COUNCIL HIGHLIGHTS

NATIONAL FOREIGN TRADE COUNCIL

"SERVING AMERICA'S INTERNATIONAL BUSINESSES SINCE 1914"

Council Highlights is a bi-monthly summary of news and events of the National Foreign Trade Council exclusively for its members.

CELEBRATING A NEW CENTURY 1914-2014 NFTC NATIONAL FOREIGN TRADE COUNCIL

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View from the NFTC Chair

Leadership on Trade

By Alan Wm. Wolff, NFTC Chairman

I last wrote to you in these pages about the quality of leadership. Today, I would have us focus on leaders in terms of the priority that they give to trade agreements. What gave rise to this thought was the recent headline in *Inside U.S. Trade*, "Reid Makes No Mention of Trade Bills In Outlining Senate Lame Duck Agenda." Well, no surprise there. Actually the same could fairly be said for Boehner, Pelosi and McConnell.

As for world leaders, the deep interest in liberalizing world trade has had its champions – particularly in the last century. Churchill cut his political teeth championing tariff cuts. Wilson broke a 112-year precedent to address Congress in person for that cause. In the dawn of modern times, FDR championed trade liberalizing agreements in the deepest part of the Depression. His legacy was the "President's Trade Agreements Program," which still yields annual reports from USTR to Congress. A key building block that America and Britain sought to put into place at the conclusion of the second World War was an organization (the International Trade Organization or ITO) committed to opening markets to trade (achieved formally 50 years later in the creation of the World Trade Organization or WTO). Another game changing set of milestones were Deng Xiaoping's opening of China in the 1970s, and Jiang Zemin's bringing China into the WTO in 2001 (a mixed record here – thousands of laws and regulations were changed to comport with the world's trade rules, but China did not abandon the use of highly interventionist policies).

Looking around the world today for the priority given by world leaders to trade liberalization, the picture is not yet as positive. An unlikely place to look, one would think, would be Japan. But the third arrow of Abenomics promised a strong dose of not only domestic reform but increased openness to international trade. The sheen on that promise has somewhat dulled.

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A Word From the President

By Bill Reinsch, NFTC President

I generally do not write in these pages about China, even though I have spent a good part of my professional and academic life studying it. The reason, in a nutshell, is that I serve on the U.S.-China Economic and Security Review Commission, and I want to avoid confusion about which hat I am hearing when I talk about China. Recently, however, I participated in a panel on China at the National Association for Business Economics (NABE) annual meeting, and I thought I'd share some of my comments at that event with you. I'm reasonably confident none of you were there to hear me, although NFTC companies were well-represented by their economists.

The politics of trade with China (and other issues with China) are changing, in my view in response to changes in Chinese policy, though the Chinese would probably argue the reverse – that it is all our fault. Initial support for better trade relations, which meant broad-based U.S. business support for WTO accession and PNTR, was based on the belief that Jiang Zemin and Zhu Rongzhi wanted to use accession as leverage for internal economic reforms. Now, nearly 15 years later, we see first Hu Jintao and now Xi Jinping failing to pursue reform aggressively and instead continuing the heavy role of government in the economy, particularly with respect to state-owned enterprises (SOEs). Add to that maritime issues in the South and East China Seas, Hong Kong democracy issues, suppression of the Uighers, among other issues, and the result is a growing amount of mutual suspicion and doubt that this can be a positive relationship, at least in the short term.

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A Word From the President

By Bill Reinsch, NFTC President

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While many American businesses operating in China are profitable; in my experience, most of them are also unhappy. The main reasons are Chinese administration of its anti-monopoly law, which is seen as discriminating against foreign companies, particularly in sectors where China wants to be globally competitive, and inadequate intellectual property protection, which is an old issue much discussed for years. Experts tell me that in some respects the latter situation is getting better, but the pace is glacial.

Lately, companies have become more outspoken about these problems through their associations. In a September 2014 report, the U.S. China Business Council (USCBC) found that “foreign companies appear to have faced increased scrutiny” in recent months. According to USCBC’s 2014 member survey, 86 percent of companies are concerned about China’s Antimonopoly Law (AML).

An August 2014 survey by AmCham China showed 60 percent of companies surveyed feel less welcome, up from 41 percent in 2013. In response to a new question, 49 percent of responders said they believe that foreign firms are singled out for attack by AML enforcement agencies.

In a report released September 8, the U.S. Chamber said that China’s use of its AML “arguably violates commitments that China undertook when it acceded to the World Trade Organization.” China has used the AML “to pursue objectives that have no place in a free, open and fair market-based economy.”

At the same time, Congress is also unhappy, although that is hardly a new development. They certainly share the business community’s concerns, but have also focused on the issue of currency. At different times in the past both the House and Senate have passed legislation on this subject, but they have yet to agree on a bill to send to the President. Nothing is likely to happen this year – there will be only a few weeks of session after the election, but the issue is not going away, even as the RMB has once again begun to appreciate.

