

Trans-Pacific Partnership Negotiations: Progress, but no End in Sight

Kluwer Arbitration Blog

June 22, 2012

David Gantz (University of Arizona James E. Rogers College of Law)

Please refer to this post as: David Gantz, 'Trans-Pacific Partnership Negotiations: Progress, but no End in Sight', Kluwer Arbitration Blog, June 22 2012, <http://arbitrationblog.kluwerarbitration.com/2012/06/22/trans-pacific-partnership-negotiations-progress-but-no-end-in-sight/>

The Obama Administration's only current regional trade negotiations, the Trans-Pacific Partnership (TPP), continue slowly toward a possible conclusion in 2013, with 12 rounds of negotiations having been completed as of the end of May 2012. A major element of a re-energized American focus on political, security and economic considerations in Asia, the TPP if it can be successfully completed would easily be the most far-reaching free trade agreement (FTA) for the United States since NAFTA. Should Canada, Mexico and ultimately Japan be brought into the negotiations, the TPP would likely surpass that of any other regional trade agreement other than the European Union in total trade value.

The failure of the Doha Round in Geneva along with the continuing proliferation of regional trade agreements generally has likely given the TPP negotiators an added incentive to complete the process. Among others in Asia, Korea, Japan and China announced in May that they would begin trilateral FTA discussions before the end of 2012. (The idea of such a pact has been under discussion in Korea at least since 2000.) In Latin America, Chile, Colombia, Mexico and Peru, all of which already have bilateral FTAs in force among them, are widening and deepening the relationships so as to facilitate a freer flow of trade, investment and persons, through their "Pacific Alliance." In other words, many of the TPP parties are not putting all their eggs in the TPP basket.

The challenges to a successful conclusion of the TPP are many. The TPP as envisioned by the United States would be more comprehensive even than the most recent Bush-era FTAs (Colombia, Panama, Peru and South Korea). In addition to elimination of most tariffs on both manufactured goods and agricultural products, expanding services market access and government procurement coverage, incorporating "TRIPs-Plus" intellectual property provisions and providing broad coverage of foreign investment, the United States wants the TPP to address competition issues, including those relating to state-owned-enterprises (SOEs), in far greater detail than in the past. Also, despite two years of negotiations, most of the most difficult content issues have yet to be agreed upon.

U.S. proposals in some chapters are meeting substantial resistance from other negotiating parties. These include Australia's reluctance to include investor-state arbitration; Singapore and Vietnam's hesitancy regarding stronger disciplines for SOEs; Vietnam's concerns with textile rules of origin; and broad opposition to U.S. proposals for potential trade sanctions for nations that fail to comply with strengthened labor and environmental provisions. Australia and New Zealand are advocating commitments to limit agricultural export subsidies and trade-distorting food aid programs, some of which may be difficult for the United States to accept in the context of an FTA. A recently leaked investment text also reveals competing proposals for addressing indirect expropriation in a manner

that would not unduly restrict national regulatory processes, particularly in natural resource sectors.

Proposals to increase the number of potential parties beyond the original Australia, Brunei, Chile, Malaysia, New Zealand, Peru, Singapore, the United States and Vietnam are also complicating and may potentially delay completion of the negotiations. When Japan announced late in 2011 that it desired to participate, Mexico and Canada immediately indicated their interest in joining as well. The advantages of including three of the United States' most important trading partners are to some extent counter-balanced by the additional complexities of dealing with the particular trade concerns relating to these major economies, particularly Japan (where reform in agriculture, autos and financial services is considered a pre-condition for participation). The existing parties also engaged in extensive discussions as to whether the additional three countries should be brought into the negotiations in the near future or asked to wait until the original nine completed the initial negotiations.

While some Administration spokes-persons had suggested that the three countries would each be considered on their own merits, it is difficult for the United States to accept Mexico's joining the negotiations without approving Canada as well, given the potential impact on NAFTA. Apart from the obvious benefits for the NAFTA partners in becoming part of the broader TPP, the new agreement could provide a "backdoor" means of modernizing some aspects of NAFTA, a highly desirable objective that for political reasons is probably impossible in any other context. In mid-June 2012, after all of the TPP parties had agreed, both Canada and Mexico were invited to join the TPP negotiations. Several conditions are to be imposed: Canada and Mexico may not re-open areas of the text where agreement has already been reached unless the other parties to the negotiation sought reopening, and would not have "veto power" over agreement on future chapters by the original nine parties. Japan, for its part, seems less interested currently in participation, with the government choosing instead to focus on various domestic tax and social security reforms.

Other nations that have indicated interest in becoming parties to the TPP include Colombia, Costa Rica and South Korea, but none of the three have formally sought inclusion in the negotiations.

The legal challenges in meshing the TPP with other regional trade agreements are also daunting. The United States has bilateral FTAs with Australia, Chile, Peru and Singapore; Australia, New Zealand and Vietnam are all parties to the ASEAN—Australia—New Zealand FTA. Precisely how the TPP would legally relate to the earlier agreements has not yet been resolved. Also, no decision has been made on whether the TPP will augment existing market access rules embodied in other FTAs among the parties or establish a single, unified group of market access commitments, or the extent to which developing country members will be afforded special treatment.

Uncertainties also remain with regard to the United States despite the Obama Administration's success in obtaining Congressional approval for long-stalled FTAs with Colombia, Panama and South Korea in fall 2011, and inter-agency agreement in April on the terms of a new Model Bilateral Investment Treaty. The U.S. President as of January 2013 will likely continue the TPP negotiations, but if Governor Mitt Romney prevails his new Administration will presumably require at least a few months to review the status of the negotiations and decide whether any negotiating positions are to be altered. Whether the president is Mr. Obama or Mr. Romney he will effectively be required to seek Trade Promotion Authority ("fast-track") from Congress before the negotiations can be completed, a legislative process which in the past has been controversial in terms of coverage of investment, labor and environmental issues and the extent of government procurement commitments, among others.