White & Case LLP
General Trade Report - JETRO

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UNITED STATES

GENERAL TRADE POLICY

US General Trade Policy Highlights

Rep. Devin Nunes Voices Support for USTR's Pursuit of Full Tariff Elimination in TPP; Ability to Secure Objective Remains Unclear

On May 29, 2014, House Ways And Means Trade Subcommittee Chairman Devin Nunes (R-CA) stated that he would not introduce any amendments to the fiscal year 2015 Commerce, Justice, Science (CJS) Appropriations Bill (H.R.4660) to restrict US negotiating positions in free trade agreements (FTAs).[1] According to the congressional record, Rep. Nunes refrained from introducing an amendment that would prohibit the Office of the United States Trade Representatives (USTR) from negotiating an FTA that excludes any product from tariff elimination.

In his remarks, Rep. Nunes cited his deep concern with Japan and Canada regarding their intentions to exclude certain agriculture products from tariff elimination in the Trans-Pacific Partnership (TPP). He noted that he had ultimately opted not to table an amendment on this issue, however, based on a commitment made by USTR Michael Froman to work closely with Congress to conclude "a strong and ambitious agreement."

Notably, Rep. Nunes' concern echoes those of House TPP Caucus Co-Chairman Rep. Charles Boustany (R-LA), who expressed fears that the TPP talks could result in a watered-down agreement because of certain concessions the United States may offer to Japan. These concerns stem from rumors that President Obama, in a private message to Japanese Prime Minister Shinzo Abe in April 2014, stated that the United States would not push Japan to eliminate tariffs on beef and pork; instead, the United States and Japan agreed to an alternative market access deal on pork and beef. The alleged flexibility accorded to Japan also raised concerns among US agriculture industry groups, which led to renewed demands, set out in a letter dated May 28, 2014, that the United States conclude negotiations without Japan if it continues to refuse meaningful market access commitments for US agriculture exports.

[1] Other lawmakers have introduced amendments to H.R.4660, adopted by the House, that prohibit the use of such funds by USTR or any covered agency to participate in FTA negotiations, should it pursue certain unsanctioned positions. The amendments covers negotiating objectives related to government procurement and greenhouse gas emissions (please see W&C US Trade Alert dated June 2, 2014).

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Nevertheless, Japanese TPP minister Akira Amari has made clear that Japan is not willing to abolish tariffs on five sensitive sectors, specifically beef, pork, dairy, rice, sugar, wheat, and barley. The Japanese government is unlikely to change its position since Japan's current ruling party, the Liberal Democratic Party (LDP), sets out this position in its electoral manifesto, which played a critical role in the LDP's election victory of 2012. Consequently, influential LDP members continue to push the Abe administration to honor this commitment.

This latest criticism by Congress and industry reflects concerns regarding the implications of outcomes of the TPP for future US FTAs. Comments by Reps. Nunes and Boustany, for example, underscore the likelihood that allowing Japan and Canada to exclude products in the TPP will make it difficult for the United States to achieve full tariff elimination in other US FTAs, such as the Transatlantic Trade and Investment Partnership (TTIP). The precedent set in the TPP could prove detrimental to US negotiating leverage in future FTAs.

It is also important to note that some US agricultural industry groups did not sign the May 28, 2014 letter. This is largely because some groups do not want to endanger US-Japan trade relations and are skeptical that the United States would consider excluding Japan from the TPP at all, for geopolitical and national security reasons. Nevertheless, in order for the Obama Administration to pursue TPP and TTIP without Trade Promotion Authority (TPA), USTR may need to maintain its negotiating position of full tariff elimination, at least in principal, to assuage the concerns of influential trade leaders in Congress. Such inflexibility, however, will continue to contribute to the TPP's protracted negotiation process.

Click here for Rep. Nunes' remarks, here for the LDP manifesto (in Japanese), and here for the May 28, 2014 letter.

Amendments to Appropriations Bill Seeks to Modify USTR Negotiating Authority

The House of Representatives has recently approved amendments to a government-funding bill that would effectively establish US negotiating positions in free trade agreements (FTAs), specifically those related to government procurement and the environment. On May 30, 2014, the House approved, by a vote of 321-87, the 2015 fiscal year Commerce, Justice, Science (CJS) Appropriations bill (H.R.4660), making available USD 51.2 billion in total discretionary funding for the Department of Commerce, the Department of Justice, the National Aeronautics and Space Administration, the National Science Foundation, and other related agencies. Notably, adopted amendments would bar the use of such funds by the United States Trade Representative (USTR) or any covered agency to participate in FTA negotiations, should it pursue certain unsanctioned positions.

