

Brussels, 20 September 2013

EU RESTRICTED

FOR THE ATTENTION OF THE TRADE POLICY COMMITTEE

Subject: TTIP – non papers on raw materials and energy

Origin: DG Trade

Objective: For information

Please find attached a draft non paper on raw materials and energy to be circulated to the US ahead of the next round of TTIP negotiations (7-11 October, 2013).

The attached documents are being sent ahead of next week's informal technical meeting of 26 September, so as to be available sufficiently in advance.

Non paper

Raw materials and energy

During the first round the EU and the US discussed the Options Paper presented by the EU, the respective commitments in free trade agreements concluded by the two sides, and the role that raw materials and energy play in these agreements. On this basis, the EU indicated it would present a preliminary and illustrative set of provisions during the second round. The provisions below reflect that undertaking.

The set of provisions is merely an enumeration, i.e. it does not constitute a definite or a complete set. On most of these provisions the EU or US has in some form reached an agreement with a third country, or these are provisions that the EU or US currently uses in negotiations with third countries. Certain provisions are based or inspired on existing provisions in the context of the WTO (GATT, Telecoms Reference Paper), the Energy Charter Treaty or the NAFTA Agreement.

Article A

Principles

1. Without prejudice to provisions in other chapters of this Agreement, this [Chapter, Section, etc.] contains specific disciplines reinforcing free trade in raw materials and energy, by notably abolishing trade and investment restrictions on goods and services and by creating a more transparent market framework fostering investments in the raw materials and energy sector.

2. The Parties recognize the importance of having viable and internationally competitive raw materials and energy sectors.
3. The Parties recognize that it is desirable to strengthen the important role that trade in raw materials and energy plays in their relationship and to enhance this role through sustained and gradual liberalisation.
4. The Parties also aim, by agreeing on rules in the raw materials and energy sector, including the renewable energy sector, to create disciplines improving international governance in these sectors.

Article B
Definitions

For the purposes of this [Chapter, Section, etc.]:

1. "raw materials" means substances used in the manufacture of industrial products, excluding energy products, processed fishery products or agricultural products, but including natural rubber, raw hides and skins, wood and wood pulp, silk, wool, cotton and other vegetable textile inputs;
2. "energy goods" means coal, crude oil, oil products, natural gas, whether liquefied or not, and electrical energy;
3. "equipment for the generation of renewable energy" means any equipment required for the generation of energy from renewable and sustainable non-fossil sources, namely wind, solar, aero thermal, geothermal, hydrothermal and ocean energy, hydropower, biomass, landfill gas, sewage treatment plant gas and biogases, but not the products from which energy is generated;
4. "major accident" means, in relation to an installation or connected infrastructure:
 - a. an incident involving an explosion, fire, loss of well control, or release of oil, gas or dangerous substances involving, or with a significant potential to cause, fatalities or serious personal injury;
 - b. an incident leading to serious damage to the installation or connected infrastructure involving, or with a significant potential to cause, fatalities or serious personal injury;
 - c. any other incident leading to fatalities or serious injury to five or more persons who are on the offshore installation where the source of danger occurs or who are engaged in an offshore oil and gas operation in connection with the installation or connected infrastructure; or
 - d. any major environmental incident resulting from incidents referred to in points (a), (b) and (c).
5. "local content requirement" means –
 - with respect to goods, a requirement for an enterprise to purchase or use goods of domestic origin or from a domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production;
 - with respect to services, a requirement which restricts the choice of the service supplier or the service supplied to the detriment of services or service suppliers from the other Party;

- “offset” means any condition that encourages local development, such as the imposed licensing of technology, investment, obligation to contract with a particular financial institution, counter-trade, and similar requirements;
- “essential facility” means a storage facility, transport network or service that is exclusively or predominantly provided by a single or limited number of suppliers and which cannot feasibly be economically or technically substituted in order to provide a service;

Article C

Export restrictions

1. The Parties recall the obligations contained in Article X [*provision with reference to Article XI in Chapter on TIG*].
2. Exports of energy goods to the other Party shall be deemed automatically to comply with any conditions and tests foreseen in the Parties’ respective legislation for the granting of export licenses.

Article D

Domestic price regulation

1. Whereas the price for the supply of raw materials and energy goods for industrial users shall not be set by the Party or regulators thereof, the Parties or the regulators thereof may impose a public service obligation on enterprises which relates to the price of supply of raw materials and energy goods.
2. The Parties have the right to define the kind of public service obligation they wish to maintain. Such obligation shall be clearly defined and of limited duration and administered in a transparent, non-discriminatory and verifiable manner and is not more burdensome than necessary for the kind of public service defined by the Party.
3. Where the Parties impose public service obligations related to the price at which raw materials and energy goods are supplied on the domestic market, the Party shall ensure that the price is published prior to the entry into force of the regulated price.