Unfortunately, as mutual suspicion grows, it spills over into investment issues. China continues to restrict inward investment in “national champion” sectors, and its actions under the anti-monopoly law are simply scaring people away. According to MOFCOM data, on an annual basis, FDI inflows into China show a slight decline after peaking in 2011 at $124 billion ($121 billion in 2012 and $117 billion in 2013). In 2012, FDI declined by 2.35 percent from the previous year, and in 2013, the year-on-year decline was 2.88 percent. More recently, the decline has accelerated. In the first eight months of 2014, FDI from Japan fell 43.3 percent from a year earlier, while FDI from the United States and EU also declined between 17 percent and 18 percent each. In July alone, FDI inflows declined 17 percent year-on-year, after growing 0.2 percent in June 2014. Monthly data can be volatile, so it is premature to declare a trend at this point, but it does look like, at a minimum, that the rate of increase of FDI into China from the United States will continue to slow.

This trend was predictable. Increasing policy suspicion, AML enforcement and the uncertainties it creates, the overall economic slowdown, and continuing failure to deal with underlying problems that could lead to a hard landing have all played a role.

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A Word From the President

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The other side of the coin – Chinese FDI into the United States – is growing and will continue to grow. Rhodium Group estimates show total Chinese FDI of $39.8 billion between 2000 and the second quarter of 2014. Annually the number is rising rapidly. In 2011, it was $4.8 billion; 2012, $7.3 billion; 2013, $14.0 billion; and in the first half of 2014, $3.6 billion, a slight fall off.

It is too soon to say whether inward investment will level off, but I doubt it. This in turn raises the danger of a Congressionally-led paranoia wave like we had with Japan in the late 1980s. That wave dissipated because it turned out to be less than expected; the Japanese in many cases appeared to be pursuing a policy of "buy high; sell low;" and their own economy entered into a sustained slowdown. I suspect none of those conditions will obtain with respect to China.

So, currently we have the Shuangwei acquisition of Smithfield leading to a bill by Sen. Stabenow that would essentially redefine national security for CFIUS purposes as including food-related acquisitions (remember: the army marches on its stomach). We also have a bill from Rep. DeLauro that would add a net economic benefit test to the CFIUS analysis and would expand the scope of the process to cover greenfield investments as well as acquisitions.

These are not likely to pass, but they are likely to produce a debate that will doubtless increase uncertainty in the investing community. If there is a bright spot on the horizon it is the ongoing negotiations with China on a Bilateral Investment Treaty (BIT). These have been going on for years, but last year the Chinese made two important commitments – to negotiate on pre- as well as post-establishment and to negotiate from a negative, rather than positive, list. Both of those are major goals for the United States. While the negotiations seem to be proceeding in good faith, and while the Chinese continue to mention the BIT as an important priority for them, it remains to be seen whether the talks can reach the finish line. If they do, it will be an important step forward, both for the overall bilateral relationship and also for reducing paranoia levels on both sides of the Pacific.

"A Word From the President" is written by NFTC President Bill Reinsch. If you have questions or comments, please forward them to breinsch@nftc.org.

Trade History

October 3, 1994: South African President Nelson Mandela speaks at the NFTC World Trade Dinner at the Waldorf-Astoria in New York during his first-ever tour of the United States. His appearance and speech celebrated the end of apartheid and reestablishment of full commercial relations with the United States, a position advocated for years by NFTC and U.S.-South Africa Business Council it founded and chaired.

View from the NFTC Chair— *Leadership on Trade*

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While Japan has led on rules negotiations in the Trans-Pacific Partnership, it has also backpedaled on the politically hardest issues (not even saying to America, "well if you can do it, we can too"). Xi Jinping spoke to an international economic conference in Xiamen just before assuming his current job – providing reason to hope for China to continue on Deng's open path, but China's actions have been disappointing to date – putting a stick into the spokes of the expansion of the WTO's Information Technology Agreement (ITA). Narendra Modi, for his part, was heralded as bringing something new and positive for economic reform in India, but his first act in the WTO was to scuttle the Trade Facilitation Agreement's coming into effect. The irony with respect to the positions taken by each of these Asian leaders is that in each case their economies would be primary beneficiaries of the international agreements that they have dug in their heels to slow.

And where is Europe? Brussels is the center of the world's largest trading bloc, but it has been less than vigorous in building a model for a 21st century architecture for world trade through the Transatlantic Trade and Investment Partnership. Admittedly, this has of late been a time of change in the European Commission, but we have yet to hear a major voice from Europe raised to press for trade liberalization. None of the leaders of the member states have been an avid champion for this cause – at least not that visibly. Cameron, Merkel, Hollande? Not apparently a key priority. European nations invented truly global trade over the prior centuries but they have now gone close to silent.

Well, that brings us to the United States. There is reason to cheer the efforts of Messrs. Froman and Punke, and a number of the folks that they lead. President Obama is expected to press for conclusion of an ambitious TPP at the APEC Summit in November. This is a time for building a legacy for the Obama Administration for the history books and trade can be an important part of that record.

There are a lot of excuses – none of them good enough – for a reluctance to lead on trade in capitals where one could have expected better. Certainly there are a large number of vital geopolitical concerns today that would demand much of the attention of any national leader. But their predecessors faced daunting challenges and had the breadth of interest and talent to press for and achieve trade liberalization. There is still time to do so.

Ambassador Alan Wm. Wolff is a Senior Counsel of the International Trade Practice at McKenna Long & Aldridge LLP and is the Chairman of the NFTC Board of Directors.