Trade-related amendments to H.R.4660 approved by the House are summarized as follows:

- **Buy American Act**. The amendment offered by Rep. Alan Grayson (D-FL) prohibits funding to negotiate agreements that include a waiver of the Buy American Act. The Buy American Act, approved by Congress in 1933, generally requires federal government agencies to purchase

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"domestic end products" and use "domestic construction materials" on contracts exceeding the micro-purchase threshold (typically USD 3,000) performed in the United States. To comply with its trade obligations, the United States has traditionally waived the Buy American Act for eligible products from designated countries (including US FTA partners), making these products subject to the Trade Agreements Act (TAA) rather than the Buy American Act. The TAA allows the President to waive "the application of any law, regulation, procedure, or practice regarding Government procurement," such that offers of eligible products from designated countries are generally entitled to receive equal consideration with domestic offers.

- **Greenhouse Gas Emissions.** The amendment tabled by Rep. Mark Meadows (R-NC) prohibits funds from being used for FTA negotiations involving greenhouse gas emission regulation. Rep. Meadows asserted the amendment reflects the will of the Democrat-controlled 110th Congress, which rejected the cap-and-trade framework in 2009. Notably, the United States has not pursued FTAs with provisions to regulate greenhouse gas emissions. However, in an alleged draft of the Trans-Pacific Partnership (TPP) Environment Chapter text dated November 24, 2013, the Parties had discussed non-binding language on commitments to cooperate on reducing carbon emissions. It is unclear how the TPP Parties have treated proposed obligations on greenhouse gas emissions since then.

The CJS Appropriations bill now goes to the Senate for consideration. The Senate, or a potential conference committee, may remove or modify the amendments by Reps. Grayson and Meadows respectively. Moreover, the President may veto the underlying bill, which Congress can only override by two-thirds vote in the House and Senate. It is not yet clear how the amendments would affect the US position in and negotiating dynamics of the TPP and Transatlantic Trade and Investment Partnership (TTIP).

Click here for the text of H.R.4660 and here for the full list of adopted amendments.

Lawmakers Propose Bill Altering Section 337 Procedures to Limit Suits by Patent Assertion Entities

On May 29, 2014, Reps. Tony Cárdenas (D-CA) and Blake Farenthold (R-TX) introduced the *Trade Protection Not Troll Protection Act* (H.R.4763), legislation to limit the assertion of patent claims by patent assertion entities (PAEs) at the International Trade Commission (ITC). PAEs are firms that purchase and assert patents but do not manufacture the articles protected by the patents. PAEs then target companies who manufacture articles incorporating those patents and try to force them to take a license. The legislation, which has been referred to the House Ways and Means Committee, seeks to amend Section 337 of the *Tariff Act of 1930* by altering the ITC's typical process when a PAE is involved, including early domestic industry and public interest determinations, and to clarify that all equitable defenses are available.

Amendments proposed in H.R.4763 may be summarized as follows:

- **In regards to domestic industry standing and investigation timeline**:
  - Require the ITC to conduct a preliminary investigation before initiating (lasting no more than

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45 days) to determine whether a complainant who relies solely on licensing satisfies Section 337's domestic industry requirement. Under current law, the ITC does not address the existence of a domestic industry until the end of the investigation; and

- Alter the standard used to determine whether a domestic industry exists by (i) requiring that a domestic firm's investment in licensing be substantial and lead to the adoption and development of articles that practice the patent in question in the United States, and (ii) disallowing a complainant from relying on the activities of a licensee to establish domestic industry status, unless the license results in the development of an article that practices the patent in the United States. Under current law, a PAE is not required to itself produce or license a third party who produces a product that practices the patent in the United States.

- **In regards to public interest (PI) determination and equitable defenses:**

  - Enable the ITC to make a PI determination (*i.e.*, determine that an article under investigation should not be excluded from entry based on consideration of the PI) early in a case. Under current practice, a PI determination occurs at the end of a case;

  - Permit the ITC, in making a PI determination, to consider not only current statutory PI provisions (*i.e.*, the effects of exclusion on US public health, welfare, consumers, economic competitiveness, and production of similar articles), but also (i) whether articles that practice the patent will be protected by an exclusion order, and (ii) whether the complainant or its licensees can meet market demand for articles that practice the patent;

  - Clarify that the ITC may hear all equitable defenses, including the so-called "*eBay*" factors that district courts must consider before granting injunctive relief.

