Center for International Environmental Law

Trans-Atlantic Trade and Investment Partnership (TTIP) Monitor

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This is the first in a series of updates from CIEL on negotiations towards a potential trade and investment agreement between the EU and U.S. This edition provides a general overview of progress to date, as well as a survey of key health and environmental issues that have been raised. Future editions will focus on recent developments relevant to civil society in European Union. Comments or questions, contact Baskut Tuncak at CIEL (btuncak@ciel.org)

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Background

The Transatlantic Trade and Investment Agreement (TTIP) is the largest bilateral trade and investment negotiation ever undertaken. The trade relationship between the European Union (EU) and United States (U.S.) is currently the largest in the world.[i] Since the formation of the World Trade Organization (WTO) in 1995, U.S. and European officials have accelerated transatlantic efforts to reduce what industry considers non-tariff (or technical) barriers to trade posed by regulatory requirements, through what it calls "regulatory convergence."

Drivers for bilateral trade negotiations between the US and EU are numerous, but include the inability to engage certain countries with economies in transition in global negotiations on trade issues; the recent economic downturns in both the EU and U.S.; the concerns of businesses about the divergence of regulatory approaches between the U.S. and the EU; and ongoing or recently concluded trade negotiations between the EU and U.S. with other major trading partners.

Given already low levels of tariffs between the EU and U.S., implied by the Final Report of the EU-U.S. High Level Working Group on Jobs and Growth, and explicitly recognized in the EU's position papers, the "[e]limination, reduction and prevention of unnecessary regulatory barriers are expected to provide the biggest benefit of the TTIP."[ii] Industry submissions reflect a similar expectation that TTIP will serve primarily as an opportunity reduce regulatory barriers to trade.

After his meeting with U.S. Trade Representative Michael Froman on 30 September, EU Trade Commissioner Karel De Gucht emphasized that this is what will make TTIP different from traditional trade agreements. "Our main ambition - beyond simply reducing tariffs across the board - is to

make the EU and the US regulatory systems more compatible and to help shape global rules in trade", he stated.[iii] Whether its "on food safety, financial services, or standards for electric cars, the EU aims "to strive for a mutual recognition on the basis of the current standards, not to water down any regulation."[iv]

Regarding the chemicals sector, despite acknowledging that U.S. and EU legislation is "so different," the EU Trade Commissioner noted the opportunities for regulatory convergence, such as chemical risk assessments.[v]

During the first round of negotiations in July of 2013 in Washington, D.C., EU and U.S. negotiators set out respective approaches and ambitions in some twenty areas covered by the TTIP. They included: market access for agricultural and industrial goods, government procurement, investment, energy and raw materials, regulatory issues, sanitary and phytosanitary measures, services, intellectual property rights, sustainable development, small- and medium-sized enterprises, dispute settlement, competition, customs/trade facilitation, and state-owned enterprises. The negotiators also met with 350 stakeholders to listen to formal presentations and answer questions. Clouding over negotiations was the potential impact of the revelation that of U.S. warrantless surveillance of electronic communication by EU and U.S. residents, concerns which have recently resurfaced.

Regulatory issues are expected to be the primary topic to be addressed during the second round of negotiations. Due to the U.S. government shutdown, the second round of negotiations was postponed, until 11-15 November 2013. The third round of negotiations is to be held 16-20 December 2013 in Washington, D.C. Increasing pressure on the U.S. to conclude an agreement with the EU was the recent conclusion of trade negotiations between Canada and the EU (see below).

Civil society is increasingly mobilizing on the myriad of health, safety, labor and environmental issues raised by the proposed TTIP. In the EU, the Green 10 has discussed the proposal and brought it to the attention of the European Commission. In the U.S., leading environmental groups also discussed the potential implications of the agreement. In the U.S., the President and U.S. Trade Representative are insisting on the need for "trade promotion authority" (fast-track) to help accelerate ratification, through the U.S. Congress conceding much of its constitutional power to debate and amend potential trade agreements. The Transatlantic Consumer Dialog (TACD) hosted a discussion featuring U.S. and EU negotiators and civil society advocates in Brussels, recently.

Regulatory convergence and other elements of the proposed TTIP present a risk to the continued development and implementation of legislation in the EU for a healthy environment. Below, areas of concern with TTIP are highlighted for the chemicals sector, many of which apply to other environmental issues as well.

Background of key public health and environmental issues at play under TTIP

Regulatory obstacles (i.e. non-tariff technical barriers to trade)

Regulatory convergence through harmonization, equivalence, mutual recognition, onerous consultation

requirements, and other provisions that may be included in TTIP could:

(1) Restrain the continued development of stronger laws in the EU;
(2) Preempt stronger sub-regional laws by Member States;
(3) Weaken developing standards for human health, labor and the environment in both the EU and U.S., such as those relating to nanomaterials and endocrine disruptors; and
(4) Influence the development of regulations and standards outside the U.S. and EU, including countries with economies in transition that have recently adopted environmental policies more similar to European than U.S. approaches.