The New Bipolarism

By Bill Reinsch, NFTC President

During the Cold War, we all got used to the idea of a bipolar world – two great powers competing for influence in the rest of the world. When the Soviet Union imploded nearly 25 years ago, it became fashionable to argue that bipolarism was dead and that we were moving into a unipolar world with the United States as the paramount power. Then, looking at the rise of China, people began to speculate about a G-2. More recently, we have begun to understand how widely both those ideas miss the mark, particularly in political terms, as countries in varied parts of the world simply refuse to follow the U.S. preferred order of things that maintains our status as the paramount power. We are learning once again through painful experience that just because we're the most powerful country on earth, we can't always get our way – in Afghanistan, in the Middle East and North Africa, in Asia, and even at the WTO.

Of course, we've learned that lesson before – Vietnam comes to mind – but it apparently bears repeating as we continue to make some of the same mistakes as well as create new ones.

We will get over those bumps in the road, as we have in the past, but another divide looms that may end up being the real return of bipolarism that we should worry about. That is the divide between countries that subscribe to a market-oriented, rule of law based economic system and those who do not.

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Investment in Ireland: A Success Story

On September 16, the NFTC gathered business leaders and government officials at an event to discuss the factors that have contributed to Ireland's growing recovery. At the event, attended by Irish Ambassador to the United States Anne Anderson, participants welcomed Ireland's continuing commitment to a competitive tax policy that supports business. However, concern was expressed that Ireland's favorable business environment risks being undermined by erosions of intellectual property (IP) protections, such as the Irish government's plain packaging proposal.

Irish Ambassador Anne Anderson addressing NFTC members on Innovation and Investment in Ireland

Leading off the event, Ambassador Anne Anderson noted that the pillars supporting Ireland's exceptional foreign direct investment performance were the "Four T's": 1) Talent, 2) Tax, 3) Track Record and 4) Technology. In defense of Ireland's corporate tax regime, the Ambassador commented, "We play fair, but we play to win … our 12.5 percent corporate tax rate is not in doubt."

The Ambassador noted Ireland would carefully watch the ongoing work of the OECD on taxation, but commented that tax policy was Ireland's "sovereign right."

Panelist Chris Padilla of IBM noted that while tax was a key factor in making investment decisions, IBM invested in Ireland because "it is across the board a good place to do business." Padilla also raised concern with the OECD's BEPS project as "a way of getting countries to raise taxes."

NFTC President Bill Reinsch moderated a discussion by a distinguished panel of business, academic and government representatives, including Chris Padilla of IBM, Jeff Schott of the Peterson Institute for International Economics, Christine Bliss of the Office of the U.S. Trade Representative (USTR) and Pat Howlin of the Industrial Development Authority (IDA), Ireland's inward investment agency.

Pat Howlin of IDA commented that when considering investment decisions, multinational businesses seek "stability, certainty and confidence in the medium to long-term future." Howlin highlighted the importance of balanced regulation: "Regulation is an important part of our efforts to promote business in Ireland, and it should not shackle business development." When challenged on the plain packaging proposal, Howlin said that this was not his area of expertise but that he was aware of the government's proposal.

Concerns were raised about Ireland's protection of IP rights. NFTC President Bill Reinsch noted concerns raised by his members about a fifth "T" – trademarks – and Ireland's proposed move regarding plain packaging of tobacco products: "The two issues that matter most are tax policy and intellectual property protection. IP protection is critical for attracting investment. It is the crown jewel of the American economy and key to our global competitiveness … As well as positive stories, Ireland also faces challenges … for example, Ireland's proposal on plain packaging for tobacco products, which sends a negative signal to other industries contemplating investments."

The panel also discussed the Transatlantic Trade and Investment Partnership (TTIP), a key focus of U.S. and EU economic policymakers. Christine Bliss of USTR noted that U.S. objectives in TTIP can complement Irish policies and highlighted Ireland's leadership role in the negotiations. Jeff Schott of the Peterson Institute commented that while the TTIP agreement may create significant opportunities for U.S. and EU businesses, companies should not think it will enter into force anytime soon. Schott stated, "Businesses should integrate TTIP into their plans, but evaluate the agreement as a medium-term prospect at best."

NFTC Hosts, Participates in Green Goods Forums in DC and NY as EGA negotiations Progress in Geneva

By Jake Colvin, Vice President, Global Trade Issues, jcolvin@nftc.org

As one of the cohosts of the Coalition for Green Trade, NFTC helped convene a September 17 event featuring USTR Michael Froman, Senate Finance Committee Chairman Ron Wyden (D-OR), House Ways & Means Chairman Dave Camp (R-MI) and private sector speakers who provided remarks about negotiations towards an Environmental Goods Agreement (EGA).

NFTC President Bill Reinsch; Timothy J. Regan, Senior Vice President, Worldwide Government Affairs, Corning, Inc.; and Joe McSwiney, President, Cascade Designs, joined the government representatives in highlighting the importance of an EGA to American businesses and users of environmental technologies.

Reinsch made the point that EGA is a win-win-win – good for the U.S. economy, good for the multilateral trading system and good for the climate.

