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TPP11: Unpacking the Suspended Provisions

Going from 12 to 11 Parties

The primary difference between the original 12 party Trans-Pacific Partnership (TPP) and the new 11 party version is a set of "suspended" provisions. This is a list of 20 items that officials from the member countries have agreed to remove temporarily from the free trade agreement texts.

With the important caveat that this is not legal advice, let us untangle the specific provisions to understand what is changed in TPP11.

These suspended provisions (found in Annex 2 of the CPTPP) are meant to be reinstated at some future date. In other words, these elements of the TPP may come back into the agreement as originally negotiated. Between now and then, member governments are not required to implement these rules at the domestic level.

Many commentators with an unclear understanding of the TPP have assumed that these suspended provisions are a significant proportion of the document. The removal of both the United States and the 20 elements, therefore, has been said to make the TPP11 less relevant.

Neither is the case.

The TPP11 (or the CPTPP) is extremely important for companies and continues to set the benchmark for future trade agreements globally.

The withdrawal of the United States from the agreement, of course, does impact the overall size of the economic pie. However, given the generally open nature of the US economy, most TPP11 firms already have access to the United States. American tariffs are quite low for everything but textiles, footwear and some agricultural products. TPP companies can enter the services markets in the US and have the ability to invest right now. The TPP11 rulebook matches existing US laws. For TPP11 firms, therefore, the absence of the US is not as damaging as it first appears.

More important, the new TPP11 has *no* changes to any of the current member schedules or commitments in areas like market access for goods, services, investment, temporary movement of business persons, government procurement, or state-owned enterprises.

In other words, *all* of the existing annexes from the TPP agreement remain unchanged. All tariff cuts will take place on schedule as planned. All services open as intended. All investment is opened as indicated for TPP11 firms. All procurement access that was originally scheduled will continue.

No Changes in Most Chapters

Furthermore, there are *zero* changes to the legal texts at all (beyond removing references to the United States) in the original chapters for 1-4 (definitions, market access for goods, rules of origin, textiles), 6-8 (trade remedies, sanitary and phytosanitary, technical barriers to trade), 12 (temporary movement of business persons), 14 (electronic commerce), 16-17 (competition, state owned enterprises), 19 (labor), 21-25 (cooperation and capacity building, competiveness and business facilitation, development, SMEs, regulatory coherence), 28 (dispute settlement).

What is especially striking about this list is what has not been touched. Despite some general discomfort by several members over the course of TPP talks, several important chapters came through completely unscathed. For example, the e-commerce chapter was left intact. ISDS is still moving ahead. The deeply controversial chapter on state-owned enterprises remains. The dispute settlement provisions are untouched.

The Percentage of Suspensions

Some of the institutional and administrative issues found in the last chapter have been altered with new procedures for things like withdrawal and accession in TPP11.

If the changes to Chapter 18 on intellectual property rights are excluded for the moment, the remainder of the alterations in the document generally amount to a sentence adjustment from an entire chapter. For instance, chapter 5 on trade facilitation is intact in TPP11 *except* for the second sentence of Article 5.7.1(f). As noted further below, the second sentence would have obligated members to consider further from time to time the amount of duty applied to express shipments below a certain fixed amount.

The original TPP legal text ran to 622 pages. The greatest number of changes can be found in the investment chapter (9) which temporarily removes two kinds of agreements from TPP11 coverage (essentially those covering mining and raw materials) and in the IP chapter (18).

With all the adjustments, the TPP11 text is approximately 10 pages shorter, plus the IP chapter changes, which reduces the length by another 18 pages. Thus, the agreement still runs to 584 pages, plus all the thousands of pages of associated member schedules which are intact.

The final text page count will be different, of course, since it will also include the new sections on accession, withdrawal, and review that have been added. It will also strip out all specific references to the United States. Nevertheless, the point is that the suspended elements constitute only a small fraction of the overall agreement.

Figuring out the exact "percentage" of the agreement that has been affected is a fruitless exercise. It would be like trying to determine what is the difference in your favorite book if you took out all the words that start with the letter "z." What matters is the relevance of the suspended provisions to your company. But do note that in every case, firms have not yet been granted any of these benefits, so *no company is losing something they once had*.

