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The Transatlantic Trade and Investment Partnership: political context and update on the negotiations

Dissettle Round Table: EU-US trade relations: the dawn of a new era?
27 March 2015, Faculty of Economic Sciences, University of Warsaw

The Transatlantic Trade and Investment Partnership (TTIP) has been in discussion for almost two years now, with eight rounds of negotiations having taken place to date. It has become a highly political and sensitive issue. Mainly, the provision on the Investor to state dispute settlement (ISDS) has crystallized opposition and criticism, while at the same time the opportunities offered by the agreement in terms of growth and job creation, more than welcome in the current difficult times, have not managed to grasp public attention so far.

TTIP makes a lot of economic sense. With 2 bln traded daily by both partners, TTIP presents a huge regional cooperation project with a global strategic relevance.

Transatlantic relations are a key pillar in Europe's foreign relations. EU and US are politically linked by the NATO Treaty, but our economic relationship has not been founded on a solid institutional basis. Economic relations have been far too often focusing on solving bilateral problems related for example to hormone beef, chlorine chicken bath or Airbus vs Boeing competition.

TTIP is an important opportunity, a chance for building a strong economic relationship.

Both sides aim at a win-win outcome of the negotiations. Both sides will have to be convinced that they got a good deal. Public opinion in Europe often points to the risk of Europe being a weaker partner in this relationship. However, today Europe has a trade surplus with the U.S. There are many competitive European businesses already active in US. There are many qualitatively superior European products and services placed on the American market. Also, looking toward future one can make a long list of benefits that can come to Europe with the TTIP. Already today these relations create 15 mln jobs on both sides of the Atlantic.

Of course, gains from the TTIP will not be evenly distributed. There will be sectors and enterprises with higher benefits. Impact assessment studies point to the highest benefits in the case of motor vehicle industry, metal products or processed food. Major benefits will not come from tariffs reduction as already today on average they are below two percent. But there are still some peaks in tariffs, for example on the European side in the case of trucks it is still 22%, in the case of footwear 17% and clothing 12%. On the U.S. side textiles are still subject to 40% tariffs, clothing 32% or ceramic 30%.

Most gains will come from regulatory cooperation, mutual recognition, harmonization and dialogue. SMEs will not have to anymore go through a lengthy and costly double approval of their products.

There are many impact assessment studies and what seems rather clear is both the unequally distributed gains and for some benefits coming over the medium term only, especially when it comes to regulatory cooperation. Some gains will come as low-hanging fruit, others will be coming gradually with regulatory cooperation and convergence.

There is a risk for third countries that have today a rather close relationship and interdependence with either US or EU. Some of those states have been from the beginning of the negotiations raising the issue of an impact on their situation. They will have several options opened. One of them can be an early opportunity to enter into a similar agreement with EU and US.

There is also the issue of the global impact of TTIP and there are opinions that it could be damaging for the global regulatory convergence. TTIP is an opportunity to develop an embryo of the future global trade rules which are not covered by the WTO. We can go then to WTO carving a new agreement. TTIP can be seen as a backstop against the system going backward.

These are comprehensive negotiations between two big trading blocks, transparent in the conduct of the negotiations and based on maintaining the importance of the WTO in the world trade system. We entered the TTIP negotiations with our eyes fully opened on where the WTO is today, practically unable to produce new global rules. TTIP can stimulate the emerging economies to come back to the table of the WTO. It is also important to ensure that the risk that in the short term TTIP negotiations can divert resources from the WTO negotiations is addressed.

But in the longer term, TTIP will have a systemic impact in different areas, including rules, regulatory regime and trade agreement. Some developing countries fear of trade diversion effect but studies show that in this context an EU agreement with India would have much bigger impact on developing countries than TTIP.

On the regulatory side, positive spill over effects will take place, in terms of greater global harmonization. Changes will become erga omnes and harmonization will increase markets.

There is evidence from the time when NAFTA was negotiated and contributed to the acceleration of the completion of the Uruguay Round that regional negotiations can facilitate global deal.

