

Client Alert

International Trade & Litigation Practice Group

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Trans-Pacific Partnership Agreement: Inclusion of Japan in Talks Raises Stakes/Opens Opportunities to Address Trade Barriers

On April 24, 2013, the Obama Administration notified Congress of its intent to include Japan as the 12th country to take part in negotiations for the Trans-Pacific Partnership (TPP). The notification begins a formal consultations process among the Administration, Congress, and stakeholders on the U.S. negotiating objectives with respect to Japan. Japan is expected to begin participating in the TPP negotiations in July.

In parallel to the TPP negotiations, the United States will conduct bilateral talks with Japan to address non-tariff measures in the automotive sector and several other sectors. These talks will include discussions on insurance, transparency, investment, intellectual property rights, standards, government procurement, competition policy, express delivery, and sanitary and phytosanitary measures.

The participation of Japan greatly increases the economic significance of the TPP Agreement. Japan is by far the largest U.S. trading partner participating in the TPP negotiations, and it does not already have a free trade agreement with the United States. With the inclusion of Japan, the TPP Agreement will create an integrated regional market accounting for nearly one-third of all global trade and approximately 40 percent of the world's GDP.

As part of the Administration's outreach to stakeholders, both the Office of the U.S. Trade Representative and the U.S. International Trade Commission will solicit written comments and oral testimony from interested stakeholders relating to Japan's inclusion in TPP, including the economic costs and benefits of removal of tariffs and reduction in non-tariff barriers on goods traded with Japan; product-specific import or export interests or barriers; import sensitivities related to Japan; relevant investment and government procurement issues; and competition-related matters that should be addressed in the negotiations.

Japan's entry into the TPP negotiations presents a unique opportunity to address existing trade concerns and rebalance the U.S.-Japan trade environment. Firms that trade in goods and services with Japan, that compete with Japanese goods and services, or that historically have experienced difficulty in penetrating the Japanese market should consider taking part in the domestic consultations process.

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Below are some key elements of the TPP Agreement for which firms should weigh the impact of Japan's joining the negotiations and consider providing input to help inform the U.S. negotiating strategy:

- **Market Access for Goods.** The TPP Agreement will include tariff phase-out schedules that cover more than 11,000 commodity categories. Tariffs on many products will likely be phased out immediately. Tariffs on more sensitive products will be phased out over varying periods of time. Companies should consider the impact and timing of these phase-outs on their imported inputs, the goods they export to Japan (the average applied tariff rate in Japan is currently around 6.3 percent), and Japanese goods that compete with their products in the United States. The TPP Agreement will also address export and licensing procedures, customs processing, and other issues that can facilitate trade between the parties.
- **Rules of Origin.** Rules of origin (ROO) determine whether a particular good is eligible for preferential treatment under the TPP Agreement. The TPP countries are already at an advanced stage of their consideration of product-specific ROO, seeking a single TPP ROO to the extent possible. The parties reportedly also have agreed that inputs produced in any TPP country may be cumulated so that a product produced with components made in multiple TPP countries can be eligible for preferential treatment. Companies should consider whether Japan's entry into the TPP warrants further consideration of the ROO for the goods that they export and the inputs used in their production.
- **Market Access for Services.** The TPP negotiations are expected to expand market opportunities for services providers, including professional services, telecommunication services, express delivery, and e-commerce. Japan is a huge market for services, and several concerns with Japan's services market have been long-standing. Chief among them is the role of government-owned Japan Post in the express delivery, insurance, and financial sectors. Other issues include localization requirements, mobile wireless licensees, interoperability and technology neutrality in health IT services, and transparency in the regulation of e-commerce, data centers, and cloud computing.
- **Government Procurement.** As in past U.S. FTAs, commitments are expected on government procurement, which would provide opportunities for firms of each nation to bid on certain federal and state contracts over a set monetary threshold on a reciprocal basis. Notwithstanding the fact that Japan is one of only four TPP countries that are parties to the WTO Government Procurement Agreement (*i.e.*, Canada, Japan, the United States, and Singapore), U.S. companies have reported that the participation of U.S. firms in Japanese procurement has remained limited, particularly in the areas of design/consulting, construction, and IT procurement.
- **Technical Barriers to Trade.** The TPP Technical Barriers to Trade (TBT) provisions will commit TPP countries to promulgate and apply standards, technical regulations, and conformity assessment procedures in a manner that is transparent, does not discriminate against foreign goods, and is no more trade restrictive than necessary to achieve the objective (*e.g.*, to protect public health or to prevent fraud). The chapter is expected to include several sector-specific annexes that seek to more closely align the TPP countries' approaches to regulating a particular sector. The TPP Agreement is expected to contain annexes on cosmetic products, pharmaceuticals, and medical devices.

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- **Foreign Investment.** Although some issues are far from settled, the TPP Agreement is expected to address investment issues such as non-discriminatory treatment of foreign investments and investors; minimum standards of treatment; rules on expropriation; transfer of payments of a foreign investor out of a host territory; exceptions for identified non-conforming measures; state-to-state and investor-state dispute settlement procedures; and prohibitions on performance requirements.
- **State-Owned Enterprises.** As state-owned enterprises (SOEs) increasingly are participating in international trade, the United States has pushed for commitments that help ensure a level playing field for private companies that compete with SOEs. It is unclear what form the TPP commitments on SOEs will ultimately take. It is expected that the commitments will focus on transparency and ensuring that SOEs receive no competitive advantages unavailable to private firms.

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