8 years in the U.S., but in the KOREA-EU FTA market exclusivity rights are 5 years and does not include data exclusivity patents.¹⁷⁷ Therefore, one option is for U.S. TTIP negotiators to try to receive the 8 year market exclusivity

mark but settle for no less than 5 years. For data exclusivity patents, the U.S. should try to get similar durations as in the U.S., about 4 years.

However there is no mention of patent durations in the KORUS treaty text.¹⁷⁸ Therefore, for the sake of simplicity and cooperation in this negotiating process, the U.S. TTIP negotiators should not introduce the matter of IP durations in pharmaceuticals and should not discuss the topic with their EU counterparts regarding the matter unless the EU requires that it be included in a treaty. If this is the case, then U.S. negotiators should follow the 8 down to 5 years prescription stated above and require similar data exclusivity rights as those currently present in the U.S. Ultimately, U.S. negotiators should put a higher priority on GMP and QbD issues during pharmaceuticals sector discussions.

Recommendations

- U.S. negotiators should negotiate towards a system of mutual recognition or mutual reliance on Good Manufacturing Practice with the EU in order to cut down on redundant inspections of plants in the U.S. and EU. This would allow the industry on both sides to cut costs significantly.
- The U.S. and EU should create joint approaches to scientific advice and QbD applications and evaluation. TTIP can include text that would ensure that the FDA and EMA continue to work towards common policies in this area.
- Furthermore, TTIP should standardize the duration of market exclusivity patents on new substances between the U.S. and EU. U.S., negotiators should start with 8 years and work their way down to no less than 5 years. However, such a discussion regarding IP issues should bear less priority than GMP and QbD issues and discussions on common duration

on patents should only be introduced after success in GMP and QbD issues and at the invitation of the EU.

- TTIP should establish a U.S.-EU (FDA-EMA) working group on pharmaceuticals harmonization including all of these previous issues. The working group should also pursue harmonization on differences in terminology.

Chapter 13. Trade in Medical Devices and Regulatory Regimes | *By Mark Rutherford*

Chapter Summary

Issue

Differences in the regulation of medical devices between the United States and European Union have prompted an industry desire for the inclusion of a medical devices chapter in the Transatlantic Trade and Investment Partnership.

Background

The U.S. and EU regulations on medical devices differ greatly in both form and function. Whereas all medical devices in the United States must be approved by the Food and Drug Administration (FDA), the EU allows a number of independent third parties referred to as “notified bodies” to approve or deny the sale of individual medical devices on the basis of their potential safety hazards. The U.S. process for approval of medical devices typically takes far longer than that of the EU and as a result, has led to calls by the medical devices industry in both the U.S. and EU to achieve mutual recognition of regulatory standards. While there have been agreements on mutual recognition of standards of medical devices (MRAs) between the U.S. and EU as recently as 1998, they have been relatively ineffective in reducing technical barriers to trade.¹⁷⁹ Industry spokesmen argue that the U.S. standards and requirements for testing are too costly and are no more effective in provision of safety than those of the EU. However, it is yet unclear if safety standards are truly equivalent, and in turn what effects full mutual recognition may have on patient safety.

U.S. Interest

Relaxation of the FDA’s regulatory standards on medical devices would be beneficial to both the U.S. and EU medical devices industries.

Policy Options

Among the proposals by the U.S. and EU medical devices industries include the creation of a single audit procedure that would require the approval of a medical device in just the U.S. or EU to allow its sale in both, elimination of tariffs, and the implementation of a U.S.-EU joint unique device identification (UDI) program to ensure post-market safety surveillance of medical devices.¹⁸⁰ Elimination of tariffs and the creation of a UDI would be non-controversial and achievable. However, because adoption of mutual recognition standards may be perceived as reducing American medical device safety standards, other options such as harmonization may be more desirable to USTR. In any case, no decision could be made to adopt mutual recognition until safety standards on medical devices were evidenced to be equivalent in the U.S. and EU.

Recommendations

- USTR should not allow for mutual recognition until it can be determined that U.S.-EU safety standards are equivalent. An independent body (non-industry) of experts may be required to determine this. Pushing for harmonization and increases in EU medical device safety standards may be more appropriate, despite the political difficulty for the EU to achieve such a change.
- USTR should seek to eliminate tariffs and seek agreement on the development of a UDI program.

TTIP in the Context of Medical Devices

Differences in the U.S. and EU's regulatory regimes for medical devices have prompted the medical devices industries in both the U.S. and EU to request that a reform of current policy be included in any future TTIP accords. Among the possible changes include a harmonization or mutual recognition of standards, an elimination of all tariffs on medical devices and the creation of a Unique Device Identification program that would allow for more cohesiveness in medical device functionality of the U.S. and EU medical devices industries.

Background and History of U.S. and EU Medical Device Regulation

The EU's main regulatory body for medical devices is known as the Medical Device Directives (MDD). The MDD was created in 1992 after the signing of the Maastricht Treaty and formation of the European Union, largely due to the vast regulatory differences between the 1992 EU signatories.¹⁸¹ The MDD sets safety standards for medical devices in most European states, yet is not the body that performs the required safety tests for medical devices seeking to reach the European market. Instead, safety tests are implemented by what are known as "notified bodies," private third-party enterprises given the ability to approve or deny medical devices based on their compliance with EU safety standards.¹⁸² Once a notified body approves a medical device, it is branded as being within the *Conformité Européen*, or having the "CE-mark."¹⁸³

The U.S., in contrast, has a much more centralized system of certification of medical devices. The Food and Drug Administration in the U.S., a public rather than private entity, carries out both the standard setting and safety testing of medical devices. The U.S. regulatory regime has been criticized for being too costly and requiring too much time for new medical devices to be approved. There have been numerous instances where medical devices approved in

the EU were not approved in the U.S. until years after their EU approval; furthermore, the FDA is estimated to reject around 25 percent of requests for medical device approval per year. As a result of the difficulties presented by the FDA, the EU has and “will probably remain the first point of entry for many medical device makers.”¹⁸⁴ However, the testing regime imposed by the FDA is not without its merits and ought not to be abandoned.

Who Stands to Gain from Medical Device Liberalization?

The leading medical device industry groups in both the U.S. and EU have spearheaded the push for reform of U.S.-EU medical device regulation, most notably for the adoption of a single audit process, elimination of tariffs, and of a unique device identification process.¹⁸⁵ Ostensibly, these industry groups, who have made joint statements in favor of reexamination of current policy, would have profits to gain from a relaxation of U.S. testing requirements and certification synthesis with the EU – less testing and bureaucratic requirements translates to quicker tangible gains for the medical devices industry. However, it is not yet clear that current safety standards could be upheld while reducing testing requirements and allowing the CE-mark to count as a safety certification in the U.S. Elimination of tariffs and development of a UDI will also directly benefit the U.S.-EU medical devices industry.

Visualization of Reformed Medical Devices Regulation

A single audit process is similar to the adoption of a mutual recognition regime – only a “single audit,” or certification by either the U.S. or EU, would be required to allow the sale of a new medical device in the U.S. or EU. However, there are fears in the U.S. that the EU system of using private notified bodies for approval of medical devices is not sufficient to ensure the safety

of consumers.¹⁸⁶ These fears were compounded in 2010 when Poly Implant Prothese (PIP), a French manufacturer of breast implants, was found to have sold implants that “were leaking industrial silicone inside patients.”¹⁸⁷ In this case, the EU system of medical device regulation had failed. However, the scandal prompted a reworking of the EU’s system for generating approval of medical devices. As of late 2013, notified bodies are permitted to perform unannounced inspections of manufacturers. In addition, only “a limited number of [notified bodies] with appropriate specialist knowledge can assess high-risk devices, [or] any device implanted in the body.”¹⁸⁸ Yet despite recent reforms in the EU regulatory scheme, allowing the CE-mark to count as a U.S. approved certification would be irresponsible without having conducted a full assessment of whether or not the EU regulatory system can be reasonably guaranteed not to allow such safety concerns to occur in the future. In parallel, USTR may push for harmonization of U.S.-EU regulatory standards to levels seen in the U.S., though EU adoption of such standards is unlikely. Harmonization of standards would likely require a lengthening of the EU testing process of medical devices, and perhaps a centralization of the certification process to sufficiently ensure consumer safety. Pursuing harmonization of standards is worthwhile to USTR, even allowing that the nature of the current EU medical devices regulatory system may make harmonization politically infeasible for EU negotiators.

At a minimum, USTR should push for elimination of tariffs and development of a U.S.-EU UDI. Such changes offer tangible benefits to the medical devices industries that do not put American consumers and patients at risk.