TTIP has a clear global relevance but also a strategic benefit for the EU-US bilateral relationship. Both sides of the Atlantic, despite regulatory differences, on standards are much closer than each of them with another partner. One can say that if we do not find agreement today, then tomorrow it will be the big emerging powers that will impose their standards on the rest of the world, including sustainability related ones.

TTIP comes in a period when the big narrative on the importance of trade for growth and well-being has practically disappeared from the public sphere. But EU needs growth and new jobs and more trade can be a boost for growth and competitiveness. The reality is that wealth continues to be where trade is and that in the long run only open economies grow.

TTIP negotiations have been criticized as lacking transparency, being conducted secretly behind the closed doors while in reality they have been conducted with an unprecedented doze of transparency. Both the Council and the European Parliament have endorsed the mandate for the European Commission. Availability of documents on the web has been expanded from position papers to textual proposals. Briefings and debriefings in the context of negotiation sessions have taken place from the very beginning. In short, at the EU level there has been above the average transparency. Where not enough indeed is happening is at the Member States level. This should change because the final agreement will be of mixed character which implies not only the consent of the European Parliament but also the ratification by national parliaments.

The TTIP negotiations take place between the two major global economic and trade powers. By definition these negotiations are difficult. For EU it is essential to have a full chapter dedicated to energy. Public procurement is also very high on the list of key negotiation issues. Regulatory dimension of financial services is one more example of what EU stands for. There is also a list of issues which the EU keeps firmly outside the scope of the TTIP negotiations, for example genetically modified organisms, audiovisual sector, public utilities and services, data protection. From the day one, the Commission is assuring the public that any lowering of European consumer safety standards is out of question, the same goes for the sustainability of development or social standards, including working conditions.

One of the issues that has attracted so far the highest attention of European public and has been subject of much debate is the investor protection clause.

This is the most contentious of the chapters in the TTIP negotiations. In itself, such a clause, allowing firms to turn to an arbitration court when they consider their rights under a free trade agreement are being threatened by a government decision, is nothing new or uncommon. Over 1 400 investment treaties signed by EU Member States already include an ISDS provision. However, there is broad consensus that the system now needs to be modernised, and the Commission is well aware of this. This is why the investment protection clauses in the agreements with Canada and Singapore have already been revised to include a "modified", "modernised" or "updated" version of ISDS. When, last year, it became evident that the sentiment of the public towards ISDS was very negative, the Commission paused the negotiations and engaged in a public consultation on this issue.

The consultation was carried out from March to June 2014, and focused on twelve specific issues, e.g the scope of the ISDS clause; arbitrators' ethics; non-discriminatory treatment for investors; appellate mechanism and consistency of rulings; transparency in ISDS, multiple claims and relationship to domestic court. Approximately 150,000 replies were received, the vast majority (97%) of them being from civil society organisations, but there were also replies from individuals. The aim

was to assess the views of society on whether the ISDS proposed in TTIP rightly balanced the right to regulate with investment protection. As Commissioner Malmström put it, the consultation, the results of which were published last January, “clearly show[ed] that there [was] huge scepticism against the ISDS instrument”,
When specific, as opposed to general, concerns have been detailed, they related to the review of ISDS decisions and the appeal mechanism; the relationship between domestic legal systems and ISDS (that is, how to articulate both and at what stage of the proceedings will recourse to ISDS be possible), the design of the arbitral tribunals and the protection of the right to regulate.

Further to the consultation, the Commission has consulted with stakeholders and institutions before submitting a new policy proposal. Two days ago, on March 25th, Commissioner Malmström, on the occasion of an informal meeting of trade ministers in Riga, has explained how she intended to address the four priority issues that have been defined following the consultation. She explained that she intended to use the type of revised ISDS included in the agreement with Canada as a baseline, and mentioned the need to make sure that the conditions for investment protection are "very limited, very clear, transparent and that there is no way we will put into question States' right to regulate to protect citizens". Concerning concrete reforms, she mentioned reforms concerning an appellate mechanism and the establishment of a "sort of permanent court" where the judges conducting the arbitration procedures would be chosen in advance. Meanwhile, it appears that the issue of ISDS was not broached during the most recent round of negotiations.

