

A COMPREHENSIVE AND PROGRESSIVE AGREEMENT FOR TRANS-PACIFIC PARTNERSHIP

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Legal Briefings - By **Donald Robertson, Leon Chung and Zhongwei Wang**

The ministers responsible for the Trans-Pacific Partnership (**TPP**) of 11 countries have [announced](#) that the core elements of a Comprehensive and Progressive Agreement for Trans-Pacific Partnership are agreed (**CPTPP**).

KEY POINTS

1. While much of the original TPP looks to remain intact, 20 provisions of the TPP are suspended, in particular with respect to Investor-State Dispute Settlement (**ISDS**) disputes for initial approvals of investments and financial services. There are also 4 items to be finalised by the Parties' consensus.
2. The final impact of these changes can only be determined after the release of the full text. Current indications are that the differences will not significantly change the shape of ISDS under the TPP. Investors making investments into these 11 countries will still want to proactively consider how so as to take advantage of the protections given by this agreement if it comes into force.
3. This is a significant step forward to implementing a mega-regional agreement for the Asia-Pacific region, which substantially is the form rejected by the United States early this year.

CORE ELEMENTS AGREED¹

On 11 November 2017, after some last-minute drama, the core elements of a Comprehensive and Progressive Agreement for Trans-Pacific Partnership (**CPTPP**) were agreed by the TPP ministers of Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam. While much of the detail behind these 'core elements' has not been provided, it appears that the major provisions of the TPP have survived. Although 20 provisions of the TPP have been suspended and 4 other items are to be finalised by consensus, this does not detract from the integrity of the TPP.

The finalisation and signing of the CPTPP is not yet a done deal. However, with agreement on the core elements, it is a significant step forward. Even though the US has withdrawn from participating in the agreement, the CPTPP still promises to be the 'gold standard' agreement that the US once hailed. Meanwhile, the US has indicated that it will push forward with bilateral agreements in the future, although reportedly often using the text of the TPP as the model. It is also seeking to renegotiate the North American Free Trade Agreement.

PROVISIONS TO BE SUSPENDED OR YET TO BE FINALISED: IMPACT ON ISDS?

Twenty provisions of the TPP have been suspended. These include some of the more controversial provisions concerning sovereign control over foreign investments and the scope of the ISDS provisions allowing arbitration of state regulatory control of markets and industries.

Most notably, the CPTPP suspends most provisions relating to 'investment agreements' and 'investment authorisations' – that is, agreements with a government regarding investment in that state, and the authorisation by a government of a foreign investment. Effectively, the suspension is aimed at avoiding arbitral disputes in relation to the initial decision in relation to the investment being made, although some of these matters are already specifically spelt out elsewhere (such as initial screening decisions).

In addition, nothing in this statement indicates any changes to the TPP regarding protections for the 'establishment' of investments. Accordingly, ISDS will remain an important aspect of the TPP, and investors making investments into these 11 countries will still want to proactively consider how to structure those investments so as to take advantage of the protections given by this regional trade agreement in the event that it comes into force.

Other important suspensions include:

- the arbitration procedure with respect to financial services;
- the ability to have a decision of the Party's telecommunications regulatory body

reconsidered;

- the obligation to provide for procedural fairness in procedures for listing new pharmaceutical products or medical devices for reimbursement purposes; and
- provisions dealing with various subject-matters including custom duties on express shipments, postal monopolies, government procurement, intellectual property and illegal trade of wild flora and fauna.

The items that need to be finalised by consensus among all Parties deal with various carve-outs, including Canada's reservation of its right to adopt measures that affect cultural industries.

ENDNOTES

1. [Trans-Pacific Partnership Ministerial Statement](#).

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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