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U.S.-EU Trade Barriers and the Transatlantic Trade and Investment Partnership Agreement

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INTRODUCTION

In recent months, we have repeatedly heard divergent opinions on whether U.S. trade agreements should be negotiated, renegotiated, or scrapped altogether. The U.S.-EU trade of goods and services totals about $700 billion annually, the largest amount of trade between any two partners anywhere in the world.[1] Despite the magnitude of the trade and economic relationship between the U.S. and the EU, many observers contend that the relationship has not reached its full potential.[2] Recently, concerns about chronically low economic growth and increased competition from emerging markets have intensified the need for increased economic cooperation across the Atlantic. Low growth and increased competition also prompted a protectionist reaction to increasingly free trade as evidenced by the United Kingdom's vote to leave the European Union and by the election of Donald Trump as President of the United States. Today we may either seize the opportunity to create a long-term globalized economy shaped by U.S. and European values or erect protectionist barriers to maintain certain jobs in the short term.

The stated purpose of the Transatlantic Trade and Investment Partnership (TTIP) Agreement is to remove barriers to U.S.-EU trade across a wide range of industries.[3]

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[1] Op-Ed by President Barack Obama & Chancellor Angela Merkel, *The Future of Transatlantic Relations*, Whitehouse.gov, (Nov.17,2016), https://www.whitehouse.gov/the-press-office/2016/11/17/op-ed-president-obama-and-chancellor-merkel-future-transatlantic.

[2] Shayerah I. Akhtar & Vivian C. Jones, Cong. Research Serv., R43158, *Proposed Trans-Atlantic Trade and Investment Partnership (T-TIP): In Brief* (2014), http://www.fredsakademiet.dk/ordbog/tord/ttip.pdf.

[3] U.S. Mission to the EU, *Transatlantic Trade and Investment Partnership*, Economic Issues, United States Mission to the European Union, https://useu.usmission.gov/ttip-sme.html.

Since tariffs between the U.S. and the EU are already low, around 4% on average,[4] much of TTIP's impact will stem from its emphasis on eliminating non-tariff trade barriers. These non-tariff trade barriers primarily include: harmonizing regulations pertaining to product safety and functionality, mutual recognition of professional certifications, and improved processes for investor-state dispute resolution.

The purpose of this Article is to provide an update on the status of negotiations since the U.S. presidential election, provide an overview of key TTIP provisions, and ultimately to impress upon the incoming U.S. administration the importance of maintaining a strong transatlantic alliance of which TTIP could be the centerpiece.

I. STATUS OF NEGOTIATIONS

The U.S. and the EU began TTIP negotiations in July 2013 and have held 15 rounds of negotiations so far. The fifteenth round concluded in New York on October 7, 2016.[5]

As of this writing, negotiations have been essentially put on hold until the new U.S. administration is fully in place.[6] Given the campaign rhetoric of the incoming administration, many commentators seriously doubt that TTIP negotiations will be successfully concluded.[7] Even before the election, the goal of successfully concluding TTIP negotiations seemed increasingly out of reach.[8] Why? The most widely-held explanation is that "governments on both sides of the Atlantic are under pressure from populist waves of discontent."[9] But this is not the entire story. A significant factor complicating negotiations is that they are occurring with 28 EU member states on one side, each with their own separate national interests, and the 50 U.S. states on the other, with

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[4] *Id.*

[5] European Commission, *Report of the 15th Round of Negotiations for the Transatlantic Trade and Investment Partnership* (2016), http://trade.ec.europa.eu/doclib/docs/2016/october/tradoc_155027.pdf.

[6] Council of the European Union, *Foreign Affairs Council Meeting on 11/11/2016*, http://www.consilium.europa.eu/en/meetings/fac/2016/11/11/.

[7] V.S. Seshadri, Research and Information System for Developing Countries, Discussion Paper No. 185, *Transatlantic Trade and Investment Partnership*, http://ris.org.in/images/RIS_images/pdf/DP%20185%20Amb%20V%20S%20Sheshadri.pdf.

[8] Josh Lederman & Kathleen Hennessey, *Obama Loses Reliable Partner, Faces Uncertainty after Brexit*, PBS Newshour, (Jun. 25, 2016, 1:28 PM), http://www.pbs.org/newshour/rundown/obama-loses-reliable-partner-faces-uncertainty-after-brexit/.

