



White & Case LLP

General Trade Report - JETRO

September 2014

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UNITED STATES

GENERAL TRADE POLICY

US General Trade Policy Highlights

Trade Promotion Authority Update: Congress Unlikely to Vote on TPA Reauthorization Prior to November Congressional Elections

The US Congress is unlikely to vote on legislation to reauthorize Trade Promotion Authority (TPA) prior to the Nov. 4, 2014 Congressional elections, as the Senate Democratic leadership continues to oppose TPA, and Democratic and Republican Congressional trade leaders continue to disagree regarding the contents, details, and timing of potential legislation to reauthorize TPA.

TPA commits Congress to use expedited (*i.e.*, “fast track”) procedures to consider legislation to implement any trade agreements that the President negotiates during a specified period of time. In so doing, TPA enables the President and foreign governments to negotiate trade agreements with the assurance that Congress will not amend any negotiated agreement, but rather will wholly accept or wholly reject any such agreement via a timely “up or down” vote. Many trade analysts suggest that absent this assurance, foreign governments have reduced incentives to negotiate trade agreements with the United States, as Congress might revise individual clauses in such agreements. In exchange for this assurance, and as outlined in legislation implementing TPA, the President must adhere to certain negotiating objectives and certain procedures to notify and consult with Congress regarding the progress of any negotiations.

The *Bipartisan Congressional Trade Priorities Act (BCTPA)* – TPA legislation potentially applicable to such prospective trade agreements as the Trade in Services Agreement, the Transatlantic Trade and Investment Partnership, and the Trans-Pacific Partnership – has been introduced in both the Senate (S.1900) and the House of Representatives (H.R.3830). On Jan. 9, 2014, House Ways and Means Committee (HWMC) Chairman David Camp (R-MI) introduced H.R.3830, while former Senate Finance Committee (SFC) Chairman Max Baucus (D-MT) and SFC Ranking Member Orrin Hatch (R-UT) introduced S.1900. The *BCTPA* would apply to trade agreements entered into before July 1, 2018 (or July 1, 2021 if the President requests an extension and Congress does not vote against such an extension).

However, Congress is unlikely to reauthorize TPA prior to the Nov. 4 elections, in large part because Senate Democratic leaders oppose TPA. Majority Leader Harry Reid (D-NV), who stated that his colleagues would be “well-advised” to not “push” for TPA, reportedly will not permit a vote on the *BCTPA* prior to the elections. Majority Whip Richard Durbin (D-IL), who is “critical and skeptical” of

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TPA, has claimed that a consensus exists among Senate Democrats that the Senate should not consider TPA legislation during 2014.

Also impeding TPA reauthorization are disagreements among Democratic and Republican Congressional trade leaders regarding the contents, details, and timing of reauthorization legislation. HWMC Ranking Member Sander Levin (D-MI) declined to co-sponsor H.R.3830 and opines that Congress must receive increased access to draft negotiating texts prior to advancing TPA. Additionally, SFC Chairman Ron Wyden (D-OR), who replaced former Sen. Baucus as Chairman in February, intends to seek “smart track” changes to the *BCTPA*. While the content and parameters of any such changes remain uncertain, they likely would implicate consultation and transparency requirements. Chairman Wyden has emphasized that (i) the Obama Administration should provide Congress and the public with increased information regarding ongoing negotiations, perhaps through the appointment of a transparency officer within the Office of the United States Trade Representative (USTR); and (ii) Congress should be granted more time to deliberate, as well as access to “procedures” to “right the ship if trade negotiators get off course.”

Meanwhile, Republican members of Congress have argued that (i) the Obama Administration has failed to build support for TPA among Congressional Democrats and (ii) TPA must precede the finalization of any ongoing trade negotiation. For example, on July 17, 2014, all 23 Republican HWMC Members stated in a letter to USTR Michael Froman that despite being “strong supporters” of TPP, they “will not support TPP if the agreement, even an agreement in principle, is completed before TPA is enacted.” According to the Members, “[c]oncluding TPP – or any major trade agreement – without TPA undermines the Constitutional role of Congress over trade policy.”

TPA was first enacted in 1975 and renewed in 1979, 1984, 1988, and 2002. Congress has used TPA to enact the Tokyo Round Agreements Act of 1979, the Uruguay Round Agreements Act of 1994, and 14 bilateral or regional trade agreements. The most recent iteration of TPA was enacted in December 2002 and expired in July 2007. With the exception of President Obama, every president since Franklin D. Roosevelt in the 1930s has possessed TPA or a special trade negotiating authority similar to TPA.