ISDS has become the focus of so much criticism and might even hold back the negotiations although the Commission did its best to ease concerns, ensuring that it will modernise the ISDS proposal, protect the right to regulate and stick to the highest standards. As outlined before, we are going through economically difficult times, growth is sluggish and, in particular, there is a lack of both public and private investment which has cost us years of growth. We see welcome and promising moves from EU authorities to address the issue of the investment gap, with the European Fund for Strategic Investment and the Capital Market Union, and introducing a mechanism which makes Europe more attractive for investors would complement those efforts. In the current context, we cannot afford to miss such an opportunity, which is just the type of opportunity that TTIP would provide.

Therefore, what kind of ISDS should we aim for? Such a mechanism would be meant to ensure legal certainty, offer maximum protection and equal treatment for investors, in particular SMEs, and respect the rule of law. A well-designed ISDS, suited to the 21st century, included in a trade deal concerning such major economies, has the potential to frame and set the new global standards for investment protection. That is precisely what we should aim for.

What calls the attention is the fact that in public debate the issue of American companies opposing European governments dominates while the protection of the European companies in the states of the US does not appear at all. Of course, even the best ISDS system is not a guarantee for any company that the legal regime will not change.

Eight rounds of negotiations are behind us. They have been accompanied by numerous political and technical meetings. Both sectorial and horizontal issues have been tackled, nevertheless the most difficult and contentious issues are still ahead of negotiators.

Whether the window of opportunity between now and the Presidential elections in the US will end up with the completion of the negotiations, it will depend on whether Congress will grant Trade Promotion Authority as soon as possible.

TPA, also known as "fast track", is a form of delegation, by which the Congress, by way of a legal text, gives the Executive Branch (therefore, mainly, the president), the right to propose trade agreements to the Congress without this latter having the possibility to amend them (the Congress can only approve or reject the whole of the agreements). The act granting TPA sets out the terms and conditions of the delegation so as to ensure Congress's and stakeholders' involvement: it defines the priorities and objectives of the negotiations, the details of the procedures to be followed in order to conclude the trade agreements, and lays down consultation requirements with the Congress and with stakeholders. As with all delegating provisions, TPA is granted for a limited period of time. The last TPA was given in 2002 and expired in the summer of 2007. The procedure has not been renewed as of yet.

Within the context of TTIP, the absence of TPA has not been a particular problem until now. However, we might start worrying about it as negotiations proceed further, since, without TPA, negotiations might become a more complex and cumbersome process.

The legislative procedure for TPA introduced in the House of Representatives and in the Senate has had insufficient bipartisan support so far, and, according to a quick glance at the American press, oppositions seem to exist both on the left and on the right.

The issue is that a number of democrats were not willing to accept a TPA that was not accompanied by trade adjustment assistance measures (different compensation offered to firms and individuals). Since the US does not have extended social safety net, this assistance is becoming increasingly important for democrats. As an example of this opposition from the left, let me just mention that, most recently, on March 2nd, 64 unions signed a letter to President Obama expressing their opposition to TPA, expressing concerns that "fast track trade deals" would negatively affect wages and employment and be detrimental to the middle class.

In addition, within the Republican Party itself, Tea Party representatives are also opposed to TPA, out of opposition to President Obama and because it is perceived as a weakening of the power of the Congress.

Finally, just like in the EU, trade policy seems to be less consensual than in the past. Let me just recall here that the US, in the same time as TTIP, is also involved in the negotiations of the Trans-Pacific Partnership, for which TPA would also be necessary.

All of those developments might explain why, although President Obama called last January in his State of the Union address for TPA to be granted to him, nothing has happened as of yet.
Analysts in January were mentioning that, politically, in order to obtain TPA, President Obama would need to respond to the concerns voiced on ISDS, the need for trade adjustment assistance, and the currency undervaluation.

So, what can we expect? Taking all of the hurdles mentioned into account, a final deal on the TTIP will probably not come before 2016.

We face difficult times ahead. The transparency of the trade deal keeps improving. TTIP is a unique opportunity for two global players to conclude a far-reaching agreement in order to set new global standards, mould globalisation according to their own visions and boost investment, growth and jobs on both sides of the Atlantic in times when they are most needed. We must remember that we face a narrow window of opportunity before the US presidential elections in 2016. And we must capitalise on it.