The Trans Pacific Partnership (TPP) Agreement

大成 DENTONS

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At a news conference in Ottawa on October 5, 2015, Canadian Prime Minister Stephen Harper praised the TPP as "the largest economic partnership in the history of the world" and "the new gold standard for international trade agreements."

The TPP is the largest trade agreement of any kind negotiated in the last 20 years, both in terms of the amount of trade it covers and in the depth of the commitments called for. The deal was concluded among 12 Pacific Rim countries: Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam. It will substantially reduce barriers to trade and investment among the 12 TPP economies, which account for 40 percent of global economic output and more than 800 million consumers.

The final agreement caps more than five years of negotiations and in 30 chapters will, once ratified by the TPP parties, provide major improvements for cross-border trade in goods and services and in foreign direct investment. It will deepen and facilitate economic integration among the member countries by incorporating new and emerging trade issues including the Internet and e-commerce, enhanced rules on state-owned enterprises and international trade and investment. Moreover, it creates a platform for further regional integration as a potential landing point for other countries in the region that could seek to join the TPP in the future. Several countries, including Korea, the Philippines and Thailand are considering joining the TPP.

Many of the TPP countries are members of other free trade agreements (FTAs), most notably the United States, Mexico and Canada, which are members of the North American Free Trade Agreement (NAFTA). Moreover, all TPP members are members of the World Trade Organization (WTO). A US objective in the TPP was to preserve rights under prior trade agreements, such as NAFTA and other FTAs, so that the TPP would coexist with these other agreements to the extent that they provided additional benefits. However, in most cases, the TPP enhances the treatment for trade and investment provided for in those agreements.

Next steps

While an agreement has been reached amongst the trade officials from each TPP country, the legal texts must be finalized and subjected to a “legal scrub”. The final text will then have to be implemented or ratified in each of the 12 member countries. In the United States this means that the TPP must be approved—on a up or down vote with no amendments—by Congress. Prior to that vote, however, the president must submit the completed text to Congress which will have 90 days to review the details before a vote can be called. Therefore, the agreement is not expected to be voted on by Congress before February 2016.

While the agreement has been finalized, there will still be several opportunities for stakeholders to provide comments and advance their interests. These likely include congressional hearings, agency rule-making and other public forums.

The TPP countries also view this agreement as a vehicle for further regional integration. The TPP includes specific provisions for other countries to join the TPP. Any country seeking to join the TPP would enter into a negotiation with all current members to assure that the standards the others had agreed to are met.

Key elements

The TPP reflects an ambitious effort to create a 21st century trade agreement that will address current economic and trade priorities and promote economic integration and growth. Key aspects of the TPP include:

- **Elimination or substantial reduction of tariffs.** The TPP will result in the elimination or reduction in the tariff on tens of thousands of products. Most tariff elimination in industrial products will occur immediately while some reductions (such as on autos and auto parts) will be phased in over a number of years. The specific tariff reductions will be published in country-specific schedules. Those in the trading community will need to review the country-specific schedules to determine when reductions for specific products will occur.

- **Rules of origin**. Not all goods produced in a TPP member country will qualify for preferential duties. To qualify for preferential duties, a product must have a specified amount of content from countries that are party to the agreement (be "TPP Originating") or otherwise meet the applicable origin rules. Many of the rules are relatively simple. Others however, such as for textiles, apparel, autos and auto parts are complex. Knowledge of the rules, as well as strategic use of these rules, can be very advantageous for companies sourcing in the region.

- **Customs administration.** In many cases, it is not the tariff that is the primary hurdle to selling across a border, but rather arcane and opaque customs procedures. The TPP mandates increased transparency and modernized procedures that should facilitate the customs clearance process. Advance rulings can be obtained in several areas, including customs valuation, and customs penalty processes will be subject to increased transparency. Importers will be able to obtain release of goods under bond without unnecessary delay. In a world of increasingly global supply chains and just-in-time requirements, this is one of the most important chapters in the TPP, as it will promote seamless and speedier movement of goods across borders. Customs officials will also have import information sharing measures to address counterfeit goods and duty evasion schemes.