Recently, the creation of an oversight body, the Regulatory Cooperation Council was proposed by the EU (see below).

Investor State Dispute Settlement

Investor-state dispute settlement (ISDS) would further allow foreign corporations to bypass domestic courts and sue governments in private tribunals over laws and policies that the corporations allege reduce their expected future profits. The inclusion of such extreme provisions in prior trade and investment deals has enabled powerful interests, from tobacco companies to corporate polluters, to use investor-state dispute resolution to challenge and undermine consumer, public health and environmental protections. Investor-state tribunals have ordered taxpayers to compensate foreign corporations for the domestic, non-discriminatory enforcement of such protections. Given the robustness of legal systems in the U.S. and EU, there is no pretext for the inclusion of such provisions in TTIP, although they are sought by industry and negotiators on both sides.

Tariffs

Although tariffs between the EU and U.S. are already low, further decreases can have substantial environmental effects. For example, one concern highly relevant to the chemicals sector is increased access by EU businesses to lower priced U.S. natural gas, and the resulting increase in the use of the chemically-intensive "fracking" process for extraction.

Intellectual Property

A mainstay of trade negotiations, including bilateral negations, is the elevation of standards of intellectually property protection. The continued elevation of IP standards is widely criticized by civil society organizations as further shifting an already skewed balance further in favor of rights holders, i.e. placing private interests ahead of various benefits information in the public domain. Unique to TTIP and particularly relevant to the chemicals sector is the desire to escalate standards of protection of trade secrets and confidential business information.

Preemption

According to initial position papers, the "EU considers that the aim of maintaining an overall balance of commitments in the TBT area can only be achieved if both the sub-regional (in the EU) and the sub-federal (in the US) regulations are covered."[vi] This expectation is set forth clearly and repeatedly as a central EU objective for the negotiated outcomes under TTIP. A range of state-level or Member State-level initiatives on toxic chemicals and other environmental issues could be preempted by various provisions of TTIP, which could also

have a chilling effect on their future development—either through onerous consultation requirements or the potential for ISDS cases.

Regarding divergent approaches in the EU, the US Trade Representative and industry has complained about Member States interpreting provisions of REACH in ways that would lead to improved consumer protection. Other precautionary efforts are also ongoing in EU Member States, for example in the creation of registers for manufactured nanomaterials and moratoria on the use of hydraulic fracturing for shale gas extraction or 'fracking.'

Public Participation

Negotiations between the EU and U.S. are being conducted with the same level of secrecy of previous negotiations. In otherwords, the public has very little opportunity for input and neither access to negotiating documents nor position papers on either side.

The secrecy and opacity observed in other trade negotiations, including the negotiations for the Trans Pacific Partnership and between the EU and Canada, are inconsistent with basic principles of good governance and with the public's right to informed, meaningful participation in what amounts to a public policy dialogue of profound national consequence on both sides of the Atlantic.

Negotiations between the United States and the EU should demonstrate a clear commitment to public participation and should be conducted in an open, transparent and participatory manner. Specifically, the United States and the EU should commit to broad public access to negotiating documents and positions, to facilitate informed public debate regarding the negotiations and any resulting agreement.

Global Standard-Setting

Given the combined economic might of the EU and U.S., areas of convergence between the two countries are viewed as increasing pressure on China, India and other key emerging economies to follow suit. Like processes of the OECD, many public interest concerns exist around processes that do not enable meaningful participation from a broader range of stakeholders. Also, again like the OECD, concerns exist that the standard-setting process will be cumbersome and slow, if not paralyzed, on important public health and environmental issues, delaying progress at the global level.

Key Developments

Proposed EU-U.S. Regulatory Cooperation Council

Following the postponement of the second round of negotiations, EU Trade Commissioner Karel De Gucht publicly proposed the creation of a joint EU-U.S. oversight body for the development of regulations in the two regions.[vii] As proposed, the "Regulatory Cooperation Council" would consist of the heads of the most important EU and US regulatory agencies (unspecified), monitor the implementation of commitments made, and consider new priorities for regulatory cooperation. He also notes, that it could also ask regulators or standards bodies to develop regulations jointly, which would then have a good chance of becoming international standards. De Gucht's proposal indicates that proposals from stakeholders would be considered, but no further elaboration on the

degree to which public participation or transparency was provided.

U.S. Spying (PRISM)

Following revelations of spying by the U.S. National Security Agency on Europeans and others, several European politicians called for the cancelation of trade negotiations between the EU and U.S. However, negotiations were held and the issue dissipated. Recently, however, additional information has surfaced that renewed tensions around U.S. spying and demands for some action by the EU. While suspension of trade negotiations is not cited as an option, EU officials do speculate that the failure to address European concerns about data protection will prevent the European Parliament from approving TTIP.[viii]

EU-Canada trade negotiations

The Comprehensive Economic Trade Agreement (CETA) has concluded between the EU and Canada. The text of the final agreement is not publicly available. One key question for many is whether ISDS provisions were included in the agreement. The agreement has increased pressure on the U.S. to conclude its own agreement with the EU. All 28 EU member states must ratify the agreement for it to enter into force. Romania's foreign minister has said his country could scuttle CETA if Canada doesn't remove visa requirements for Romanians.

