

EU Disclosures Could Complicate TTIP Negotiations

By Alex Lawson

Law360, New York (September 4, 2015, 1:38 PM ET) -- The European Union, in an attempt to stem the persistent accusations of secrecy in the Transatlantic Trade and Investment Partnership negotiations with the U.S., has taken the highly unusual step of publishing its full negotiating proposals, a move that experts say could complicate the already precarious talks.

Ever since declaring a “fresh start” in the TTIP negotiations following the European Commission's change in leadership last fall, the EU has made public participation in its trade agenda a primary goal, publishing a litany of documents aimed at shedding light on the 28-nation bloc's intentions for the accord.

The bulk of these materials are fact sheets and position papers sketching the EU's priorities in broad strokes, but the commission has also published its full textual proposals across nine different areas. This mostly unprecedented move, while nobly intended, could roil the TTIP negotiations, according to Cato Institute trade policy analyst Simon Lester.

“I feel like [posting legal texts] makes it difficult for negotiators to push their position with their trading partners,” Lester told Law360. “The governments are trying to convince each other of doing X or Y, but if all this stuff gets posted and they have to engage in a debate with their own constituencies, it sort of undermines their position in the talks.”

International trade talks of any sort, especially ones featuring economic heavyweights like the U.S. and EU, have always faced calls for increased transparency. The U.S. trade representative's office has regularly touted its record on public outreach, citing meetings with lawmakers and various stakeholders.

But there are good reasons why negotiators keep these consultations under close watch, as public rancor over the substance of a given proposal can alter the dynamic at the negotiating table in likely unhelpful ways.

Alston & Bird LLP trade policy adviser and former USTR negotiator Eric Shimp said the path the EU has chosen could lead those on the U.S. side to be more skeptical on the finality of its proposals, given the looming threat of dramatic public outcry that could force the government to walk back.

“If you, the EU, are making this representation to me, the U.S., on a certain subject area that's already public, as a U.S. negotiator, you then become a little more distrustful of what you're hearing from the other side,” Shimp told Law360. “You've published this, but has it been test-driven with the public? Is it going to change if you get negative feedback?”

Taking such an aggressive approach to transparency is risky for any negotiator, but, Shimp noted, it presents a particular quandary for the EU, which has to consider the interests and political sensitivities of 28 sovereign nations.

Public outcry over the TTIP has already shut down one key prong of the talks for nearly two years, as the commission officially postponed deliberations over the investment chapter amid sharp criticism of the opaque nature of investor-state dispute settlement.

The commission collected scores of public commentary and has begun to craft an alternate ISDS proposal that addresses those fears. But the postponement remains in place, and the entire episode is emblematic of the sort of obstacles that can emerge when public discourse butts up against complex negotiations.

Asked if the U.S. felt any pressure to come forward with its own full TTIP negotiating proposals, a USTR spokesman told Law360 only that the two governments “have different systems” of public consultation on trade and that the U.S. process is outlined in the recently passed Trade Promotion Authority legislation.

Most observers agreed that the U.S. was not likely to follow the EU's lead in disclosing its textual proposals, but did note that the disparity in public disclosures would open the White House to even more transparency barbs.

“They've already been getting this criticism about not being transparent enough; and now you've got the EU being more transparent, they're going to likely get some additional public criticism because of it,” Lester said. “I don't think they will publish texts or change much substantively, but there will be more pressure.”

Lester added that the rise of the Internet and the information age have put today's trade negotiators in a position unique from their predecessors, who may have felt comfortable circulating draft texts without fear of public consumption or backlash.

Mayer Brown LLP partner and former USTR chief of staff Timothy Keeler downplayed the impact of the EU's moves, asserting that despite Brussels commitment to openness, certain matters will still be kept behind closed doors.

“Any negotiation is going to have a public aspect to it and a private aspect to it,” he told Law360. “That won't change, but they are just changing the line that is drawn as to when and where they make things public and what kinds of things they make public. But it is impossible to conduct a negotiation entirely in the public sphere.”

--Editing by Sarah Golin and Edrienne Su.