Article E

Dual pricing

1. Without prejudice to the possibility to impose public service obligations on enterprises related to the price of supply of raw materials and energy goods consistently with paragraphs 1-3 of Article D [Domestic Price Regulation], neither Party or regulatory authority thereof, shall adopt or maintain measures resulting in a higher price for exports of raw materials and energy goods to the other Party than the price charged for such goods and materials when intended for domestic industrial consumption.

2. The exporting Party shall upon request of the other Party provide the necessary information to substantiate that a different price for the same raw materials and energy goods sold on the domestic market and for export does not result from a measure prohibited by paragraph 1.

Article F

Trading and export monopolies

Parties shall not maintain or institute a trading or export monopoly for raw materials or energy goods.

Article G

General access conditions

1. The Parties shall grant to the enterprises of the other Party regularly established on its territory the right to purchase, sell, import and export raw materials and energy goods under the same conditions as national enterprises.
2. Parties shall ensure that any rules concerning authorisation procedures, including certification and licensing procedures, that are applied in particular to equipment, plants and associated energy transport networks or grids, Liquefied Natural Gas facilities and storage facilities, are objective, transparent non-arbitrary and do not discriminate between applicants from the Parties.
3. When the activities mentioned in paragraph 1 and 2 are subject to authorisation, such authorisation shall also be granted in accordance with Chapter/Section [*on Domestic Regulation, Services and Establishment Chapter*].

Article H

Access to and licensing of the exercise of the activities of prospecting, exploring for and producing hydrocarbons

1. Whenever an area is made available by the competent authorities for the exercise of prospecting, exploring for and producing hydrocarbons, each Party shall ensure that enterprises of the other Party, as regards access to and exercise of these activities, are treated in a non-discriminatory manner.
2. The Parties shall take all the necessary measures to ensure that licenses, through which an enterprise is entitled to exercise, on its own behalf and at its own risk, the right to prospect or explore for or produce hydrocarbons in a geographical area, are granted following a published procedure and invite potentially interested applicants to submit applications by means of a prior public notice.
3. The notice shall specify the type of license, the relevant geographical area or part thereof and the proposed date or time limit for granting a license. Where preference is given to applications by enterprises which are single natural or legal persons, the notice shall so specify.

4. The Parties may grant authorisations without initiating a procedure where the area for which authorisation is requested has been subject of a previous published procedure which did not result in the grant of an authorisation or which has been relinquished by an enterprise.
5. Each Party may require an enterprise, which has been granted an authorisation for the exercise of the activities of prospecting, exploring for and producing hydrocarbons, to pay a financial contribution or a contribution in hydrocarbons. The detailed arrangements of such contribution shall be fixed in such a way so as not to interfere in the management process and decision-making of enterprises.
6. In implementing paragraphs 2-5, the Parties shall ensure that enterprises of the other Party are treated in a non-discriminatory manner.
7. As to the licensing conditions and the licensing authorisation procedure, Article A and Article B shall also apply (*A and B would feature in the Chapter/Section on Domestic Regulation, Services and Establishment Chapter*).

Article I

General principles of risk management in offshore oil and gas operations

1. The Parties recognise that the security of supply of offshore oil and gas can be jeopardised in the event of major accidents happening in US and EU waters and also in international waters involving EU and US based enterprises.
2. The Parties therefore will cooperate by:
 - a. creating a level playing field in both jurisdictions to secure high standards of safety and environmental protection from offshore oil and gas operations and promote these standards internationally;
 - b. sharing information on progress with these aims and,
 - c. promoting transparency and disclosure of industry performance to ensure the successful outcomes intended by their new regulatory approaches;
3. The Parties shall:
 - a. require operators to ensure that all suitable measures are taken to prevent major accidents in offshore oil and gas operations;
 - b. ensure that operators take all suitable measures to limit the consequences for human health and for the environment in the case of a major accidents;
 - c. ensure that operators are not relieved of their duties by the fact that actions or omissions leading or contributing to major accidents to persons, the environment and offshore installations were carried out by contractors;
 - d. requires operators to ensure that offshore oil and gas operations are carried out on the basis of systematic risk management so that the residual risks of major accidents to persons, the environment and offshore installations are acceptable;
 - e. ensure that the regulatory authority for safety and the environment relating to offshore oil and gas operations has the adequate human and financial resources to be fully competent and that it is independent of any functions relating to economic development of offshore oil and gas operations;

- f. ensure that decisions on granting or transferring licenses to carry out offshore oil and gas operations take into account the capability of an applicant for such a license to meet the requirements for operations within the framework of the license as required by the relevant provisions of domestic law.

