UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS

USCIB Comments on Negotiating Objectives Regarding U.S.-EU Trade Agreement

Docket Number: **USTR-2018-0035**

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On October 16, 2018, the Trump Administration notified Congress of its intention to initiate negotiations on a U.S.-European Union (EU) Trade Agreement. The United States Council for International Business (USCIB) supports negotiation of a comprehensive trade agreement with the EU as part of a broader strategy to open international markets for U.S. companies and remove barriers and unfair trade practices in support of U.S. jobs.

The EU is an important trade partner for the United States. The EU countries together make up the number one export market for the United States, with goods exports to the EU in 2016 totaling $269.6 billion, constituting 18.6% of total U.S. goods exports. U.S. goods and services trade with the EU totaled nearly $1.1 trillion in 2016, with exports totaling $501 billion. The United States also has a surplus in services trade with the EU, totaling $55 billion in 2016. A successful trade agreement with the EU should cover not just market access for goods, but also address important services issues.

USCIB members see the value of common approaches toward establishing a more integrated and barrier-free transatlantic marketplace through cooperation in international standards and regulatory bodies and support closer coordination among regulators in the oversight of entities regulated in both markets to enhance oversight but avoid overlap and duplication. Regulatory discrimination and differentiation across the Atlantic is an increasingly frustrating obstacle to trade, investment and the ability to conduct business.

USCIB supported the negotiations of a comprehensive, high-standard U.S.-EU trade agreement, eliminating of tariff and no-tariff barriers on goods and services trade between the U.S. and the EU. The range of issues that were on the table at the time, ranging from strong investment protections, to increased trade facilitation, and regulatory coherence, continue to be of great importance to our members. Below are several USCIB priority issues for negotiations of a U.S.-EU Trade Agreement.

Investment

USCIB supports strong investor and investment protections. Those protections, which include robust investor-state dispute settlement (ISDS) rule-of-law provisions must be included in any final trade agreement. The provisions concluded in USMCA on ISDS, favoring specific sectors and not providing comprehensive protections to all investors alike should not be viewed as precedent.

USCIB also does not support any proposal of a multilateral investment court, for which the EU now has an official mandate from the Council to negotiate. Such a court has the potential to create many problems for U.S. investors, removing the current advantages of the system, which includes highly qualified international investment experts and an independent de-politicized process.

Transatlantic restrictions on FDI should be reduced to a minimum. An ISDS mechanism through which businesses can seek redress directly from a government for expropriation, discriminatory treatment, and other treaty violations, is a crucial component of the agreement. Certain types of legislation cannot be adjudicated by domestic laws and all governments have the capacity to be discriminatory. ISDS depoliticizes important investment rules by putting them in the realm of neutral and legal arbitration. Although ISDS has been the subject of some recent criticism, it remains necessary to adequately ensure the fair treatment of foreign investors. It does not undermine any individual nation's sovereignty. Simply, it ensures that states follow World Trade Organization (WTO) and other basic obligations in making regulation non-discriminatory.

What constitutes an investment must be defined broadly, to include investment agreements, without carving out any industries or sectors from the protections of this chapter. The pillars of the investment chapter also must remain intact, including national treatment, most-favored-nation (MFN) treatment, minimum standard of treatment, guarantees for compensation in case of expropriation, free transfers, prohibition of performance requirements, and ISDS. A U.S.-EU agreement should include protection from performance requirements to purchase or use a particular technology for all sectors, including financial institutions. It should also include protection from any requirement to transfer technology for all sectors, including financial services. It is also critical that an agreement reached with the EU include rules prohibiting Parties from requiring companies to transfer their technology, production process, or other proprietary information to persons in their respective territories as a condition of market access.

<u>Customs and Trade Facilitation</u>

On July 25, 2018, the United States and the European Union issued a joint statement to, among other things, "work together toward zero tariffs, zero non-tariff barriers, and zero subsidies on non-auto industrial goods." Reduction in tariffs and non-tariff barriers is an admirable goal. A natural complement to maximize the increase in trade due to tariff reductions is enhanced trade facilitation measures. A potential U.S.-EU deal on tariffs provides a vehicle for both sides to commit to bridging trade facilitation gaps, furthermore committing to implement high standard trade facilitation practices benefit producers, consumers and the broader economic interests of both sides. As two of the largest economies in the world, a trade agreement with best-in-class trade facilitation commitments sets the standard for the rest of the world to follow.