Chapter 14. Sanitary and Phytosanitary Regulation in TTIP | By Mark Rutherford

Chapter Summary

Issue

How USTR might pursue SPS issues in upcoming TTIP negotiations.

Background

The EU's unwillingness to back away from the precautionary principle in SPS negotiations leaves USTR with limited options in debating SPS in the context of TTIP. While repeal of the EU's ban on hormone treated beef or an increase in the number of certified GMO events for EU import are worthy goals, past disagreement in these realms foretells much difficulty in their actualization. Creation of a U.S.-EU consultative mechanism to determine health and safety in agriculture is a worthy goal as well, but the differences in the manner in which scientific findings and biotechnology writ large are perceived in the U.S. and EU will present difficulties in coming to a lasting agreement. Elsewhere in SPS, the EU places a limited quota on U.S. imports of non-hormone treated cattle and has rejected shiploads of American non-GM grain or EU-approved GM grain on the basis that it contains one seed in 10,000 of non-approved GM product. These are all issues that USTR will need to find creative solutions to make progress on.

U.S. Interest

Resolving disputes in any or all of the aforementioned SPS issues would generate increased exports for the American agricultural industry.

Policy Options

USTR could use TTIP as an opportunity to finally come to a head with the EU on its application of the precautionary principle in SPS by arguing for a full repeal of its ban on non-approved GMO events and on beef treated with hormones. However, EU stated positions on the precautionary principle and histories of dispute in the realm show that battling the precautionary principle head on may not be the best application of USTR's negotiating inertia. Instead, USTR could press on issues where the EU has shown and stated some willingness to compromise in the past, such as increasing the allowable limit of non-approved GMO events in grain shipments and increasing import quotas in the Non-Hormone Treated Cattle Program.

Recommendations

- Press for the EU to increase its cap on non-approved GMO allowable limits in grain shipments from 0.01% to a more realistic and practical level, such as 0.1%.
- Request that the EU expand import quotas for the Non-Hormone Treated Cattle Program.

Introduction

Sanitary and phytosanitary (SPS) regulations have long been a thorn in the side of United States and the European Union trade negotiations. The debate, largely centered on the relative safety and health risks associated with food and agriculture, has been deeply contentious due to disagreements on what constitutes sound science, public sentiment, and effective campaigns run by non-governmental organizations. To make matters more difficult, the World Trade Organization's ability to settle disputes between the U.S. and EU in this matter has been weak due to the limitations of its own SPS Agreement, and political unwillingness to do so. Overarching reform and agreement in the SPS realm will be difficult, if not impossible; small agreements and changes on SPS may be made in Transatlantic Trade and Investment Partnership negotiations, but the intensely politicized nature of SPS in U.S.-EU trade leads us to argue that large scale changes here should not be a priority of the U.S. Government in TTIP negotiations. Instead of focusing on reversing the EU's stance on its precautionary principle and science-based risk assessment in the SPS realm, or the outright reversal of the beef hormone ban, the U.S. would do best to use its negotiating energies in raising the allowable limits on non-approved GMO product in approved agricultural products, and the expansion of the Non-Hormone-Treated Cattle Program.

Background of Sanitary and Phytosanitary Regulatory Disputes

Precautionary Principle and the WTO

The largest point of contention between the United States and European Union on SPS issues is in the EU's application of the "precautionary principle." Any strategy employed by USTR to further open European markets to politically sensitive agricultural products must bear

in mind the force the precautionary principle holds in the European political mindset. The precautionary principle functions as follows: where the United States would take scientific studies on the health and safety risks of agricultural products at face value, the European Union often argues for continued testing and delay, citing a lack of overwhelming evidence in the matter. The precautionary principle has been invoked by the European Union in myriad U.S.-EU SPS debates. The EU's application of the precautionary principle has reduced U.S.-EU trade by disallowing the American importation of non-EU approved GMO events (strains), chicken treated with pathogen-reduction treatments and beef treated with growth hormones. Arguably, the European invocation of the precautionary principle is a reflection of the perceived risks associated with newly developed biotechnologies. However, it has in many cases been that the application of the precautionary principle by the EU has less to do with scientific risk, and more to do with political risk; European consumers on the whole have long been apprehensive about the intersection of science and agriculture.

While the basic obligations of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures require that “Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is *based on scientific principles, and is not maintained without sufficient scientific evidence*,”¹⁸⁹ there have been a number of cases brought to the WTO since the signing of the SPS agreement to dispute how closely the EU has followed the WTO's scientific obligations. As recently as 2004, the United States, Argentina, and Canada raised a complaint to the WTO based on the EU policy pertaining to the importation of GMOs. The complainants charged firstly that the approval system for the introduction of new GMO events to the EU was without scientific basis, and secondly that certain EU states were not allowing the importation of GMO events that had been

previously approved by the EU. The bans themselves were reactions to public outcry against the importation of GMO product, and the EU “justified their bans on the basis of the principle of precaution. The three complainants argued that the moratorium and bans violated the SPS agreement because there was no scientific justification.”¹⁹⁰ In the end, the EU was forced to comply with its own and WTO regulations – however, this is not to say that the EU was forced to halt all invocation of the precautionary principle. Indeed, while Article 2 Paragraph 2’s asserts that the SPS regulations of WTO members must be based on scientific principles, Article 5 Paragraph 7 provides a back door to the obligation:

In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt SPS measures on the basis of available pertinent information, including that from the relevant international organizations as well as from other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.¹⁹¹

Of note here are two important assumptions. First: the contradictory nature of the WTO SPS agreement has created further difficulty in U.S.-EU agricultural trade, and highlights the need for bilateral agreement on SPS issues due to the WTO’s incapability to enforce regulation in the matter. Secondly: Article 5 Paragraph 7’s inability to offer judgment on what constitutes “insufficient scientific evidence” has made past and future cohesion of U.S.-EU SPS regulation near impossible. Disputes over what constitutes “insufficient scientific evidence” and the European application of the precautionary principle will likely continue until the U.S. and EU can agree to identify a scientific body charged with determining health and safety standards in the SPS realm, such as the World Organization for Animal Health located in Paris.

U.S. and EU Scientific Assessments in SPS Issues

Of equal and related concern to the European application of the precautionary principle is the differing manners in which the U.S. and EU apply and assess scientific studies in the SPS realm. While the U.S. and EU both have scientific bodies assigned to determine the health and safety in SPS issues, their findings and policy conclusions have diverged greatly.

Case in point is the U.S.-EU dispute over beef hormones. The EU upholds a ban on the importation of beef products treated with growth hormones, citing “a lack of data on the type and amount of [growth-promoting hormone] residues in meat on which to make a quantitative exposure assessment.”¹⁹² The ban on beef treated with growth hormones is estimated to cost U.S. beef exporters nearly \$100 million yearly.¹⁹³ In 1997 the EU was taken to task by the WTO for upholding their ban without a proper risk assessment. In response the EU undertook 17 different risk analysis studies to determine the health and safety of the different hormones used in U.S. beef production, with varying results. One of the studies, concluded in 1999, determined that a particular hormone used in American beef production was potentially carcinogenic; a study released the next year by the EU questioned the validity of the previous year’s study, and a third study released in 2002 questioned the validity of the previous two, drawing further uncertainty to the carcinogenic potential of the particular hormone.¹⁹⁴ The U.S., not surprisingly, has long held a contrasting opinion.

The United States continues to maintain that U.S. beef from cattle treated with certain approved growth hormones poses no public health risk. Overall, the official U.S. position is that ‘there is a clear world-wide scientific consensus supporting the safety of these approved and licensed hormones when used according to good veterinary practice.’¹⁹⁵

Clearly, a harmonization of SPS standards based on scientific based risk assessment as seen in the U.S. would be in the favor of U.S. interests. However, the prospects to either harmonize standards or generation of mutual recognition between parties appears slim.