If and when Congress will vote to reauthorize TPA remains uncertain, but Congress almost certainly will not vote on TPA prior to the Nov. 4 elections. The existence and timing of any reauthorization vote will depend largely on the floor schedule established by Majority Leader Reid and the results of the elections. Should Republicans win control of the Senate and retain control of the House, Congress most likely will reauthorize TPA by approving the *BCTPA* or similar legislation. However, such reauthorization might not occur until 2015, when the next Congress convenes.

Click [here](#) for the text to S.1900, [here](#) for the text to H.R.3830, and [here](#) for a copy of the letter from the HWMC Republican Members.

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International Trade Commission Report Determines That Foreign Barriers Impede Digital Trade by US Firms

On Sept. 11, 2014, the US International Trade Commission (ITC) released a report regarding the effects of foreign trade barriers on international digital trade by US firms. The report, *Digital Trade in the U.S. and Global Economies, Part 2* (Inv. No. 332-540), also provides information regarding the value, potential growth, and economic linkages and contributions of digital trade in the US economy.

The report determines that the following foreign barriers impede global digital trade by US firms: customs measures, data privacy and protection requirements, intellectual property rights infringement, localization requirements, market access limits, and uncertain legal liability rules. According to a survey conducted by the ITC in preparation for the report, the removal of these barriers for “digitally intensive” firms (*i.e.*, 140,000 firms heavily engaged in digital trade) would boost US sales abroad and increase US gross domestic product (GDP) by an estimated USD 16.7 – 41.1 billion. According to the survey results, firms most frequently identified Algeria, China, and Nigeria as countries where firms “faced barriers,” including barriers that “precluded doing business.” Firms least frequently identified the occurrence of such barriers in Australia, Italy, and the United Kingdom.

The report also concludes that (i) enhanced productivity and lower trade costs resulting from digital trade likely increased US GDP by an estimated USD 517.1 – 710.7 billion in 2011; (ii) US digitally intensive firms sold USD 935.2 billion in products and services, and purchased USD 471.4 billion in products and services over the internet in 2012; and (iii) digitally intensive firms exported USD 222.9 billion and imported USD 106.2 billion in products and services ordered online in 2012.

The report is the second in a series of digital trade reports produced by the ITC. The first report, *Digital Trade in the U.S. and Global Economies, Part 1* (Inv. No. 332-531), was completed in July 2013 and overviewed the definitions, trends, and economic impacts of US digital trade. Former Senate Finance Committee (SFC) Chairman Max Baucus (D-MT) requested the reports on December 13, 2012. SFC Chairman Ron Wyden (D-OR) applauded the *Part 2* report, stated that the Obama Administration “needs to ensure that trade agreements contain strong, enforceable rules that promote digital trade,” and urged United States Trade Representative Michael Froman “to redouble his efforts to ensure that the Internet remains an open platform for global commerce.”

Click [here](#) for the report.

Congress Extends Export-Import Bank Charter Through June 2015

On Sept. 18, 2014, the US Senate voted to extend the charter of the Export-Import Bank of the United States (Ex-Im Bank) through June 30, 2015. On Sept. 17, 2014, the US House of Representatives approved the extension of the charter, which was scheduled to expire on Sept. 30, 2014. The provision extending the charter is embedded in the *2015 Continuing Appropriations Resolution* (H.J. Res. 124), a package of short-term government funding legislation introduced by House Appropriations Committee Chairman Harold Rogers (R-KY) on Sept. 9, 2014. President Obama is expected to sign the legislation shortly.

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The Ex-Im Bank is an independent federal government agency and the official export credit agency of the United States. Established by the *Export-Import Act of 1945* (P.L. 79-173) and operative pursuant to a renewable charter, the Ex-Im Bank assists with the financing of US exports, mainly via the provision of direct loans, export credit insurance, loan guarantees, and working capital finance. The Bank's level of financial exposure is capped at USD 140 billion.

The extension of the Ex-Im Bank charter through June 2015 temporarily suspends a contentious debate among policymakers, business representatives, and policy advocates regarding Congress' long-term treatment of the Ex-Im Bank. Proponents argue that the Bank promotes US exports, counteracts subsidization of exports by foreign governments, and provides necessary financing unavailable through private markets. Opponents argue that export financing is more appropriately provided through private markets and that the Bank is a fund for "corporate welfare" that principally benefits large and politically influential businesses. President Obama and most Congressional Democrats support the Ex-Im Bank, while Republicans are more divided on the issue, with many House Republicans in particular opposing the Bank.

Despite being approved in the House of Representatives by a vote of 319 to 108 (with 176 Republicans and 143 Democrats voting in favor), extension of the Ex-Im Bank charter should not be interpreted as newfound Republican support for the Bank. Rather, the extension was embedded in major government funding legislation, which most Republicans and Democrats supported to avoid a partial government shutdown prior to Congressional elections on Nov. 4, 2014.

