

# CHINA'S ARDUOUS PATH TO CPTPP ACCESSION – A MYRIAD OF OBSTACLES WITH AN IMPROBABLE OUTCOME

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On September 16, 2021, China submitted its request to accede to the *Comprehensive and Progressive Trans-Pacific Partnership* ("**CPTPP**").[1] The CPTPP is a free trade agreement between 11 countries, including Canada.[2] The CPTPP was established on the basis of the *Trans-Pacific Partnership* ("**TPP**"), a trade pact initiated in large part by the US to counter China's influence in the Indo-Pacific. However, the US withdrew from the agreement in 2017, leading the remaining countries to agree to a revised, slightly more progressive agreement, the CPTPP.

For more general information on the provisions of the CPTPP, see our previous bulletin titled <u>The Comprehensive and Progressive TPP – Countering The Pressures for Protectionism</u>, published when the Canadian government first announced it would sign the agreement.

### **Prevailing Context**

China's bid to join the CPTPP comes amid a time of complex political and diplomatic relations with member countries. The following briefly canvasses some of the activities contributing to the complexity the CPTPP member-countries' relations with China. For instance, China is subject to economic sanctions by a number of countries, including Canada, for alleged human rights violations, including allegations of forced labour against the Uyghurs and other Muslim ethnic minorities in the Xinjiang Uyghur Autonomous Region of China. China recently responded to these sanctions by implementing an anti-foreign sanctions law (see our bulletin titled *China's New Sanctions Blocking Regime: Should Canadian Businesses in Hong Kong Be Worried*?). There are ongoing territorial disputes between China and Japan, Malaysia, Brunei and Vietnam which add complexity to the political dynamics at play. Trade relations are currently strained between China and Australia, and China imposed tariffs on Australian wine and barley. Tensions between Canada and China also intensified in 2018 with the arrest of Huawei CFO Meng Wanzhou in Vancouver and the subsequent detention of Michael Spavor and Michael Kovrig in Beijing. Although all three individuals have recently been released, relations between the two countries remain sensitive. And on September 15, 2021 Australia, the UK and the US announced a trilateral security agreement, referred to as AUKUS. Under AUKUS, the US and UK aim to supply Australia with a fleet of nuclear-powered submarines. While Chinese officials maintain that China's bid to join the CPTPP has "no



connection" with the AUKUS security pact, some have pointed to the timing of China's application, the day after AUKUS was signed, as significant.[3]

These circumstances significantly complicate China's application for accession. However, the geopolitical advantage China would gain by joining the CPTPP is clear. First, China would immediately become the dominant player in the trade agreement, as its economy (as reflected by GDP) is greater than the rest of the member countries combined. [4] Second, China's accession to the CPTPP would also extend that country's its economic reach, building on efforts made through the Regional Comprehensive Economic Partnership ("RCEP"), the Belt and Road Initiative, and the Asian Infrastructure Investment Bank. [5]

Although China has previously indicated that it plans on decoupling its economy from that of the West, China clearly recognizes that joining the CPTPP would help solidify China as a global champion for economic globalization and become more centrally integrated in global trade as a whole. [6]

# What needs to happen before China can join?

#### **CPTPP Accession Process**

Pursuant to Article 5 of the CPTPP, China will need to reach an agreement with all 11 signatories as to the terms and conditions of its accession. The first step towards reaching this agreement, and of the accession process generally, is providing notification of a formal request to commence negotiations to the CPTPP depositary.[7] China completed this step on September 16, 2021. CPTPP members, through the CPTPP Commission,[8] must then decide whether to commence the accession process. During this time, China may conduct consultations with each party, but these consultations do not constitute official negotiations. If the Commission agrees to commence the accession process, the Commission will establish an Accession Working Group that will consist of government representatives of each party of the CPTPP. China will conduct negotiations via the Accession Working Group and bilaterally as appropriate.

Although numerous observers have suggested that China's accession to the CPTPP may be facilitated by Article 30.4 of the TPP, which provides for somewhat easier accession for Asia-Pacific Economic Cooperation ("APEC") countries, this process appears complicated by Article 30.4's exclusion from the CPTPP.[9]

A number of CPTPP obligations will cause China particular difficulties in its negotiations with CPTPP members. We explore some of these below.

Key Hurdles for China's Accession: CPTPP Standards

Chapter 14 – Digital Trade: The CPTPP's chapter on digital trade is one of its most innovative features.
 Designed to enhance the digital economy, the digital trade chapter protects cross-border data transfers,



subject to restrictions imposed by a member states' regulatory regime, so long as the regime aims to achieve a legitimate policy objective (Article 14.11). It also eliminates data localization requirements subject to similar exceptions (Article 14.13). The CPTPP also prohibits governments of CPTPP members from demanding access to an enterprise's source codes as a condition of import, distribution or sale (Article 14.17). Importantly, these provisions are subject to the CPTPP's dispute settlement mechanism and, further, a national security exemption is not available to allow members to derogate from these requirements. While China has made similar commitments on data transfer and data localization as a member of RCEP, this agreement does not contain a provision prohibiting the forced transfer of source codes. [10] Additionally, the digital trade provisions of the RCEP are not subject to dispute settlement and members may use a self-judging national security exemption to circumvent these requirements.