Efforts to synthesize scientific findings on SPS issues with trade policy have thus far been unfruitful. Yet, USTR would do well to follow on the public statements made by TTIP lead negotiators Ignacio Bercero and Dan Mullaney to develop “consultative mechanisms...[and] cooperative measures using appropriate science, appropriate risk assessment to achieve an appropriate level of protection.”¹⁹⁶ The exact form of these “consultative mechanisms” and “cooperative measures” has not yet been publicly discussed, and will need to take into account the intense political barriers to agreement, such as European insistence on use of the precautionary principle and European consumers’ general aversion to biotechnology. Support for such a shift is also strong in the U.S. private sector, with the American Meat Institute and North American Export Grain Association pushing for “risk-based scientific decision making, regulatory convergence and equivalence/systems recognition” to all play a role in TTIP negotiations.¹⁹⁷

SPS Policy Options

While one of the main stated goals of TTIP negotiators has been the development of consultative measures to enhance scientific-based risk assessment in U.S.-EU SPS trade issues, past disputes in this realm have been contentious enough that future prospects for cooperation would appear slim. Given the fact that the two sides cannot look at the same risk assessment studies and draw parallel results, mutual recognition of standards in SPS appears unlikely. Furthermore, European consumer resistance to biotechnology places political constraints on

European diplomats that may have negative implications for the creation of a consultative mechanism that would abandon or weaken the precautionary principle. A more effective way forward might be to pursue incremental changes in EU SPS policy, such as an increase in the allowable trace limit on non-approved GMO products, or an increase in the quota of non-hormone treated beef allowed for American exporters to ship to Europe. These changes, while less ambitious, may provide quicker benefits for U.S. agriculture and be less contentious in the political sphere.

Trace Allowances of Approved and Non-Approved GMOs

The EU employs a no tolerance policy on the importation of non-approved GMO products. Practically, the level is currently set at 0.01% (agricultural products imported to the EU can contain up to 1 seed in 10,000 of non-approved GMO product)¹⁹⁸. Given the costs of achieving such a high standard of “purity” and the facility with which agricultural products in transit can cross-contaminate, this limit has trade distorting effects. A shipment of seed or grain that contains just one non-approved GMO seed, or that has been lightly dusted with non-approved GMO product can be turned around at the port on the grounds of this zero tolerance policy.¹⁹⁹ GMO and organic crops can also cross-contaminate in the field, as is often the case when winds push the pollens of one crop’s plot to another. Indeed, “in the production of food, feed and seed, it is practically impossible to achieve products that are 100% pure”²⁰⁰. An increase in the allowable trace limit of non-approved GMO product would help to eliminate this trade-distorting effect and generate benefits for American exporters. European leaders have also voiced some willingness to increase the allowable limit on non-approved GMO product as a practical measure, as the zero tolerance policy has begun to effect feed prices for European livestock.²⁰¹ Arguing this case in the TTIP forum may prove fruitful for USTR.

Increased Quotas in the Non-Hormone Treated Cattle Program

Due again to European consumer reticence to accept changes in biotech regulation, attempts to reverse the ban on hormone treated beef will likely be unsuccessful. Instead, energies might more productively be focused in the expansion of the Non-Hormone Treated Cattle Program. Currently, the European Union imports a certain volume of U.S. cattle each year that have been certified and proven to be hormone-free. The EU had in 2009 offered to increase the quota by 58,000 metric tons while also reducing the included 20% tariff in the Non-Hormone Treated Cattle Program; however, the U.S. rejected the offer on the grounds that it wanted a full repeal of the hormone ban instead.²⁰² The recent U.S. decision to permit beef imports from the EU for the first time in twenty years could encourage more cooperation from EU negotiating partners. After years of standstill on the SPS front between the U.S. and EU, it may be time to reexamine previous U.S. positions in order to move forward. Taking small steps such as enlarging the Non-Hormone Treated Cattle Program and increasing the trace allowances of non-approved GMO product may help end the stalemate in U.S.-EU SPS negotiations.

Leaving Beef Hormones and Joint Risk Assessment on the Back Burner

The removal of the beef hormone ban and the creation of a joint scientific body for risk assessment on SPS issues could increase bilateral trade and establish new rules that might have implications for global trade. If, in preliminary negotiations, Europeans appear more willing to compromise and budge on such large issues as the precautionary principle and beef hormones, USTR ought pursue these issues further; however, given the historic political contentiousness of these issues and unchanging public stance on them, this will likely not be the case. Instead,

USTR might devote more of its energy to issues such as increasing the allowable limit for non-approved GMO strains as a percentage of approved agricultural imports and increasing the quotas and reducing the tariffs for the Non-Hormone Treated Cattle Program. Incremental changes in the SPS realm, while generating fewer headlines, provide a concrete benefit to U.S. agricultural interests without the risks that come along with battling the precautionary principle or arguing for a reversal of the beef hormone ban.

SECTION IV: Global Trade Rules

Chapter 15. Intellectual Property Rights | *By Joshua Gregory*

Chapter Summary

Key Policy Considerations

The EU and U.S. share much in common in terms of Intellectual Property Rights (IPR), and TTIP presents an opportunity to establish mutual trade rules that recognize these shared values of copyright and trademark protections. By agreeing on such a large scale, IPR in TTIP may eventually serve as a baseline for global standards.

Background

The U.S. and EU have collaborated in the past on IPR issues as seen through the newly released Joint Copyright Classification System. Recently relations between the EU and U.S. have been strained after Chancellor Merkel's discovery of NSA spying. As a result German outcry, EU negotiators have strongly pushed for further citizen data protections. This issue is one that the U.S. negotiators are hesitant to raise as governmental and U.S. business actions are founded upon Internet analytics and other uses of citizen's data. In the past many U.S. and EU IPR rules were harmonized through the TRIPS agreement.

Policy Considerations

Prosecuting copyright violations on the Internet is difficult. However through a strengthening of these rules and procedures instances of Internet IPR violations could be reduced. Negotiators could focus on strengthening rules to further prosecute trade secret theft and cybercrime. A public joint copyright and trademark database could be created to allow for greater copyright protection integration. Accessibility could be emphasized here creating easier methods for small and medium size business to protect marketplace innovation.

Recommendations

- Strengthen rules regarding trade secret theft
- Develop new rules to reduce cybercrime
- Establish rules that limit the instances of "cybersquatting"
- Ensure that intellectual property right do not become barriers to trade
- Establish and accessible and public joint EU and U.S. copyright database

Background on Intellectual Property Rights

Copyright Protections in the EU and the U.S. are very similar. Both regions have protection for all registered copyright works until 70 years after the author/ creator's death. The only major difference between them is that the EU designates a specific section for Broadcast organizations and designs.²⁰³ As these two regions already share so much in relation to intellectual property rights, policy convergence is an achievable objective in TTIP negotiations.

Convergence on IPR has already taken place outside of TTIP negotiations. For example, in January 2013, the EU and U.S. launched the Cooperative Patent Classification System. As the European Patent Office President stated of the document, "The launch of the CPS constitutes a significant breakthrough in efforts to achieve greater harmonization in the patent system at international levels".²⁰⁴ This system creates a common language for registering patents in the U.S. and EU. Most importantly, this system represents a pre-TTIP negotiation between the U.S. and EU and is a significant step to further negotiations.

Building off the Cooperative Patent Classification System, TTIP negotiators should strongly consider creating a joint electronic trademark system.²⁰⁵ This system could include a system for electronically applying to and maintaining copyrights and registered trademarks. Additionally this system could create a copyright index of trademark applications and registered trademarks made available as a public database.²⁰⁶

The priority of U.S. negotiators for TTIP is the expansion of and enforcement of IP regulations, digital content protection and enforcement and adoption of U.S. IP laws abroad.²⁰⁷ From the TRIPS agreement to the Bali negotiations and KORUS, the U.S. has consistently brought national IPR regulations to other nations. As the U.S. and EU align so closely on IPR

policy, these negotiations present an opportunity for the U.S. to expand its powers to enforce and prosecute IP violations abroad.

Objectives for U.S. negotiators should be to enhance the role of intellectual property to encourage economic development and technological innovation.²⁰⁸ Particularly with the rise of the digital economy, protecting the transfer and trade of technology is key to both EU and U.S. economic interests. Respecting national legal systems, TTIP negotiators may consider promoting deeper economic integration to better protect and provide for the creation of property rights.²⁰⁹ Another key objective for TTIP should be ensuring that intellectual property rights do not become barriers to trade.²¹⁰

Both the EU and U.S. should jointly reaffirm preexisting commitments to the TRIPS agreement. Additionally TTIP negotiators should seek to ensure greater transparency for copyright application processes to support innovation and economic development. To ensure economic development and innovation in small and medium sized enterprises TTIP negotiators could consider stating that no copyright must be widely known among the public.²¹¹ Copyright disputes should be judged solely on the date of copyright application and other applicable legal basis.

Another area that warrants joint EU and U.S. cooperation is technological protection measures. As many of the 21st century's innovations are occurring in technological sectors of the economy, EU and U.S. interests would be best served by setting global trade rules that protect technological copyright protections.²¹² Establishing a global benchmark for legal remedies to internationally protect technological copyright violations would not only serve bilateral interests but could also prevent copycat products from entering the market globally.

