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Client Alert

The New TPP and the Evolving Trade Landscape in the Asia-Pacific

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The trade and investment environment in the Asia-Pacific is one of the most dynamic, growth-oriented, and consequential to global companies, but also one of the most rapidly evolving. This week, eleven nations released the full text of the new Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). This successor to the Trans-Pacific Partnership (TPP), will be signed in Santiago, Chile on March 8, by the trade ministers from Canada, Mexico, Chile, Peru, Japan, Singapore, Viet Nam, Malaysia, Brunei, Australia and New Zealand.

A review of the completed text of the CPTPP agreement provides a lens into how the landmark deal will reshape the regional trading and commercial landscape. Companies doing business in the region – or with competitors there – and those contemplating growth in these markets will want to pay close attention to the CPTPP. Close analysis will help guide investment choices, inform where companies base regional operations, and drive decisions about global supply chain management and preferential market access.

Crowell & Moring International helps shape and navigate this evolving policy landscape from both the public and private perspective. We help companies assess how to move forward in the Asia-Pacific, and counsel governments in the region as they implement domestic legal, regulatory, and policy changes to implement the provisions in the CPTPP. Here are some key dynamics to watch, as the CPTPP countries move toward ratification and implementation.

Preferential Access for CPTPP Members

Tariff reductions and expanding market access is a key feature of the CPTPP, in addition to provisions around regulatory harmonization, environmental and labor protection, and business-friendly investment. Companies exporting into CPTPP markets, and particularly those exporting from the United States, need to assess how preferential market access for CPTPP exporters will affect the competitive landscape.

The agreement preserved all tariff outcomes agreed to under TPP, meaning that custom duties on 95 percent of trade in goods between the parties will be either duty-free immediately or according to tariff reduction/elimination schedules, once CPTPP enters into force. In particular, countries like Japan will reduce tariffs on sensitive agricultural products like beef and pork for the other CPTPP parties, while markets like Malaysia and Vietnam will gradually eliminate high tariffs on various automobiles (currently 30 and 70 percent, respectively). The agreement also eliminates various non-tariff barriers and facilitates a faster importation and customs process. Final side letters between parties, which have yet to be released, will also be important to take into account to the extent they modify market access or other rules.

Benefits to Service Industries

Some of the most important commitments in CPTPP center on liberalization of trade in services. CPTPP's provisions will guarantee market access and non-discriminatory treatment to a wide array of services exporters, including in the professional services field, business processes, insurance and financial services sectors, and transportation and distribution providers. Obligations that require transparency in proposed regulations, ones that support payments for cross-border supply of services, and that generally prohibit requirements for local presence or investment will benefit software developers, cloud-services suppliers, and other companies enabled by Internet-based platforms. The CPTPP parties are implementing this services liberalization with a broad, negative list approach, meaning that only those services specifically mentioned are restricted.

Logistics companies and express shippers, however, lost the benefit of a provision from the original TPP that would have mandated countries to review – and potentially exempt – duties for express shipments under a *de minimis* amount.

Mixed results for IP-Intensive Industries

When the CPTPP agreement was initially announced, the most reported news focused on the list of "suspended" provisions that the remaining countries decided to not carry over from the original TPP text, following formal withdrawal by the United States in the early days of the Trump Administration. Many of these related to intellectual property provisions that were pushed in negotiations by the U.S., particularly around patent term protections for biopharmaceutical innovation. TPP negotiations were particularly intense around data and market protection terms that the United States sought for biologics, an innovative new class of drugs, which will no longer apply.

Additionally, content producers – such as musicians, authors, the film industry, and artists – should note the suspension of a TPP provision that would have extended copyright protections to "life of the author plus 70 years," beyond the current standard of life plus 50 years. CPTPP members also struck a provision that would have exported the U.S. regime around intermediary liability, which liberally shields internet service providers (ISPs) from liability over content posted by third parties.