- **Cross border supply of services**. The TPP requires that governments provide to foreign service providers treatment as good as the best available treatment provided to domestic companies, and prevents discrimination among foreign sources of supply. No limits can be set on the number of suppliers or the number of transactions. This commitment applies to all services unless there is an exception specifically agreed by all parties. Therefore, review of the country-specific schedules is required to determine the applicability of the rules to a specific service in a particular country. For those services where the new rules apply, no longer can a local presence be required to supply a service. Regulations are to be transparent and reasonable. Important additional commitments are made for the provision of financial services (this will be particularly important for insurance, portfolio management, electronic payment card services and transfer of information for data processing) and express delivery.

- **Agricultural products.** Tariffs will be eliminated or reduced on a wide variety of products. Restrictions will be phased out in many cases. Importantly, the TPP countries expressly commit that sanitary and phytosanitary (SPS) measures are not to be used as unnecessary barriers to trade. SPS measures are to be transparent, non-discriminatory and science-based. Public comment will be provided for proposed SPS measures to inform decision-making, and inspections are to be carried out without delay. The parties also agreed to improve information exchanges related to equivalency of regulations among the TPP countries. A consultative mechanism is to be established to reduce the trade impact while providing for food safety.

- **Product standards—technical barriers to trade.**The rules on product standards and conformity assessments are to be transparent, nondiscriminatory and designed to promote legitimate objectives, and not be unnecessary barriers to trade. The TPP provides rules that will facilitate the acceptance of the results of conformity assessment procedures from the regulatory bodies in other TPP parties making it easier to access multiple TPP markets. The rules will also provide for a reasonable interval between the publication of a technical regulation and implementation. Specific sections of the TPP deal in greater detail with cosmetics, medical devices, pharmaceuticals, information and communications technology products, wine and distilled spirits, proprietary formulas for prepackaged foods and food additives and organic agricultural products.

- **Investment.** While providing basic investment protections including treating foreign investors in the same manner as domestic investors and not discriminating among investors from various member states, also prohibits performance requirements, such as local content requirements or technology requirements. The TPP also provides, with certain exceptions, for the free transfer of funds. However, not all investments are covered. Parties were able to exempt, through negotiation with the other TPP parties, certain "non-conforming measures" on a "negative" list, whereby those measures are not covered. However, in most instances even when a measure is not covered, countries have agreed not to make those existing measures more restrictive.

- **Protection of intellectual property.** The TPP provides wide ranging obligations to facilitate businesses use of their intellectual property, from registering patents, trademarks, copyrights, industrial designs, geographical indications, trade secrets and other forms of intellectual property, to enforcement of these rights. Brand names are to be protected. Standards are set for issuing patents. Due process and transparency are required. Agreement was reached on a process for dealing with geographical indications. A minimum period for data exclusivity was agreed for biological pharmaceuticals. Parties will still have rights to act in the interest of public health. Extensive provisions governing copyright are included, with an attempt to balance the rights of content providers and Internet service providers. Trade secret theft is to be punishable as a crime.

- **Investor-state dispute settlement.** The agreement provides the opportunity for investors to challenge foreign states in binding dispute settlement in situations where the investors believe their rights under the TPP have been violated. An exception is provided for countries opting to invoke it for regulations of tobacco.

- **Government procurement.** While not opening up all government procurement, the TPP expands that portion of the parties' government procurement markets that will be open to all bidders throughout the region. The agreement creates a "positive" list of entities or activities that are open to non-national bidders. Foreign businesses will have to review these lists to determine whether they are eligible to bid on foreign government procurements.

- **State owned enterprises (SOEs) and designated monopolies.** The TPP provides that member states will ensure that their SOEs make commercial purchases and sales based on commercial considerations. Moreover, the SOEs or designated monopolies cannot discriminate against enterprises or goods from other member states. Regulations are to be administered generally on a nondiscriminatory basis as between SOEs and the private companies with which they compete. The TPP does provide countries the opportunity to favor their domestic SOEs in certain instances where the SOE is providing a public service.