- Chapter 17 State-Owned Enterprises ("SOEs"): The CPTPP's chapter on SOEs poses a particular challenge for China, with multiple articles adding obligations which China will be hard-pressed to meet given the make-up of its economy. For example, Article 17.4 requires that SOEs act in accordance with "commercial considerations" when purchasing or selling goods and services. Commercial considerations are those that would normally be taken into account in commercial decisions of privately owned enterprises, and include factors such as price, quality, and marketability. Article 17.6 requires that member parties not cause adverse effects to another party through the use of non-commercial assistance in the territory of another party. Non-commercial assistance includes the provision of subsidies or of goods and services (other than general infrastructure) on commercially advantageous terms. Article 17.10 imposes transparency obligations on members, and require publishing a list of SOEs on an official website and providing information on non-commercial assistance programs upon request, provided there is an explanation for how the program may impact trade or investment between the parties. SOEs and subsidies are major tools of China's economy, including for projects provided through the Belt and Road Initiative or Made in China 2025.
- Chapter 19 Labour: The CPTPP's labour chapter may also pose a challenge. Article 19.3 incorporates the International Labour Organization's Declaration on *Fundamental Principles and Rights at Work and its Follow-up* (1998) ("**ILO Declaration**"). The ILO Declaration provides the right to freedom of association and prohibits all forms of forced labour, child labour and discrimination in respect of employment. To further entrench these rights, Article 19.4 of the CPTPP explicitly prohibits members from derogating from these protections, meaning labour laws cannot be weakened to encourage trade or investment. This chapter represents another hurdle to China's accession to the CPTPP given allegations of forced labour practices in China.
- Chapter 20 Environment: The CPTPP establishes a number of positive environmental obligations for members. Members must effectively enforce their environmental laws and must not derogate from



them in order to gain a trade or investment advantage (Article 20.3). The environmental chapter is enforceable under CPTPP's broader dispute resolution mechanism. The CPTPP also recognizes sovereign right of each Party to establish its own levels of domestic environmental protection. Although China has recently made important efforts to address environmental concerns, including by announcing its goal to phase out coal investment abroad and debuting its emissions trading system, CPTPP obligations may nonetheless prove onerous given China's status as the world's largest emitter of greenhouse gases and the challenges its faces in reconciling climate and pollution control and rapid economic development.

#### China-Specific Accession Protocol

Some of the concerns discussed above could be addressed through terms and conditions in China's CPTPP accession protocol, similar to China's accession protocol to the WTO.

China's WTO accession protocol contained provisions that allowed China to join the WTO while it transitioned from a non-market to a market economy. [11] For instance, under Article 10 of its accession protocol China agreed to notify the WTO of any subsidy it provided. Section 15 of the accession protocol allowed for deviations from typical methodologies when calculating anti-dumping duties where non-market conditions existed. Additionally, Section 16 established a Transitional Product-Specific Safeguard Mechanism such that a WTO member could impose a safeguard to protect a specific domestic industry from injury from Chinese imports based on a weakened evidentiary threshold. These provisions were aimed at incentivizing China's transition to a market economy.

Given that China has not fully transitioned into a traditional market economy nearly 20 years after its WTO accession, and given the frequently expressed view that China's WTO accession protocol was not successful in transitioning China away from a managed economy, it is likely that many CPTPP members will view any Chinese accession protocol in the context of the CPTPP very warily.

It is nonetheless likely that China could similarly need to enter into an accession protocol to join the CPTPP, and certain members are likely to view the CPTPP Accession Process as an opportunity to address perceived trade distortive elements within the Chinese economy. The CPTPP Accession Process itself indicates that applicant parties must (1) demonstrate the means by which they will comply with the rules contained in the CPTPP and (2) deliver commercially meaningful market access to each CPTPP party. [12] CPTPP members will also likely want to ensure China is committed to meeting the requirements in the labour and SOEs chapters in particular.

