

TPP Compromises Set Stage For Political Standoff

By Alex Lawson

Law360, New York (October 5, 2015, 7:25 PM ET) -- The completion of the Trans-Pacific Partnership talks on Monday stands as a landmark achievement for the 12 nations party to the accord, but various concessions on issues like agriculture and intellectual property that made the TPP possible may also be the biggest obstacle to its final passage by lawmakers.

While the full TPP text will not be released for several weeks, various consultations and public statements from the trade ministers at this week's meeting in Atlanta revealed some potentially unpopular outcomes, according to Squire Patton Boggs LLP partner and former House Ways and Means Trade Subcommittee counsel Frank Samolis.

"Given the lengthy discussions and deliberations, there have been compromises on all sides," Samolis said. "I would hesitate in saying this is a done deal though. Many of the countries involved in TPP now have to get the deal agreed within their own jurisdictions, which may not be an easy sell."

TPP CHEAT SHEET

Once in place, the Trans-Pacific Partnership will form the largest free trade accord since the formation of the World Trade Organization in 1995, covering issues that have never been contemplated in a free trade agreement. The TPP would:

- » Cut tariffs on 18,000 products.
- » Allow for the imposition of a two-year safeguard with a potential one-year extension for certain domestic industries facing a glut of new imports.
- » Require state-owned enterprises within TPP countries to conduct commercial activities in accordance with market-based considerations.
- » Force Vietnam to allow the formation of independent labor unions.
- » Threaten Malaysia with trade retaliation if it fails to improve its forced labor and human trafficking record.
- » Bar countries from requiring the localized storage of data or the surrender of valuable source codes as a condition for market entry.

» Require parties to commit to sustainable forest management and conserve at-risk plants and animals.

Thanks to this summer's approval of legislation to renew Trade Promotion Authority, the TPP will face a simple majority vote in both chambers of the U.S. Congress with no amendments. But given the fierce debate that preceded the TPA legislation and the powerful industrial lobbies tracking the TPP, the administration faces a steep hill to push the deal over the finish line.

As news of the final accord began to trickle out early Monday, the TPP's traditional opponents within labor, environmental and consumer advocacy circles reiterated their fervent opposition to the accord, placing the onus squarely on the U.S. Congress to reject the deal once it comes up for a vote.

Trade agreements like the TPP have never been popular among those groups, but what has been startling is the early skepticism voiced by many observers that are normally considered to be free trade champions, such as Senate Finance Committee Chairman Orrin Hatch, R-Utah.

"Closing a deal is an achievement for our nation only if it works for the American people and can pass Congress by meeting the high-standard objectives laid out in bipartisan Trade Promotion Authority," Hatch said in a statement. "While the details are still emerging, unfortunately I am afraid this deal appears to fall woefully short."

Hatch warned the TPP officials last week that they should resist the temptation to rush into a final TPP agreement that falls short of the TPA bill's negotiating objectives. While he didn't elaborate on which portions of the agreement were troubling for him, his fears are likely driven by the compromise on patent protections for biologic medicines.

The Finance Committee chairman has been among a litany of lawmakers pushing for the U.S. to make sure that high-value biologic drugs, which are used to treat diseases like cancer and rheumatoid arthritis, should be given 12 years on the market before facing generic competition.

But the U.S. was the only TPP member with that position and appears to have backed down from the 12-year number in a bilateral arrangement with Australia, a development that has roiled the Biotechnology Industry Organization and other business groups.

If Hatch views the biologic protection issue as a deal-breaker, the TPP's route to ratification may become even more fraught than previously envisioned, according to Wiley Rein LLP partner Timothy C. Brightbill.

"The Obama administration relied mostly on Republican support for TPA, with a certain number of Democrats as well, so when Sen. Hatch expresses concerns, that is potentially a very big issue," Brightbill told Law360. "How these last few compromises were made ... could change some members of Congress who supported to TPA to now be more skeptical."

Another potential land mine will be the level of access given to beef and dairy products. From the outset, the TPP has set the goal of full tariff elimination on all goods, but New Zealand Trade Minister Tim Groser said Monday that negotiators were not able to achieve that goal.

"This establishes, in the long run, complete elimination of all tariffs on everything New Zealand exports with two exceptions: one is the beef tariff in Japan, and ... some dairy products — some of which will achieve tariff elimination, and others have proven to be too difficult," Groser said at a press conference closing the talks.

Groser did not elaborate on the extent of the dairy products exempt from tariff removal, but any concession in that arena is likely to upset the National Milk Producers Federation and the U.S. Dairy Export Council, which gave a brief joint statement Monday declining to offer a view on the TPP until it had a chance to review the text.

Given the timeline for TPP approval set out in the TPA bill — the president must give Congress 90 days notice before he can even sign the deal — U.S. Trade Representative Michael Froman acknowledged that passing the TPP will not take place until next year.

That time frame creates another potential hurdle for the TPP, as it will slip further into presidential and congressional election cycles, during which any policy matter of substance will face difficulty gaining traction, according to Mayer Brown LLP senior adviser Warren Payne.

"Trade votes are always hard, and this one will be no different," Payne told Law360. "Exactly how hard will depend on these details in the agreement that people don't know about yet. If this were to come up in the heat of the primary season, that would only make this vote hard not easier."

--Editing by John Quinn and Katherine Rautenberg.