[9] Judy Dempsey, *Judy Asks: Will TTIP Happen?*, Carnegie Europe, Apr. 27, 2016, http://carnegieeurope.eu/strategiceurope/63458.

different sets of laws and regulations in each. This political reality was on full display in the recent EU vote to approve the Comprehensive Economic and Trade Agreement (CETA), a trade deal like TTIP but between the EU and Canada. To be fully-implemented, CETA must be ratified by 38 regional and national EU parliaments.[10] On October 14, 2016, the parliament for the Belgian region of Wallonia voted to block CETA, effectively derailing the entire agreement. Witnessing this debacle play out, observers have noted that with so many potential vetoes held by regional governments, it is difficult to see how TTIP, a much bigger deal with the United States, could possibly be passed.[11]

Despite these difficulties, successfully concluding a substantive TTIP agreement would benefit both the U.S. and the EU resulting in more consumer choice and increased competitiveness for both large and small businesses. Along with the economic benefits of increased cooperation, a broad and substantive TTIP could also strategically complement the increasingly tenuous military alliance among NATO member states. To better understand how TTIP can deliver on its promise, we next analyze several key provisions that are still being negotiated.

II. Key Provisions

A. Investor-State Dispute Settlement

One of the most debated provisions of the TTIP is the investor-state dispute settlement (ISDS) provision.[12] An ISDS provision would allow European businesses investing in the U.S. (and vice versa) to bring claims against the U.S. government through arbitral tribunals alleging that investment protection obligations have been breached. For example, international investment agreements typically provide that a government can only expropriate (i.e., nationalize) an investment if it pays sufficient compensation to the investor. If a country expropriates such an investment without providing sufficient compensation, the investor could use ISDS to bring a claim directly against

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[10] *Hot-Air Walloons*, The Economist, Oct. 22, 2016., at p. 46 *available at* http://www.economist.com/news/europe/21709060-tiny-region-belgium-opposes-trade-reasons-are-hard-understand-wallonia.

[11] *Id.*

[12] European Commission, *Fact Sheet: Investment Protection and Investor-to-State Dispute Settlements in EU Agreements*, (November 2013), http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf.

that country, claiming a breach of investment protection obligations and seeking damages.[13]

Supporters of ISDS use examples like this as proof that an improved investor-state dispute settlement process will "ensure that Americans doing business abroad receive the same kinds of protections—such as protection from discrimination and expropriation without compensation—that are available to companies and investors doing business in the United States under U.S. law."[14] Detractors of ISDS argue that such provisions favor corporate investors and interfere with the democratic process by restricting states' rights to legislate in the public interest. These detractors also criticize ISDS's lack of transparency. Faced with this criticism, both sides have propounded shared principles that seek to ameliorate the ISDS while retaining its core function—encouraging international investment by providing greater protections for investors. These principles include: (1) open hearings, (2) protecting the national right to regulate, (3) awarding attorney's fees for frivolous claims, and (4) limiting remedies against governments to monetary damages only.[15] These principles, if effectively implemented, might just be the compromise the two sides have been looking for to overcome the impasse on this issue.

B. Regulatory Cooperation

Though ISDS is the most hotly debated provision, the provisions concerning regulatory cooperation have been regarded by many participants in the negotiations as TTIP's core.[16] The concept of "regulatory cooperation" is defined as "the process of interaction between U.S. and EU regulators, founded on the benefits regulators can achieve through closer partnership and greater regulatory interoperability."[17] Regulatory cooperation can occur in two

[13] U.S. Trade Representative, *Fact Sheet: Investor-State Dispute Settlement (ISDS)*, Office of the United States Trade Representative https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds.

[14] U.S. Trade Representative, *The Trans-Pacific Partnership: Upgrading & Improving Investor-State Dispute Settlement*, https://ustr.gov/sites/default/files/TPP-Upgrading-and-Improving-Investor-State-Dispute-Settlement-Fact-Sheet.pdf.

[15] *Id.*

[16] U.S. Trade Representative, *Transcript from the Closing Press Conference of the Fifth Round of Transatlantic Trade Investment Partnership Negotiations*, Office of the United States Trade Representative, May 23, 2014, https://ustr.gov/about-us/policy-offices/press-office/speeches/transcripts/2014/May/Transcript-from-Closing-Press-Conference-Fifth-Round-TTIP-Negotiations.

[17] U.S. Chamber of Commerce, *Regulatory Coherence & Cooperation in the Transatlantic Trade and Investment Partnership (TTIP),* https://www.uschamber.com/sites/default/files/regulatory_coherence_regulatory_cooperation_chamber_ttip_paper-final_2.pdf.

primary ways: by creating joint standards, or by mutually recognizing existing standards. The EU prefers the former method[18] while the U.S. seems to prefer the latter.[19]

Each method has its upsides and its downsides. On one hand, the EU's preferred method of creating joint standards is difficult to accomplish. In the realm of international trade, as in most of international relations, each side is reluctant to relinquish its sovereign authority to regulate commerce to another nation. On the other hand, mutually recognizing existing standards has the downside of not creating a single world standard to which third-party countries (e.g., China) can adhere. Thus, instead of promoting economic efficiency, mutual recognition of existing standards has the potential to divert trade from lower-cost producers who cannot adhere to the new standards to higher-cost producers favored under the new regulations. The negative impact of trade diversion is two-fold. First, diverted trade may hurt the non-member nation economically and politically, this has the potential to create a dangerously-strained relationship between the non-member nation and the member-nations. Secondly, and perhaps more importantly, the shift from one nation with a high comparative advantage in a product or service to a nation with a lower comparative advantage for the same product or service is inefficient on its face and works to decrease the overall surplus. A decrease in the overall surplus harms consumers as it burdens them with increased prices and decreased quality.