According to its cosponsors, the legislation aims to "protect" US companies from "abusive litigation" by PAEs, also referred to as "patent trolls." Critics of PAEs argue that PAEs purchase and assert patents only after a product is in production, do not manufacture competing products in the United States, generally do not license technologies to producers of competing products, and categorize themselves as US industries requiring and meriting trade protection. As a result, according to PAE critics, PAEs abuse the ITC's patent function and exploit the legitimate function of Section 337 as a trade statute intended to prevent unfair importation of infringing products.

Despite significant debate in Congress regarding PAEs, when and if the House Ways and Means Committee will advance the legislation to the full House for consideration remains unclear. While both Democratic and Republican lawmakers (particularly those representing districts with high technology companies) have criticized PAEs, eventual passage of the legislation faces several obstacles. These include the prioritization of other trade issues by the Committee, pending reorganization of the Committee's leadership, and limited demonstrated interest by the Committee in patent trade issues. In addition, neither Rep. Cárdenas nor Rep. Farenthold is a member of the Committee.

While future action by the House Ways and Means Committee on H.R.4763 remains uncertain, the House Judiciary Committee, which has general jurisdiction over patent issues, is actively interested

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in patent reform. On December 5, 2013, the House passed, by a 325-91 vote, a Judiciary-originated bill that limits the grounds for invalidity of a patent claim that a post-grant review petitioner is prohibited from asserting in certain ITC proceedings to only those grounds that the petitioner raised during post-grant review. That bill, H.R.3309, awaits action in the Senate Judiciary Committee.

Click here for the text of H.R.4763.

DOE Proposes Amendments to LNG Export Licensing Process for Non-FTA Countries; Impact on Exports Remains Unclear

On May 29, 2014, the US Department of Energy (DOE) announced a proposal to overhaul the licensing process for exports of US liquefied natural gas (LNG) to non-free trade agreement (FTA) countries. The proposed changes would affect the manner in which LNG export applications are ordered and processed; DOE is proposing to review applications and make final public interest determinations only after completion of the review required by environmental laws and regulations, thus eliminating "conditional approvals." DOE has lauded the initiative as expediting LNG exports and as a reflection of changing market dynamics.

Section 3 of the Natural Gas Act (15 U.S.C. § 717b) requires DOE approval for all exports of LNG, including exports to countries that have an FTA with the United States. However, exports to non-FTA countries are subject to a discretionary "public interest" test, and DOE may refuse to grant permission to export if it finds that the exports "will not be consistent with the public interest."

Until now, DOE has issued conditional approvals for such exports prior to the completion of an environmental review of export facilities by the Federal Energy Regulatory Commission (FERC), conducted pursuant to the National Environmental Policy Act (NEPA). This practice was designed to provide regulatory certainty before project sponsors spent significant resources on the NEPA review, which can cost up to USD 1 million. Under DOE's proposal, however, DOE would wait until after FERC completes its environmental review before making a final determination on whether the relevant exports are "not in the public interest," as required by US law. Although DOE's proposal would alter the timeframe for applying the public interest standard, the substance of that decision – including the discretion afforded to DOE – would be unaffected.

DOE's proposal states that the procedural change would ensure a more efficient process and prioritize resources on more commercially advanced projects. It also would provide DOE with more information for making a public interest determination in the final instance, thereby allowing for a more accurate evaluation of the project's impact on the public interest and the market. DOE further observes that market participants have shown a willingness to dedicate the resources necessary for a NEPA review prior to receiving conditional authorizations from DOE, and that those projects for which a NEPA review has been completed are generally more likely to be financed and constructed. As a result of the proposed change, applications that have completed a NEPA review would be reviewed more promptly and not delayed by other applications for which a NEPA review has not been completed. Essentially, FERC would take the lead in the approval process and determine the order of approvals for most LNG export projects involving non-FTA countries.

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The anticipated impact of DOE's proposal has prompted mixed responses. For example, the Dow Chemical Company believes that the proposal will not liberalize exports, but instead protect against a rush to do so. Several analysts also have expressed skepticism that the new procedures will actually result in a faster approval process for exports, and have noted that, instead of streamlining the process, the changes will only result in new conditions for FERC's environmental reviews. Nevertheless, industry representatives have broadly welcomed DOE's proposed change, stating that it would create a less politicized approval process (even though it would be more expensive).

Several Senate lawmakers in favor of LNG exports have welcomed the change. Most notably, Chairman of the Senate Committee on Energy and Natural Resources Mary Landrieu (D-LA) stated that the change would streamline the permit approval process. On the other hand, several Members of Congress have criticized DOE's proposal, asserting that it will inject more uncertainty in the process and thus slow down export license approvals and discourage investment in LNG export projects. They also oppose the proposal because it does not remove the restrictions entirely.