- **The digital economy.** The provisions governing electronic commerce are one of the main features making the TPP truly a 21st century agreement. Central to these provisions is a commitment to allow the free flow of information and data across borders. Forced localization of servers as a condition of serving a market is prohibited. No customs tariffs can be applied to data transmissions. National treatment (treatment as good as that given to domestic companies) is assured for other parties' companies. Governments are to transact more of their business through electronic means, making it easier for foreign companies, particularly small and medium-sized companies, to do business throughout the region. An example is the use of electronic customs forms. Requirements for encryption are not to favor domestic industries over companies based in other TPP countries. There are also provisions for consumer protection and to assure greater cybersecurity.

- **Competition policy.** Parties are to have laws that prohibit anticompetitive practices, as well as consumer protection statutes against fraud. Institutions are to be maintained to administer these laws, and to cooperate on matters of mutual interest, including law enforcement. Due process and procedural fairness is to be provided. There are consultative provisions, but TPP dispute settlement is not available to sue governments over their implementation of these provisions.

- **Telecommunications.** Fairness is to be provided in allocation of spectrum. Competition in mobile services is to be fostered. Transparency in regulation is assured. Market forces are to be allowed to determine competitive outcomes to the extent possible. Major telecommunications services suppliers are to provide interconnection, leased circuit services, co-location and access to infrastructure under reasonable terms and conditions and in a timely manner.
- **Labor.** All parties agree to adopt and maintain their laws and practices consistent with the International Labour Organization (ILO) 1998 Declaration. Moreover, the parties agree to laws governing minimum wage, hours of work and occupational health and safety. The commitments in this chapter are subject to the dispute settlement procedures included in the dispute settlement chapter. In certain instances, tariff concessions can be withdrawn for nonperformance of obligations under the labor chapter.
- **Environment.** The TPP members have agreed to effectively enforce their environmental laws and not to waive or weaken those laws in order to attract trade or investment. They also agreed to implement the obligations under the Convention on International Trade in Endangered Species (CITES) and to protect fisheries and other marine wildlife.
- **Regulatory coherence.** While not providing new rules as such, regulatory coherence is one of the new trade areas. It supports regulatory coherence by promoting mechanisms for effective consultation and coordination. Generally while not mandating specific regulations, it encourages best practices across all regulatory areas. Governments are to maintain a regulation clearing house to avoid adoption of conflicting regulations that interfere with trade. They are to share best practices.
- **Transparency and anti-corruption.** Along with providing for basic regulatory transparency, they also agree to maintain or adopt laws criminalizing—offering to or solicitation of undue advantage by public officials—as well as other acts of corruption that impact international trade and investment. While the commitments in this chapter are laudable, they are not subject to dispute settlement.
- **Dispute settlement.** With certain exceptions specified in the agreement, the commitments made in the TPP are subject to dispute settlement. The agreement provides for a consultation mechanism: if the parties fail to reach a mutually agreeable solution during consultations, they can request establishment of a panel to resolve the issue. To ensure compliance, the agreement allows for retaliation if a party found not to have complied with the agreement fails to comply with its obligations under the agreement.

Having negotiated prior trade agreements while working in both the public and private sectors, we know that that the October 5, 2015 announcement is a giant leap forward, but not yet the finish line. The next few months will provide businesses and other private-sector stakeholders numerous opportunities to advance and protect their interests. These include everything from participating in public forums or congressional hearings to meeting with members of Congress or government regulators. The next few months will also provide businesses a window to learn the new rules of the road that will govern trade, investment and growth among the TPP countries and identify opportunities to maximize the benefits available under this 21st century agreement.

Our team of international trade lawyers, public policy advisors and market access advisors have in-depth experience helping public and private sector stakeholders understand these complex agreements and leverage them to reduce tariff and non-tariff barriers, facilitate trade and advance their economic and policy objectives.

Your Key Contacts

Paul M. Lalonde
Partner, Toronto
D +1 416 361 2372
M +1 416 414 5833
paul.lalonde@dentons.com