

The TPP Agreement: A Canadian Business Perspective

International Trade & Customs Law Bulletin

On October 5th 2015, twelve Pacific Rim countries (Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the USA, Vietnam) concluded nearly eight-year long negotiations on the Trans-Pacific Partnership Agreement ("TPP"). It is said to be the largest regional trade agreement ("RTA") in history, constituting 40% of the world GDP.

The TPP is broad in its scope - dealing with tariffs, small- and medium-sized enterprises (SMEs) trade, services trade and investment, environmental and labour protections, intellectual property, and various, broad commitments regarding currency manipulation and exchange rate policies. This bulletin will highlight the key impacts of the TPP on Canadian businesses as communicated through various government agencies. Confirmation of what is contained in the TPP will require a full and detailed examination of its contents, once released.

Goods Access Under the TPP and its Impact on Canadian Businesses

A number of Canadian industries and sectors are affected under the TPP:

- **Industrial goods and consumer products:** The majority of Canadian industrial goods and consumer products to TPP countries will be duty-free once the TPP comes into force. The majority of the remaining tariffs will be eliminated within 10 years, and the rest within 20 years. Regarding the export of heavy crude oil from Canada, the NAFTA rules of origin do not allow for the use of non-originating diluent and in consequence Canadian heavy crude oil exports to the United States may not be eligible for duty-free treatment. Instead, they may face a per-barrel duty. The TPP rules of origin applicable to Canadian crude oil exports are intended to address this concern such that imports into the United States will not be subject to this duty.
- **The automobile industry:** The TPP will provide for phased-in tariff elimination for all vehicles and vehicle parts into TPP markets. Canada already has duty free market access for passenger vehicles and other automotive products into Japan. With the TPP, Canada will be able to export automobiles to Malaysia and Vietnam under the phased-in tariff elimination process instead of tariffs as high as 35% and 74% respectively. The TPP's rules of origin for vehicles and vehicle parts will allow Canadian producers to use parts and other materials sourced from within the region, and in turn, benefit from preferential market access treatment when they export to other TPP countries. To access this preferential rate, the TPP rules of origin require that 45% of key Canadian-produced vehicles parts and 40% of other key Canadian-produced vehicle auto parts be comprised of TPP-originating content. At this date, we understand that the 45% of key vehicle parts includes engines, transmissions, chassis, bumper systems and larger assemblies like axles. The final list of items will be known when the final TPP text is released.
- Canada and Japan have bilaterally negotiated a special motor vehicle safeguard, more comprehensive than the regular TPP transitional safeguard, to protect the Canadian domestic automobile industry from harm caused by any potential import surge of Japanese automobiles arising from tariff reductions under the TPP. It will be available for 12 years after Canada's motor vehicle tariff is eliminated (through 5 annual cuts). Once the safeguard is triggered, it can remain in place for up to 5 years.
- Further, there is an accelerated dispute settlement procedure such that in the event of non-compliance with TPP and the bilateral obligations, Canada's tariffs on Japanese motor vehicles may be "snapped-back" to the original rate for a period of 100 days. This "snap-back" mechanism is available to Canada for a period of 6 years after the motor vehicle tariff is eliminated.
- **Forestry and related products:** The TPP apparently will eliminate tariffs for forestry and related products in markets such as Japan, Malaysia and Vietnam. This means that a Canadian mill that manufactures and supplies pulp and paper products, including newsprint, will have duty-free access to several markets with which Canada currently does not have a free trade agreement (FTA). Depending on the type of forestry products, and the countries involved, some tariffs will be lifted on the coming into force of the TPP, while others will be eliminated over a period of between 3 to 15 years.
- **Fish and seafood products:** Canadian fish and seafood exporters to the TPP member countries are currently facing tariffs of between 5% to 34%. With the implementation of the TPP, tariffs apparently will be eliminated in key TPP markets. Depending on the type of fish and seafood products and the countries involved, some tariffs will be lifted upon the coming into force of the TPP, while others will be eliminated over a period of between 3 to 10 years after the entering into force of the agreement.
- **Agricultural and agri-food products:** The TPP will allow Canadian agricultural products, food and beverages and wines and spirits to benefit from either a complete elimination or significant reduction in tariff duties depending on the product. Further, non-tariff barriers such as technical barriers to trade, customs administration procedures and regulatory 'red-tape' increasing costs of cross-border business are addressed with new rules on technical regulations, customs facilitation, and enhanced regulatory cooperation.
- **Supply-managed products:** Canada has offered limited new access for supply-managed products to TPP members. This access will be granted through progressively greater in-quota allocations over a 5-year period, which apparently amount to the following percentages of Canada's current annual production: 3.25% for dairy, 2.3% for eggs, 2.1% for chicken, 2% for turkey and 1.5 % for broiler hatching eggs.