At present, there is much support for a continuation of the Safe Harbors Policy, which was enacted by the U.S. and the EU in the wake of the EU's e-Commerce Directive and the U.S.'s Digital Millennium Copyright Act. The Safe Harbors Act grants exceptions to Internet businesses for violations of data privacy and copyright liability.²¹³ The Computer & Communications Industry Association advocates the continuation of this policy. Specifically, this association notes the importance of granting exceptions to internet businesses for violations of copyright on behalf of their users: "...holding Internet and e-commerce businesses liable for the wrongful conduct of their users would jeopardize the growth of this vital industry and place unreasonable burdens on these service providers".²¹⁴ Although copyright infringement on the Internet is hard to control, any action to hold companies accountable for the actions of their users would have to prove gross negligence by the companies themselves. However, these actions would not be agreeable to EU Internet and technology business interests or the U.S. because of the difficulty of proving gross negligence.

Due to European concerns, data privacy will likely be a topic discussed during TTIP negotiations. Considering Chancellor Merkel's offense at the alleged NSA spying, there is greater urgency for negotiators of the EU to push for data privacy guarantees²¹⁵. The European Commission has even issued a formal statement concerning its outrage at U.S. companies' treatment of EU citizens' private data²¹⁶. Although the EU has not forced many of these companies to change their policies, TTIP negotiations could put pressure on the U.S. to guarantee data privacy. U.S. negotiators would best represent U.S. business interests by reaching agreement with the EU due to current German outrage.

In the first round of TTIP negotiations, lead U.S. negotiator Dan Mulley stated that data privacy conversations would be restricted to negotiations outside of TTIP; however, if the

Internet and e-commerce is to be discussed in TTIP negotiations, these issues will arise again²¹⁷. As a result of a request from Germany, data privacy concerns almost postponed negotiations in the second round. However, the body eventually decided that data flow concerns should be handled separately²¹⁸. If e-commerce brings this issue to the forefront once again, U.S. negotiators should be ready with a response to current EU outrage.

Business interests on all sides support stronger intellectual property protections. This makes it imperative that the U.S. TTIP negotiators work with the EU to develop and strengthen current standards. The National Association for Manufacturers supports stronger protections for trade secrets, “For certain manufacturing sectors, trade secrets are, in fact, the only viable intellectual property option. While there are some protections for trade secrets under Article 39.2 of the WTO TRIPS Agreement, they are weak”²¹⁹. Specifically TTIP negotiators could focus on trade secret theft. Trade secret theft is an increasingly common crime that is difficult to prosecute under current IP rules and regulations and is detrimental to joint business interests across economic sectors. TTIP negotiators could focus on cyber theft of IP, although this issue that could raise data privacy and management discussions to the forefront.

As the Brookings Institute stated in its February 2014 report, the development of an intellectual property framework that respects the balance between exceptions for Internet service providers and enforcement of IPR is crucial²²⁰. Additionally, protections need to be developed with regards to cybersquatting²²¹. This practice involves using the intellectual property of others as an Internet domain name to prevent the original trademark holders from using these domains. As this practice is so widespread, developing joint regulations will protect business interests.

In the case of cross border data flows, issues such as privacy and child decency need to be protected. However, any instances of data flow restrictions that give domestic companies an

unfair competitive advantage needs to be stopped. These restrictions could include blocking access to foreign websites or redirecting Internet searches. Restricting these activities will ensure that all businesses are equally accessible over the Internet.

Recommendation

The TTIP negotiations provide an opportunity for the U.S. and EU to create a copyright system appropriate for the 21st century. Solidifying rules for new technologies and Internet services will provide greater incentives for innovation and streamline enforcement of copyright violations across both regions.

Negotiators need to suggest that both the EU and U.S. could provide legal remedies to combat “cybersquatting”. TTIP negotiators should consider developing rules that prevent the bad faith use of domain names identical or similar to registered trademarks²²². As this practice is worldwide, it would be beneficial to develop global trade rules on this matter within TTIP and protect joint business interests.

Both the EU and U.S. would benefit from further defining trade secret violations by ensuring that both parties support criminal and civil prosecutions for disclosure or bad faith use of trade secrets. As trade secret theft harms national and international commerce, developing these rules within TTIP would greater protect innovation within economic markets²²³. These protections will fulfill the requests of many business associations such as the National Association of Manufactures by strengthening protections for trade secrets beyond those previously established in the TRIPS agreement.

The development of rules surrounding trade secrets is key in TTIP negotiations. Establishing these rules will help curb cybercrime internationally and expedite prosecution of

bilateral IP cybercrime. TTIP negotiators need to consider establishing a joint trademark and copyright database that is publically accessible. Although copyright terms between the two regions are very similar, any discrepancies need to be mended through TTIP negotiations. If any new IPR global trade rules are to be set then negotiators should enact measures to ensure that IPR does not become legitimate barriers to trade.

Chapter 16. Geographic Indicators | *By Joshua Gregory*

Chapter Summary

Key Policy Considerations

Reaching an agreement with the EU on the issue of Geographic Indicators will be difficult; U.S. business interests will be best served by allowing GI's that have entered the common language to be exempt from prosecution.

Background

Geographic Indications GI's are an area of intellectual property that upholds the historical rights of products, which have originated from a specific geographic region and have that region as part of the products name. This issue was previously negotiated in the TRIPS agreement, however the EU has expressed a desire to pursue more stringent protections for GI's internationally. More recently the EU and U.S. have negotiated this issue with Korea and the differences between these two documents highlight potential areas to overcome in future TTIP negotiations.

Policy Considerations

As the EU holds more GI's for goods in sections such as wine, spirits and cheese negotiating this issue is a way to uphold EU trade interests. TTIP negotiators could consider adding a provision that would limit the prosecution of GI violations for products that have become commonplace and are no longer commonly associated with that geographic region. Including such a provision in TTIP would uphold U.S. interest but draw EU opposition. If any concessions are to be made by the U.S., consideration could be given to enacting lengthy transition periods to allow businesses time to adopt the new GI standards.

Key Recommendations

- U.S. negotiators should include a provision to protect U.S. business interests by not allowing terms that have become commonplace to no longer be protected by GI's.
- Any concessions made by the U.S. should include lengthy transition periods to allow U.S. businesses time to adapt products marketing and brand names.

Geographic Indicators

Geographic Indicators are a symbol or name given to a product verifying that it originated from a specific region. This regional association indicates that the product was produced in a certain manner and possesses specific qualities, such as traditional production methods or ingredients. In fact section 3 of the WTO's Trade Related Aspects of Intellectual Property Rights (TRIPS) mandates the requirement of geographic indicators. For example, in the U.S., geographic indicators are designated for Florida Orange Juice, Idaho Potatoes and others²²⁴.

The European Court of Justice (ECJ) has upheld its own restrictions for geographic indications perhaps most notably for Parmesan cheese. Cheese sold under this designation in the EU has to originate from the Parmigiano – Reggiano region. However, in the U.S., Kraft still sells cheese under the designation of Parmesan cheese. As the Congressional Research Service (CRS) reported on the TTIP negotiation process, “The United States tends to protect GI’s through trademark law, and expresses concern that the EU approach raises national treatment issues and adversely affects trademarks and widely accepted generic products”²²⁵. Moving forward, TTIP negotiators will have to either synchronize these differences in approaches to GI protections and develop methods to enforce violations both in the U.S. and EU, or refuse to discuss these issues during the TTIP negotiating process. Although the U.S. has enforced its own brand of geographical indicators, this issue is even more valuable for the EU. As stated in The National Interest, “A strengthening of GIs would benefit Europe, and some global marketing by U.S. firms with certain products would have to change”²²⁶.

To examine the U.S. and EU perspectives on Geographic Indicators it is helpful to look again at differences made between the KOREU and KORUS Free Trade Agreements (FTA). The

KOREU expands Geographic Indicator protection for products beyond those specified in the WTO's TRIPS agreement. Specifically, the KOREU agreement protects 160 products made in the EU and 64 products produced in South Korea²²⁷. Also, compared to the U.S. agreement, the EU agreement spends a great deal more time specifying criminal liabilities in the case of violations of Geographic Indicators. On the other hand, "KORUS does not cover GIs within criminal procedures and remedies and cross-border measures"²²⁸.

Along with issues of criminal liability, another area of conflict has emerged with regards to generic names derived from GI protected regions. Furthermore, after the implementation of KOREU the U.S. has responded by seeking reassurance from the Korean government that products that do not originate from Geographic Indicated regions would not restrict the shipment of U.S. products. The Korean government stated that the KOREU agreement would not apply to names derived from these geographic indicators but not originating from the products specified region²²⁹. This clarification allows U.S. products to be delivered to South Korea despite differences in GI regulations between KOREU and KORUS. It is clear that the EU wishes to extend Geographic Indicator protection beyond the previous focus on wine and spirit distribution. Differences on regulations for Geographic Indicators remain between the two regions. These differences cannot be ignored in the upcoming TTIP negotiation process as they represent a policy divergence. Currently, the EU is solidifying its policy agenda for expanded GI protections through bilateral agreements such as KOREU²³⁰. This policy agenda can be overcome by U.S. negotiators by insisting that a list of agreed upon generic names is generated and ensuring that additional GI protections will only be applied to compound names.

