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2017 Key Trade Issues: U.S. International Trade Agreements

In this Issue:

What could the election of Donald Trump and a Republican majority in the U.S. Congress mean for U.S. international trade policy in 2017 and beyond? And what are the potential opportunities and challenges for U.S. importers and exporters? Over the course of the next few weeks, Polsinelli will post a series of articles focusing on the key trade issues that are likely to take center stage in 2017 with the inauguration of Donald Trump as the 45th President of the United States, and the efforts of the 115th Congress.

This article targets the international trade agreements to which the United States is a signatory, such as the Trans Pacific Partnership Agreement (TPP), the North American Free Trade Agreement (NAFTA), and other agreements.

Overview of U.S. Free Trade Agreements

The United States is currently a party to several free trade agreements involving 20 countries including:

- Australia
- Bahrain
- Canada
- Chile
- Colombia
- Costa Rica
- Dominican Republic
- El Salvador
- Guatemala
- Honduras

- Israel
- Jordan
- Korea
- Mexico
- Morocco
- Nicaragua
- Oman
- Panama
- Peru
- Singapore

The oldest free trade agreement is the U.S. – Israel Free Trade Agreement, which has been in existence for over 40 years. Free trade agreements (FTAs) are agreements between two or more countries that are intended to reduce or eliminate tariffs and non-tariff barriers on substantially all trade amongst the parties in order to allow for the free movement of qualifying goods and services in their territories. Goods that are subject to this preferential tariff treatment must satisfy certain FTA-specific rules of origin, which can include tariff shift rules, regional value content requirements, or a combination of the two rules. FTAs also result in significant cost and duty-savings for foreign customers of U.S. products, which make U.S. goods more attractive in foreign markets. In addition, FTAs result in lower costs for U.S. manufacturers that source raw materials, parts and components from FTA partner countries for manufacturing operations performed in the United States. Half of all U.S. exports are currently made to FTA partner country markets.

Presidential Authority with regard to FTAs

Congress has historically granted broad authority to the President to negotiate, enter and even withdraw from FTAs. The Trade Act of 1974[1], as amended, authorizes the President to negotiate trade agreements with foreign countries focusing on tariff and non-tariff barriers, and the resulting agreements are required to be submitted to Congress for approval. The President currently has what is known as "fast track authority" or "Trade Promotion Authority" (TPA) under which Congress agrees to consider trade agreements and vote on their implementing legislation without making any amendments to the agreements. This expedites the FTA implementation process and assures U.S. trading partners that the negotiated agreement will not be second-guessed or modified by U.S. legislators. TPA was used to pass FTAs between the United States and Colombia, Panama and South Korea. TPA is granted only for certain, limited periods of time, and must be reconsidered and reauthorized by Congress.[2]

Each time that Congress has extended TPA, it has also given the President authority to terminate or withdraw from FTAs. That is, after providing formal notice (i.e., six months) to FTA partner countries, the President has the unilateral authority to revoke prior Executive Orders that provided preferential tariff treatment under FTAs and to institute higher tariffs on imported goods. No formal approval from Congress is required before the President decides to take such actions. With respect to the President's authority to implement higher tariffs on goods that were previously afforded preferential tariff treatment under FTAs, Section 125(c) of the Trade Act of 1974, as amended, provides as follows:

> *Whenever the United States, … withdraws, suspends, or modifies any obligation with respect to the trade of any foreign country…, the President is authorized to proclaim increased duties or other import restrictions…. No proclamation shall be made under this subsection*

1 Trade Act of 1974, as amended (Public Law 93–618, as amended; 19 U.S.C. Section 12).

2 The TPA was extended by Congress in the Omnibus Trade Act of 1988, TPA Act of 2002, and Bipartisan Congressional Trade Priorities and Accountability Act of 2016.

increasing any existing duty to a rate more than 50 percent above the rate set forth in rate column numbered 2 of the Tariff Schedules of the United States, as in effect on January 1, 1975, or 20 percent ad valorem above the rate existing on January 1,1975, whichever is higher.

