

THE COMPREHENSIVE AND PROGRESSIVE TPP – COUNTERING THE PRESSURES FOR PROTECTIONISM

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On January 23, 2018, the Canadian government announced it will sign the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (“**CPTPP**”), also referred to as “**TPP-11**”. The agreement is a major commitment to free trade by the 11 participants remaining after the United States withdrew from the original TPP agreement. The text of the CPTPP is largely the same as the original TPP, with certain provisions suspended.^[1]

A Massive New Free Trading Zone

The CPTPP will create one of the world’s largest free trading blocs. The 11 parties represent a market of 500 million people and a GDP of US\$10 trillion. On the Americas side, the participants are Canada, Mexico, Chile^[2] and Peru. In the Asia-Pacific region, the participants are Australia, Brunei, Japan, Malaysia, New Zealand, Singapore, and Vietnam. In economic terms, Japan is the largest partner, contributing roughly half of the aggregate GDP, while Canada is the second largest, representing about 15%.

As in the original agreement, custom duties on approximately 95% of trade in goods are to be removed over time. There are also significant commitments related to non-tariff barriers, services, investment and a host of other areas.

Changes in the CPTPP

Intellectual Property: The CPTPP suspends parts of 14 different sections in the original TPP relating to IP rights. These deal with areas such as the patentability of new uses for existing inventions, timing and efficiency of reviews for pharmaceuticals, and a standard copyright term of 70 years from the first publication date. The CPTPP still contains more detailed IP rights provisions than other major Canadian trade agreements like CETA (the Comprehensive Economic and Trade Agreement between Canada and the European Union)^[3], but without the United States as an aggressive proponent, some protections were scaled back. For a more detailed review of the TPP’s IP provisions and their impact on Canadian IP laws, [see our commentary](#).

Investment Protection: The CPTPP suspends a few provisions in the original TPP related to “investment

agreements” and “investment authorizations.” Neither of these concepts appear in CETA. These changes remove the ability of foreign investors to bring a case under the investor-state dispute settlement process in certain specific situations. However, the bulk of the investment protections have been retained despite the controversy that periodically arises regarding government autonomy.

Procurement: The government procurement provisions are largely unchanged, except for the suspension of the condition that the good produced or the service performed must be supplied in compliance with the labour rights recognized in the CPTPP. The condition in the original TPP was not particularly onerous, and there is no comparable provision in CETA.

State-of-the-Art Provisions

Anti-Corruption: The original TPP included a chapter on anti-corruption which has no counterpart in CETA or other major trade agreements. Canada is already a leader in this area, having modernized its *Corruption of Foreign Public Officials Act in 2013* ([see our commentary](#)) and more recently following the lead of the UK *Bribery Act* by eliminating the exemption for facilitation payments ([see our commentary](#)). The CPTPP anti-corruption chapter requires all of the countries to introduce/maintain criminal offences to combat bribery of public officials, impose more stringent financial record-keeping rules if necessary, and undertake training to promote integrity among public officials. While these measures are systemic and not applicable to individual cases, they are designed to bring all CPTPP members to a higher standard of anti-corruption enforcement, with the objective of reducing the impact of corruption on international trade and investment among the parties.

Competition Policy: The CPTPP chapter on competition policy is much more robust than the counterparts in other trade agreements. It requires all of the countries to adopt/maintain national competition laws that proscribe anticompetitive business conduct, as well as consumer protection laws against fraudulent and deceptive commercial activities. The enforcement of these policies is to be procedurally fair and as transparent as reasonably possible. The CPTPP also requires each country to recognize a private right of action for a person to seek redress for injury to that person’s business or property caused by a violation of national competition laws. While dispute resolution is not applicable in respect of individual proceedings, these institutional design provisions are designed to raise minimum standard for competition law enforcement throughout the CPTPP countries.

Environment: As a modern trade agreement, the CPTPP contains a significant chapter on environmental obligations. The CPTPP’s obligations are roughly on par with those in CETA. The CPTPP’s chapter is backed by a dispute resolution mechanism, giving the agreement teeth across the diverse range of 11 parties. We have previously provided additional analysis of the TPP environment chapter ([see our commentary](#)).

Side Letters

Certain areas that Canada wanted covered in the CPTPP are not dealt with in the final multilateral agreement. However, the Canadian government is pursuing a series of bilateral “side-letter” agreements with individual countries to obtain additional protections for its cultural and automobile sectors. On culture, Canada is expected to complete side-letters with each of the counterpart countries to provide protection for federal and provincial government activities in cultural areas, especially for the French language. In the auto sector, Canada has already reached side-letter agreements with Japan and Malaysia, and is pursuing an agreement with Australia as well. The agreements with Japan and Malaysia address rules of origin (including to potentially allow Canada to benefit from concessions in future agreements with other non-party countries, such as the US) and dispute resolution. The Australian side-letter is expected to be along the same lines.

Next Steps and Future Implications

The CPTPP is scheduled to be signed in March. Once 6 of 11 parties ratify the agreement (and these 6 must account for at least 85% of the parties' collective GDP), the agreement will come into force as among those ratifying parties, likely in late 2018 or early 2019. The majority of the tariff reductions on goods will take effect when the CPTPP comes into force as will all provisions related to services liberalization and investment.

With CETA and the CPTPP in place, Canada will have substantially expanded its connections in two of the largest trading blocs in the world. While South Korea, another major economy in the Asia-pacific region, is not a party to the CPTPP, Canada already has a recent and modern free trade agreement with South Korea ([see our commentary](#)).

The timing of the CPTPP announcement is notable, with Canada having very recently hosted the 6th round of talks on modernizing NAFTA. If those negotiations are successful, Canada will be uniquely situated for North American, trans-atlantic and trans-pacific trade and investment flows. And if NAFTA is terminated, the CPTPP will continue to provide for substantial free trade between Canada and Mexico while Canada and the US revert to the terms of the 1988 Canada-US Free Trade Agreement.

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[1] [List of suspended TPP provisions - Annex II to Joint Ministerial Statement](#), dated November 11, 2017.

[2] Canada has an existing free-trade agreement with Chile, implemented in 1997. This agreement appears compatible with the CPTPP and therefore likely to continue in force along with the CPTPP.

[3] For additional information on CETA, see some of our articles: “[CETA Carves Out More than just European Cheese and Canadian Beef](#)” and “[CETA is Provisionally Implemented — the C\\$1.5 Billion Threshold Arrives](#)”.

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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