A week later, as the second round of EGA negotiations were getting underway in Geneva, NFTC Vice President Jake Colvin spoke at an event hosted by the International Centre for Trade and Sustainable Development and the Guarini Center on Environment, Energy and Land Use Law at NYU School of Law on “Ensuring a positive contribution of trade policy to climate action towards COP 21.”

Colvin highlighted business interest in a deal on green goods and flagged several challenges as negotiations progress – ensuring that a list is implementable from a customs perspective and working to expand membership in the EGA. Other speakers included Assistant USTR Jennifer Prescott, James Bacchus (Chair, Global Practice at Greenberg Traurig), Michael Liebreich (Founder and Chairman of the Advisory Board, Bloomberg New Energy Finance), and Ann Condon (Director, Resource & Environmental Strategies, GE).

The next round of EGA negotiations will take place December 1-5 in Geneva. For more information contact Jake Colvin at jcolvin@nftc.org.

NFTC Statement on U.S.-Brazil Cotton Dispute Resolution

By Chuck Dittrich, Vice President, Regional Trade Initiatives, cdittrich@nftc.org

On October 1, the NFTC issued the following statement from NFTC Vice President for Regional Trade Initiatives Chuck Dittrich regarding the announcement that the United States and Brazil have settled their longstanding dispute over U.S. cotton subsidies.

“The NFTC welcomes today’s announcement that after many years the United States and Brazil have come to an agreement to resolve the longstanding dispute over U.S. cotton subsidies.

“The NFTC and its members support WTO compliance, and we are encouraged to see that the U.S.-Brazil agreement contains adjustments to the U.S. cotton program to make it more WTO compliant in the long term, rather than just a short-term fix.

“While this issue has been resolved, the NFTC urges the Administration and Congress to work together to ensure all U.S. agricultural polices are in line with the rules-based global trading system, which the United States supports through the WTO.”

Legislating Sanctions on Russia: The Wrong Approach

*Richard Sawaya, Vice President, USA*Engage, rsawaya@nftc.org*

Since the conflict in Ukraine began this year, it is clear that:

- Western and Russian decision-makers operate from different versions of history. Geography matters.
- The West is not willing to engage in military conflict with Russia over the disposition of Ukraine.
- Economic sanctions, at best a tactic, have been therefore substituted for a strategy to negotiate a new deal regarding the relationship of Russia and the West to Russia's near neighbors.

After the fall of the Soviet Union, EU/NATO expansion was pursued by the West successfully as a means to democratize and integrate the newly independent states of the former Soviet Union into the global economy. Given Russia's history and geography, this could only be seen by its decision-makers as a threat to national security interests in the "near abroad." In the same period of time, Russia, as a substantial participant in global finance and commodity flows, also became a major actor in the global economy, and a member of the WTO.

As the conflict in Ukraine has reached its present point, it is clear that the West is not willing to risk military conflict with Russia over Ukraine. Or, for that matter, Georgia or Moldova. Because of Russia's place in the global economy, the power of economic/financial sanctions to alter Moscow's decision-making is instead presumed. Hence the U.S./EU sanctions that have targeted Russia's energy, defense and financial sectors. To date, it is hard to conclude that any such alteration in Russian thinking has occurred. In fact, the sanctions marginalize the players in the Russian economy that support economic integration with the West.

Whatever the merits of U.S. and EU sanctions, the Russia-Ukraine case would argue for Congress to support the Administration's conduct of policy.

The day before adjournment, the Senate Foreign Relations Committee (SFRC) passed S. 2828, the *Ukraine Freedom Support Act* by a vote of 18-0. As reported, the only mandatory part of the bill would extend, "codify," and set a termination threshold for the U.S. sanctions targeting Russia that would be severely counterproductive and grossly penalize U.S. companies, particularly in the energy sector. It would work against any diplomatic solution.

Chairman Menendez and Ranking Member Corker attempted to have the Senate pass the bill by unanimous consent that evening, without success.

Based on a number of meetings with Senate staff on both sides of the aisle, it appears that:

- S. 2828 could reach the Senate floor during the lame duck session.
- Given the general level of senatorial umbrage over Russia's conduct in Ukraine and elsewhere, passage would be very likely.
- State and Treasury Department officials have stated the Administration opposes S. 2828. It is unclear how strongly they oppose it.

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Legislating Sanctions on Russia: The Wrong Approach

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- Beyond SFRC member offices, Senate offices are largely unaware of the sanctions ramifications of S. 2828.
- While the Senate Banking Committee has jurisdiction over sanctions, SFRC staff did not consult with their Banking counterparts.
- When questioned about the inflexibility of codifying and extending energy sector sanctions on Russia in the event the EU were to reverse its sanctions, SFRC staff point to the mandatory global sanctions in S. 2828 barring any entity from participating in future energy projects in Russia.
- The provisions of S. 2828 are in fact hortatory with respect to provision of arms to Ukraine, NATO activities, etc. The only mandatory provisions are the sanctions provisions, and the very high bar set for their termination guarantees their permanence.
- If advocacy to drop the sanctions provisions or change them from mandatory to permissive were successful with key senators not on the SFRC, the bill's proponents might modify the bill in the interests of floor passage.

