Obama Administration Seeks Input on Newly-Launched International Services Agreement Negotiations

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On January 15, 2013, the Office of the United States Trade Representative (USTR) notified Congress of the Obama Administration's intent to enter into negotiations on an International Services Agreement (ISA) with forty-six other members of the World Trade Organization (WTO).[1] The ISA negotiations are separate from (although a result of) the stalled Doha Round negotiations of all WTO members. This marks a major step toward the liberalization of, and the establishment of, comprehensive rules for international trade in services, which could lead to job creation in all sectors of the U.S. economy. An ISA would address restrictions that ISA member governments impose on (mostly foreign) participation in their services sectors, as well as establish rules for issuing regulations and settling disputes, and procedures for other countries to join the ISA in the future. The four most commercially-significant issues that an ISA would address are: (1) market access and national treatment; (2) cross-border data flows; (3) state-owned enterprises; and (4) future services. These issues are discussed in more detail below.

On January 24, 2013, USTR published a request for public comments regarding its negotiating objectives for the ISA. With the first round of formal negotiations possibly occurring as early as March 2013 in Geneva, now is the time for U.S. companies, particularly U.S. service providers, doing business in or competing with companies from the countries involved in the ISA negotiations to submit comments to USTR on their interests and priorities regarding international trade in services. The public comments are due by **February 26, 2013**, and USTR will hold a public hearing in Washington, DC on **March 12, 2013**, at which public commenters may testify.

Key Issues:

Market Access and National Treatment

A fundamental issue the ISA negotiations will address is the extent to which governments may impose restrictions in their services sectors. Such "market access" policies include: limitations on the number of services companies in a market, requirements to form joint ventures with a local partner, or foreign equity caps. "National treatment" refers to an obligation of governments to not discriminate against firms on the basis of their nationality. A final ISA would include each country's "schedule" of commitments for various service sectors.

Cross-Border Data Flows

Although a contentious issue for some of the negotiating countries, ensuring that data can cross borders freely is critical not just for technology companies but for almost all services companies, which increasingly provide cross-border services digitally and electronically.

State-Owned Enterprises

Services companies may be put at a competitive disadvantage when state-owned enterprises (SOEs) receive financial support, regulatory preferences (including participating in developing technical standards), and preferential distribution channels from their governments. U.S. companies have a strong interest in seeing ISA rules that ensure that SOEs operate solely on commercial terms so that they can compete on a level playing field.

Future Services

It must be determined how an ISA would address services that do not currently exist but that, as a result of technological or other innovations, could eventually exist and might not fit neatly into today's established categories. For examples, should such new services be presumed to be open to participation by service companies in all ISA countries, or should each ISA country have to open its market to those services?

USTR's Request for Comments

USTR's request for comments states that it envisions the ISA as an agreement covering all services that (1) "will place a high priority on enabling U.S. service suppliers to compete on the basis of quality and competence rather than nationality," and (2) will be "flexible enough to address new issues arising in the global marketplace and changes in the way services are traded." USTR has requested comments on all relevant matters, including:

a. economic costs and benefits to U.S. service suppliers and consumers of eliminating barriers to services traded either on a cross-border basis or through a foreign commercial presence;

b. existing barriers to trade in services that should be addressed;

c. areas where existing international rules governing services trade, such as those found in the World Trade Organization's (WTO) General Agreement on Trade in Services and U.S. free trade agreements, could be strengthened or enhanced; and

d. relevant issues related to the supply of services through various modes of supply and technologies.

How Could This Affect My Company?

Whether your company is focused on the U.S. market or expanding its operations abroad, submitting comments on, and staying abreast of, the upcoming ISA negotiations could be critical to your business in several ways – some beneficial and some possibly adverse.

The ISA negotiations provide a great opportunity for U.S. services suppliers in all sectors – audiovisual, entertainment, media, telecommunications, construction, distribution, energy, transportation, tourism, financial and other professional services sectors – to improve their business opportunities in each ISA country. These benefits could include new and improved market access and national treatment in the provision of services, as well as increased regulatory transparency in key and emerging markets. Disciplines on state-owned service companies could provide U.S. companies a level playing field on which to compete in key markets. If structured properly, an ISA could also attract countries with large services markets that are not currently committed to participating in the negotiations, such as Brazil, China, India, Russia and South Africa.

On the other hand, some of the new protections afforded by an ISA will further open the U.S. services market and thus result in increased competition for sensitive domestic markets.

Lastly, the current debate over U.S. immigration reform could be affected by the ISA negotiations. Specifically, the Obama Administration could use the negotiations as an opportunity to respond to potential demands from the negotiating countries to grant more short-term H-1B visas to highly skilled workers seeking to enter the United States to perform specific service. Up until now, USTR has reportedly been reluctant to offer new visa concessions in other free trade agreement negotiations due to concerns that it could create problems with Congressional approval. Under this scenario, USTR would not likely offer up new concessions on visas beyond what Congress has already approved in an immigration reform bill, but instead would offer some of the additional visas to countries involved in the ISA negotiations.

About Kelley Drye's International Trade Group

As one of the largest and most highly regarded international trade practices in the country, Kelley Drye assists clients with a full range of importing and exporting activities. We are experts in protecting domestic manufacturers against unfairly traded goods and helping companies overcome barriers to entry in foreign markets. We have worked with every significant U.S. trade and customs statute, including antidumping, countervailing duty, export control and economic sanctions laws, the Foreign Corrupt Practices Act, the Customs Modernization Act, section 201 (escape clause), section 301 (violations of U.S. trade rights), and section 337 (unfair trade practices).

Please contact Paul Rosenthal or John Herrmann if you would like to submit comments on international trade in services, or if you have any questions or concerns about the how the ISA negotiations may be advantageous or adverse to your business. We would be happy to provide you with a customized analysis and monitor developments affecting your interests.

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[1]The following forty-six countries, together with the United States represent nearly two-thirds of total global trade in services, which have expressed their intention to participate in negotiations to establish the ISA: Australia, Canada, Chile, Chinese Tapei, Colombia, Costa Rica, Hong Kong, Iceland, Israel, Japan, Korea, Mexico, New Zealand, Norway, Pakistan, Panama, Peru, Switzerland, Turkey and the European Union on behalf of its 27 member states (Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom).