

## **PROBLEMS WITH JAPAN'S PROPOSAL FOR BRINGING THE TPPA INTO FORCE<sup>1</sup>**

Japan has proposed a clause that sets out the terms on which the Trans-Pacific Partnership Agreement would enter into force, which seems to enjoy the support of a number of other TPPA negotiating parties.<sup>2</sup> It would leave countries at the mercy of the US's unilateral process of certification,<sup>3</sup> and expose countries that were not among the initial group to demands for additional concessions as a condition of acceding to the Agreement.

### **Big players count most**

The text proposed by Japan has not been released, but it is understood to say the Agreement would come into force after two years when at least six countries representing 85% of the GDP of the original negotiating countries have met the conditions. That means the US and Japan would have to be originating parties. The table below shows just adding two of the larger countries (Canada, Australia, Mexico) would be enough, and just two further TPPA countries (or one if all three of those larger players joined in the first tranche). Poor and small countries are virtually irrelevant.

<b>Country Name</b>	<b>2013 GDP (US\$)</b>	<b>Each TPP country's % of total TPP GDP</b>
Australia	1560372473125	5.61
Brunei Darussalam	16111135786	0.06
Canada	1838964175409	6.61
Chile	276673695234	0.99
Japan	4919563108373	17.68
Malaysia	313158247643	1.13
Mexico	1262248825556	4.54
New Zealand	188384859627	0.68
Peru	202362597917	0.73
Singapore	302245904260	1.09
United States	16768053000000	60.27
Vietnam	171222025390	0.62
TOTAL TPP GDP:	27819360048319	
85% of total TPP GDP:	23646456041071	
US&JP GDP:		77.96

Data from <http://data.worldbank.org/indicator/NY.GDP.MKTP.CD>

<sup>1</sup> Professor Jane Kelsey, University of Auckland, New Zealand, 24 September 2015

<sup>2</sup> 'TPP Countries Move Toward Japanese Proposal on Entry into Force', *Inside US Trade*, 14 August 2015

<sup>3</sup> See [www.tppnocertification.org](http://www.tppnocertification.org)

## US certification

This formula does nothing to address the leverage the US exercises through the certification process, whereby it refuses to bring an agreement into force with another country until that country has complied with the US definition of its obligations under the Agreement. Past use of unilateral certification is documented at [www.tppnocertification.org](http://www.tppnocertification.org).

The certification process is written into the Fast Track legislation and is therefore a legal obligation on the US President before a treaty can be signed.

### **SEC. 106. IMPLEMENTATION OF TRADE AGREEMENTS**

**(a) In General (1) << President. Deadlines >> Notification and submission** -- Any agreement entered into under section 103(b) shall enter into force with respect to the United States if (and only if) — . . . (G) Notification: the President, not later than 30 days before the date on which the agreement enters into force with respect to a party to the agreement, submits written notice to Congress that the President has determined that the party has taken measures necessary to comply with those provisions of the agreement that are to take effect on the date on which the agreement enters into force.<sup>4</sup>

The law makes specific provision for Congressional oversight of the certification and notification process.

### **SEC. 104. CONGRESSIONAL OVERSIGHT, CONSULTATIONS, AND ACCESS TO INFORMATION.**

**(a) Consultations with Members of Congress. -- (2) Consultations Prior to Entry into Force.** -- Prior to exchanging notes providing for the entry into force of a trade agreement, the United States Trade Representative shall consult closely and on a timely basis with Members of Congress and committees as specified in paragraph (1), and keep them fully apprised of the measures a trading partner has taken to comply with those provisions of the agreement that are to take effect on the date that the agreement enters into force

Suggestions have been made to negotiators on ways to neutralise or at least minimise the use of certification by the US, but there is no indication those have been adopted. Indeed, the current proposal would seem to allow – even encourage – Japan to engage in a similar process.

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<sup>4</sup> SEC. 106 a)1)G) of <https://www.congress.gov/114/plaws/publ26/PLAW-114publ26.pdf>

## CAFTA Precedent

The specific wording is crucial to determine how the US can apply its certification. The text is believed to follow a similar line to the provision of entry into force for CAFTA, adapted to set a minimum number of originating parties and to ensure that both the US and Japan are among them.

### CAFTA Article 22.5: Entry into Force

1. (a) This Agreement shall enter into force on January 1, 2005, provided that the United States and one or more other signatories *notify the Depositary in writing by that date that they have completed their applicable legal procedures.*

(b) If this Agreement does not enter into force on January 1, 2005, this Agreement shall enter into force after the United States and one or more other signatories make such a notification, on such later date as they may agree.

2. Thereafter, this Agreement shall enter into force for any other signatory 90 days after the date on which that signatory notifies the Depositary in writing that it has completed its applicable legal procedures. Unless the Parties otherwise agree, a signatory may not provide a notification under this paragraph later than two years after the date of entry into force of this Agreement.

3. The Depositary shall promptly inform the Parties and non-Party signatories of any notification under paragraph 1 or 2.

The crucial phrase is *notify the Depositary in writing by that date that they have completed their applicable legal procedures.* In relation to the US that means notification that the US has completed its applicable procedures, including certification.

### Delays in US Certification under CAFTA

The experience of CAFTA countries in the delays before the US transmitted its formal notification in accordance with the above provision should ring alarm bells for all the other potential TPPA parties.<sup>5</sup>

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<sup>5</sup> Source: 'The U.S. Process of Conditioning Implementation of Free Trade Agreements upon U.S. Certification that an AFTA Partner Country has met U.S. Expectations Regarding Policy Changes to Comply with FTA Terms', Public Citizen, 15 October 2012, p.2

CAFTA country	Date of partner's legislative or other means of approval	Date of US legislative approval	Date CAFTA went into effect for that country	Delay
El Salvador	17 Dec 2004	28 July 2005	1 March 2006	7 months
Honduras	3 March 2005	28 July 2005	1 April 2006	8 months
Nicaragua	9 Oct 2005	28 July 2005	1 April 2006	6 months
Guatemala	10 March 2005	28 July 2005	1 July 2006	11 months
Dominican Republic	6 Sept 2005	28 July 2005	1 March 2007	18 months
Costa Rica	7 Oct 2007	28 July 2005	1 January 2009	15 months

### Double certification for 2<sup>ND</sup> tranche parties

Countries that are not in the first tranche of parties will have to secure approval to accede from the originating parties in the form of the TPP Free Trade Commission.

That is likely to follow a similar process to WTO accession, where acceding countries are routinely required to accept WTO-plus obligations, and the accession of countries to the TPPA negotiations, especially Mexico, Canada and Japan, where they are required to make commitments not required of other parties. This would involve bilateral negotiations with each of the originating parties to get their approval, and then collective approval.

It is not clear whether the Commission would act by consensus, but assuming it follows the pattern of the CAFTA Commission,<sup>6</sup> that would mean any originating country could effectively veto entry by any other country, whether an original negotiating party or country new to the TPPA, unless it secures the TPPA-plus commitments it wants.

So, regardless of whether a non-US/non-JP country is in the 1<sup>st</sup> or 2<sup>nd</sup> tranche of parties bringing the TPPA into force, the US and JP could both put them through the certification process and if they are in the 2<sup>nd</sup> tranche, the rest of the 1<sup>st</sup> tranche countries can also certify them.

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<sup>6</sup> [https://ustr.gov/sites/default/files/uploads/agreements/cafta/asset\\_upload\\_file996\\_3939.pdf](https://ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file996_3939.pdf)