Therefore, the United States should prioritize securing commitments in the following areas: increased customs *de minimis* levels; improving on common data elements for import and export; harmonizing and simplifying customs clearance processes in order to obtain immediate release of goods upon arrival; binding rules on express delivery shipment channels; enhancing requirements to provide electronic portals for traders (that is, facilitating the submission and processing of electronic documentation via Single Window); converging of the U.S. and EU trusted trader program (i.e. AEO) requirements and meaningful Mutual Recognition Agreement (MRA); including no restrictions on drawback or duty deferral programs in the agreement; authorizing a robust and centralized system for the issuance and publication of binding rulings on tariff classification, customs valuation and origin; self-certification for origin; elimination of direct export requirement; and harmonizing informal clearance levels to facilitate low value (i.e., under *de minimis* and informal entry levels) shipments (given the dramatic rise in the level of shipments moving cross border because of e-commerce).

USCIB members are concerned with customs valuation practices around the world. We believe that the First Sale principle, which remains in place in the U.S. and which benefits EU importers, must be re-instated in the EU. In addition, the United States should seek to reinstate past U.S. FTA text related to customs valuation of digital content on carrier media, which provides for an expanded scope of digital content as well as ensures no exclusion on carrier media. We believe that specific inclusion of the practice is critical for U.S. companies. Lastly, the United States should prioritize securing a provision or clause to prohibit the use of reference price databases or minimum prices for customs valuation purposes.

In recent months, there has been increased discussion about the treatment of electronic data transmissions. We believe that the parties should commit to work together to make the WTO Moratorium permanent. Not only should the parties agree to not apply customs duties to electronic data transmissions, parties should prioritize the non-application of customs formalities to such transmissions.

The U.S. should seek to expand temporary admissions (e.g., ATA Carnet) provisions historically provided for in market access chapters of U.S. FTAs. For example, expand ATA Carnet coverage to include all categories of temporary admissions provided for under the Istanbul Convention, subject to the same scope and definitions, without regard to country of origin. Other provisions should be in line with the provisions of the Istanbul Convention.

Moreover, the United States should seek close cooperation with the EU in taking action to address the phenomenon of illicit trade. Illicit trade in goods forms a barrier to increasing market share for legitimately traded products and prevents producers from either side of the Atlantic from reaping the benefits of liberalized trade. Illicit trade is a major concern across industries with negative impacts on fiscal, health, and security matters. To tackle this problem, a transatlantic strategy should be devised and implemented that combines robust customs control and law enforcement, strong legislative responses in terms of dissuasive penalties on perpetrators, and enhanced cooperation mechanisms. A trade agreement with state of the art customs control and anti-illicit trade related provisions would set the standard for the rest of the world to follow.

Express Delivery Services

The July 25, 2018, U.S.-EU joint statement committed to working to reduce barriers and increase trade in services. Similar to the priorities specified in the trade facilitation measures section explained above, services trade is also complementary to tariff reductions. Services are a part of and enable manufacturing, agriculture, as well as nearly all other sectors of the U.S. and EU economies. Services are also a key part of supply chains. Nowhere is this more evident than in transportation and logistics services, which are crucial services to the movement of goods. There are very few commitments for transportation and logistics services memorialized in the General Agreement on Trade in Services (GATS), despite both the EU and the United States having open markets. As such, the Administration should prioritize negotiating the inclusion of binding market access and national treatment commitments in transportation and logistics services.

Additionally, the postal/courier sector is unique in that in that every country in the world has a de facto market dominant/monopoly player—the national postal operator. The United States and the EU are the leaders in the world at effective postal regulation. The two governments have worked together at the WTO to tackle some of the challenges unique to ensuring that the sector operates in an efficient manner with appropriate safeguards against abuse by market dominant players. In order to ensure their businesses have access to world-class delivery service options, the United States and EU should commit to fair, non-discriminatory treatment of non-postal service providers through the inclusion of a delivery services sectoral annex.

Finally, the joint statement also provided for the launching a dialogue on standards to "ease trade, reduces bureaucratic obstacles, and slash costs." Trans-Atlantic regulatory coherence on standards is a laudable goal that, if achieved, could serve to eliminate many non-tariff barriers consistent with both countries' stated intentions for negotiations.

Improved Regulatory Cohesion

Improved regulatory cohesion would likely be among the greatest gains from a future trade agreement between the United States and the EU. The objective of such improved regulatory cohesion is to facilitate trade between the EU and the United States. It should thus be a key component in furtherance of the liberalizing trade objective that is driving the U.S.-EU trade relationship. Regulatory cohesion should not lead to the adoption of unnecessary and unscientific obstacles to trade under the guise of harmonization and cohesion, but rather to a regulatory environment that is based on a full assessment of relevant and sound scientific evidence and is as less trade restrictive as possible while acknowledging different policy objectives and regulatory preferences that may exist.

Harmonizing EU and U.S. certification procedures would eliminate many of the challenges associated with trade of manufactured goods. In addition to differences between U.S. and EU certification and standards testing, variations between regulations among EU member states complicate trading across Europe. The EU and the United States should also try to address material existing problems of regulatory or standards divergence in the high-tech area which cause competitive imbalances between the EU and U.S. businesses.