The issue of Geographical Indicators has been heavily contested between the two regions since 1999 and will not be easily negotiated throughout the TTIP process. After failing to resolve

GI disputes with the EU, the U.S. in 2003, “won the establishment of a panel to adjudicate the dispute” with the World Intellectual Property Organization (WIPO)²³¹. The U.S. claimed that the EU’s GI policies discriminated against U.S. products. Furthermore, the U.S. alleged that EU regulations on the matter violated the WTO’s TRIPS agreement by not giving equal protections to the U.S.. The WIPO ruled that GIs should protect full place names and removed the requirement that applicants for GI protection must also give protections to other EU GIs. Despite this ruling, the EU pushed for expanded GI protections for agricultural and other products in the DOHA round²³². It is clear that the EU wishes to push for expanded GI protections in future TTIP negotiations.

We must consider the consequences of U.S. policy concession on the issue of EU protected GIs, such as Paragiano-Reggiano. One thing to consider is that the EU already gives a 15-year transition period for unregistered GI’s²³³. The length of transition period can be an area for negotiations by the U.S.. A negotiable transition period would allow advertisers to educate the public about product labeling changes to avoid customer confusion. Secondly, lower-priced generic goods would still be appealing on the free market despite the presence of traditional GI produced products. This argument is especially strong as sparkling wine sales did not markedly decrease after the EU forced Spain to change the label their sparkling wines from Champagne to Cava²³⁴. This example provides hope that if concessions need to be made with the EU, U.S. producers will still see relatively similar profits.

What Will TTIP Global Trade Rules for GI’s Look Like?

The U.S. would like to uphold Geographic Indications to the level previously set by the TRIPS agreement. In the TTIP, U.S. interests would be best served by defining geographic

indications as stated in Article 22 of the TRIPS agreement²³⁵. However, if the U.S. attempts to uphold GI protections to the standards established in TRIPS during the next round of TTIP negotiations, negotiators will face opposition from the EU.

Flexibility with regards to geographic indications could also be proposed during TTIP negotiations. This flexibility would be best utilized to protect U.S. business interests with regards to GI's that have become generic terms for products. To attain this flexibility, U.S. negotiators could establish a rule that does not exclude the possibility that a recognized geographic indication may become customary in common language for a specific commodity²³⁶. For example, the U.S. could argue that a product such as Parmesan Cheese has become a term customary for that particular kind of cheese. Although the EU will oppose this suggestion, the U.S. will take steps to see an article in the same vein implemented through TTIP.

It is necessary to optimize U.S. policy objectives with regards to GI's. The U.S. should first focus on bringing EU members into compliance with existing GI protections before discussing the expansion of GI protections. Moreover, establishing common rules surrounding GI's will be difficult. If the EU seeks prosecution the US negotiators need to insist that lengthy grace periods are enacted. U.S. business interests would be best served by establishing a rule in TTIP that precludes GI protections for indicators that have become common language for a specific commodity.

Chapter 17. Environment | *By Joshua Gregory*

Chapter Summary

Key Policy Conclusions

TTIP presents an opportunity to codify joint environmental policy into a document that will serve as the most comprehensive global baseline on environmental standards to date.

Background

The EU and U.S. agree on large sections of environmental policy. Despite the U.S. enacting legislation formalizing opposition to the EU's carbon emission requirements on airlines companies in 2011, the EU and U.S. have collaborated on environmental programs in the past through programs such as ENERGY STAR. Since the WTO has yet to publish a comprehensive agreement dealing with environmental standards with regards to trade policy, the global impact for their inclusion in TTIP is unprecedented. Recently the U.S. and EU both negotiated free trade agreements with Korea, formally known as the Korea European Union Free Trade Agreement (KOREU) and Korea United States Free Trade Agreement (KORUS). These agreements provide a framework for how environmental issues can be structured in TTIP.

Policy Consideration

There are many policy options TTIP negotiators can explore due to our mutual interests and concerns in environmental policy. Similar policy with regards to invasive alien species could be harmonized into a joint agreement that not only sets baseline standards but also increases cooperation to limit harmful effects on biodiversity. Sustainable technologies are an emerging economic sector and the EU and US would benefit by promoting sustainable technologies through TTIP. Carbon emission could be lowered bilaterally by creating trade incentives for businesses. Additionally, corporate social responsibility could be supported by a commitment from both regions in TTIP. One area of contention may lie in airline emissions, however both sides are optimistic to resolve the issue. There are many environmental issues in which TTIP can harmonize standards including limiting global carbon emissions and the promotion of corporate social responsibility and biodiversity.

Key Recommendations

- Discuss the implementation of an arbitral tribunal to resolve environmental policy disputes
- Implement provisions to increase the distribution and development of sustainable technologies and products

Introduction

The EU and U.S. share many rules and regulations related to the environment, including strong regulations on waste disposal, emission standards and wattage requirements for appliances²³⁷. Through a comprehensive free trade agreement, the EU and U.S. have the opportunity to bring environmental rules and regulations to the forefront for the global community. As rising international powers, such as the BRIC nations, have often overlooked environmental concerns in favor of development goals, TTIP provides the opportunity to create environmental targets for these countries to strive towards²³⁸. Currently there is no global baseline for environmental standards. TTIP is a chance for the U.S. and EU to recognize these standards as a potential model for the future.

Citizen Concerns and Global Interests

The U.S. and EU have recently coordinated environmental standards in the Korea European Union Free Trade Agreement (KOREU FTA) and Korea United States Free Trade Agreement (KORUS FTA). Both of these FTA's strive to strengthen environmental protections. Although the U.S.- Korea Free Trade Agreement (KORUS) provides a framework for the creation of a dispute settlement mechanism for environmental concerns, the creation of a FTA between the U.S. and EU would encompass a much larger regulatory framework. Prior to KORUS, the U.S. had limited means to resolve free trade disagreements, involving fact-finding reports and outside consultation²³⁹. Arguably, the EU agreement is more focused on "trade

promoting sustainable development¹” and fighting issues of climate change²⁴⁰ due to environmental preferences in the EU.

Citizens and interest groups have expressed concerns over the negative environmental impacts of TTIP. Contrary to these objections, the European Commission has stated that the environmental impact of TTIP would be minimal at best²⁴¹. The European Commission admitted that increased CO2 emissions, toxic waste, biodiversity reduction and greater use of our earth’s resources could put additional strain on our natural environment. However, the increased trade and use of green products and services would largely offset any negative environmental effects from TTIP. Furthermore, to ease the objections of EU citizens, the European Commission’s report stated that both sides have agreed to “reduce unnecessary costs and administrative delays stemming from reregulation, while achieving the levels of health, safety and environmental protection that each side deems appropriate”²⁴². Negotiators will have to bear in mind what both regions deem appropriate in the formation of a TTIP agreement.

Contrary to the oppositions’ beliefs, it is important that negotiators inform the public that TTIP will not lower environmental standards, rather that it will simply create an agreed upon baseline from which environmental standards can not be lowered. Higher instances of environmental protections in the EU will largely not be affected as long as both parties can create agreed upon standards and mutually recognize any differences in policy²⁴³.

Many scholars have reached a similar conclusion. According to Gerry Alons, “since both parties will particularly aim at defending existing policies in the TAFTA/ TTIP, an eventual agreement is also unlikely to raise transatlantic environmental standards. However, as these standards are relatively high in global comparison, they could be a powerful precedent for the

¹ Sustainable development is being able to meet the needs of the present without sacrificing the ability of future generations to meet their own needs¹.

rest of the world”²⁴⁴. A 2013 report from the European Commission drew similar conclusions of the potential global impact of TTIP. The report makes the argument that, by fostering economic growth, developed countries tend to have cleaner environmental standards²⁴⁵. The report recommends that negotiators from both sides of the Atlantic use neutral terms whenever possible to avoid environmental activist outcry when discussing non-tariff barriers to trade. Finally, TTIP will bring further distribution and specialization in environmentally friendly technologies, which will lead to efficiency gains and less resource use²⁴⁶.