Given the political difficulty of establishing joint standards, mutual recognition agreements are likely more appropriate to improve regulatory compatibility in the short term. Attention must be paid towards avoiding the negative consequences of trade diversion.

Thus, negotiations between the EU and the U.S. should focus on preparing a process through which other countries, namely, China, India, and Japan, could sign association agreements with the TTIP signatories. Such agreements would allow a third country's product that conforms to either a U.S. or EU

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18 European Commission, *Technical Barriers to Trade: Initial EU Position Paper*, http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151627.pdf ["The EU is therefore a major supporter of the international standard-setting system."].

19 U.S. Trade Representative, *Fact Sheet: U.S. Objectives, U.S. Benefits in the Transatlantic Trade and Investment Partnership: A Detailed View*, Office of the United States Trade Representative, March 2014, https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/March/US-Objectives-US-Benefits-In-the-TTIP-a-Detailed-View.

standard to be automatically declared as conforming to both standards without need of further assessment.

C. Technical Barriers to Trade

Less than critical regulatory cooperation, but still an important part of TTIP, Technical Barriers to Trade (TBTs) are defined as a "mandatory technical regulations and voluntary standards that define specific characteristics that a product should have, such as its size, shape, design, labelling/marketing/packaging, functionality, or performance."[20] TBTs are not an inherently bad thing. In fact, the primary reason that the number of technical regulations has multiplied in recent years is a direct function of higher living standards worldwide, which have boosted consumers' demand for safe and high-quality products.[21]

Sometimes TBTs can be arbitrary and discriminatory. For example, consider a hypothetical in which a state decides to prohibit the importation of any bicycle with tires greater than 25 inches. Such a decision has no grounding in public policy but has the potential to harm manufacturers of slightly-larger-than-average bicycles. This is the sort of TBT that TTIP hopes to eliminate. In the most recent round of negotiations, the parties continued to discuss draft provisions of their respective proposals on: transparency, the resolution of trade concerns, cooperation and institutional provisions, namely the TBT Committee to be created under TTIP, standards and conformity assessment.

D. Tariffs

Average U.S. and EU tariffs are already low. However, given the magnitude of the transatlantic relationship further elimination and reduction of tariffs could yield significant economic gains. Most observers generally view tariffs as "low-hanging fruit" in these ongoing negotiations.

Both the EU and the U.S. are calling for the elimination of most tariffs immediately and "phasing out all but the most sensitive tariffs in a short time frame," which means that some products could be accorded longer phase-outs, partial liberalization, or even exemptions from tariff reforms. [22]

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[20] European Commission, Technical Barriers to Trade, *infra* note 21.

[21] European Commission, *Technical Information on Technical Barriers to Trade*, https://www.wto.org/english/tratop_e/tbt_e/tbt_info_e.htm#problem.

[22] European Parliament, *Parliamentary Questions*, May 18, 2016, http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2016-002218&language=EN.

E. Regulating the Financial Sector

There is an ongoing debate about whether the scope of TTIP negotiations should include financial services. Governments on both sides of the Atlantic have undertaken reforms of their respective financial systems following the global financial crises of 2008–2009. These reforms have raised questions about the coherence of international financial regulation and whether differences in regulations affect the competitiveness of domestic financial services firms. For its part, the Obama Administration has expressed reluctance to include financial services regulation in TTIP, in part, because of concern that it may undermine its ability to regulate domestic financial markets on its own.[23]

CONCLUSION: MOVING FORWARD IN A TIME OF UNCERTAINTY

TTIP has the potential to create significant changes in international trade and economic relations. For the U.S., TTIP is a continuation of its support for comprehensive regional free trade agreements and demonstrates that the U.S. has no intention of ignoring Europe in the era marked by the increasing rise of the developing world. For the EU, TTIP is an important reaffirmation of transatlantic ties at a time when many EU member states are struggling with high unemployment and stagnant growth.

TTIP is too important of an opportunity for the U.S. and EU to pass up. Should negotiations stall or produce results not seen as sufficiently ambitious, further questions could be raised about the strength of the transatlantic relationship. Perhaps even more concerning, if the U.S. and the EU do not take the lead and shape the rules for global trade going forward, that void may be filled by others—others who may not share the European and American standards for protection of human rights and the natural environment.

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[23] Inu Barbee & Simon Lester, *Financial Services in the TTIP: Making the Prudential Exception Work*, GEO. J. INT'L L., 953–54 (2014), *available at* https://www.law.georgetown.edu/academics/law-journals/gjil/recent/upload/zsx00414000953.PDF.