Thus, any increase in tariffs on imported goods could range between 20% to 50% of the tariff rates that were in effect and applicable to the goods on January 1, 1975. However, the existing preferential tariffs established under an FTA could remain in effect for a certain period of time (i.e., 12 months) after the President's decision to terminate U.S. participation in an FTA in order to give U.S. importers and exporters time to adjust their operations and activities.[3]

The Trans Pacific Partnership Agreement

The Trans Pacific Partnership agreement (TPP), which includes the United States and 11 other countries in the Asia Pacific region (i.e., Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and, Vietnam), would be the largest regional free trade and investment agreement ever negotiated. In February 2016, the United States and the various signatory countries signed the agreement and currently have a maximum period of two years in which to implement it into their local laws. If the TPP were to enter into force, import tariffs on more than 18,000 "originating" goods[4] traded between the parties would be eliminated. The Obama Administration characterized the TPP as a means for supporting higher paying jobs in the United States, growing the U.S. economy, and countering China's economic expansion. Even if the TPP were implemented into U.S. law, the agreement itself would enter into force only after at least six of the signatory countries (that represent a minimum of 85% of the GDP of all of the participants) have implemented the agreement into their local laws. Many of the signatory countries have already started the ratification process of the TPP under their laws.

President Obama announced in early August his wish that Congress pass TPP implementing legislation before he leaves office, and the U.S. Trade Representative sent the draft Statement of Administration Action to Congress.[5] However, the TPP was highly criticized by both presidential candidates. President-Elect Trump stated during his campaign that, if elected, he would renegotiate or withdraw from the agreement. On November 21st, President-Elect Trump issued a YouTube video statement in which he stated that soon after the inauguration, he intends to submit formal notification to the TPP signatory countries of the United States' withdrawal from the agreement. Many of the signatory countries have already begun the TPP's ratification process. It is possible that they could enter into their own separate agreement absent the United States.

The North American Free Trade Agreement

The North American Free Trade Agreement (NAFTA) is an FTA that includes the United States, Canada and Mexico. It was signed into force by former President Bill Clinton on

3 However, the President may implement higher tariffs on imported goods in less than one year if there is a need for such action provided that formal notice is provided to Congress and a public hearing is held.

4 Goods would be "originating" and therefore eligible for preferential tariff treatment under the TPP if they are: (a) wholly obtained or produced entirely in the TPP territory; (b) produced entirely from TPP-originating materials; or, (c) in full compliance with product-specific rules of origin. The TPP also provides a de minimis rule that would allow imported products containing non-originating materials to qualify for the TPP—even if they don't otherwise satisfy the agreement's product-specific rules of origin. Originating goods would also be required to be shipped directly from one member country to another without passing through the territory of a non-party in order to qualify for the TPP.

5 The Statement of Administration Action describes the White House's interpretation of the U.S. obligations under the TPP and the proposed executive actions that would be required for its implementation into U.S. law. During this time, the Administration and Congress may begin consultations, as well as hold committee hearings on the TPP. The submission of the draft to Congress initiates the 30-day time period after which a TPP implementing bill and the final Statement of Administration Action may be submitted to Congress for consideration.

January 1, 1994, and eliminated duties on "originating" goods and non-tariff barriers on goods and services traded between the parties. Key NAFTA provisions included rules of origin, services trade, foreign investment, intellectual property rights protection, government procurement, and dispute resolution. Labor and environmental provisions were included in separate side agreements. It should be noted that subsequent FTAs that were negotiated and implemented by the United States were based on the NAFTA model. According to the 2015 Congressional Research Services report on the NAFTA, U.S. trade with Canada and Mexico more than tripled since the agreement's entry into force. For example:

> *In 2011, trilateral trade among NAFTA partners reached the $1 trillion threshold. Since 1993, total U.S. trade with Mexico increased more rapidly than total trade with Canada and trade with non-NAFTA countries. In 2014, Canada was the leading market for U.S. exports, while Mexico ranked second. The two countries accounted for 34% of total U.S. exports in 2014. In imports, Canada and Mexico ranked second and third, respectively, as suppliers of U.S. imports in 2014. The two countries accounted for 27% of U.S. imports.*[6]

The report also stated that the NAFTA helped U.S. manufacturing industries, especially the U.S. automotive industry, become more globally competitive through the creation of new supply chains, especially along the U.S.-Mexico border.[7]

The terms of the NAFTA itself, in Section 2205, allow the parties to unilaterally withdraw from the NAFTA, as follows:

> *A party may withdraw from this Agreement six months after it provides written notice of withdrawal to the other Parties. If a Party withdraws, the Agreement shall remain in force for the remaining Parties.*