Specific Issues in Suspension List

The original texts and schedules are available for review on the New Zealand repository at: https://www.mfat.govt.nz/en/about-us/who-we-are/treaties/trans-pacific-partnership-agreement-tpp/text-of-the-trans-pacific-partnership. The revised documents should be released shortly. The suspended elements refer back to the original text.

Chapter 5 on trade facilitation remains the same. Firms will still have significantly faster, smoother customs procedures, including self-certification of shipments, advance ruling and even new help with express shipments. What they will not have, courtesy of the suspended sentence, is a review of the thresholds for express. Express shipments also suffered another, slightly more serious blow in the suspension of two paragraphs in the services chapter in Annex 10B. The original TPP document kept postal monopolies in greater check. However, the rest of the annex remains, so express shipments have better access and rights under TPP11 than previously existed.

The rest of chapter 10 on services is intact. TPP11 firms have unprecedented opportunities to deliver services across member markets. This includes the opening of nearly all 160 sectors and subsectors on the first day of the agreement. It limits local presence requirements and includes specific help for groups like legal services.

Investment (Chapter 9) also remains untouched, including the increasingly controversial investor-state dispute settlement mechanisms (ISDS). TPP officials spent considerable time narrowing down the scope of the agreement and including new provisions to give government more rights to ensure public interest objectives can be met. These have been preserved. Changes to the document essentially all involves stripping out two classes or types of covered agreements, called investment agreements and investment authorizations, which are mostly used for oil, mining, and other types of raw materials. The rest of what appears to be a long list of provisions just takes out all subsequent references to these two agreements in the texts. Note, however, that these two types of agreements are only a small portion of types of investment. The remainder of investments are still covered and protected by TPP11.

Individual member promises for market opening in both services and investment are listed together in the annexes. Recall that these use “negative” scheduling. If specific sectors or subsectors are NOT listed, they are opened for TPP member firms. In practice, nearly everything is opened in Annexes I and II for Chapters 9 and 10. These have not changed in TPP11.

Two service sectors usually get their own chapters—financial services and telecommunications. These are viewed as “backbone” services. The TPP follows the same path. In TPP11, these chapters received very minor adjustments.

For financial services (chapter 11), members have removed an annex (11-E) that gave Brunei, Chile, Mexico and Peru different treatment for a set time period.

The telecommunications chapter is largely intact. The dispute resolution section (13.21) remains, but one section on reconsideration has been frozen.

There had been considerable speculation that the government procurement chapter (15) might be adjusted heading into TPP11. Instead, nearly the whole chapter remains. There are two key aspects to this chapter. First, TPP11 firms have new access to government procurement contracts above specified thresholds at the federal level. Second, TPP11 countries are required to put in place systems for allowing TPP11 firms to bid on government contracts.

These benefits remain. Two changes may be made in TPP11. First, a specific reference to labor rights has been removed from a condition for participation (15.8.5). Second, subject to additional negotiation, the parties may adjust the current rule that asks for new talks within three years to extend coverage to the sub-federal or sub-central levels and extend this timeline to five years instead.

The most extensive changes, overall, in the TPP11 came in the intellectual property rights chapter (18). There are two main reasons for this. First, many of the more advanced provisions in the IP chapter were included at the insistence of US negotiators and were quite unpopular in the original agreement. With the withdrawal of the United States, the remaining members had less incentive to keep these rules. Second, while Japan (especially) fought hard to keep the TPP members from making changes overall, it managed to confine the bulk of the suspensions to the IP chapter.

The original IP chapter was the most substantial portion of the agreement, running to 75 pages. Even with approximately 18 pages now cut, the IP commitments in the TPP11 remain extensive. The TPP11 will provide the most advanced IP trade agreement for all (or nearly all) members signed to date.

Without getting into too many details, what has been temporarily carved out of the TPP11 are commitments that were viewed as too extensive and far-reaching for many members. Four broad areas have been struck out.

First, the US had asked for additional time to be added to patents if parties experienced delays. These provisions have been suspended (18.46 and 18.48).

Second, several highly controversial issues related to pharmaceutical patents were removed, including the whole section on biologics (18.51) and patent test data (18.50).

Third, the TPP11 no longer has several sections related to new ways of protecting technology and information, including technological protection measures (TPMs), rights management information, encrypted satellite and cable signals, and safe harbors for internet service providers (ISPs).

Finally, the copyright term length has not been extended to life of the creator plus 70 years, but is reset to life plus 50 years.

How damaging these changes will be for firms is hard to judge. No existing benefits have been revoked. As an example, if a country currently protects copyright for 70 years, this remains. But if a member protects copyright for 50 years, this need not be changed under TPP11 at this time.

It should be noted that even for companies that lost some of the benefits in the IP chapter noted above, there remain additional protections in the IP chapter and elsewhere that still apply.

The environmental chapter (20) is unchanged, other than the removal of three words to adjust the scope slightly.

Finally, the transparency chapter (26) has an annex just for medical devices. While the annex remains, one section on how national health systems handle these items has been suspended.

The Final Four Issues

These 20 provisions were meant to be the only items reworked in TPP11. In the race to close the agreement, however, four additional items were left outstanding. These still have to be addressed by officials in the coming weeks before the final agreement can be signed by leaders.

Malaysia would like to have the list of items it placed on the Annex IV reservation list for state-owned enterprises reviewed. Brunei has a minor adjustment it would like reviewed under its schedule for non-conforming measures in Annex II for coal. Vietnam would like to reconsider whether or not trade sanctions can be applied for labor under article 28.20. All three are issues of being granted additional time for transition, not a complete removal from the provision. Finally, Canada would like to review a specific Non-Conforming Measure it placed in Annex I on cultural issues in communications. None of these four items would appear to take terribly long to iron out.

What Comes Next

Hence, the final TPP11 or CPTPP documents should be ready for leaders to sign shortly. The lawyers will need to review the texts to ensure consistency in drafting. The texts will be translated again into Spanish and French, although English is the official language of the TPP.

The agreement is apparently set to come into force when six of the new signatories completes domestic level ratification procedures. This could be quite soon—many officials are predicting this hurdle could be met prior to the end of 2018.

While the TPP11 parties have spent months revising the agreement, officials managed to keep nearly the entire original agreement intact. The text of CPTPP is only 28 pages shorter and none of the thousands of pages of individual country schedules and commitments for goods, services, investment, government procurement, state-owned enterprises and so forth have been changed.

Firms need to start preparing now for the rapidly approaching entry into force of the TPP11. Come see us at the Asian Trade Centre for help in understanding how the agreement applies to your firm, or to get help restructuring your supply chain. For more details on what your firm should do next, see the latest TPP11 booklet for companies at asiantradecentre.org.

The TPP11 Changes (In Brief)

	Chapter Topic	New?	Suspended Provision
1	Introduction	No	
2	Market Access for Goods	No	
3	Rules of Origin	No	
4	Textiles	No	
5	Trade Facilitation	Yes	One Sentence
6	Trade Remedies	No	
7	SPS	No	
8	TBT	No	
9	Investment	Yes	Removed two types of investment agreements from coverage (for mining and oil investments)
10	Services	Yes	Greater competition from postal monopolies for express carriers
11	Financial Services	Yes	Removed annex: Brunei, Chile, Mexico and Peru different treatment for a set time period
12	Temp Movement	No	
13	Telecomms	Yes	Reconsideration suspended from dispute settlement
14	E-Commerce	No	
15	Government Procurement	Yes	Labor not a condition for procurement, extension to sub-federal level may be 5 years away and not 3
16	Competition	No	
17	State-Owned Enterprises	No	
18	Intellectual Property	Yes	Four broad categories of changes: • No extensions if patents are delayed • 2 new rules of pharma patents suspended • New rules of protecting technology suspended including: technological protection measures (TPMs), rights management information, encrypted satellite and cable signals, and safe harbors for internet service providers (ISPs) • Copyright not extended to life + 70 years
19	Labor	No	
20	Environment	Yes	Three words changed on scope
21	Cooperation and Capacity Building	No	
22	Competiveness and Business Facilitation	No	
23	Development	No	
24	SMEs	No	
25	Regulatory Coherence	No	
26	Transparency	Yes	Annex on medical devices removed section on national health systems
27	Administration	No	
28	Dispute Settlement	No	
29	Exceptions	No	
30	Final Matters	Yes	Rewritten to include new provisions on withdrawal, accession, entry into force

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