USCIB also urges the United States and the EU to explore how to deepen regulatory cooperation and coherence in fintech developments, complimenting multilateral and other bilateral efforts aimed at promoting cross-border financial technology development and growth.

Financial regulatory co-operation and coherence

During the previous U.S. administration, the European Commission and others on the Transatlantic Trade and Investment Partnership (TTIP) negotiations discussed the possibility of formally including a new framework for financial regulatory cooperation within the text of the TTIP agreement. Much has happened since TTIP was under active consideration. For example, in summer 2016 the previous U.S./EU Financial Markets Regulatory Dialogue was revamped to become the U.S./EU Financial Regulatory Dialogue. There are a range of options for how improved regulatory cooperation is codified. One possibility, and noted above in the context of TTIP, would be to enshrine, within the text of a trade agreement, a joint regulatory coordinating mechanism. Another is to house regulatory cooperation outside of a trade agreement, in some ways comparable in nature to the existing U.S.-EU Regulatory Forum but with far more rigor regarding outcomes as well as stronger transparency and industry engagement. Independent of how it is done – within or outside of the trade agreement – improving on what the existing Regulatory Forum does is crucial. We therefore believe these options should be evaluated and discussed between industry and the respective Governments in coming months.

Such a mechanism should be principles-based, with clear requirements agreed between the respective regulators to mitigate conflict and complexity before they manifest themselves. One key element of any mechanism is stakeholder engagement. Robust transparency obligations that ensure stakeholders can review and comment on proposed measures will be vital to the success of such a mechanism.

Non-Tariff Barriers / Digital Trade

Forced Localization policies, or government requirements that foreign companies localize investments, production, services, or other activities, complicate the flow of goods and services between the United States and the EU. USCIB supports the elimination or restriction of such policies in favor of easing the flow of goods. In recent years, countries have also restricted cross border data flow to benefit domestic businesses. A U.S.-EU trade agreement should include commitments that data can flow unimpeded across borders except for limited and well-defined public policy exceptions.

Cross Border Data Flows

With advances in technology and the rapid growth in the use of the Internet, more and more businesses rely on the cross-border flow of data as part of their day-to-day operations. However, at the same time, our members have seen more and more countries seeking to restrict the flow of data across their borders for a wide range of reasons. In many instances, these restrictions represent protectionist policies intended to favor domestic businesses. Where the restrictions are based on legitimate public policy concerns, they could often be designed in ways that have a less negative impact on trade in services. A U.S.-EU agreement should include commitments that data can flow unimpeded across borders except for limited and well-defined public policy exceptions. The agreement should seek to circumscribe exceptions, such as security and privacy, to ensure they are not used as disguised barriers to trade.

For financial services, USMCA Article 17.17 Transfer of Information is a good example of a strong free flow of data provision that a U.S.-EU agreement can draw upon.

Forced Localization

In recent years there has been an increase globally in the number of government requirements that foreign companies localize investments, production, services, procurements or other activities as a condition of doing business in that country. While some of these are similar to long-standing local content requirements, others present newer and more complex requirements that leave companies little option but to perform activities in a specific country. To the extent that the United States and the EU have such localization requirements, they should negotiate commitments that eliminate or restrict these types of forced localization laws and regulations.

For financial services, USMCA Article 17.18 Location of Computing Facilities prohibits data localization as long as financial institutions provide the access to data to regulators for their regulatory and supervisory purposes. Inclusion of such a provision in a U.S.-EU agreement is critical to the affirmation of this U.S. Government policy for the provision of financial services in a global economy.

Coordination and collaboration on Cybersecurity

In the USMCA Digital Chapter, Article 19.15, the Parties agreed to endeavor to build capacities of the national entities responsible for cyber incident response and to strengthen collaboration and cooperation to identify cybersecurity incidents and engage in information sharing. Such provisions may be expanded recognizing the long-standing relationship between the United States and the EU.

Other key digital priorities for a U.S.-EU agreement include:

- prohibitions on data storage and data processing taxes, as well as prohibitions on applying taxation measures in a way that discriminates against digital services or is not technologically neutral;
- prohibitions on requirements to disclose source code or algorithms or grant access to encryption technologies, as provided in USMCA Digital Chapter, Article 19.16;

- prohibitions on customs duties for digital products and transmissions;
- enhanced coordination on security standards to prevent regulatory divergence and align national regulations with industry-supported international standards and best practices;
- provisions encouraging parties to secure bilateral agreement under the U.S. CLOUD Act and EU e-Evidence Regulation for law enforcement requests to data; and
- disciplines to help ensure governments do not impose facilities-based or other unjustified and arbitrary requirements on providers of online services and applications.

In addition, U.S. and EU negotiators should ensure that any new digital regulations do not unfairly target firms in either market and do not increase barriers to trade.