Although TTIP environmental negotiations face many potential challenges from the public over environmental degradation, the fact remains that EU and U.S. environmental regulations are comparatively strong compared to many developing nations²⁴⁷. Moreover, the EU and U.S. have had a strong history of jointly promoting environmental protections. This cooperation can be clearly seen through the EPA-EU ENERGY STAR Agreement, which since implementation in 2001 has expanded to certify and promote products that fulfill sustainable energy requirements²⁴⁸. Furthering previous bilateral cooperation on environmental issues provides many opportunities to harmonize rules and regulatory structures to remove non-tariff environmental barriers. EU negotiators will most likely push for eliminating non-tariff barriers to support the distribution of green technologies and practices that limit climate change. As environmental goods and services is a growing sector in the global economy, enacting measures to support these technologies in TTIP would be in both the EU and U.S.’s interest.

Some of the most significant objectives for TTIP negotiations with regard to global standards are the promotion of mutually supportive environmental trade policies that both encourage high levels of environmental protections and the enforcement of environmental laws²⁴⁹. As both regions currently hold some of the highest environmental regulations

worldwide, codifying bilateral rules will establish an international precedent. Additionally, setting this benchmark between both regions will establish a model for standards that can be used to address other global trade and environmental related issues.

Although the EU and U.S. have enacted environmental protections, there tends to be more resistance in the U.S. and further protections stand as obstacles to ongoing negotiations.

The purpose and scope of these negotiations was recently discussed by Karel De Gucht when he stated:

We need to make absolutely sure that transatlantic trade and investment supports, rather than undermines our high standards on these sustainable development issues. We will not sacrifice them for commercial gain. On the contrary, this agreement offers the potential to go beyond what we have been able to include in previous trade agreements on these issues²⁵⁰.

When discussing environmental issues, TTIP negotiators have the chance to realize joint interests by eliminating non-tariff barriers to trade and establishing mutually agreed upon environmental standards. Raising global environmental standards is especially important as it reduces the low cost comparative advantages that developing nations currently hold over the U.S. and EU.

Potential for Mutual Environmental Standards

As both the EU and U.S. already have strong environmental standards, it is important to recognize that these global trade rules will complement the objectives of TTIP in maintaining a natural environment that can sustainably support increased rates of global trade for years to come. However, it is also important for negotiators to affirm that setting environmental standards

that pose as a distinguished restriction on trade or investment is inappropriate to the global trade objectives of TTIP²⁵¹.

That being said, there are a variety of areas on which EU and U.S. policy can converge and through which TTIP's setting of global trade rules can codify. One example is the Montreal Protocol, which lists a variety of substances that need to be controlled in both manufacturing and use to limit harmful effects to the ozone layer²⁵². Both EU and U.S. negotiators can uphold the intent and obligations of this protocol to ensure globally that human health and environmental damage is mitigated.

Another potential area of collaboration in TTIP negotiations would be the encouragement of corporate social responsibility. This would provide both regions the opportunity to affirm that enterprises within member states jurisdiction voluntarily adopt practices of corporate responsibility related to the environment²⁵³. Although this would be a voluntary policy, these rules would still be subject to member states international standards and guidelines as determined by that particular member state. By adopting these policies both regions can set a precedent for the inclusion of corporate social responsibility and effectively encourage transnational corporations to operate in a manner consistent with sustainable development.

One policy area in the developing world that is not often brought to the forefront is the protection of endangered species, conservation policy and maintaining biodiversity. The EU and U.S. both have formulated and uphold these values, to which TTIP represents an opportunity to jointly agree on these issues and set benchmarks for global trade rules. TTIP negotiators can devise an agreement that recognizes the importance of conservation and sustaining biodiversity in achieving joint goals of sustainable development²⁵⁴.

Continually, as fisheries are an important economic sector in both the EU and U.S., TTIP negotiators can support national business interests by protecting these resources. Any affirmation of these values must mutually recognize policy difference to uphold government's access to their own states resources. However, both regions can cooperate and affirm issues such as the protection and maintenance of ecosystems²⁵⁵. Another area in which the EU and U.S. agree on is on the issue of Invasive Alien Species²⁵⁶. The first step in setting this global trade rule would be the joint recondition that alien invasive species can move across borders and through trade routes adversely affecting the environment and economic sectors, such as fisheries and human health.

The U.S. and EU largely recognize the adverse effects that climate have can have on the environment. However the degree to which this issue is politically actionable differs between these two regions. Nevertheless, TTIP negotiators will likely agree that the formal recognition of climate change as a global environmental issue is a joint interest. As a core framework, TTIP negotiators may find success in reaffirming the United Nations Framework Convention on Climate Change²⁵⁷. Both parties could converge around the issue of rationalizing or eliminating fossil fuel subsidies. As stated in the 2011 Honolulu Declaration, these subsidies have proven to be economically inefficient and encourage wasteful use of fossil fuel emissions²⁵⁸. While benefitting the environment, this policy could produce economic gains for the EU and U.S. and present a clear area for harmonization during negotiations²⁵⁹.

Continually, both sides of the Atlantic are heavily invested in promoting trade related to environmental goods and services. As such, TTIP negotiators could jointly recognize the importance of trade and investment in this sector in combatting environmental challenges and

stimulating economic growth²⁶⁰. Along with this, both regions should eliminate all tariff and non-tariff barriers in this sector.

The area with the highest potential for environmental gains is the creation of a mechanism for an arbitral tribunal²⁶¹ to deal long term with outstanding issues, such as different airline emissions policies. This dispute resolution mechanism should serve as what scholars have deemed a “WTO Plus”²⁶², a supplemental agreement that respects national interests. As the WTO has not yet adopted comprehensive environmental standards, TTIP could serve as a framework for international environmental mitigation. To prevent long-term legal discrepancies from arising between these two regions, an environmental dispute settlement mechanism is key.

Airline Emissions

Although there are many issues in which the EU and U.S. can harmonize policy, an issue that could be an obstacle for TTIP negotiations is the EU’s recently enacted airplane emissions rule. This rule charges airlines for emissions that exceed the number of carbon permits purchased from the EU²⁶³. Recent actions by the U.S. have come into direct conflict with EU environmental policy. For example, President Obama, in November 2012, signed the European Union Trading Scheme Prohibition Act, which prohibits U.S. civil aircraft from participating in the EU’s aircraft emissions trading scheme²⁶⁴.

Airlines for America (A4A) is a trade association that represents U.S. airline business, such as American, Alaskan and Delta Airlines. A4A has consistently voiced its opposition to imposing EU emission requirements on U.S. airlines, stating that EU policy poses a direct threat to the U.S.’s ability to transport goods and services.²⁶⁵ A4A estimates that the EU’s airline emissions cap and trade program will cost U.S. airlines 3.1 Billion dollars between 2012 and

2020²⁶⁶. To achieve policy convergence, TTIP negotiators should come up with market incentives to convince U.S. companies that EU environmental policies are in their best long-term interests.

The European Union's airplane manufacturing market is the second largest in the world, directly behind that of the United States²⁶⁷. European Union negotiators would directly benefit national manufactures by working with the U.S. to come together and set joint airline emission standards. Granted that EU-U.S. relations with regards to airline emissions are already volatile, agreement on common standards for airline emissions will be a priority for EU negotiators. Unification of EU-U.S. policy will be a difficult, but necessary, step to balancing EU and U.S. business interests.

Innovative Environmental Responses

Both the EU and U.S. currently agree on increasing energy efficiency, the development of low carbon technologies, and investment in alternative and renewable energy sources²⁶⁸. Additionally, cooperation from both sides of the Atlantic can set global precedents with regards to lowering emissions in transportation sectors, specifically maritime shipping and air transport. Addressing issues such as deforestation and improving monitoring of greenhouse gas emissions should be included in a comprehensive environmental policy for TTIP²⁶⁹. U.S. negotiators have an interest in promoting sustainable air transport, a vital factor that allows the U.S. to work with the EU to harmonize differing emissions standards.

U.S. negotiators also have recognized the importance of a dispute settlement mechanism as a vital part of TTIP negotiations. This arbitral tribunal shall at the request of EU or U.S. formal request hold a meeting to make recommendations based on the legal basis for alleged

TTIP violations²⁷⁰. If a similar dispute settlement mechanism is implemented in TTIP, then this will ensure that all future disputes that arise between the two regions will be resolved through a legal framework that will not put the future viability of TTIP in jeopardy.

Environmental goods and services is another highlighted area that will play an important role in TTIP. The European Commission has spoken highly of the positive environmental benefits of increased trade in environmental goods and services²⁷¹. Encouraging the trade of environmental goods and services is in both EU and U.S. interest.

