

With Presidential Notice and Release of Final Text, Congress' Extensive Review of the Trans-Pacific Partnership Agreement Begins

Article By:

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On Thursday, November 5, the much-anticipated final text of the ***Trans-Pacific Partnership (TPP)*** was released by the office of the United States Trade Representative (USTR). Soon thereafter, the White House released an official notice from President Obama of his intent to sign the agreement once the 90-day review period is complete. This notice was necessary to start the 90-day clock before his signature triggers the next step in the process — Congressional approval.

The text of the TPP is now being reviewed by the U.S. Congress, as well as the relevant legislative bodies of the other TPP member states. The TPP final agreement text contains all of the provisions and requirements that will govern trade among the group of 12 member countries, which includes the United States, Australia, Brunei, Chile, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam, Canada, and Japan. The USTR has published the full text of the agreement, which is available [here](#).

Some of the important questions raised throughout the negotiation phase of the agreement have been answered by the release of the text, while others remain unclear as thousands of pages of TPP text are carefully analyzed. From the perspective of implementing the TPP as soon as it becomes available, some major takeaways can be categorized as follows:

Impact of TPP on Current Agreements

- The TPP will not replace any existing agreements among member countries. In fact, more favorable provisions of other agreements are not considered “inconsistent” with TPP. Article 1.2(2).

Thus, importers may use more favorable rules of origin, for instance when importing products from a country with multiple agreements, or may choose to use an existing agreement until the phase-in periods for the TPP ripen.

- National Treatment provisions require that goods of member countries be afforded the same treatment, or treatment no less favorable than the most favorable treatment that government

provides any like, directly competitive, or substitutable goods. Article 2.3(2).

This likely means that the U.S. will follow the trend of recent free trade agreements and incorporate all TPP member countries, including Malaysia and Vietnam, into the list of “Free Trade Agreement Countries” in the definition of “Designated Country” for purposes of the Trade Agreements Act (TAA). The TAA can override the Buy America provisions of the Foreign Acquisition Regulations for certain transactions.

Rules of Origin, Qualification Requirements, and Favorable Treatment

- Rules of origin include NAFTA-style tariff shift and regional value content rules, instead of the GSP-like qualification method that focuses on local processing percentages.
- TPP authorizes four (4) different Regional Value Content Rules, including the focused value method, build-down method, build-up method and net cost method. Article 3.5. Product-specific rules detail which RVC method, if any, must be used for qualification and determining whether an imported product is originating under the agreement.
- Unlike NAFTA, TPP is an importer-based agreement, meaning an importer can attest to the validity of a TPP claim and provide a Certificate of Origin. Article 3.20. However, member countries may impose additional requirements, including requirements that a Certificate of Origin be issued by a “competent authority” or by an “approved exporter.”
- Like NAFTA, and inconsistent with subsequent bilateral and multilateral Free Trade Agreements entered into by the United States, the TPP Certificate of Origin must be in the importer's possession, even if self-qualified, at the time the TPP declaration is made. Article 3.24.
- Goods sent between TPP member countries for repair or alteration will be duty free, regardless of origin, and will be readmitted after repair or alteration duty free. Article 2.6.
- *De Minimis* rate for non-originating goods is set at 10 percent, with some exceptions. Article 3.11.
- Fungible goods can be considered originating if stored using GAAP compliant inventory management methods. Article 3.12.
- To qualify as originating, goods cannot be transshipped through the territory of a non-member country unless the goods do not undergo operations other than unloading, reloading, separation from a bulk shipment, storing, labelling or marking required by the importing country, or any other operation necessary to preserve it in good condition or to transport the good to the territory of the importing country. If the goods do enter non-member countries, they must remain under the control of the customs administration in the territory of a non-member country. Article 3.18.
- To thwart customs fraud, the TPP allows for customs officers to investigate imports from TPP countries. This investigative authority extends to the reviews of the exporter and manufacturing facility in the member country where the export took place. Article 3.27.

While many of the provisions of the TPP have general applicability, several sections and provisions have impacted specific industries directly. The following are some observations regarding industries directly impacted by the TPP provisions.

