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Unusual Bipartisanship Makes New Free Trade Agreements More Likely

By Stephan E. Becker and Elizabeth V. Moeller

Major new free trade agreements are on the horizon. For the past several years, the Obama Administration has been negotiating two new major free trade agreements: the Trans-Pacific Partnership (TPP) and the Trans-Atlantic Trade and Partnership Agreement (TTIP). Because of divisions within the Democratic Party regarding trade agreements, previously it was uncertain whether the President could garner the support necessary to obtain Congressional approval. With both Houses of Congress now controlled by the Republican Party—which historically has supported trade agreements—the prospects for ultimate approval have significantly improved. Action on the TPP in particular is possible during 2015.

Trans-Pacific Partnership

Most of the existing U.S. free trade agreements have only two parties—the United States and one foreign country. (Exceptions are the NAFTA, with Canada and Mexico, and the CAFTA, with Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and the Dominican Republic.) There are currently 12 countries negotiating the TPP: the United States, Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore and Vietnam. Of these, the United States already has free trade agreements with all except Japan, Malaysia, New Zealand and Vietnam.

Although there are extensive multilateral obligations to reduce or eliminate trade barriers contained in the World Trade Organization (WTO) agreements, free trade agreements go further. Such agreements require the complete elimination of customs duties (usually phased out over time), and also contain commitments relating to trade in services, government procurement, protection of intellectual property, and a wide range of other subjects. Adding Japan, Malaysia, New Zealand and Vietnam to the list of countries that have made free trade commitments to the United States will create new market opportunities for many industries.

To be eligible to benefit from preferential tariff commitments, exporters and importers must be able to verify that a product complies with the applicable "rule of origin" for that product. Rules of origin ensure that sufficient value is added in a member country so that products of a non-member cannot benefit simply by undergoing minimal processing in a member country. The TPP is expected to contain a "cumulation" provision that will allow content from any of the 12 member countries to be counted toward satisfaction of the rules of origin. This provision will create more flexibility for component sourcing and manufacturing arrangements.

The TPP is also expected to include enhanced obligations in a number of areas, for example with respect to disciplines on government support (e.g., subsidies) to state-owned enterprises, and the elimination of barriers to the provision of services by foreign companies in certain sectors.

Although a number of difficult issues remain to be resolved in the negotiations, significant progress has been made on the text. The prospect of potential receptivity by the U.S. Congress has created new momentum to complete the negotiations, and an effort is being made to reach agreement on the toughest subjects in the very near future.

Trans-Atlantic Trade and Partnership Agreement

TTIP is a proposed free trade agreement between the United States and European Union, on behalf of its 28 member states. Average tariffs on goods between the two trading partners are already low at 3%, and a major portion of bilateral trade is not subject to any duties. However some sectors still have relatively high customs duties, particularly the agricultural sector.

As with the TPP, the TTIP negotiating agenda is ambitious and goes beyond reducing customs duties. The United States and the European Union hope to deepen economic integration by streamlining customs rules and procedures, increasing liberalization of trade in services, expanding participating in government procurement contracts, and coordinating approaches for issues of global concern such as protection of intellectual property. A major goal is to increase regulatory coherence by promoting transparency, participation and accountability in the development of regulations concerning standards for products.

Trade Promotion Authority Legislation

The procedures under which the Administration negotiates and submits trade agreement are complex. Normally, Congress authorizes the negotiations through the enactment of Trade Promotion Authority (TPA) legislation. TPA allows the President to negotiate trade agreements under certain parameters, including requirements to consult with certain Congressional committees during the negotiations, and to incorporate certain goals, priorities and objectives into the trade agreements. If all of the substantive and procedural requirements are met, a trade agreement can be submitted by the President to Congress simultaneously with implementing legislation, and Congress is required to act within strict time deadlines to either approve or disapprove the entire agreement, without the ability to introduce amendments. Absent this procedure, foreign governments would be reluctant to make concessions, knowing that the Congress could override commitments of the U.S. government and reopen the negotiations.

The President's TPA authority actually expired in 2007. Nonetheless, the Administration has carried out the TPP negotiations as though TPA were in place, in the expectation that Congress would at some point reenact TPA with largely the same substantive and procedural requirements.

Last week the House Ways and Means Committee and the Senate Finance Committee both reported out draft TPA legislation, and the full House and Senate are expected to take up the legislation for debate and a votes within the next few weeks.

These are noteworthy developments and the result of bipartisan consensus from leaders in the House and Senate. However, trade agreements remain politically controversial. We expect opponents from both political parties to propose amendments designed to force the Administration to stop the TPP and TTIP negotiations. To overcome a potential filibuster and pass the full Senate, the legislation also will need to garner all Republican votes and at least six votes from Democrats to achieve a 60-vote margin.

Achieving this goal will require Senator Ron Wyden (D-OR), Ranking Member of the Senate Finance Committee, and other Democrats to continue to work closely with the President's trade leadership team, which is intent on advancing TPP and TTIP as legacy issues for President Obama. Given the strong levels of bipartisan engagement among key leaders at this time, the prospects for ultimate approval are relatively strong.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, the authors, or any of the attorneys below.

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