Election year politics may also have played a role in DOE's decision. Sen. Landrieu is in a tough re-election battle, and DOE's proposed change would permit Cheniere Energy's Louisiana export terminal expansion project to leapfrog 11 other projects awaiting DOE approval and, as a result, start exporting LNG as early as 2015. Compounding this speculation are media reports that the Obama Administration intends to use energy policy to help Sen. Landrieu's re-election bid, and a recent visit by Energy Secretary Ernest Moniz to Louisiana to promote her energy efforts.

DOE has made the proposed procedural change available for a 45-day public review and comment period. During that time, DOE will continue to process applications based on its published order of precedence. As part of the same announcement, DOE stated that it plans to undertake an economic study on how potential US LNG exports between 12 and 20 billion cubic feet per day (Bcf/d) could affect the public interest. Past studies have looked only at cases of 6 and 12 Bcf/d.

Click here for a copy of DOE's proposal.

Senate Appropriations Bill Seeks to Introduce Nonbinding Reporting Requirements on US Trade Agencies

On June 5, 2014, the Senate Appropriations Committee (SAC) approved a bill that would impose new but nonbinding reporting requirements on the Office of United States Trade Representative (USTR) and the International Trade Administration (ITA). The Senate bill, the 2015 fiscal year Commerce, Justice, Science (CJS) appropriations bill (S.2437), would also increase funding for most major trade agencies, relative to a similar bill (H.R.4660) passed by the House of Representatives on May 30, 2014.

The Chairman's Report (CR) accompanying S.2437 comprises additional reporting requirements for USTR and ITA. Most notably, the CR requires USTR to provide (i) monthly international travel reports detailing costs and purposes of travel and (ii) quarterly reports "outlining ongoing trade negotiations as well as enforcement activities and objectives achieved for existing trade

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agreements." In addition, the CR requires the Interagency Trade Enforcement Center, whose role, according to the CR, is "not clearly defined or well understood," to explain its functions in detail. However, none of these requirements are contained in the bill's language, only in the CR, and are therefore nonbinding.

The reporting requirements reflect growing tensions between the Obama Administration and Congress on trade. The CR criticized USTR, for example, for its "lack of responsiveness and attention to Committee inquiries and requests." More broadly, several members of Congress have complained that the Obama Administration (and USTR in particular) inadequately seeks congressional input in trade negotiations and fails to inform Congress of the details of ongoing Trans-Pacific Partnership (TPP) and Transatlantic Trade and Investment Partnership (TTIP) negotiations. The nonbinding reporting requirements thus constitute mainly a political exercise: an attempt by Congress to express dissatisfaction with the Obama Administration and willingness to exercise greater oversight over the trade negotiation powers that Congress has delegated to the Administration.

S.2437 awaits consideration and likely passage at the full Senate. Thereafter, a joint House–Senate Conference Committee will likely convene to reconcile any differences between S.2437 and H.R.4660. For example, whereas H.R.4660 includes amendments that effectively prohibit USTR from negotiating agreements that waive Buy American requirements in government procurement or regulate greenhouse gas emissions.

The nonbinding reporting requirements set forth in the CR will stand unless the language of a potential House-Senate Conference Committee Report directly conflicts with them. How they would affect the US position in and negotiating dynamics of the TPP and the TTIP remains unclear, but any effect likely would be minor because the requirements, in addition to being nonbinding, only comprise reporting.

Click here for the text of S.2437, here for the text of H.R.4660, and here for the Chairman's Report accompanying S.2437.

House Passes Legislation to Expedite LNG Export Licensing Procedures; Senate Response Remains Unclear

On June 25, 2014, the House of Representatives passed a bill that would require the Department of Energy (DOE) to issue a licensing decision on an application to export liquefied natural gas (LNG) within 30 days of the completion of an environmental impact assessment by the Federal Energy Regulatory Commission (FERC), as required by the *National Environmental Policy Act*. The House passed the bill, the *Domestic Prosperity and Global Freedom Act* (H.R.6), by a vote of 266-150 (with 220 Republicans and 46 Democrats voting affirmatively).

In addition to directing DOE to issue a decision on an application for authorization to export LNG within 30 days, H.R.6 does the following:

- Requires an applicant, as a condition for receiving DOE authorization to export LNG, to disclose publicly the specific destination(s) of any such authorized LNG exports.

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- Assigns jurisdictional authority, for purposes of civil actions arising in relation to LNG licensing, to regional federal courts and requires those courts to expedite any civil actions regarding LNG licensing.

Section 3 of the *Natural Gas Act* (15 U.S.C. § 717b) requires DOE approval for all exports of LNG and states that such approval shall be granted "unless…the proposed exportation…will not be consistent with the public interest." The *Natural Gas Act* states further that exports to countries with which the United States has a free trade agreement are "deemed to be consistent with the public interest," and applications for such exports "shall be granted without modification or delay." Exports to countries with which the United States does not have a free trade agreement receive no such treatment. In addition to acquiring export licensing approval from DOE, companies seeking to export LNG must complete an environmental review and secure a construction permit from FERC.

On June 4, 2014, DOE revised its LNG export licensing procedures such that DOE now will consider export licensing applications only after an applicant has received approval from FERC. H.R.6 builds on this DOE revision by requiring DOE to issue a decision on an export licensing application no later than 30 days after FERC completes the relevant reviews.

H.R.6 now goes to the Senate for consideration. The Democrat-controlled Senate might not consider the legislation and has ignored previous efforts by the Republican-controlled House to expedite the permitting process for natural gas exports. However, in light of the upcoming mid-term elections and in response to growing support among Senate Democrats to liberalize LNG exports, the Senate might be more inclined to consider H.R.6. Senate Republicans overwhelmingly support liberalization of LNG exports, as do certain key Senate Democrats, including Sen. Mary Landrieu (D-LA), Chair of the Energy and Natural Resources Committee, and Sen. Mark Udall (D-CO). Both Senators Landrieu and Udall represent states with abundant natural gas reserves, face difficult reelection battles, and have sponsored or co-sponsored legislation similar to H.R.6 in the Senate. As such, they likely will attempt to rally Democratic support to consider and pass H.R.6. If and when the Senate will consider H.R.6, however, remains unclear.

Click here for the text of H.R.6 and here for H.Amndt.959, which imposes the 30-day time period requirement.

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CUTOMS

Customs Highlights

Industry Groups Advocate Repeal of 100-Percent Cargo Scanning Mandate

On June 2, 2014, 70 industry groups expressed support for the decision by Department of Homeland Security (DHS) Secretary Jeh Johnson to extend for two years the deadline to implement 100-percent scanning of US-bound maritime cargo. Secretary Johnson informed Congress of that decision in a May 5, 2014 letter to Sen. Thomas Carper (D-DE), and the industry groups – which collectively represent US distributors, farmers, importers, manufacturers, retailers, and transportation and logistics providers – responded in the June 2, 2014 letter to Secretary Johnson that they "fully support" the extension.

The *Implementing the 9/11 Commission Recommendations Act of 2007* requires scanning of all maritime cargo containers shipped to the United States at foreign ports for national security purposes. The *Act* also provides for a non-enumerated number of two-year extensions at the discretion of the Secretary of the DHS. The Obama Administration previously acknowledged significant – and perhaps insurmountable – difficulties to implementing the 100-percent cargo scanning requirement, and former DHS Secretary Janet Napolitano previously exercised discretionary authority to extend by two years the July 1, 2012 implementation deadline.

Implementation of the scanning mandate, should it occur, faces the following challenges:

- **Statutory interpretation**: The language of the statute is unclear and fails to define such integral terms as "scanned";

- **Resources**: Operating the scanning requirement appears unfeasible, as scanning the more than 10 million maritime cargo containers that enter the United States annually would entail substantial and still-undetermined quantities and types of monetary and other resources;

- **Technology and infrastructure**: Technological capacities necessary to establish, maintain, and monitor so broad a global scanning system do not exist, and many foreign ports lack the physical characteristics necessary to install scanning equipment or operate scanning processes;

- **Global commerce**: 100-percent scanning would impact global commerce negatively by increasing costs, delaying transport, and disincentivizing cross-border transactions;

- **Foreign governments**: Most governments of foreign trading partners oppose the mandate, as it would impose burdensome and still-undetermined requirements extraterritorially. In addition, strict extraterritorial protocols could lead to reciprocal requirements imposed by foreign governments that US containerized exports similarly be scanned; and

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- **Security**: Significant debate exists regarding whether 100-percent container scanning would improve security – the requirement's primary objective.

Notably, both Secretary Johnson and former Secretary Napolitano have expressed similar concerns. In his May 5, 2014 letter to Sen. Carper, Secretary Johnson stated that "DHS's ability to fully comply with this unfunded mandate of 100-percent scanning, even in long term, is highly improbable, hugely expensive, and in our judgment, not the best use of taxpayer resources to meet this country's port security and homeland security needs." Likewise, former Secretary Napolitano stated in a May 2, 2012 letter to Congress that an unsuccessful 2007–2010 pilot program produced an "array of diplomatic, financial and logistical challenges." That program, the Secure Freight Initiative, involved six foreign ports, cost approximately USD 16 billion, and caused DHS to conclude that 100-percent cargo scanning was "neither the most efficient nor a cost effective way to secure our Nation and global supply chains against nuclear terrorism."

Though anticipated and welcomed by most global stakeholders, the decision by Secretary Johnson does not provide the long-term commercial certainty and political confidence desired by private and public international clients. According to the signatories of the June 2 letter, "instead of going through this exercise every two years," the DHS Secretary and the Obama Administration should "recommend to the Congress that the statutory 100-percent container scanning requirement be repealed."

In contrast to the challenges associated with the universal screening system, Customs and Border Protection (CBP) currently operates a risk-based system through which it coordinates with importers, exporters, and ocean carriers to detect and inspect containerized cargo shipments deemed to be high risk. This risk-based strategy, according to the June 2 letter, "is fully embraced by industry as well as our foreign trading partners and has proven to be highly effective."

While most industry groups, international companies, and foreign governments would benefit from repeal of the 100-percent cargo scanning mandate, Congress has not demonstrated significant interest in doing so. For now, Secretary Johnson's decision only temporarily delays mandatory cargo scanning, and this issue likely will be revisited in the spring or summer of 2016.

Click here for a copy of the industry groups' June 2, 2014 letter.

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FREE TRADE AGREEMENTS

Free Trade Agreement Highlights

153 House Democrats Call for TPP to Result in Improved Labor Outcomes

On May 29, 2014, 153 House Democrats issued a letter to United States Trade Representative (USTR) Michael Froman, urging the Obama Administration to adopt an "enhanced framework" for labor rights protection in the Trans-Pacific Partnership (TPP). Led by Reps. George Miller (D-CA), Mark Pocan (D-WI), Loretta Sanchez (D-CA), and Rosa DeLauro (D-CT), the letter's signatories cite reports from the Department of Labor and the Department of State, each noting violations of worker's rights in Vietnam, Malaysia, Brunei, and Mexico, including those related to forced and child labor, freedom of association, and collective bargaining. The letter calls for the implementation of strong, enforceable domestic labor laws in the aforementioned countries as a prerequisite for Congress' consideration of the TPP and the continued extension of trade benefits under the Agreement.

A notable shortcoming of the letter is that, although it envisions the TPP leading towards "improved outcomes for workers," it does not discuss the process and provisions through which the TPP will do so. This could reflect the fact that US lawmakers have no access to the TPP negotiating texts (thus, no basis for comparison) and have presumed that USTR is pursuing TPP labor requirements as set forth in the Bipartisan Trade Deal ("May 10 Agreement"). Instead, the signatories call for domestic labor reforms in line with "international labor standards," in Vietnam, Malaysia, Brunei, and Mexico, as a requirement to join TPP, a politically challenging request that implicitly requires foreign intervention in domestic affairs and holds the countries' TPP membership hostage.

While the letter does suggest that the TPP could serve as a mechanism to trigger and later maintain domestic labor reforms, TPP negotiating parties have thus far tabled reservations regarding the possibility of subjecting the labor chapter to dispute settlement. As such, it is not clear how the United States can use the TPP as an enforcement mechanism for labor rights, much less as a tool to insist upon domestic labor reforms before the TPP is concluded.

Despite the general expectation that the TPP should address labor rights, it is not immediately clear how the Parties will address the scope and depth of such provisions. Notably, the P-4 agreement, the genesis of the TPP, only covers commitments to cooperate on labor issues. It would be reasonable to expect the United States to pursue labor principles equal to those included in US free trade agreements (FTAs) with Peru, Panama, Korea, and Colombia, which requires its Parties to adopt and maintain five internationally accepted labor rights that are contained in the *ILO*

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Declaration on Fundamental Principles and Rights at Work and Its Follow-Up.[2]

However, requiring the TPP Parties to adopt and maintain such principles prior to signing the TPP will be difficult, and will likely illicit an unenthusiastic response. Providing flexibility for a phase-in approach for Parties to meet labor obligations, however, would be more feasible. In that respect, the letter's request reflects more the US political dynamics, specifically Congress' positioning on trade and TPP in preparation for the mid-term elections, rather than a clear force behind the US negotiating position on labor.

Click here for a copy of the letter and here for the May 10 Agreement.

TTIP: Leaked EU Draft Services Offer Excludes Financial Services Market Access

On June 13, 2014, a non-profit organization named the Associated Whistleblowing Press (AWP) leaked an alleged draft of the European Union's (EU) draft offer regarding services and investment in the Transatlantic Trade and Investment Partnership (TTIP) negotiations. Notably, the alleged offer, dated May 26, 2014, excludes financial services market access and addresses the following broad areas:

- **Services**: The Commission in the draft offer states that the offer mirrors the EU's proposal submitted during November 2013 Trade in Services Agreement (TiSA) negotiations both in terms of format and substance, with the major exception of financial services, which the draft offer excludes. The explanatory note included with the draft offer, however, states that "commitments on financial services will be included at a later stage."