The NFTC and other major business associations will continue to make the case against the legislative imposition of mandatory, draconian sanctions on Russia. As the Administration has repeatedly stated, the executive sanctions are targeted, scalable and reversible. Making them permanent by legislation would transform them into further cause for blowback in Russia against major U.S. commercial interests, both within and outside of the targeted defense, finance, and energy sectors.

CFIUS' Mandate Should Not Be Expanded

J. Dan O'Flaherty, Vice President, doflaherty@nftc.org

On September 14, Rep. Rosa DeLauro introduced H.R. 5581, which would require CFIUS to conduct a "net benefit" review of covered transactions. In her introductory statement Rep. DeLauro said that, while she appreciates the importance of foreign direct investment (FDI), she regards this measure as necessary to "ensuring that American workers are not sacrificed for foreign profits." In pursuit of this objective, her bill would expand CFIUS' purview beyond the current national security test to include, among other things, "the effect [of the prospective investment] on the level of economic activity in the United States."

H.R. 5581 is a singularly bad idea. It is an expansive and restrictive effort to define the national interest in terms of the economy, the environment, public health and procedural probity and transparency. Its concept of the nation's net benefit encompasses a sweeping array of criteria including such things as "the level and quality of employment" and "the effect of the proposed transaction on productivity, industrial efficiency, technological development, technology transfers and product innovation in the United States." Many of these tests would require subjective judgments which are easily politicized. Certainly H.R. 5581 gives no guidance on the metrics to be applied.

Obviously there is no chance of H.R. 5581 being acted on by this, or perhaps any, Congress, but it is a reflection of the public debate about the value of FDI. In particular, it reflects longstanding unease in many quarters about mergers and acquisitions of U.S. companies by foreign companies that may be directed or controlled by their governments, including sovereign wealth funds, and therefore presumably have a political agenda. There is also concern about asset stripping, worker layoffs and union busting by new foreign corporate masters. The response of some, such as Rep. DeLauro, is to mandate screening of proposed investments across a broad range of criteria assuming that the process would not deter vitally needed FDI.

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CFIUS' Mandate Should Not Be Expanded

J. Dan O'Flaherty, Vice President, doflaherty@nftc.org

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Now other OECD countries, notably, Canada, Australia and New Zealand screen FDI for net benefit. So why shouldn't the United States? Here the debate in Canada about investment screening under the "Investment Canada Act" is instructive. Three issues in particular stand out: (1) the need for a screening regime to conform to international trade law norms, such as MFN and national treatment; (2) a lack of predictability about application of net benefit test which can discourage FDI; and (3) a lack of transparency in the process necessitated by the need for confidentiality of business information which nonetheless leads to concerns about how fair and equitable the process is. And one must add to these concerns the inherently subjective nature of assessing political risk.

Of course, the context of this debate is the importance of FDI for U.S. economic growth, something which state governors understand as they travel the world courting job-creating direct investments in their states. Recalling that we all learned in "Econ 101" that economic growth consists of C+I+G+X where the "I" is a crucial variable, great care should be taken to do no harm in that sector, especially in an economy in which consumption is not driving a strong recovery. In 2011, for example, foreign firms accounted for nearly 10 percent of U.S. private investment and, crucially, 16 percent of private research and development spending. Compensation at U.S. affiliates has been consistently higher than the U.S. average for both manufacturing and non-manufacturing jobs. Indeed recent trends for "insourcing" or returning manufacturing jobs to the U.S. should provide confidence that factors attracting domestic and foreign firms to invest here reflect strength not weakness.

Legislating Update on Alien Tort Statute Litigation

J. Dan O'Flaherty, Vice President, doflaherty@nftc.org

On September 5, the Federal District Court for the Northern District of California dismissed *Doe v. Cisco* Systems, a civil suit brought under the Alien Tort Statute (ATS). The suit alleged that Cisco had aided and abetted violations of the human rights of members of Falun Gong by creating a customized online surveillance system, "Golden Shield," which enabled the plaintiffs to be tracked, detained and tortured by Chinese authorities. The plaintiffs argued that the considerable involvement of Cisco's headquarters in San Jose, California, created a substantial nexus to the United States, therefore, permitting the suit to be brought under the ATS even though the alleged human rights violations occurred in China.

The court dismissed the case under the Supreme Court's 2013 ruling in *Kiobel v. Royal Dutch Petroleum*, which held that the ATS does not provide jurisdiction for foreign plaintiffs seeking redress in U.S. courts for acts committed outside the United States. The Court created a presumption against extraterritoriality, but also noted that that presumption could be overcome where "the claims touch and concern the territory of the United States with sufficient force to displace the presumption."

In *Doe v. Cisco*, the District Court did not find a "sufficient showing of the nexus between acts committed by Defendants in the United States and the alleged violations that occurred in China." However, the District Court expects this to be the basis for an appeal in the Ninth Circuit: "After *Kiobel* it is not clear what circumstances will 'touch and concern the territory of the Unite States' in such a way that is sufficient to overcome the presumption against extraterritoriality, as the Supreme Court did not outline a specific test to apply." With respect to aiding and abetting liability the District Court held that it "should refrain from deciding this issue and instead anticipate that the Ninth Circuit will resolve the issue."