For example, different versions and unilateral offshoots of the proposed Digital Services Tax (DST) would apply new and untested taxes primarily to U.S. companies, in contravention of the EU's agreement to provide "national treatment" to services and service suppliers of other WTO Members. A draft regulation on terrorist content, while well-intentioned, would authorize member states to impose unspecified and potentially conflicting "proactive measures" directly on hosting providers and require providers to proactively disclose evidence to law enforcement authorities, potentially in violation of ECPA. The U.S. should ensure other aspects of the Digital Single Market (DSM) do not result in unjustifiable or arbitrary market access barriers for U.S. firms.

We encourage negotiators and regulatory counterparts to address potential barriers in these and other proposals and ensure that they are developing an open environment for innovations that originate within and outside the EU.

Unilateral Measures on Taxation of the Digitalizing Economy

The EU has proposed unilateral taxation measures to address the digitalization of the economy that are inconsistent with current tax principles in fundamental ways. The EU has not yet adopted these measures. USCIB members are concerned that: these measures target U.S. companies; would undercut a broader international agreement; and may violate income tax treaty obligations and trade obligations of EU member states. USCIB supports a solution that complies with treaty obligations (both tax and trade); is based on income tax principles, including taxing profits, not revenues, is based on local value creation by the company, appropriately recognizes the value of technology intangibles in the income allocation factors; minimizes double taxation; and includes strong dispute resolution mechanisms. The OECD is pursuing agreement along these lines and the issues should be decided at the OECD.

Intellectual Property

USCIB members recognize that both the EU and United States have high levels of intellectual property (IP) protection that already exist in law and enforcement, albeit under different systems. Some U.S. industries would like to see certain IP issues of concern in the EU addressed. For example, a U.S.-EU agreement provides an opportunity to seek provisions for effective patent enforcement systems that promote early resolution of patent disputes before an infringing product is allowed on the market. In addition, the United States should seek the highest standards for IP, including regulatory data protection consistent with the negotiating objectives under Trade Promotion Authority. Further, a U.S.-EU agreement should provide patent term restoration to compensate for delays during the marketing approval process for biopharmaceutical products, as well as measures that provide adjustments of patent term to compensate patent owners for delays that occur during the examination and grant of patents. Such delays reduce the effective patent life for some biopharmaceutical products. A U.S.-EU agreement also presents an opportunity for the United States and the EU to demonstrate global leadership and cooperation on IP, and to combat the erosion of IP rights in other areas of the world, including ongoing issues with China.

Government Procurement and Purchases by State-Owned Enterprises

Government entities and state-owned enterprises (SOEs) represent a significant share of overall market access in EU states, and that share can be disproportionately important for goods and services businesses that sell extensively to government or government-owned customers. Given the commercial importance of the government share of the market, a U.S.-EU agreement should contain enforceable government procurement (GP) commitments on market access, transparency and procedural fairness that are at least as ambitious as those in the WTO Agreement on Government Procurement; a meaningful U.S.-EU agreement cannot rely on a separate, WTO plurilateral agreement to guarantee U.S. exporters access to EU government purchasers.

In addition, a U.S.-EU agreement should ensure that financial institutions will not be discriminated against in the procurement of services by the government and its related entities. Too often in trade agreements government procurement of financial services is excluded through government procurement chapters or in financial services chapters themselves. A new and fresh approach is warranted to ensure this type of business continues to be open to financial institutions.

A U.S.-EU agreement should also contain substantive, enforceable commitments on non-discriminatory, commercially-based purchases (as well as sales) by SOEs that are at least as robust as those contained in the USMCA.

Financial Services

Maximize cross-border market access in trade and investment
Ensure broad and deep market access commitments enhancing volumes of cross-border financial services transactions and foreign direct investment. A U.S.-EU agreement should utilize a negative-list approach when scheduling commitments supported by a “ratchet mechanism” that will capture future liberalization in the sector of the trading partner. Traditional free trade agreements have covered very few commitments in the area of cross-border trade in financial services. At a minimum cross-border supply of financial services must include traditional

insurance commitments, investment advice, portfolio management and electronic payment systems. The two parties should engage with the financial sector to explore other services that could also benefit from commitments for the cross-border supply of those services.

Subsidies

A U.S.-EU agreement should set a high standard to discipline subsidies to financial services related entities. Provisions in the financial services chapter should discipline the granting of subsidies to state-owned financial institutions with limited exception for certain programs.

Priority Sector Lending

Today governments seek to require foreign financial institutions to participate in programs that require lending in particular sectors or to domestic firms. Often these sectors are not the sectors of typical business expertise for the foreign financial institution and require it to take on risk it otherwise would not. These programs undermine stability and opportunities to engage in other types of business when capital must be reserved for such programs. The United States and the EU should set a high standard to prohibit these types of requirements in trade policy.