Transpacific Partnership (TPP) negotiations

As negotiations approach conclusion, a key issue in the United States is the renewal of "Fast Track" (or "Trade Promotion") Authority to the President and U.S. Trade Representative to conclude both TPP and TTIP negotiations. Fast Track removes Congress' exclusive constitutional authority to "regulate Commerce with foreign nations" by circumventing ordinary Congressional review, debate and amendment procedures. With the grant of Fast-Track Authority, the American public has less opportunity to influence the negotiation of trade agreements, creating what certain civil society group refer to as a "dangerous lack of accountability" on for U.S. policymakers.[ix]

Investor State Dispute Settlement used to challenge fracking moratoria

Lone Pine Resources filed suit under the North American Free Trade Agreement (NAFTA) seeking $250 million Canadian dollars in damages due to Quebec's moratorium on 'fracking' for natural gas.[x] This is one more in a long list of chemical-related Investor-State Disputes brought under NAFTA.

Additional resources

CIEL, submission to U.S. Senate committee hearing on TTIP (30 October 2013): http://ciel.org/Publications/TTIP_Hearing_30Oct2013.pdf

Transatlantic Consumer Dialog (TACD), Outcome of stakeholder meeting (29 October 2013), including resolutions on chemicals and nanomaterials: http://www.tacd.org/

American Chemistry Council, Submission to U.S. Trade Representative on TTIP (May 10, 2013): http://www.americanchemistry.com/Policy/Chemical-Safety/Endocrine-Disruption/ACC-Comments-on-Trans-Atlantic-Trade-and-Investment-Partnership.pdf

European Commission, background on TTIP (webpage): http://ec.europa.eu/trade/policy/in-focus/ttip/

European Commission, background and figures on EU-U.S. trade relationship (webpage): http://ec.europa.eu/trade/policy/countries-and-regions/countries/united-states/

Final Report, EU-U.S. High Level Working Group on Jobs and Growth (11 February 2013): http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf

Calendar

2nd Round of negotiations: 11-15 November 2013 in Brussels (regulatory issues expected to be focus of negotiations); Briefing: 15 Nov 2013, register: http://trade.ec.europa.eu/doclib/press/index.cfm?id=982

3rd round of trade negotiations: 16-20 December 2013 in Washington, D.C.

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[i] European Commission, Trade: United States (webpage, last accessed 4 Nov. 2013), *available at* http://ec.europa.eu/trade/policy/countries-and-regions/countries/united-states/

[ii] European Commission, EU-US Transatlantic Trade and Investment Partnership: Trade Cross-cutting disciplines and Institutional provisions--Initial EU position paper (July 16, 2013) [hereinafter Trade Cross-cutting disciplines], *available at* http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151622.pdf

[iii] European Commission, Statement by EU Trade Commissioner Karel De Gucht on the Transatlantic Trade and Investment Partnership (TTIP) ahead of the second round of negotiations (10 October 2013), *available at* http://trade.ec.europa.eu/doclib/press/index.cfm?id=969

[iv] European Commission, Regulatory issues top the agenda of second round of EU-US trade negotiations, *available at*: http://trade.ec.europa.eu/doclib/press/index.cfm?id=970

[v] Karel De Gucht, European Trade Commissioner, Transatlantic Trade and Investment Partnership (TTIP) – Solving the Regulatory Puzzle (10 Oct. 2013), *available at* http://trade.ec.europa.eu/doclib/docs/2013/october/tradoc_151822.pdf

[vi] European Commission, EU-US Transatlantic Trade and Investment Partnership: Technical Barriers to Trade (July 2013) [hereinafter TBT position paper], *available at* http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151627.pdf

[vii] Karel De Gucht, European Trade Commissioner, Transatlantic Trade and Investment Partnership (TTIP) – Solving the Regulatory Puzzle (10 Oct. 2013), *available at* http://trade.ec.europa.eu/doclib/docs/2013/october/tradoc_151822.pdf

[viii] Bloomberg BNA, *Surveillance Concerns Put EU-U.S. Trade Agreement at Risk, EU Privacy Official Says* (November 4, 2013), *available at* http://www.bna.com/surveillance-concerns-put-n17179879801/

[ix] Electronic Frontier Foundation (EFF) DeepLinks Blog, Public Interest Coalition Opposes Fast-Track Authority for the Trans-Pacific Partnership (blog 23 Oct. 2013), *available at* https://www.eff.org/deeplinks/2013/10/public-interest-coalition-letter-no-fast-track-authority-trans-pacific-partnership

[x] Baskut Tuncak, *Fracking Dispute Under NAFTA Highlights Potential Pitfalls of EU-U.S. Trade Agreement* (CIEL, blog article, 7 Oct. 2013), *available at* http://ciel.org/wordpress_211560016/?p=1034

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