- **"Non-Services"**: With respect to establishment (*i.e.*, foreign direct investment) in so-called "non-services," the Commission notes that the draft offer is based substantively on the EU-Korea Free Trade Agreement and follows the TiSA approach (*i.e.*, a positive list for market access and a negative list for national treatment).

- **Subnational-Level Measures**: The draft offer covers market access commitments (and any limitations) at the EU Member State level and confirms that the EU expects the United States to provide a similar level of detail with respect to US commitments at the state level. The draft offer asks EU Member States to submit any known examples of market access or national treatment restrictions at the US-state level.

The draft offer's exclusion of financial services market access suggests that the upcoming 6th round of TTIP negotiations will not include any financial services discussions. According to the leaked draft, the non-inclusion of the EU's financial services market access offer is "appropriate" and due to "the

[2] These principles comprise the freedom of association; the effective recognition of the right to collective bargaining; the elimination of all forms of compulsory or forced labor; the effective abolition of child labor; and the elimination of discrimination in respect of employment and occupation.

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firm US opposition to include regulatory cooperation on financial services in TTIP." By excluding its offer with respect to market access in financial services, the EU appears to be pressuring the United States to reconsider its refusal to discuss the regulation of financial services in TTIP. A note to EU Member States accompanying the draft offer states that "[t]his situation may change in the future if the U.S. show[s] willingness to engage solidly on regulatory cooperation in financial services in TTIP."

The EU has pushed for the inclusion of financial services commitments on both market access and regulation since the beginning of TTIP negotiations. Michel Barnier, EU Commissioner for Internal Market and Services, reiterated this support during a speech at the Peterson Institute for International Economics in Washington, D.C. on the same day that the draft offer was leaked. The United States firmly opposes including financial services regulations in TTIP, primarily due to fears that this could weaken the United States' regulatory apparatus and reforms instituted pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). Dodd-Frank, which was signed into law in 2010 and constitutes the United States' implementation of the global Basel III regulatory standards for banks, instituted broad reforms to the US financial regulatory system.

While sources confirm that the US already has tabled its initial services and investment offer, we understand that the EU has yet to present its offer before the 6th TTIP negotiating round, which is expected to occur in mid-July 2014.

Unofficial copies of the leaked offer can be provided upon request. Click here for Commissioner Barnier's speech.

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MULTILATERAL

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Multilateral Highlights

Russia Launches WTO Dispute with United States Over Sanctions

On June 20, 2014, Russian Prime Minister Dmitry Medvedev announced that Russia has requested WTO consultations with the United States regarding economic sanctions recently imposed in response to Russia's annexation of Crimea and alleged continued involvement in Ukrainian affairs. According to Prime Minister Medvedev, the U.S. sanctions have produced "a negative impact on [Russia's] foreign trade" and "violate WTO rules," particularly as they relate to most-favored nation (MFN) treatment and the provision of services.

The United States imposed sanctions in April and May 2014, shortly after Russia annexed the Crimean peninsula on March 18, 2014. Initially, the United States imposed several sanctions through a coordinated effort with the European Union. However, the United States later imposed additional and more targeted sanctions, most recently against 17 companies – including several banks – which the United States alleges are closely connected with the Russian government and Russian President Vladimir Putin. In response to the sanctions, international payment providers Visa and MasterCard ceased to service Russian banks, prompting Russia to create a national payment system to mitigate economic injury and reduce the Russian financial system's dependence on Visa and MasterCard.

Prime Minister Medvedev claims that while the sanctions violate the United States' MFN obligations at the WTO, the United States, by virtue of having "both doctrinal and practical authority" at the WTO, likely will prevail to at least some degree. According to Prime Minister Medvedev, the case poses the question of "which account of the legitimacy of the sanctions the WTO will accept" and offers an "opportunity to evaluate the objectivity and impartiality of the organization."

Russia's announcement comes one day after US Treasury Secretary Jacob Lew warned Russia that the United States might impose additional and more punitive sanctions if Russia does not seek a diplomatic solution to the ongoing conflict in Ukraine. Secretary Lew commented that "[t]he United States is prepared to impose additional targeted financial measures on Russia if it continues to escalate the situation in Ukraine."