As an emerging sector of the economy, both regions should consider further promoting trade in environmental goods and services to boost their economies. Invasive alien species and corporate social responsibility could be discussed as other areas for joint harmonization. Furthermore, the establishment of an environmental arbitral tribunal is key to success in environmental policy. Beyond facilitating trade, such a mechanism would curb legal disputes and the outcry of EU citizens. Further clarifying and unifying enforcement mechanisms for both parties should limit disputes that arise between the two regions. TTIP negotiators should seek agreement on the issue of airline emissions, especially considering the past volatility between these two regions on this issue. An agreement on common standards for airline emissions would normalize relations and facilitate further trade between these two regions.

Chapter 18. Labor Policy | *By Tucker Hoffman and Wenzhe Sun*

Chapter Summary

Key Policy

TTIP provides an opportunity for U.S. and EU to develop and implement a labor standards framework that can be used as a model in future free trade agreements (FTAs).

Background

Since 1996, U.S. and EU high-level working groups have been working to establish universally accepted labor standards that address common human right's violations. The US and the EU already have some of the world's most stringent labor standards, and seek to harmonize these standards to more effectively incorporate them in future FTAs. While implementing similar standards at a multilateral level may not be feasible, TTIP could allow U.S. and EU to enhance the enforcement of labor standards at a bilateral level and help ensure a future of fair competition throughout the global economy.

Interests

The U.S. and the EU seek to maintain and spread the core values of the International Labor Organization's (ILO) Fundamental Principles and Rights at Work, as well as the UN Declaration of Human Rights. By incorporating these core values into labor standards, the U.S. and the EU seek to enhance the protection and welfare of their citizens.

Recommendations

- The U.S. and EU need to adopt and maintain Fundamental Principles and Rights at Work as stated in ILO Declaration
- The language used in TTIP can reduce vagueness of treaty text to ensure that workers from all sectors are covered under these standards.
- Ensure the effectiveness of a timely, accessible and reliable conflict resolution mechanism that redresses workers in a timely manner.
 - Negotiators should seek to include a provision excluding labor relations, wage and hour disputes from the conflict resolution mechanism.

Principles and Negotiating Labor Standards

In 1996, the WTO recognized the International Labor Organization (ILO) as the “competent body to negotiate labor standards”.²⁷² WTO’s adoption of ILO’s core labor standards, including the freedoms of: association, the right to collective bargaining, the elimination of all forms of compulsory or forced labor, child labor, and non-discrimination, demonstrated the multilateral community’s desire to address labor standards in the international forum. However, subsequent summit talks addressing additional labor standards stalled as such regulations have the potential to decrease the competitiveness of developing economies.²⁷³ U.S. and EU seek to circumvent the WTO’s labor impasse by including labor standards in TTIP.

The U.S. and the EU have maintained an annual high-level working group on employment and labor-related issues since 1996.²⁷⁴ This group has brought together labor unions, representative from U.S. and EU businesses, and NGO’s to discuss the development and implementation of codes of conduct on labor standards. This group has discussed and codified a wide range of labor policies, from employment access issues facing people with disabilities to the uses of nanotechnology in the workplace.²⁷⁵ By developing common terminology and evaluation practices, U.S. and EU are able to reduce the vagueness of labor standards incorporated into FTA in the future. This is the key focus of incorporating labor standards into TTIP; by reducing the vague wording of labor standards U.S. and EU will be able to effectively incorporate the rights of all workers throughout the economy.

Previous FTA that have included labor standards, such as NAFTA or PERU-US FTA, have been worded vaguely and have failed to include large sections of the population, excluding citizens from basic human rights and the avenues to address their injustices.²⁷⁶ The effective codification and implementation of labor standards in FTA is just as important as ensuring a

timely, accessible and reliable conflict resolution mechanism to address violations of labor standards. It is imperative that we reach a strong, mutually recognized code of standards and a comprehensive framework for the enforcement of those standards if we are going to create a model for the inclusion of labor standards in FTA for others to follow.²⁷⁷

The development of a successful framework for the implementation of universally accepted labor standards is an imperative step to reducing human rights violations around the world. The inclusion of labor standards in FTAs has the potential to increase public health, reduce ‘social dumping’ by corporations seeking-out the comparative advantage of low-cost labor and improve the living standards of laborers across all sectors. Increases in a country’s living standards directly facilitates the reduction of income inequality and is essential for the development of a healthy, dynamic economy.

Effective rules are the foundation of every society; in order for governments to be perceived as legitimate entities they need to provide clarity and predictability in the implementation and execution of their respective laws. TTIP has provided the U.S. and the EU with an opportunity to incorporate the codification of labor standards and the processes of implementing the enforcement of those standards within FTAs, as a model for the rest of the world to follow. These standards not only uphold the core principles laid out by the ILO, they embody the universal value that all humans have inalienable rights and that upholding these rights is at the center of the democratic order.

Recommendations

- The U.S. and EU need to adopt and maintain Fundamental Principles and Rights at Work as stated in the International Labor Organization Declaration.

- Any agreement must have the objective of reducing vagueness of treaty text to ensure that workers from all sectors are included in these standards.
- Negotiate the creation of an accessible and reliable conflict resolution mechanism that redresses workers in a timely manner.

Chapter 19. Competition Policy | *By Tucker Hoffman and Wenze Sun*

Chapter Summary

Background

TTIP provides the U.S. and the EU the opportunity to take initiative on establishing global trade rules regarding competition policy. The U.S. and the EU have very similar competition policies that center on three distinct areas: merger control policies, cartel abatement and policies directed at firms that hold dominant positions within their respective market. Although, the EU competition policy is modeled off of the U.S. antitrust laws, there are major differences in the enforcement procedures of antitrust laws on both sides of the Atlantic. The inclusion of developing countries into the global economy has shifted the U.S. and the EU focus of competition policy to include issues such as state-own-enterprises, and effective ways to implement antitrust procedure in a more transparent way. To create a comprehensive competition policy that others can follow in the future, we need to address the differences in enforcement and increase the transparency of these procedures.

US Interests

The rising affluence of state-owned-enterprises not only threaten the competitiveness of U.S. and EU's companies, they reduce the innovation within the economy and distorted market data. To make sure that governments and business around the world are not engaging in anticompetitive behavior, it is in the U.S. and EU to develop rules encompassing state-owned and ensure a level competitive playing field. Establishing a mutual standard on competition policy will allow the U.S. and EU to maintain regulations that protect and promote a fair, competitive business environment.

Recommendations

- Both Parties agree to prohibit anti-competitive practices such as cartels, abusive behavior by companies with dominant market position, and anti-competitive mergers.
- TTIP negotiators need to develop a comprehensive framework for the judicial enforcement of antitrust laws that foster innovation, investment and competitive markets.
- Increase the transparency of antitrust enforcement procedures to allow for those under investigation access to evidence.
- Ensuring that local enforcement procedures take into account international developments regarding antitrust investigations (so that outcomes to not have extra-territorial or multiple impacts).
- If a dispute arises from a party breaking commitments outlined in a finalized agreement, there should be prescribed mechanisms for remedy, such arbitration with a third party.

The Growing Role for Competition Policy

Competition policy has historically been centered on issues regarding: merger control policies, cartel abatement and policies directed at firms with dominant positions. The U.S. and the EU have been working together to develop a framework to effectively address the impact of anti-competitive behavior on the world economy. However, changes in the international economy and pushed these developed countries to focus on different elements of competition policy such as: the enforcement of antitrust laws, designated monopolies, and state-owned enterprises.²⁷⁸ The most important element in regard to TTIP is the differences in the enforcement of antitrust laws between the U.S. and the EU. Although EU antitrust laws are modeled off of the U.S., their enforcement has a single administrative approach that largely leaves the judicial system out of the procedure other than during an appeal. Violations of antitrust laws on both sides of the Atlantic are brought before antitrust enforcement agencies, which have increasingly been called into question due to the lack of transparency and judicial process.²⁷⁹

To increase the transparency of antitrust enforcement agencies, the U.S. and the EU need to encourage these agencies to not only publish the major cases with violations of antitrust laws, but also to publish cases that have been rejected. This increases the transparency of these organizations and allows the public to evaluate whether these processes are fair, predictable and reliable. Increasing this transparency brings more legitimacy to these enforcement processes and should be a central goal in TTIP negotiations.

