

US Retreat From Digital Trade Talks Confounds Attys

By Jennifer Doherty

Law360 (November 9, 2023, 10:15 PM EST) -- The Biden administration has backed off from digital trade discussions under the Indo-Pacific Economic Framework, angering technology companies and dimming trade observers' hopes for substantive improvements in e-commerce among the 14 IPEF partners.

Sen. Elizabeth Warren, D-Mass.; Rep. Jan Schakowsky, D-Ill.; and 10 of their Democratic colleagues congratulated the administration in a letter published Tuesday for halting the discussions, a move they said would counter Big Tech's efforts to "frustrate privacy, [artificial intelligence], civil rights and liberties, anti-monopoly, gig worker and other digital safeguards that Congress and the administration seek."

While Warren and consumer advocacy groups including Public Citizen say the move is a win for transparency and regulatory oversight, many trade policy experts see it as a misstep that goes against White House obligations and opens the door for other countries to set pivotal standards for international e-commerce. It was also an unabashed public relations flop for the administration.

"The Biden administration has lost their minds," said Hogan Lovells LLP senior counsel Warren Maruyama, who served as general counsel in the Office of the U.S. Trade Representative, or USTR, during the second Bush administration.

Maruyama, like other former trade officials Law360 spoke to from both Democrat and Republican administrations, emphasized that digital trade provisions akin to what was on the table at IPEF have been part of U.S. trade talks for the past decade.

Congress, which grants the executive branch its authority over international trade, previously set out the U.S. position on topics from which the administration is now backing away, namely nondiscrimination, freedom of cross-border data flows and prohibitions on data localization in the Bipartisan Trade Promotion Authority Act of 2015, Maruyama said. Recent landmark trade deals including the United States-Mexico-Canada Agreement and 2019's U.S.-Japan Digital Trade Agreement reflect that stance.

"So this is all very bizarre," he said.

The lawmakers' letter also came on the heels of last month's announcement that the U.S. would withdraw support for three proposals on e-commerce the Trump administration laid out at the World Trade Organization back in 2019.

Contrary to the appearance Warren's letter gave, the USTR actually put a pin in the IPEF's digital trade chapter "months ago," according to an official with knowledge of the talks who requested anonymity in order to speak openly.

"We're a little frustrated that she disclosed publicly that we've hit pause in negotiations while, frankly, we figure out what's the right approach for us to be taking on this," the official told Law360.

The Biden administration, which has worked hard to align itself with organized labor and consumer groups, faced "a lot of pushback" from U.S. stakeholders on the IPEF's digital trade talks, according to the official, causing the USTR to pull back in search of a "middle ground solution" that would support U.S. competitiveness without pandering to corporations.

The agency made the decision to pull the WTO proposals during this period of reflection, for the sake of consistency, the official added.

Melinda St. Louis, the director of Public Citizen's Global Trade Watch, said the USTR's decision to remain at the WTO negotiating table but assume a neutral stance while it reconsidered "playbooks from the past" was "quite smart" in an interview with Law360. She welcomed the administration's willingness to reevaluate the same deals Maruyama pointed to, which she said have allowed corporations to set the digital trade agenda "before our domestic processes have been able to even figure out what our policies are."

In both the WTO and IPEF negotiations, the USTR was also coming up against deadlines. The Asia-Pacific Economic Cooperation summit coming up in San Francisco next week has been the target for final IPEF agreements since the initiative was announced. The WTO Joint Initiative on E-Commerce is likewise expected to submit its latest proposals to members at the organization's ministerial conference in February in Abu Dhabi.

Without time to comprehensively recalculate its position, the agency likely felt safer staying quiet, according to Robert Holleyman, president and CEO of the consulting firm Crowell & Moring International.

"I think USTR is probably saying they would rather have nothing or very little on digital trade than work through the details of a robust, but maybe not less than fully robust, agenda," said Holleyman, who served as deputy U.S. trade representative during the Obama administration. "This was the immediate off-ramp."

That exit has left a gap at the negotiating table that some trade observers, including Senate Finance Chair Ron Wyden, D-Ore., have said China is only too willing to fill.

"USTR's unilateral decision to abandon any leverage against China's digital expansionism, and to oppose policies championed by allies like Australia, Japan, the U.K. and Korea, directly contradicts its mission as delegated by Congress," the senator said in a statement last month. "It may be time to reconsider the degree of that delegation going forward."

Not all critics of USTR's digital trade retreat viewed it as a gift to Beijing, however.

Jamieson Greer, the former USTR chief of staff and current King and Spalding LLP partner, an avowed China hawk, predicted more impact on commerce with other partners "who believe in the rule of law."

"In our experience, [China doesn't] follow the rules unless it's convenient for them. So to me, this is more about having rules to make sure so-called allies like France and others don't discriminate against our companies," Greer told Law360.

Regardless of how the move affects Washington's position in global trade forums, the decision has hollowed out a key section of the IPEF just days ahead of a ministerial summit where leaders are expected to unveil the Indo-Pacific framework.

The project has been central to the Biden administration's mission to vindicate its "worker-centered trade policy," which aims to grow trade without prioritizing erasing tariffs, a previous approach the administration has blamed for outsourcing that cut away at the middle class.

"It's lowering the ambition and the scope of what the U.S. is even fighting for in the Indo-Pacific, and I think that is a strategic mistake," said Hogan Lovells partner Kelly Ann Shaw, former deputy assistant to the president for international economics. "Instead of leaning in, we're sort of leaning back, and we don't even have the ability to articulate what we want in that space."

--Editing by Andrew Cohen.