The US consultations request is the first step in the WTO dispute resolution process. Unless the parties resolve the matter in 60 days, Russia has the right to request the establishment of a dispute panel to resolve the case.

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Draft TISA Financial Services Annex Leaked, Reveals Disagreement

On June 19, 2014, the non-profit organization Wikileaks leaked an alleged draft of the financial services annex to the Trade in Services Agreement (TISA). The draft annex, dated April 14, 2014, describes itself as a "[c]onsolidation of text proposals" and appears to include proposals from at least Australia, Canada, the European Union, Hong Kong, Korea, Norway, Panama, Turkey, and the United States.

The draft annex contains articles on the following topics: (i) scope; (ii) definitions; (iii) scheduling financial services commitments; (iv) standstill; (v) monopoly rights; (vi) financial services purchased by public entities; (vii) commercial presence; (viii) cross-border trade; (ix) temporary entry of personnel; (x) new financial services; (xi) data processing and transfer; (xii) payment and clearing systems; (xiii) self-regulatory organizations; (xiv) senior management and boards of directors; (xv) non-discriminatory measures; (xvi) regulatory transparency; (xvii) prudential measures; (xviii) treatment of information; (xix) recognition; (xx) dispute settlement; (xxi) expedited availability of insurance; and (xxii) supply of insurance by postal insurance entities.

The draft annex includes both non-bracketed and bracketed text and reveals differing positions and objectives on the following important issues:

- **Cross-border trade**: The United States proposes to permit cross-border trade in electronic payment services, certain types of investment advice, and certain portfolio management systems. Norway proposes to permit cross-border trade in insurance, most notably for offshore energy exploration, development, and production, as well as for ocean-going fishing vessels and maritime and aviation passengers.

- **Data processing and transfer**: The United States proposes an absolute right "to transfer information in electronic or other form… for data processing where such processing is required in the financial service supplier's ordinary course of business." The European Union and Panama propose language stating that no Party shall "prevent transfers of information or the processing of financial information, including transfers of data by electronic means… for data processing or that, subject to importation rules consistent with international agreements, prevent transfers of equipment, where such transfers… are necessary for the conduct of the ordinary business of a financial service supplier." The EU and Panama proposal also states that the provision should not be understood to restrict a Party's right to protect personal data, personal privacy, and the confidentiality of individual records and accounts, so long as such right is not used to circumvent the provisions of the Agreement.

- **Regulatory transparency**: Panama proposes a general declarative provision calling upon Parties to "recognize" the importance of regulatory transparency and "make available to interested persons domestic requirements and applicable procedures for completing applications relating to the supply of financial services." However, Panama's proposal does not include specific obligations regarding Parties' development of regulations. The United States proposes regulatory practices similar to those existing under US law, including advance

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publication of regulations to the "extent practicable," a "reasonable opportunity" to comment on proposed regulations, and a prompt and transparent decision-making process. The EU and Turkey proposal includes text to the same effect, as well as aspirational language that would encourage Parties to incorporate into domestic law internationally agreed standards for financial services regulation.

- **Prudential measures**: Panama and the EU propose that Parties shall not be prevented from "taking" measures for prudential reasons, whereas the United States proposes that Parties shall not be prevented from "adopting or maintaining" such measures. Additionally, while the Parties agree that prudential measures may be taken to protect investors and depositors, policy holders, or persons to whom a fiduciary duty is owed by a financial service supplier, Panama and the United States propose expanding this protection to include "financial market users."

- **Dispute settlement**: The European Union and the United States propose to subject "disputes on prudential issues and other financial matters" to a dispute settlement body possessing "the necessary expertise relevant to the specific financial service under dispute." The United States also proposes language on remedies: specifically, where a measure is found to be inconsistent with the agreement but the impact of that measure is outside of the financial services sector, the complaining Party may not suspend benefits in the financial services sector; if the impact is on the financial services sector and any other sector, the complaining Party may suspend benefits in the financial services sector that have an equivalent effect.

Because the Sixth Round of TISA negotiations occurred between April 28 and May 2, the April 14 date of the alleged draft annex suggests that it may be an outdated version of the financial services annex currently under negotiation. This is especially plausible in light of the fact that the Sixth Round was dedicated to the establishment of negotiating texts in each of the five sectoral annexes (one of which is financial services).[3] The financial services draft annex developed during the Sixth Round, therefore, may differ from the alleged draft annex released by Wikileaks.

The United States will host the Seventh Round of TISA negotiations in Geneva on June 23-27, 2014.

Click here for the alleged draft annex.

[3] The other four sectoral annexes are competitive delivery services, domestic regulation and transparency, transportation services, and telecommunications and e-commerce (*i.e.*, information and communications technology).

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