As noted above, the Trade Act of 1974, as amended, authorizes the President to unilaterally withdraw from FTAs such as the NAFTA, and to set higher rates of duties on imported goods without the formal approval of Congress. It is anticipated that if the United States were to withdraw from the NAFTA and impose higher tariff rates to goods imported from Canada and Mexico, the costs borne by U.S. manufacturers that source Canadian and Mexican raw materials, parts and components would increase—those costs would likely be passed along to U.S. consumers in the prices of the finished goods. In addition, U.S. exporters would likely find that their products would become less competitive in Canadian and Mexican markets given that customers in those countries would be paying higher duties on U.S. goods.

During his campaign, President-Elect Trump criticized the NAFTA, calling it the "worst trade deal ever signed," and vowed to renegotiate the agreement or withdraw from it[8]—it should be noted that President Obama made the very same promise when he was running for President, but never took steps to renegotiate or withdraw from the NAFTA. Earlier this month, Canadian Prime Minister Justin Trudeau announced that he is willing to renegotiate the NAFTA, and that trade deals such as the NAFTA should be periodically reviewed to ensure that they continue to provide benefits to the parties. Mexico's Foreign Minister, Claudia Ruiz Massieu, announced that the Mexican government would also be willing to discuss the NAFTA and how to modernize it, but ruled out renegotiation of the agreement. It should be noted that the

6 U.S. Congressional Research Services. North American Free Trade Agreement. (R42965; April 16, 2015), by M. Angeles Villarreal and Ian F. Fergusson.

7 *Id.*

8 Some of the issues which have drawn controversy with respect to the NAFTA include country of origin marking and labeling, environmental standards, consumer safety standards, and softwood lumber (which has long been subject to antidumping duties by the United States).

NAFTA has been modified by the parties several times since it went into force in 1994 (e.g., changes in the rules of origin for certain products, modifications made to the dispute resolution processes, liberalized entry rights for certain professional occupations, etc.).

Other U.S. Trade Agreements

As noted above, the U.S. is currently a party to FTAs with twenty countries, and the Trump Administration would have the unilateral authority to terminate or withdraw from these trade agreements under the agreements themselves and the Trade Act of 1974, as amended, upon providing written notice to the various parties. The Trump Administration would also have the authority to raise tariffs on goods imported into the United States from those countries. It is anticipated that such actions would draw opposition from many U.S. companies in view of the facts that they have been relying on the preferential tariff treatment afforded under these agreements for many years, and the potential impact of such actions on their supply chains. It is more likely that the incoming President would first seek to review these agreements and their renegotiation before moving to terminate them.

In addition to the FTAs that are currently in effect, the United States is also negotiating the Trans-Atlantic Trade and Investment Partnership (T-TIP) with the European Union, as well as the Trade in Services Agreement (TiSA) with twenty countries. To date, President-Elect Trump has not commented on the T-TIP, which is intended to expand trade and investment between the parties by, among other things,: (a) eliminating tariffs on agricultural, industrial and consumer products between the United States and the EU; (b) providing reciprocal access to the EU market for U.S. textile and apparel products; and, (c) eliminating or reducing non-tariff barriers that hinder U.S. exports, such as certain sanitary and phytosanitary restrictions, tariff-rate quotas, and permit and licensing barriers; etc. The Trade in Services Agreement (TiSA), currently in negotiations, is intended to promote and reduce barriers to international trade in services amongst the U.S. and 20 trading partners, which include Australia, Canada, Chile, Chinese Taipei, Colombia, Costa Rica, the EU, Hong Kong, China, Iceland, Israel, Japan, Korea, Mexico, New Zealand, Norway, Pakistan, Panama, Peru, Switzerland and Turkey. This group of countries represents nearly 2/3 of global trade in services. Since the T-TIP and TiSA are still in their early stages, it is possible that President-Elect Trump will agree to allow the negotiations to continue. If the negotiations come to completion, if the new President does not oppose the agreements and if they were to come before Congress, it is anticipated that the Republican dominated Congress would approve them.

Stay tuned for our next article. If you have any questions pertaining to the current U.S. FTAs or other international trade issues, please feel free to contact a member of Polsinelli's International Attorneys, including Melissa Proctor at mproctor@polsinelli.com.

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For More Information

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