

TPP Breakthrough Unlikely As Key Players Remain Coy

By Alex Lawson

Law360, New York (August 27, 2014, 7:04 PM ET) -- Chief Trans-Pacific Partnership negotiators will use a 10-day session next month in Hanoi, Vietnam, to chip away at outstanding chapters of the agreement such as food safety, intellectual property and investment, but experts doubt that a serious breakthrough will occur, as the political climates of key TPP nations remain murky.

Statements from various TPP governments reveal that the informal negotiating session beginning Sept. 1 in the Vietnamese capital will include deliberations on a number of areas that are of critical importance to businesses in the U.S. and elsewhere, but McKenna Long & Aldridge LLP senior counsel Alan Wolff said that the decisions necessary to close the deal still need to be made at the highest levels of government.

"There is a lot of goodwill among the larger participants," Wolff told Law360. "That said, there is no evidence that any of these leading countries have gotten to the point where the political leaders will give their chief negotiators the scope to offer the difficult concessions needed for exchanges that will bring closure."

But Wolff made clear that even if there is no landscape-altering announcement of substantial progress in the talks, the Hanoi session can still prove fruitful if the negotiators can narrow some gaps remaining at the lower levels of many TPP chapters.

Vietnam's Ministry of Industry and Trade circulated a memo last week revealing that the Hanoi session will address outstanding issues in goods and services market access, intellectual property, environmental rules and state-owned enterprises.

Separately, a trade official for Chile, another TPP participant, on Thursday said that the negotiators will also discuss food safety regulations and so-called technical barriers to trade, which often deal with diverging standards and regulations among partners.

Much of the blame for a lack of progress in the talks has been laid at the feet of Japan, which has been seen as reluctant to fully open its market to agricultural imports from the other participants. Indeed, bilateral meetings between the U.S. and Japan on food market access over the last two months have ended with brief statements from the U.S. trade representative's office that "some progress" had been made but offering no further clarity on what is necessary to bridge the gap.

But Wolff said that, along with Japan, the U.S. and Canada also share much of the burden for ensuring that those differences can be ironed out in order to deliver the agreement in a timely fashion.

"On these three depend the level of the outcome," Wolff explained.

Mayer Brown LLP partner Timothy Keeler, former chief of staff at the USTR's office, said that any outcomes at the Hanoi session would likely amount to "table-setting" for a November summit of the Asia-Pacific Economic Cooperation that President Barack Obama has highlighted as a forum to announce substantial progress in the talks.

Along with the differences with Japan, Keeler said, a major hurdle to closure for the U.S. is the increasing unease from Capitol Hill about the absence of Trade Promotion Authority, which allows the executive branch to negotiate trade agreements while limiting legislators to a yes-or-no vote on the pacts without amendment.

"I can't imagine there's going to be any big breakthroughs [in Hanoi] given the overall state of play with the U.S.-Japan negotiating dynamic still at loggerheads and the connection between TPA and TPP creating questions about the role of Congress in the negotiations," Keeler said.

TPA, also sometimes referred to as fast-track negotiating authority, has been expired since 2007, and various efforts to reinstate it have failed to gather serious momentum, with Senate Majority Leader Harry Reid, D-Nev., squashing the notion of any movement on a TPA bill introduced earlier this year.

The rancor over the Obama administration's decision to continue negotiating TPP without TPA in place has intensified in the wake of a letter from the Republican bench of the influential House Ways and Means Committee, in which the members said they would not support any TPP deal, even one reached in principle, without first passing a TPA bill.

Keeler said that the letter would appear to close the door on the administration's preferred option of striking a TPP deal at the November APEC summit and then passing a TPA bill soon after.

"I suppose the Republicans' letter answered the question of, 'What comes first, the chicken or the egg?'" Keeler said. "I don't want to be too close-minded and inside-the-box, but with that letter out there it seems that they have closed off one path quite clearly and opened up another path."

Keeler also said that the uncertainty surrounding the U.S. fast-track process can manifest itself at the actual negotiating table, as the other countries lack assurance that the TPP deal they strike won't soon be changed by U.S. lawmakers, who would not be barred from amending the pact once it came to a vote.

Even as the TPP-TPA impasse begins to creep up against the informal deadline of the November APEC meeting, chief negotiators will still have plenty on their plates as they inch the agreement forward, according to Wolff.

"The prime movers of the negotiations really do seek to move as close as they can to a wrap-up by late fall, for some form of announcement at the APEC summit," he said. "So Hanoi is not, in my estimate, likely to consist of show, of marching in place, but rather is steadily building toward a conclusion."

--Editing by Jeremy Barker and Katherine Rautenberg.