The decision in *Doe v. Cisco* cites conflicting District Court rulings interpreting *Kiobel* on both the issue of what circumstances "touch and concern the territory of the United States" and whether aiding and abetting is justiciable under the ATS. These issues will be the battleground of prospective ATS litigation, and the NFTC will continue to monitor this litigation closely and ensure that NFTC members are kept fully informed.

How Did We Get Here??

By Catherine Schultz, Vice President for Tax Policy, cschultz@nftc.org

The OECD released four instruments and three reports to the G-20 on the first seven action items of the Base-Erosion and Profit Shifting (BEPS) project on September 16. On September 22, the U.S. Treasury Department issued Notice 2014-52, which seeks to reduce the economic benefits companies gain from inverting and to make inversions more difficult to accomplish. What do these two very political and very public releases have in common? The goal – to stop multinational corporations from minimizing their level of taxation. Although all of the key players in the OECD and Treasury have said that what corporations are currently doing to minimize corporate taxes is legal under the U.S. tax code, they have said that corporations are “immoral” and “unpatriotic.” An enormous international effort is underway to do what the U.S. Congress and the Administration could accomplish with less global input – reform the U.S. tax code.

When the U.S. tax code was last reformed in 1986, the U.S. tax base was more reliant on manufacturing. Everyone did not have cell phones, personal computers and use of the Internet was in its infancy. The 1986 *Tax Reform Act* was developed over two years, with many failing votes and cancelled meetings and deep political differences on what should be accomplished in reforming the tax code. The key players (President Reagan, Treasury Secretary Baker, House Ways and Means Chairman Rostenkowski, Senate Finance Chair Bob Packwood) never gave up, and now we have this utopic view of what tax reform could be – but it was very ugly sausage making at the time.

The world has changed. We now live in a global, digital and digitized economy where borders mean less than they did when we were in a manufacturing-based society. Goods move more freely around the world, and 95 percent of the world’s consumers live outside the United States. More people around the world have cell phones than ever before. Computers are ubiquitous.

The House Ways and Means Committee and Senate Finance Committee spent the past five years holding hearings and drafting tax reform proposals. House Ways and Means Committee Chairman Dave Camp released a very detailed tax reform package early in 2014. The package shows some of the trade-offs that might be necessary for a tax reform package to move forward. The Camp proposal is just one view of how the tax code could be reformed. Moving the United States from a worldwide tax system to a more globally acceptable territorial-style system , and significantly lowering the top corporate tax rate would not only make U.S.-based multinationals more competitive, it would also make the United States more attractive to foreign investors. Reforming the U.S. tax code would encourage companies to keep their corporate headquarters in the United States and encourage others to move here as well.

The BEPS project involves the G-20 plus many developing countries, 44 countries in all are involved. A reformed U.S. tax code would not change some of the base erosion concerns, but it would alleviate many of the perceived problems countries are now spending millions of dollars trying to resolve. The focus and effort should be on reforming the broken U.S. tax code. Will it be easy? No. Neither will all of the combined efforts of the OECD, the EU and Treasury. Reform the U.S. tax code. That is a goal the OECD, Treasury, Congress and the business community could all support.

Understanding the Expatriate Perspective: Feedback to Employers and Vendors

By: Allen Koski, Vice President, Cigna Global Health Benefits®
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The following article is based on their presentation at the 2014 ISCEBS Symposium

All too often surveys on the topic of global mobility capture the employer rather than the expatriate's perspective. In late 2013, Cigna Global Health Benefits and the NFTC collaborated – for the second time since 2001 – on a survey of 1,511 mostly corporate expatriates on assignment in 140 countries. Very candid feedback about their assignment experiences should help employers and global mobility managers better support global talent with targeted vendors, programs and services.

When global assignees were asked to rank employer-sponsored services, those surveyed rated general relocation services first (63 percent), settling in services second (53 percent), medical preparedness third (49 percent), followed by company paid advance visit to the assignment location, schools, advance financial and tax consultation, cross-cultural training, language training and relocation of family pets. More than half the respondents noted their employers provide at least the top six categories.

2001 and 2013 Surveys find a Gender Gap

One of the biggest changes noted since the 2001 survey was the closing of the gender gap. As William Sheridan discussed in the presentation, "The definition of support is very different between male and female expatriates. To female expatriates, support is making clear to the organization and the location where the expatriate is being deployed that this is the best candidate—a candidate selected on merit." He adds, "Male expatriates see support as the components of the mobility package." The survey indicates that upon return, males are 13 percent more likely to go directly from one assignment to another. Female expatriates are more likely to take an expatriate assignment from another employer.

The 2013 survey found that employers are doing an adequate job in many of the key areas, but often they overlook a few gaps in communication.

Gap in Communication of Benefits and Programs

The 2013 survey found a gap in employers providing services and the percentage of expatriates who are aware of these services. Expatriates under age 34 and first time assignees need extra attention. "Roughly 80 percent of employers note they provide language and cultural training to their globally mobile population. But, our survey found only 42 percent believed their employer provided cross cultural training and 40 percent language training," said Allen Koski. "While many employers might have resources on their corporate intranet that doesn't necessarily mean they're easily found by expatriates and their families."

It was also noted that expatriates had low recognition of repatriation services. This is a common complaint among the expatriate community with many multinational employers presenting their expatriates with no defined plan after assignment completion. One recommendation would be to set up a global mentorship program where an expatriate is matched up with a higher banded manager back at the home office. A mentorship program can help maintain a connection to the organization and provide information about opportunities upon return from assignment.