Agriculture and Manufacturing

The National Treatment and Market Access for Goods chapter (the Goods chapter), highlights the TPP's goal to remove barriers to the export of American manufactured goods and farm products. Specific to agriculture, some TPP countries impose tariffs, increasing the cost substantially for buyers of American products.

Here are some key takeaways from this chapter:

- The TPP will eliminate tariffs on the majority of U.S. exports of food and agricultural products, and will provide new market access and increased export opportunities through tariff reductions or changes to tariff rate quotas for the remaining products not covered.
- All TPP Parties have agreed to commit to eliminating agricultural export subsidies on goods sold in TPP markets.
- TPP Parties will be expected to develop multilateral disciplines on export credits, export credit guarantees and insurance programs.
- Export restrictions on specific food products are limited by the Goods chapter, with a requirement that a Party consult with interested TPP importing countries, for any restriction planned to last more than 12 months.

Some key takeaways specific to manufacturing are:

- In addition to eliminating tariffs, the Goods chapter prohibits import licensing conditioned on performance requirements, as well as contractual relationship requirements. This means exporters of manufactured goods cannot be required to use a local distributor to import goods into a TPP country.
- The Goods chapter requires TPP Parties to provide duty-free treatment for temporary admission of manufactured goods, including professional equipment, commercial samples, goods for display/demonstration, sports equipment, commercial samples of negligible value, and printed advertising material.

Textiles and Apparel

The TPP addresses the apparel industry in its Textiles and Apparel chapter, carrying forward from other trade negotiations the “yarn-forward” approach. This approach incentivizes use of yarns and fabrics from TPP countries, by giving those end products preferential treatment under TPP.

Here are some key takeaways from this chapter:

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- The TPP will eliminate tariffs on U.S. exports of textiles and apparel to other TPP markets. Some of these tariffs will be immediately reduced to zero, while other will gradually be phased out.
 - To ensure success of the “yarn-forward” approach, goods must be made within the free trade area with TPP originating materials to qualify for lower tariffs. In the event that TPP members cannot produce enough of a particular material to meet production needs, a short supply list will allow for use of specific materials from outside the TPP region.
 - As mentioned above, the TPP extends investigative authority to Customs officers of member countries in the goal of limiting fraud. The TPP sets forth specific rules and obligations for the verification of textile and apparel goods in Article 4.6, which provides additional requirements and formalities, such as the involvement of the host member state in investigation proceedings.

Pharmaceutical, Medical Device and Biotech

Covered in a number of TPP chapters, the pharmaceutical, medical device and biotech industries are affected in the following significant ways:

- Pharmaceuticals will receive protection of undisclosed testing and other data collected in the process of seeking market approval for developmental products.
- Under the Intellectual Property chapter, pharmaceutical, medical device and biotech products are included in the TPP’s commitments to clarify and strengthen the protection of brand names.
- Biologics and pharmaceuticals produced by TPP countries will receive market and data protection for a minimum standard of eight years. This represents the first extended term of market protection for biologics.

Automotive

Similar to agriculture, the automotive industry has been plagued by high tariffs for buyers of American autos. The TPP addresses this issue in a number of chapters.

The primary takeaways are:

- Current U.S. imposed tariffs are 2.5 percent on Japanese cars and 25 percent on trucks. Through the TPP, these tariffs will eventually be reduced to zero – though the 25 percent tariff on trucks will remain in place for 30 years.
- The TPP’s Technical Barriers to Trade chapter highlights the product standards that TPP countries will be held to. For autos, technical regulations developed by country governments will ensure that products do not pose risks to public safety.

U.S. Automakers will most likely struggle with the Rules of Origin and Origin Procedures chapter, since these manufacturers use numerous non-U.S. materials sourced from countries outside of the TPP. In several instances, autos incorporating non-TPP articles are not expected to qualify for lower tariffs due to the applicable origin rule.

What's Next?

Now that the final text of the agreement has been published, the procedures mandated by the Trade Promotion Authority require Congress to have 90 days to review the final text of the agreement before President Obama can sign it. Once signed, the deal will be subject to an up-or-down vote by Congress, unless lawmakers decide the deal does not conform to negotiating objectives. Similar ratification procedures will be undertaken by every member country.

As the end of the 90-day period draws closer (on or around February 2, 2016), we expect to learn more about any serious Congressional objections or contentions with the agreement that could trigger delays.

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