In addition to extending the Ex-Im Bank through June 30, 2015, H.J. Res. 124 reauthorized several major government functions through Dec. 11, 2014. Isolating the expiration period of the Ex-Im Bank in this manner jeopardizes the Bank's long-term future, as any future proposals to extend the Bank's charter beyond June 30, 2015 might occur as standalone legislation, rather than be embedded in major government funding legislation similar to H.J. Res. 124.

Whether the Ex-Im Bank will be extended beyond June 30, 2015 thus cannot be certain. Should Republicans retain control of the House of Representatives after the Nov. 4 elections, as is predicted, then the potential expiration of the Bank's charter remains a strong possibility. While some House and Senate Republicans have begun to discuss potential reforms to the Ex-Im Bank, significant opposition to the Bank persists, and key House Republicans, including Financial Services Committee Chairman Jeb Hensarling (R-TX) and House Majority Leader Kevin McCarthy (R-CA), remain strong critics of the Bank.

Click [here](#) for H.J. Res. 124.

Congressional Trade Leaders Request International Trade Commission Investigation into India's Trade Practices

On September 25, 2014, Senate Finance Committee Chairman Ron Wyden (D-OR) and Ranking Member Orrin Hatch (R-UT) and House Ways and Means Committee Chairman Dave Camp (R-MI) and Ranking Member Sander Levin (D-MI) requested that the US International Trade Commission (ITC) conduct an investigation into trade practices by India. According to the Congressional trade

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leaders, certain Indian trade practices are “unfair” and discriminatory against US trade and investment.

The request for an investigation builds on a previous request by Congress that the ITC investigate India’s trade practices. As such, the ITC is scheduled to deliver two reports to Congress: (i) a first report, due to Congress by December 15, 2014, examining India’s trade policies from 2003 through mid-2014; and (ii) a second report, due to Congress by September 24, 2015, examining India’s trade policies after mid-2014. In requesting the second investigation, the Congressional leaders highlighted “recent national elections in India and “a new Bharatiya Janata Party-led government” and specified that the ITC should identify “any significant changes” by the new Indian government to India’s trade and investment policies and practices.

The request for a second investigation comes during an important period in the economic relationship between the United States and India. On September 29–30, Indian Prime Minister Narendra Modi will meet with President Barack Obama to discuss trade, investment, defense, and security issues. On September 9, 2014, Senator John McCain (R-AZ), an influential Member of the Senate Foreign Relations Committee, highlighted ongoing bilateral investment treaty negotiations between the United States and India, suggested that the countries should sign a free trade agreement, and advocated for India’s eventual integration into the Trans-Pacific Partnership.

However, despite efforts to strengthen US-Indian trade and investment, frictions exist between the US and Indian governments. Most notably, the United States remains frustrated with India’s July 31, 2014 refusal at the World Trade Organization (WTO) to support the adoption of the Trade Facilitation Agreement Protocol of Amendment. India did not support adoption of the Protocol on the grounds that insufficient progress had been made on other issues to which WTO Members previously agreed – notably, the creation of a permanent derogation for developing country agricultural subsidies that underwrite food security programmes.

The Congressional trade leaders requested the investigation under section 332(g) of the Tariff Act of 1930 (19 U.S.C. § 1332(g)), which mandates the ITC to conduct general fact-finding investigations on any matter related to international trade, as initiated by the ITC or as requested by the Senate Finance Committee, the House Ways and Means Committee, or the President (through the United States Trade Representative).

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FREE TRADE AGREEMENTS

Free Trade Agreement Highlights

TPP Chief Negotiators Make Incremental Progress in Hanoi Meetings

From September 1–10, 2014, chief negotiators to the Trans-Pacific Partnership (TPP) met in Hanoi to resolve outstanding differences in the draft legal texts that prescribe rules and disciplines for the contracting Parties. The chief negotiators did not achieve major breakthroughs, as the discussions focused on identifying potential options to be negotiated by higher-level trade officials.

According to a press release issued by the Office of the US Trade Representative (USTR), negotiators made progress on state-owned enterprises (SOEs), intellectual property, investment, rules of origin, transparency, anti-corruption, and labor. In addition, negotiators continued deliberations on market access for goods, services, investment, financial services, and government procurement.