# **CUSMA's Eject Button**

China's request to join the CPTPP causes a further complication for Canada and Mexico. This is because



Canada and Mexico are both parties to the CPTPP and the *Canada-United States-Mexico Agreement* ("**CUSMA**") and Article 32.10 of the CUSMA specifies that a party to that agreement can terminate it and replace it with a bilateral agreement between the remaining parties, should one of the parties enter into a free trade agreement with a non-market economy country.[13]

The US treats China as a non-market economy country, which could allow it to remove Canada or Mexico from the CUSMA. The US has not yet indicated whether it would review the CUSMA upon China's accession to the CPTPP. Ambassador Katherine Tai, the US Trade Representative, recently stated that the US views the CPTPP as outdated, signalling that an application to join the CPTPP from the US is unlikely. [14] However, given the aforementioned stated goal of the CPTPP to counter China's influence in the Indo-Pacific region, and given an ongoing US strategic shift (including through an increased military presence in the region), the US may be motivated to press this eject button -or threaten its use- should Canada or Mexico agree to China's accession. While Vietnam, another country viewed by Canada and the United States as a non-market economy, is already party to the CPTPP, this may be of little comfort to Canada or Mexico given the US' heavy political and economic focus on China (rather than on Vietnam). Given that that CUSMA is vitally important for both Canada and Mexico, the US' ability to terminate the agreement if China were to join the CPTPP may be sufficient to give Canada and Mexico reason to prevent China's accession.

#### Conclusion

The CPTPP is gaining in popularity. The UK and Taiwan have already applied to join. Others, like South Korea, Indonesia and Thailand have expressed interest in joining.

Some members of the CPTPP, namely Singapore and Malaysia, have expressly welcomed China's interest in joining the CPTPP. And while some members may support accession by China, other countries, including Canada, are much more unlikely to do so. One diplomatic crisis between Canada and China has been resolved since Meng Wanzhou's extradition case was dropped and the two Michaels were released and arrived back in Canada. However, many other tensions, including around forced labour and alleged human rights violations, remain. Trade irritants persist, including with respect to canola and Chinese excess steel capacity. And the mere possibility that the US could request removal of Canada from the CUSMA on the basis of the CUSMA's non-market economy clause will significantly complicate matters.

Although closer trade between China and CPTPP could bring important benefits to all sides, China's path to accession will be arduous and the country will face a series of near-unsurmountable hurdles.

[1] People's Republic of China, Ministry of Commerce, "China officially filed an application to join the "Comprehensive and Progressive Trans-Pacific Partnership Agreement"," Press Release (16 September 2021).
[2] Comprehensive and Progressive Agreement for Trans-Pacific Partnership [CPTPP], 30 December 2018. The



countries are Australia, Brunei, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam. Three countries still need to ratify the CPTPP: Brunei, Chile, and Malaysia.

- [3] People's Republic of China, Ministry of Foreign Affairs, <u>Regular Press Conference of Foreign Ministry</u> <u>Spokesperson Zhao Lijian</u>, 17 September 2021 [PRC Ministry of Foreign Affairs Press Conference].
- [4] If the CPTPP were in force in all member countries, the agreement would cover 13.5% of global GDP. China's GDP alone covers approximately 18% of global GDP.
- [5] <u>Regional Comprehensive Economic Partnership</u> [RCEP], 15 November 2020. A free-trade agreement with 15 signatories from the Asia-Pacific.
- [6] For example, when asked about China's application to join the CPTPP, a spokesperson for China's Ministry of Foreign Affairs stated: "China joining the CPTPP would help promote economic integration in the Asia-Pacific, and facilitate post-COVID economic recovery, trade development and investment growth in the world." See: PRC Ministry of Foreign Affairs Press Conference, *supra* note 3.
- [7] Government of Canada, <u>CPTPP Accession Process</u>, Sections 1-4. The depository country is New Zealand.
- [8] Specifically, the CPTPP Commission, consisting of **ministers and senior officials** from all CPTPP members, will determine whether to commence the accession process with the aspirant economy within a reasonable period of time after the date on which the aspirant economy made the Accession Request.
- [9] While the CPTPP generally incorporates the TPP by reference, Article 1.1 of the CPTPP states as follow: "1. The Parties hereby agree that, under the terms of this Agreement, the provisions of the Trans-Pacific Partnership Agreement, done at Auckland on 4 February 2016 ("the TPP") are incorporated, by reference, into and made part of this Agreement mutatis mutandis, except for Article 30.4 (Accession), Article 30.5 (Entry into Force), Article 30.6 (Withdrawal) and Article 30.8 (Authentic Texts)." (Footnote omitted)
- [10] RCEP, supra note 5, Articles 12.14 and 12.15.
- [11] WTO, <u>Accession of the People's Republic of China</u>, Decision of 10 November 2001, WT/L/432 (23 November 2001).
- [12] Government of Canada, <u>CPTPP Accession Process</u>, Section 5. The CPTPP Accession Process is Annex 1 to the Decision by the CPTPP Commission on Accession Process, made during the First CPTPP Commission Meeting on January 19, 2019 in Tokyo, Japan.
- [13] <u>Canada-United States-Mexico Agreement</u>, 10 December 2019, Article 32.10.
- [14] Center for Strategic and International Studies, <u>A Conversation with Ambassador Katherine Tai, US Trade</u> Representative, (transcript) (4 October 2021).

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## **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against



making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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