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Understanding the Expatriate Perspective: Feedback to Employers and Vendors

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Support for Expatriates to the United States and Canada

It's often overlooked that the United States is the most frequent destination for expatriate assignments. With typically ample support for expatriates to BRIC (Brazil, Russia, India, and especially China) countries and other hardship locations, few employers consider the many unmet expectations for employees on assignment in North America. The survey found overall 13 percent of total respondents report unmet expectations regarding their assignment benefits package. In North America (United States and Canada), this percentage of unmet expectations was nearly double.

The survey responses indicate a considerable disconnect when it comes to assignments based in the United States; particularly on issues like finding a doctor, knowledge of the health care system, financial issues (e.g. getting a credit card) and tax issues. Koski adds, "This feedback may explain why many employers are turning to inpatriate medical plans instead of the current domestic program. These programs tend to have simplified benefits and fewer penalties for members who fall out of network. Often inpatriates do not understand in- and- out -of-network providers." Other suggestions indicate providing greater tax and financial consulting support in the United States.

Medical Preparedness and Care

Expatriates are traveling into more unique global locations. They are working in emerging markets where sophisticated medical services may not be fully formed. The survey found a higher demand for medical preparedness in the Middle East, Sub-Saharan Africa and the BRIC countries. With 78 percent of expatriates (or their family members) accessing medical care while on assignment, they are requesting increased benefits in more comprehensive health plans with pre-departure benefits.

The focus on medical preparedness needs to start before assignment with pre-departure screening. Pre-departure screening will assist a family member with chronic conditions like asthma, diabetes, allergies and other common health issues in their deployment location. A focused pre-departure program will offer an online health assessment that provides feedback on medical issues. If the expatriates need assistance on an issue, they can reach out directly to a personal health advisor for as long as they are on assignment. "It is a large loss to an organization when a chronic but manageable health condition is missed, leading to a failed assignment. Employees should be able to evaluate their medical issues relative to the deployment location before they take an assignment." Koski adds.

Human Resources: How Much Can They Relate to Expatriates?

Expatriates are often characterized as overly demanding. Employers understand expatriates are very important to the business, but they are expensive with high expectations. Expatriates reported concerns about human resources in the 2013 survey, citing human resources-related issues more frequently than any other concern (other than cost). Expatriates believe there is a lack of understanding of the challenges they face. They perceive human resources' as possessing a low awareness of the day-to-day challenges they and their families face. Issues often cited as disconnects include visa issues, work permit delays, relocation disconnects and real estate differences.

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A suggestion is to provide human resources support from a team member who has either traveled extensively, worked abroad or has coordinated many relocations. Bill Sheridan states, "Human Resources staff with higher awareness of the day-to-day issues will drive higher employer satisfaction and better retention for global employers. Repatriation after assignment will be more effective. With the importance and cost of global talent, this may provide employers a valuable edge."

The survey confirms that employers are doing a fairly good job in the pre-assignment and during assignment phases. However, room for improvement exists in the repatriation phase and in key segments like communication, customization, medical preparedness, Human Resources support and assignments to difficult locations.

Often, employers use technology to address these issues. While technology is helpful, a stronger understanding of the gaps can provide focus. We recommend an annual member survey – or for small groups – a group call to elicit feedback. It is important for each employer to understand how expatriates perceive the relative value of various mobility programs, vendors and communication methods.

Calendar of Events

Save the Dates!

- **October 29, 2014 -** NFTC Annual Meeting – Washington DC
- **October 30-31, 2014 -** NFTC Fall Tax Committee Meeting – Washington, DC
- **November 5, 2014 -** NFTC Tax Lunch Forum – Speaker: TBA – Washington, DC
- **November 13, 2014** - International Compensation & Benefits Committee – Houston, TX (*By invitation*)
- **December 3, 2014 -** NFTC Tax Lunch Forum – Speaker: TBA – Washington, DC
- **December 3, 2014 -** World Trade Dinner and Award Ceremony – Centennial Celebration – Washington, DC
- **February 24, 2015 -** International Benefits Committee Meeting – New York City (*By Invitation)*
- **March 25-26, 2015 -** Annual International Human Resources Conference – Houston, TX
- **October 15, 2015 -** International Benefits Committee Meeting – New York City *(By Invitation)*

Additional events and dates will be announced as they are confirmed.

SAVE THE DATE!

Wednesday, December 3, 2014
The Centennial NFTC World Trade Dinner

Andrew W. Mellon Auditorium
1301 Constitution Avenue NW Washington, DC

For sponsorship or event information
Please contact James Wilkinson at jwilkinson@nftc.org or 202-464-2022

Centennial Update

By: James Wilkinson, Vice President for Strategy and Growth, jwilkinson@nftc.org

The quiet of August was put to good use at the Council headquarters with the redecorating of the Frank Kittredge Conference Room. The room now features items related to the NFTC, wowing first time visitors and longtime members alike.

