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Trans-Pacific Partnership Negotiations: Waiting for U.S. Proposals

David Gantz (University of Arizona James E. Rogers College of Law) · Monday, June 20th, 2011 · Institute for Transnational Arbitration (ITA), Academic Council

The seventh round of TPP negotiations will take place in Vietnam the week of June 20 but caution on the part of U.S. negotiators makes it highly unlikely that after fifteen months of ongoing negotiations any of the major issues will be resolved or even fully opened to discussion. In particular, the United States Trade Representative (USTR) is likely to avoid presenting definitive U.S. views on labor, environment, state owned enterprises (SOEs) and intellectual property. (Limited proposals on both environmental issues and IP have been offered by the United States in the past, but apparently lacked detail, and do not address the data exclusivity, extended patent term and patent linkage issues incorporated in the pending FTAs.) These key issues are likely to be contentious not only among the other parties to the negotiation (Australia, Brunei, Chile, Malaysia, New Zealand, Peru, Singapore and Vietnam) but in other U.S. agencies and with some Members of Congress.

The Obama Administration clearly wishes to avoid alienating any potential supporters of the pending free trade agreements with Colombia, Panama and South Korea, which are (understandably) considered a higher priority than the TPP. Consultations with “stakeholders” and Congress on TPP issues are said continuing as, for example, with some Members of Congress demanding that the key elements of the May 2007 “Bilateral Trade Deal” negotiated by USTR with the Democratic Congress be included in the language on the environment in the TPP. (WorldTrade Online)

The challenges go well beyond the domestic political minefield as the anticipated content of any new U.S. FTAs such as the TPP become more extensive and complex. All of the critical chapters beyond trade in goods found in recent FTAs—labor rights, environmental protection, intellectual property, sanitary and phytosanitary measures, financial and telecommunications services, government procurement, rules of origin (particularly for textiles and apparel), transparency (now encompassing “regulatory coherence”), trade capacity building—remain essential if a completed TPP is to be supported by the business community and Congress. However, additional issues have surfaced. These include the desirability of stronger national treatment provisions for dealing with national preferences and exemptions from government procurement disciplines offered to state owned enterprises (SOEs), particularly in Vietnam. There also appears to be increased, related interest at USTR and elsewhere in the Administration in negotiating stronger provisions on competition issues, treated extensively in the 2002 United States—Singapore FTA but not in most of the other Bush-era FTAs.

The desired SOE obligations are perhaps the most important and far-reaching of this first trade agreement of the Obama Administration, a "critical issue in ensuring fair competition" according to USTR. Chapter 15 of NAFTA and similar provisions of most subsequent U.S. FTAs dealt, very briefly and rather ineffectively, with competition policy, monopolies and state enterprises as a group, with the NAFTA provisions reflecting United States and Canadian business concerns with Mexico's Pemex and Comisión Federal de Electricidad monopolies. Today, in the TPP context, U.S. business interests are particularly concerned about the impact on U.S. enterprises and workers of relatively recent "significant distortions in the terms of competition in the global marketplace" by SOEs, who with the cooperation of their governments "choose to discriminate against imported goods in derogation of their core trade obligation to provide treatment no less favorable than that accorded to domestic like products." However, the proponents also worry about SOE export competition in global markets. (Apr. 15 letter from various industry and trade associations)

Among the TPP negotiating parties these issues are most pronounced in Vietnam, where despite some progress toward reform it is unclear whether the government has the political will to rein in SOEs and reduce the preferential benefits that many SOEs still receive. Long-existing Vietnamese SOE textile and apparel producers, which employ thousands of workers, and account for the second largest volume of U.S. textile and apparel imports after China, are said to remain heavily subsidized (BNA Int'l Trade Rep., Jun. 9), but the concerns over preferential treatment for SOEs in the TPP likely also reflect issues relating state capitalism in other TPP group members, such as Singapore and Malaysia, as well.

Whether USTR will be willing and able to table positions on these issues at the next TPP negotiating session in the United States in September remains to be seen; the answer may well depend on whether the Congress votes on the Colombia, Panama and Korea FTAs this summer, or whether disagreement over companion funding of trade adjustment assistance (TAA), demanded by the Democrats, results in a continuing congressional stalemate. The progress of the United States toward approving the pending FTAs is also being watched closely by other TPP countries; approval by the Congress will likely encourage the other TPP negotiating parties to move forward, while the absence of FTA approval will likely lead to reduced progress in the coming months. (New Zealand Trade Minister Groser)

Regardless of these immediate political issues there is general consensus that the TPP negotiations will not be concluded in 2011, certainly not by the time of the November summit of the Asia-Pacific Economic Cooperation forum, although conceivably if all goes well a framework agreement is possible by that time. Regardless of the outcome at APEC some, including this writer, believe that 2012, with a presidential campaign dominating U.S. domestic politics for most of the calendar year, is not a propitious time for concluding anything as sensitive and controversial as the TPP. The Obama Administration has not sought trade promotion authority (formerly "fast-track") to date, without which no responsible foreign government would finalize the TPP text, and almost certainly will not do so in 2012. Thus, the most optimistic scenario for concluding the TPP is probably sometime in 2013, after the November 2012 elections. With the Doha Round as we know it now ended, those who believe that the United States is falling behind many of its trading partners in addressing trade concerns and seeking market opening through regional trade agreements can only hope that the United States and its negotiating partners will be able to bring the TPP to conclusion in the foreseeable future.

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The graphic features a black background with white text and a circular icon. The icon depicts a group of five stylized human figures, with a magnifying glass positioned over the central figure. The background is accented with horizontal lines in blue and green.

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