The majority of the IP chapter from TPP remains intact and represents an advancement for global intellectual property rights – going beyond the Trade-Related Aspects of Intellectual Property Rights (TRIPS) baseline provisions in the World Trade Organization. Strong measures to prevent theft of trade secrets, including by cyber theft, and to smooth the process for trademark registration and protect against counterfeiting will benefit many industries. But without the U.S. at the negotiating table to champion many of these issues, IP-intensive industries will have to work with the CPTPP parties to implement the new standards of the agreement, while preserving opportunities to build broader international support for higher IP standards and protections. This will be important should the U.S. decide to re-engage in TPP negotiations, as recently suggested by the Trump Administration at the World Economic Forum in Davos, and advocated in a February letter to the White House from 25 Republican U.S. Senators.

Enabling the Digital Economy

The new agreement has preserved many of the vanguard obligations meant to spur the growth of a robust, vibrant digital economy and ensure fair rules for digital trade in the Asia-Pacific. These include provisions that ensure cross-border data flows, protect the free and open Internet, and broadly prohibit localization requirements. These commitments were enshrined in TPP's "Digital Two Dozen" provisions, which also worked to protect critical source code and ban forced transfers of technology as a provision to gain market access. Provisions like these are expected to be found in any final new North American Free Trade Agreement (NAFTA), which remains under negotiation. CPTPP (and likely NAFTA) will set a new baseline for how trade agreements address digital trade – an area impacting all companies who rely on the Internet for cross-border transactions and supply chains.

Importantly, even companies operating from the U.S. will gain the benefit of many of these provisions in the CPTPP, as they are generally applied in a non-discriminatory fashion and therefore raise the "floor" for standards across the region. As countries like Vietnam and Malaysia work toward certification and implementation of CPTPP, digitally-native and transformed industries will see broad, diffuse benefits.

The Path Forward

Trade Ministers from each country will sign the completed agreement on March 8th in Chile. Once that is complete, the focus will turn to the domestic procedures that each country must take to ratify the agreement. CPTPP will enter into force once half of the eleven nations complete their domestic ratification procedures. It is generally expected that this could take anywhere from twelve to eighteen months, setting mid-2019 as an aspirational goal for companies, industries, and governments to benefit from the provisions of CPTPP.

The Big Picture

The geopolitical symbolism of CPTPP's signing cannot be ignored. CPTPP will be signed within the context of an extremely active Asia-Pacific trade agenda, with negotiations on the rival, China-led Regional Comprehensive Economic Partnership (RCEP) continuing to inch along, and with numerous proposed Free Trade Agreements, both regional and with key global partners such as the EU, advancing in 2018. And the pace of new regional and multilateral trade negotiations is only quickening. Just this week, news broke that Canada and Mercosur, the South American trade bloc, intend to announce on March 9th – the day after CPTPP is signed – that they will commence FTA negotiations.

For its part, the United States has doubled-down on a robust agenda of trade enforcement, including aggressive, unilateral actions such as the Section 232 investigations on the impact of steel and aluminum imports on national security, and a Section 301 investigation on intellectual property theft by China. The outlook for future trade partnerships has focused, so far, only on a retroactive review of existing agreements (NAFTA, KORUS) and a non-specific desire for new bilateral negotiations. Any potential for a U.S. renegotiation and re-entry into TPP (which is a separate agreement from the CPTPP), is likely an issue for after the next U.S. presidential election or beyond.

The evolving trade landscape has important implications for global companies and for the governments charged with implementing the agreements. Companies that act now to assess and leverage the expected benefits of the CPTPP, while also shaping this broader landscape of trade negotiations, will be best equipped to enhance their competitive position and maximize supply chain efficiencies for the coming decade.

C&M International is at the nexus of these shifting trade winds. We work with our clients to assess, plan and advance constructive engagement between the public and private sectors for balanced, pro-growth outcomes. The landscape is evolving, but we're here to help shape it.

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