Article J

Transparency in financial reporting for extractive industries

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Article K

Transit

1. The Parties affirm the existing rights and obligations in Article V GATT, which is hereby incorporated into and made part of this Agreement. Article V GATT is understood to include the transportation by pipeline or grids of energy goods.
2. The Parties undertake that its provisions relating to transport of energy goods and the use of energy transport facilities shall treat energy goods in transit in no less favorable manner than its provisions treat such materials and products originating in or destined for its own area.
3. In order to further promote the freedom of transit, the Parties shall take all necessary measures to prohibit and address the interference with or the unauthorised taking of the energy goods transited or transported through its territory by any entity subject to its control or jurisdiction.

Article L

Interruption

1. Each Party shall ensure that operators of energy transit or transport pipelines and grids take the necessary measures to:
 - a. minimise the risk of accidental interruption, reduction or stoppage of transit and transport;
 - b. expeditiously restore the normal operation of such transit or transport, which has been accidentally interrupted, reduced or stopped.
2. A Party through whose territory energy goods transit or are transported shall not, in the event of a dispute over any matter involving the Parties or one or more enterprises subject to the control or jurisdiction of one of the Parties, interrupt or reduce, permit any enterprise subject to its control or jurisdiction, including a state trading enterprise, to interrupt or reduce, or require any enterprise subject to its jurisdiction to interrupt or reduce the existing transport or transit of energy goods, except where this is specifically provided for in a contract or other agreement governing such transit or transport, prior to the conclusion of a dispute resolution procedure under the relevant contract.

Article M

Third party access to energy transport facilities

1. Parties shall use their best endeavors to ensure on their territory the implementation of a system of third party access to energy transport networks or grids, Liquefied Natural Gas facilities and storage facilities where these facilities are essential. The system of third party access shall be applicable to all users and applied in a transparent, objective and non-discriminatory manner.
2. Where a regulatory system exists conferring third party access, the Parties shall ensure that the access tariff to energy transport facilities and all other conditions related to access to an energy transport facility are objective, reasonable, transparent and shall not discriminate on the basis of origin, ownership or destination of the energy good. The Parties shall ensure that all technical and contracted capacity, both physical and virtual, is allocated through transparent and non-discriminatory criteria and procedures.
3. In case of refusal to grant third party access in accordance with paragraph 2, the Parties shall ensure that, upon request, the energy transport facility operators provide a duly substantiated explanation to the requesting party, subject to legal redress.
4. A Party may exceptionally derogate from the provisions in paragraph 1 to 3 according to objective criteria laid down in its legislation. In particular, a Party may implement in its legislation a possibility to grant, on a case-by-case basis, for a limited period of time, an exemption to the third party access rules for major new energy transport facilities.

Article N

Regulatory authorities

1. The Parties shall endeavor that independent regulatory authorities are designated and empowered to regulate energy markets on their respective territory. These regulatory authorities shall be legally distinct and functionally independent from any other public authorities or operators.
2. The decisions of and the procedures used by a regulatory authority shall be impartial with respect to all market operators.
3. An operator affected by any decision of a regulatory authority shall have the right to appeal against that decision to an appeal body which is independent of the parties involved. Where the appeal body is not judicial in character, written reasons for its decision shall always be given and its decisions shall also be subject to review by an impartial and independent judicial authority. Decisions taken by appeal bodies shall be effectively enforced [*to be checked against Chapter on Transparency*]

Article O

Localisation in the renewable energy sector

In order to foster the development of the renewable energy sector, Parties shall not maintain or adopt measures:

- a. providing for local content requirements or any other offset affecting the other Party's products, service suppliers, investors or investments.
- b. requiring forming partnerships with local enterprises, unless such partnerships are deemed necessary for technical reasons and the Party can demonstrate these upon request by the other Party.
- c. whereby an enterprise from the other Party is obliged to transfer or to share Intellectual Property rights in order to sell products, services or to Invest on that Party's territory.

Article P

Standards, technical regulations and conformity assessment

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Article Q

Early warning mechanism

[.....]

Article R

Exceptions

1. The provisions of this [Chapter, section, etc.] shall not apply to research and development projects, nor demonstration projects carried out on a non-commercial scale.
2. Nothing in this [Chapter, section, etc.] shall be construed to prevent the adoption or enforcement by any of the Parties of measures necessary for the safe operation of the energy networks concerned, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties' products, service suppliers or investors where the same conditions prevail, or a disguised restriction on trade and investment between the Parties.

[general exceptions of the Agreement should also apply]

Article S

Implementation and Cooperation

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