Another major issue between the U.S. and the EU is the difference in understanding and evaluation of certain violations of competition policy. One of these differences is the evaluation of a firm's dominant position within the market. Under EU law, a 40 percent market share in the

presence of significant barriers to entry can constitute dominance, and a firm with 50 percent of a market or more is presumed to have dominance (AKZO Chemie BV v. Commission, case C-62/86, 1991 ECR I-3359). This is a level substantially below the point that "monopolization" restrictions begin to apply in the United States.²⁸⁰ These differences have cost American companies millions, if not billions of dollars. A primary example of this was an antitrust dispute involving Microsoft in the EU. The European Union-Microsoft Competition Case was brought against Microsoft for abuse of its dominant position in the market under competition law. It began as a complaint from Novell over Microsoft's licensing practices in 1993, and eventually resulted in the EU ordering Microsoft to divulge certain information about its server products and release a version of Microsoft Windows without Windows Media Player.²⁸¹ This dispute and other more recent examples, such as the EU-Google case, illustrate that developing a common understanding of competition policy is important not only for setting a global competition policy standard, but it also reduces trade friction between the EU and the U.S.

Another contentious and increasingly complex antitrust issue revolves around the procedure for companies involved in mergers across multiple jurisdictions that can potentially violate competition policies. The U.S. and EU need to develop a legal framework for merger procedures because there is currently no global standard for merger review and remedies. Currently there is only an informal framework that has been developed through the International Competition Network (ICN), an organization devoted to competition law enforcement. It provides an informal venue for maintaining regular contacts and addressing practical competition concerns. The ICN also gives opportunities to discuss its working group projects and their implications for competition policy enforcement. However, the ICN does not exercise any rule-making function. When the ICN reaches consensus on recommendations, or as known as best

practices, individual competition authorities decide whether to implement the recommendations and possible avenues for their implementation.²⁸² This shows that there is a critical need for the codification of merger reviews and remedies as a model for the world to follow.

The last major issue that needs to be address through TTIP is competition policy regarding state-own-enterprises or government supported enterprises. State-owned-enterprises jeopardize the competitiveness of the global economy by creating an un-level playing field and circumventing the international rules of trade and investment. The U.S. and the EU have both made commitments, through FTAs with South Korea, to implement competition policies and non-discriminatory treatment applying to all state-favored-enterprises.²⁸³ Another important distinction was made in the EU-South Korea FTA with regards to the type of government subsidies provided to state-favored-enterprises. There are two types of subsidies that are prohibited: covering debts or liabilities of certain enterprises within certain conditions that are written in the KOREU agreement, as well as subsidies given to an ailing company while there is no restructuring plan for that company.²⁸⁴ By codifying the restrictions on subsidies that can be provided to state-owned-enterprises, the U.S. and the EU seek to take the lead in ensuring that the global market remains competitive.

Through developing a comprehensive framework that facilitated the construction of better competition policy, the U.S. and the EU seek to preserve the international rules of trade and investment. However, these rules hold little weight if they are not re-enforced by a fair judicial process. This is why it is crucially important that a conflict resolution be incorporated into a comprehensive competition policy.

Recommendations

- Both Parties agree to prohibit anti-competitive practices such as cartels, abusive behavior by companies with dominant market position, and anti-competitive mergers.
- TTIP negotiators need to develop a comprehensive framework for the enforcement of antitrust laws that foster innovation, investment and competitive markets.
- Increase the transparency of antitrust enforcement agencies and procedures.
 - Publishing rejected and concluded antitrust cases.
 - Increasing accessibility to evidence for persons under investigation.
 - Ensure all evidence used in cases is derived from legal or economic fact.
- If a dispute arises from a party breaking commitments outlined in a finalized agreement, there should be prescribed mechanisms for remedy, such arbitration with a third party.
- Ensuring that governments are responsible for state-sponsored-enterprises discriminatory actions or government influences that resulted in discriminatory actions.
- Merger procedures need to seek procedural and substantive convergence
- Ensuring that local enforcement procedures take into account international developments regarding antitrust investigations to ensure that outcomes to not have extra-territorial or multiple jurisdictions impacts.

Conclusion | *By Katherine Garbe, Tucker Hoffman and Jared Stevens*

The goal of this task force report is to provide recommendation for negotiating the Transatlantic Trade and Investment Partnership (TTIP), an opportunity to reinvigorate and reaffirm the United States and European Union's role in the changing global economy. A free trade agreement of this scale stands to not only benefit citizens in both regions but also strengthen our strategic partnership for years to come.

The first section of this report gives an overview on the current trade policies in the U.S. and EU, illustrating both sides' interests and expectations in the upcoming negotiations. Recent free trade negotiations of the U.S. and the EU are taken into consideration as foundations for TTIP negotiations to expand upon. The report then presents TTIP's impact on global trade, taking stock of the global trade system under the WTO and addresses concerns over the creation of a bilateral trade agreement between two of the world's largest economies.

This report then shifts to practical reduction of barriers to trade in a variety of sectors. Sections Two and Three show that through the reduction of tariff and non-tariff barriers, TTIP has the potential to not only increase U.S. GDP but also to integrate the regulatory regimes of the largest, most compatible economic blocs in the world. Harmonizing these regulatory regimes will lead to the reduction of costs for producers, increase quality and the range of goods provided to consumers while simultaneously decrease the cost of regulatory programs for both governments. Furthermore, the collaboration of these regimes allows the U.S. and the EU to work together to develop the highest standards and products for the protection of the environment, the economy, and the public wellbeing on either side of the Atlantic.

By reciprocally reducing the restrictions to market access, we are eliminating protectionist barriers that are harmful to economic growth and competition in a free and fair market. The reduction of these barriers produces an exponential cycle of increase productivity that produces greater economic, food and energy security for both the U.S. and the EU. By upholding our fundamental values of free trade and liberalization as the best avenues to produce economic growth, we can reduce our protectionist and ultimately counterproductive tendencies.

The primary accomplishment of TTIP is not simply the reduction of tariffs or the harmonization of regulations; it is establishing global trade rules in areas that are becoming increasingly important in the international economy due to advances in markets and technology. These areas include environmental regulations, geographic indicators, intellectual property rights, labor standards, and competition policy.

TTIP provides an important chance for the U.S. and the EU to shape the rules of global commerce to reflect the core values of open and fair competition, along with high regulatory and safety standards that have become universal norms that drive global stability.

List of Abbreviations

A4A– Airlines for America
ACC – American Chemistry Council

BIT – Bilateral Investment Treaty

CE - Conformité Européen
CEFIC – European Chemical Industry Council
CEPA – Canadian Environmental Protection Act
CMP – Chemicals Management Plan (Canada)
CRFECNW – Common Regulatory Framework for Electronic Communication Networks and Services
CRS – Congressional Research Service

DHS – Department of Homeland Security
DOT – Department of Transportation

EAR – Export Administration Regulations (U.S.)
EC – European Commission
ECHA – European Chemicals Agency
EIA – Energy Information Administration (U.S.)
EJC– European Court of Justice
EMA – European Medicines Agency
EPA – U.S. Environmental Protection Administration
EU– European Union

FCC – Federal Communications Commission
FDA – U.S. Food and Drug Administration
FDI – Foreign Direct Investment
FMVSS – Federal Motor Vehicle Safety Standards
FQD – Fuel Quality Directive (EU)
FTA – Free Trade Area

GAAP – Generally Accepted Accounting Principles
GATS – General Agreement on Trade in Services
GI – Geographic Indication
GM(O) – Genetically Modified (Organisms)
GMP – Good Manufacturing Practices
GP – Government Procurement
GPA – Agreement on Government Procurement

ICT – Information and Communications Technologies
IFRS – International Financial Report Standards
IPR – Intellectual Property Rights
ISDS – Investor-State Dispute Settlement

KOREU – European Union-South Korea Free Trade Agreement
KORUS – Free Trade Agreement between the U.S. and the Republic of Korea

LNG – Liquefied Natural Gas

MDD – Medical Device Directives
MRA – Mutual Recognition Agreement

NCAP – European New Car Assessment Program
NHTSA – National Highway Traffic Safety Administration

OPPT – Office of Pollution Prevention and Toxins (U.S. EPA)

PIP – Poly Implant Prothese
PP – Public Procurement [synonymous with GP]
PVSA – Passenger Vessel Services Act

QbD – Quality by Design

REACH – Registration, Evaluation, Authorization, and Restriction on Chemicals Act (EU)

SEC – Securities and Exchange Commission
SPS – Sanitary and Phytosanitary [Regulation]
SSDS – State-State Dispute Settlement

TACD – Trans Atlantic Consumer Dialogue
TRIPS – Trade Related Aspects of Intellectual Property Rights
TSCA – Toxic Substances Control Act (U.S.)
TTIP – Transatlantic Trade and Investment Partnership

UDI – Unique Device Identification
U.S.ECE – United Nations Economic Council for Europe
USTR – United States Trade Representative

WIPO – World Intellectual Property Organization
WTO – World Trade Organization

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