January 13, 2012

Donald W. Eiss
Office of the U.S. Trade Representative
600 17th Street, NW
Washington, D.C. 20508

RE: Request for Comments on Japan’s Expression of Interest in the Proposed Trans-Pacific Partnership Trade Agreement – Docket No. USTR-2011-0018

Dear Mr. Eiss:

On behalf of the American Bar Association, I submit the following in response to the Office of the U.S. Trade Representative’s (USTR) request for comments with respect to the expressions of interest announced by the governments of Japan, Mexico and Canada in joining the Trans-Pacific Partnership (TPP). 76 Fed. Reg. 76478-81 (Dec. 7, 2011).

With more than 400,000 members, the American Bar Association is the largest voluntary professional membership organization in the world. Our members include lawyers from practice settings of all sizes and types, and from every U.S. jurisdiction, U.S. territory and other countries. Through entities such its Task Force on International Trade in Legal Services and the Section of International Law, the ABA monitors ongoing trade negotiations and other initiatives that impact trade in legal services; informs and educates ABA members and state regulators about legal services trade issues and their implications for the regulation and practice of law in the U.S. and abroad; and regularly communicates with USTR and the Department of Commerce regarding legal services issues.

The ABA has long supported a liberalized, rules-based system of international trade, both as a mechanism to advance the rule of law and as a means to enhance the ability of U.S. lawyers and law firms to effectively serve their clients through cross-border practice. The ongoing globalization of commercial activity by American individuals and businesses makes it imperative for U.S. lawyers to be able to provide advice and assistance to their clients wherever the clients need that assistance. In 2002, the ABA adopted a policy urging the USTR to seek practice rights for outbound U.S. lawyers equivalent to the practice rights set forth for inbound foreign lawyers in the ABA Model Rule for the Licensing and Practice of Foreign Legal Consultants. In support of this policy, the ABA is actively working to enhance the ability of U.S. firms to establish offices overseas and to associate freely with foreign lawyers and law firms. Inclusion of Japan, Mexico and Canada in the TPP negotiations would provide additional opportunities to address these issues on the governmental level.
Trade in Legal Services and Foreign Barriers to U.S. Lawyers.

International trade in legal services is big business. The most recent published statistics suggest that the United States exports annually legal services valued at more than $7 billion and enjoys a trade surplus of more than $3 billion. These figures probably understate the participation of U.S. lawyers in U.S. trade, for example by excluding the significant legal services provided by in-house counsel at many businesses engaged in cross-border and foreign operations. Japan, as the second largest destination for U.S. legal services, is a particularly critical market for U.S. lawyers and law firms. Its history in this area is an illustrative example of a country where much progress has been made but important issues remain to be addressed.

Prior to the mid-1980’s, although Japan had one of the most rapidly growing economies in the world, U.S. lawyers found it virtually impossible to offer their services to clients from within Japan. In 1987, Japan began to open its doors with the passage of the Foreign Lawyers’ Act. Initially, the rules were fairly restrictive, but amendments enacted in 1994 and 2005 made incremental improvements. At the earlier stages, Japan allowed U.S. lawyers and local attorneys to join in specific deal-based joint venture arrangements within Japan to advise clients on international transactions. Later profit-sharing more generally was allowed, and today foreign firms may and do open offices within Japan and staff them with U.S. nationals and Japanese “bengoshi” (fully admitted practitioners). This progressive opening of the Japanese market has served as a model for other countries in Asia.

While Japan has made significant progress in liberalizing its legal services market, a number of important inhibitions on the ability of the U.S. lawyers to practice in Japan remain, such as requirements that a foreign lawyer have practiced in his or her “home country” for at least three years before admission to practice in a Japanese office, and that practice is confined to “home country” law. Initially that “home” was the state within which a U.S.-admitted lawyer was personally admitted. In addition, as the 2011 National Trade Estimate Report on Foreign Trade Barriers notes:

Japan imposes restrictions on the ability of foreign lawyers to provide international legal services in Japan in an efficient manner. The U.S. Government continues to urge Japan to further liberalize the legal services market by, among other issues: allowing foreign lawyers to form professional corporations and establish multiple branch offices in Japan whether or not they have established a professional corporation; and by accelerating the registration process for new foreign legal consultants. The U.S. Government has also requested that Japan take measures to ensure that no legal or Bar Association impediments exist to Japanese lawyers becoming members of international legal partnerships with lawyers outside Japan.

The negotiation of Japan’s membership in the TPP would provide a forum for reviewing the remaining obstacles to opportunities for lawyers in both countries to offer their services. Similar

1 USITC, 2011 Annual Report on Trends in U.S. Services Trade, Pub. 4243, at 7-13 (Jul 2011). Footnote 78 is also worth noting as it reports these figures now include in “exports” the income of foreign affiliates of US law firms.

2 USITC, Annual Report, op. cit, at 7-16. Exports to Japan were 15.2% of total exports, only slightly less than the first place market of the U.K., which accounted for 16.1% of the total.

3 2011 National Trade Estimate Report on Foreign Trade Barriers, Office of the United States Trade Representative, March 2011, Pg. 203.
opportunities would be presented with the inclusion of Canada and Mexico as well. The existing NAFTA with Canada and Mexico includes significant provisions contemplating access for the delivery of legal services throughout the North American continent. U.S. lawyers wishing to offer services in Canada have not been materially prevented from doing so. The Mexican experience has not been as favorable, but participation in the TPP may well spur it to further facilitate cross-border trade in legal services.

**Domestic Regulation of Legal Services and Consultation in the Context of the TTP**

We recognize that bilateral and multilateral trade negotiations present important opportunities to facilitate the dialogue on issues relating to transnational legal practice and to address market access barriers faced by U.S. lawyers and law firms around the world. At the same time, as the TPP and other trade negotiations continue, it is important for USTR to remain cognizant of the fact that commitments in legal services concern a matter regulated by the supreme courts of the states. Rules regulating practice by non-U.S. lawyers, including foreign legal consultant rules, are adopted by each state’s highest court of appellate jurisdiction pursuant to its regulatory authority over the legal profession. Therefore, it is critical for USTR to engage in ongoing outreach and consultation with state supreme courts and other regulatory bodies. We appreciate the efforts that have been made by USTR in recent years to improve communications with the lawyer regulatory community and encourage additional initiatives in this regard. As always, the ABA stands ready to assist in facilitating communication and outreach with the relevant state entities.

The ABA has long-supported state-based judicial regulation of the legal profession in the U.S. However, given the increase in the cross-border practice of law, the ABA also has adopted recommendations that encourage state supreme courts to adopt limited licensure rules, such as foreign legal consultant rules, and rules that allow both U.S. and non-U.S. lawyers to engage in temporary practice in a jurisdiction where they are not licensed. The ABA continues to assist states in studying and implementing these recommendations. We hope these liberalizing measures will provide a substantive basis to persuade foreign countries to adopt regulatory regimes permitting U.S. lawyers similar access to practice in their countries.

We appreciate this opportunity to share our comments and hope that USTR will continue the practice of soliciting comments from the ABA and relevant state regulatory bodies in advance of formulating negotiating positions that may affect regulation of lawyers in the United States.

Sincerely,

Thomas M. Susman