Other provisions under the TPP

Cross-Border Trade in Services

Trade in services will encompass a wide range of areas including engineering, architecture, information management, environmental protection and monitoring, and mining and energy development. The following are some of the highlighted features:

1. The TPP covers all service sectors with a few exceptions that are listed by each member country. This approach is known as the "negative list" approach. In Canada, certain types of services are excluded, for example, health, public education and other social service sectors and activities.
2. There is a broad reservation for existing and future programs and policies with respect to cultural industries that aim to support the creation, development or accessibility of Canadian artistic expression and content.

Authors

Peter E. Kirby
Montréal
Clifford Sosnow
Ottawa

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3. Where a TPP country autonomously liberalizes certain laws, that liberalized law will become part of the party's obligation under the TPP.

Investment

The TPP will contain investment rules intended to make investment in other TPP markets more transparent and predictable. For Canadian investors, these rules provide a framework of legal rules governing investments in other TPP markets that is expected to have an impact on energy, mining, manufacturing, and the provision of financial and professional services through companies. In particular, TPP rules on investment will cover:

1. Fair, equitable and non-discriminatory treatment;
2. Rules ensuring that Canadian investors are treated on an equal footing with other investors in TPP countries;
3. The right of governments to legislate and regulate in the public interest; and
4. Access to specialist arbitration to enable investors to seek dispute settlement against the relevant TPP country for claimed breaches of the investment rules.

Intellectual Property (IP)

The TPP contains rules for the civil, criminal and border enforcement of IP rights that include combatting trade in counterfeit and pirated goods in line with Canada's *Combating Counterfeit Products Act*. The provisions governing IP permit a two year cap on additional protection.

With respect to pharmaceuticals, the TPP reflects Canada's existing regime on patent linkage, protection for clinical trial data, and early working exceptions. The TPP includes a regulatory review exception for the introduction of generic drugs after the expiry of a patent across the region.

Assistance to SMEs

The TPP contains a chapter specifically dedicated to SMEs to make market access easier and less costly for this group of businesses. The TPP provisions create a committee to help SMEs through training programs, trade education and finance, as well as assistance for capacity building.

Labour Protections

TPP provisions commit all parties to the International Labour Organization's principles for collective bargaining, including minimum wages, safe workplaces, and provisions against child labour, forced labour and excessive hours.

TPP members also will be subject to a non-derogating clause preventing them from waiving their responsibilities under domestic labour laws in order to encourage trade or investment.

Environmental Protection

There are mechanisms in place in the TPP that will help ensure that countries do not gain an unfair advantage by lowering their environmental standards to promote trade or attract investment. It also has provisions against wildlife trafficking and illegal or unsustainable logging and fishing. The TPP includes provisions that promote corporate social responsibility and that encourage trade in environmental goods and services. It also establishes a binding and enforceable dispute-resolution process to address non-compliance.

Currency Manipulation and Exchange Rate Policies

TPP members have committed to negotiating a side agreement that will incorporate non-binding commitments on exchange rate policies in an effort to discourage currency manipulation.

Three key commitments that member countries are to undertake as part of the side agreement are:

1. To not devalue country currencies to make their exports cheaper;
2. To enhance the transparency of respective monetary policies; and
3. To set up a multilateral forum to discuss exchange rate policies.

Dispute Settlement

The TPP will include a rules-based dispute settlement mechanism modelled on the WTO, which will defer to an impartial panel of experts. The TPP also includes alternative methods to settle a dispute such as conciliation and mediation. Finally, the TPP contains provisions to expedite disputes and provides for a panel of trade experts to effectively adjudicate disputes in specialized areas, such as in environment, financial services, labour and anti-corruption areas.

Next Steps

All 12 parties must next sign an agreement in principle. Once that is concluded, each country will subsequently need to ratify the TPP before it comes into force, a process that varies in each country. In Canada, the TPP will be subject to a ratification vote in Parliament. Once all TPP countries have ratified the agreement, in Canada, the agreement will need to be entered into Canadian law through relevant amendments to existing legislation. In the course of this process, it will be imperative for Canadian businesses to study the details of the agreement, understand how it affects them and understand the implementing legislative process.

This bulletin was written with the collaboration of Nerissa Yan and Nina Lavoie.