Among the new features are two large flags denoting the NFTC's President's E Award (1962) and E Star Award (2014) honors from the Department of Commerce, the nation's highest export awards, for our excellence in helping open markets for U.S. exporters. Nearby, we pay respect to two prominent individuals who played outsized roles in our establishment 100 years ago, with a special double-framed display of *Time Magazine* covers featuring founding Chairman James A. Farrell, President of U.S. Steel, and 'The Grand Old Man of the Pacific' Captain Robert Dollar, head of Dollar Shipping. Continuing in this theme are two brand new plaques listing all historic winners of the Captain Robert Dollar Memorial Award and its successor the World Trade Award. There is a biography of Captain Dollar and photos of recent dinner honorees and keynote speakers. Last, there is the large 3D commemorative artwork and a key describing the significance of each artifact in detail, giving each visitor a visual 100 year history of the NFTC.

In all, the conference room has been transformed to exude an ambiance conveying the mission, history and impact of the NFTC on behalf of its member companies. On your next visit, please take a look and let us know what you think! Send your thoughts and comments to Vice President James Wilkinson at jwilkinson@nftc.org.

During the fall, we'll be concentrating on preparations for the Centennial World Trade Dinner on December 3, which will be a party for the ages – tables and tickets are now available via the NFTC website.

In the meantime, one of the key institutions of our founding is also celebrating its centennial this year. On November 3, the NFTC will proudly sponsor a table at the India House Centennial Celebration in New York City. The keynote speaker will be Maurice "Hank" Greenberg , formerly of AIG, who was a titan in the expansion of U.S. trade, services and investment with China. The NFTC will present a congratulatory plaque to India House President John Lowman, great-grandson of India House and NFTC founding Chairman James A. Farrell. The plaque will be mounted for permanent display outside the entrance to India House in Hanover Square to celebrate and remind visitors of the shared history of our organizations.

If you would like to attend the November 13 India House Centennial Celebration in New York, please contact NFTC Vice President James Wilkinson at jwilkinson@nftc.org

The New Bipolarism

By Bill Reinsch, NFTC President

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In a way, we have been through that before, too. Communism was, after all, really about a fundamentally different approach to economics than the post-industrial revolution systems of the West. But today's challenge to capitalism is much more insidious than Marx's, both because it accepts and adapts some features of the market system and, more important, because it seems to be working, at least in the short run. Success was not an issue the Soviets ever had to deal with.

This system, which Chalmers Johnson originally referred to as "state developmental capitalism," allows the market to operate, but within a framework of heavy government involvement. The government identifies industries key to what it sees as the country's future competitiveness and nurtures them through subsidies, favored lending by banks controlled or influenced by the state, and a wide variety of practices designed to disadvantage their foreign competitors in the home market and undercut them in third markets.

This is not a one-size-fits-all pattern. Japan was an early practitioner – Johnson was referring to them – but they did it within a framework that was fundamentally based on the market and private ownership, albeit owners who frequently received, and obeyed, "guidance" from the government. The so-called "Asian Tigers" followed a similar path. China has borrowed many parts of the model but has kept it within a framework of much greater outright government ownership. India seems to be carving out its own model but once again within a framework of heavy-handed government stacking the deck in favor of domestic companies. In fairness, the Western economies have not been entirely innocent. Many have state-owned sectors, particularly in transportation and communication. The United States has, for a century and half, proved itself a remarkably successful practitioner of government intervention at key moments to stimulate innovations in agriculture, telecommunications and aerospace, to mention a few.

Economic intervention has worked for a lot of countries, and it is no surprise it is being widely copied, but the new imitators bring some differences to the table. One is that the extent of intervention in the economy is far greater and much more prolonged. They seek not simply to give their companies a leg up so they can compete but rather to protect and nurture them so they can out-compete everybody else. And, since that involves allocating capital, it virtually guarantees the creation of overcapacity that in turn leads to dumping and global economic disruptions.

The second and more worrisome is that these countries are effectively rejecting the system of rules that underpins the trading system. Sometimes they are explicit – we had no say in creating these rules so we have no obligation to adhere to them. Other times they simply ignore them or block them, as India has done with the Trade Facilitation Agreement in the WTO. Some, like China, appear to be developing alternate support structures, such as their new development bank (the "BRIC Bank") that will doubtless do a lot of good in terms of development, while at the same time enticing developing countries over to what we consider the dark side.

This is partly a struggle of different economic models competing for the hearts and minds of emerging economies, but it is also a political battle, as the Western economies struggle to maintain the rules-based system they created out of the ashes of World War II, which, not coincidentally, enshrines their continued dominance. The battle is complicated because the Western system is arguably superior over the long term, but our continued control of it is unsustainable as the locus of rapid growth moves to the emerging economies.

In other words, it's hard to lead if half the world is not following, but it's hard to cede leadership if you think the other guys are taking you over the cliff. This is where the United States finds itself today – standing up for a system of rules that is under increasing attack, knowing nonetheless that not only are we right to do so but that it is in our interest to do so. The best answer is what we have been trying to do with the IMF and World Bank – rebalance governance in order to maintain the institutions – cede some control but within a framework that guarantees continuation of the system that has contributed so much to global growth. That is harder to accomplish in consensus-based organizations like the WTO, but it is what we should be aiming at.

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NATIONAL FOREIGN TRADE COUNCIL

"SERVING AMERICA'S INTERNATIONAL BUSINESSES SINCE 1914"

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