The following outcomes of the Hanoi meetings are noteworthy:

- **US-Japan Market Access.** The United States and Japan continue to disagree regarding market access for automobiles and tariffs and safeguards for such food and agricultural products as beef, dairy, pork, rice, sugar, and wheat. Previously, the two countries intended to disclose bilateral market access terms in October. However, given limited progress on market access issues, whether the United States and Japan will meet this proposed goal is increasingly uncertain.
- **SOEs.** Vietnam reportedly has tabled the most exemptions for its SOEs from potential TPP disciplines. Sources note that negotiators are divided on the threshold after which an SOE will fall under such disciplines. Although popular analysis suggests that Vietnam has tabled many exemptions as a bargaining tactic, another critical factor is that the Vietnamese government is struggling to dismantle longstanding preferential treatment for SOEs, in law and in practice, and to cultivate business practices consistent with a free market regime. The Vietnamese position likely reflects this predicament and thus necessitates an extensive list of exemptions to avoid SOE commitments that it cannot meet.
- **Rules of Origin.** Vietnam reportedly continues to press for a more liberal interpretation of the yarn-forward rule, namely with a more extensive short-supply list. There are no signs that the United States, the rule's biggest proponent, will concede to Vietnam, and recent developments in Vietnam suggest that the textile and apparel industries are preparing for an agreement with a strict yarn-forward rule. Vietnamese government agencies and industry associations are hosting frequent seminars to prepare local industries for this scenario, while Chinese enterprises are investing in textile and apparel production facilities in Vietnam to meet the TPP's rules of origin.

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Despite incremental progress in the negotiations, TPP Parties have acknowledged the need to increase their efforts if they are to present a draft agreement by the Asia-Pacific Economic Cooperation (APEC) Leaders Summit from November 10–11, 2014 in Beijing. Media reports indicate that TPP chief negotiators may meet again in October 2014 in a final effort to resolve lingering differences and arrive at a presentable outcome. In the interim, TPP Parties will continue to hold bilateral discussions, beginning with a meeting between USTR Michael Froman and Vietnamese Deputy Prime Minister Vu Van Ninh in mid-September 2014.

Click [here](#) for the USTR press release.

TISA Update: Next Round of Negotiations to Occur September 21–25

On September 21–25, the European Union will host negotiations for the Trade in Services Agreement (TISA). The primary emphasis of the negotiations, which reportedly will be held in both plenary and parallel sessions, will be to accelerate discussions on regulatory standards and sectoral market access. In addition, negotiators will discuss transparency, localization, and horizontal market access. The following substantive areas also will be addressed: (i) financial services; (ii) movement of short-term services providers; (iii) air, maritime, and road transportation services; (iv) government procurement; (v) environmental services; (vi) healthcare services; (vii) telecommunications; (viii) electronic commerce; (ix) professional services; (x) competitive delivery services; and (xi) distribution services.

Approximately fifty Members are participating in the TISA negotiations, with a level of ambition far beyond what is conceivable in the WTO, both in terms of market access and new disciplines. Collectively, the group annually accounts for USD 30 trillion in services trade, or nearly two-thirds of annual global services trade.

Given the relative stagnation of services negotiations in the WTO's Doha Round, TISA has become the main focus for broad-based and plurilateral services liberalization efforts. The upcoming round of negotiations thus offers a good opportunity to assess progress and to move forward. However, and as reportedly previously, differences exist among TISA Members regarding membership objectives, negotiation timelines, and the substance of any potential agreement. The obstacles posed by those disagreements should not be underestimated. In addition, potentially overlapping bilateral and multilateral negotiations (such as the Transatlantic Trade and Investment Partnership) may derail, deemphasize, or conflict with TISA objectives.

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MULTILATERAL

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Multilateral Highlights

WTO Committee to Discuss Trade Facilitation Agreement on Sept. 29

On Sept. 29, the World Trade Organization's (WTO) Preparatory Committee on Trade Facilitation (PCTF) will meet to discuss ways to advance a multilateral trade facilitation agenda. The meeting will be the first WTO meeting specific to trade facilitation to occur since WTO Members failed to meet the July 31 deadline to adopt the Trade Facilitation Agreement (TFA) Protocol of Amendment.

The PCTF meeting will include: (i) a formal discussion regarding 32 new notifications to the WTO from developing country Members concerning their "Category A" technical commitments to be implemented upon entry into force of the TFA; and (ii) an informal discussion regarding ways to move forward on trade facilitation, enabling Members to clarify their positions and exchange views.

The PCTF meeting is occurring largely at the direction and request of Director-General Roberto Azevêdo, who remains a strong TFA proponent. Director-General Azevêdo also intends to hold parallel consultations regarding the implementation of the TFA and related agreements reached at Bali in December 2013. He reportedly plans to discuss the outcomes of these consultations with all Members at a Trade Negotiations Committee meeting in late September or early October.

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