



Columbia FDI Perspectives

Perspectives on topical foreign direct investment issues

No. 252 May 20, 2019

Editor-in-Chief: Karl P. Sauvant (Karl.Sauvant@law.columbia.edu)

Managing Editor: Marion A. Creach (marion.creach@sciencespo.fr)

Will the United States join the Trans-Pacific Partnership, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, or neither?*

by

Adam Douglas**

The Trans-Pacific Partnership (TPP) was signed by all twelve negotiating parties¹ on February 4, 2016. To come into force, it requires ratification by at least six of the original signatories, which together account for at least 85% of the combined GDP of the original signatories in 2013. To date, only two countries have ratified the TPP: Japan and New Zealand. Because of the GDP requirement, the TPP cannot come into force without US ratification.

On January 30, 2017, the US informed TPP signatories that it “does not intend to become a party to the Trans-Pacific Partnership Agreement” and that “it has no legal obligations arising from its signature.”² This did not, however, doom the agreement; the eleven remaining signatories agreed on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which came into force on December 30, 2018. The CPTPP incorporates by reference the entire TPP agreement, with the exception of twenty-two provisions, many of which US negotiators had insisted on but were unpopular with the other TPP signatories, including provisions that would allow US investors to initiate claims for breaches of investment agreements and authorizations. These provisions would have established a high degree of protection for US investors, but they were opposed by states that would be subject to additional legal risk.

On April 13, 2018, President Trump unexpectedly instructed administration officials to examine the possibility of “re-joining” the TPP.³ This is unlikely in the near future, given the Trump administration’s opposition to the agreement in its current form. But if the US ratified the existing text, the TPP would need only three additional ratifications to come into force, including one from either Australia, Canada or Mexico, due to the GDP requirement. Other signatories would be incentivized to follow the US and ratify the TPP to secure better access to the US market. Moreover, under the TPP’s terms, the first six original ratifying signatories receive certain benefits,

such as the authority to determine whether other countries can join TPP.⁴ US ratification could thus instigate a race among signatories to ratify TPP to qualify as one of the six.

Alternatively, the US could seek to join the CPTPP. This option becomes more likely the longer CPTPP is in force as it will progressively liberalize trade flows among countries, while TPP commitments become dated. However, CPTPP accession is “subject to such terms and conditions as may be agreed between the Parties and that State,”⁵ and the TPP provisions that are suspended in the CPTPP, including those that establish a high degree of protection for US investors, can only subsequently be unsuspended with unanimous consent.⁶ Therefore, the CPTPP parties may allow the US to accede, but not without negotiation—and the US is unlikely to get any special treatment if it wanted to join, including with respect to the suspended provisions. Thus, to re-engage in negotiations, the US would have to weigh the value of the suspended TPP provisions against access to liberalized trade flows under CPTPP. If the US places a high value on the suspended provisions, it could ratify the TPP in the hope of incentivizing others to follow suit. Otherwise, it will be required to negotiate with the CPTPP parties.

Given the Trump administration’s opposition to multilateral, rather than bilateral, trade agreements, ratification of either the TPP or the CPTPP is unlikely in the near future. However, the administration has been criticized for forfeiting US influence in the Pacific Rim and for allowing China to fill in the void with its plans for a Regional Comprehensive Economic Partnership and its Belt and Road initiative. Moreover, while the CPTPP is leaner than the original accord (without the US, it covers roughly 15% of the global economy, rather than 40% under the TPP), the revised pact is open to new members; economies such as Indonesia, the Philippines, the Republic of Korea, Taiwan, Thailand, and the UK have stated publicly that they are considering joining the CPTPP. An open agreement has the potential to create trade benefits higher than a TPP with the US on board. The US may, therefore, seek to re-enter negotiations down the road to access these benefits and secure influence in the region.

* **The *Columbia FDI Perspectives* are a forum for public debate. The views expressed by the author(s) do not reflect the opinions of CCSI or Columbia University or our partners and supporters. *Columbia FDI Perspectives* (ISSN 2158-3579) is a peer-reviewed series.**

** Adam Douglas (adam.douglas@international.gc.ca) is counsel at Global Affairs Canada in its Trade Law office. The opinions contained in this *Perspective* are those of the author, not those of the Government of Canada. The author is grateful to Orlando Cabrera, Shotaro Hamamoto and Mark Kantor for their helpful peer reviews.

¹ Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the US, and Vietnam.

² [USTR, Letter to the Trans-Pacific Partnership Depository, January 30, 2017.](#)

³ [Jennifer Rubin, “Some people say it would be the greatest flip-flop ever,” *The Washington Post*, Apr. 13, 2018.](#) As the current Trade Promotion Act has been extended to 2021, this remains a possibility.

⁴ [TPP, Article 30.5.4.](#)

⁵ [CPTPP, Article 6.](#)

⁶ [CPTPP, Article 2.](#)

*The material in this Perspective may be reprinted if accompanied by the following acknowledgment: “Adam Douglas, ‘Will the United States join the Trans-Pacific Partnership, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, or neither?,’ *Columbia FDI Perspectives*, No. 252, May 20, 2019. Reprinted with permission from the Columbia Center on Sustainable Investment (www.ccsi.columbia.edu).” A copy should kindly be sent to the Columbia Center on Sustainable Investment at ccsi@law.columbia.edu.*

For further information, including information regarding submission to the *Perspectives*, please contact: Columbia Center on Sustainable Investment, Marion A. Creach, marion.creach@sciencespo.fr.

The Columbia Center on Sustainable Investment (CCSI), a joint center of Columbia Law School and the Earth Institute at Columbia University, is a leading applied research center and forum dedicated to the study, practice and discussion of sustainable international investment. Our mission is to develop and disseminate practical approaches and solutions, as well as to analyze topical policy-oriented issues, in order to maximize the impact of international investment for sustainable development. The Center undertakes its mission through interdisciplinary research, advisory projects, multi-stakeholder dialogue, educational programs, and the development of resources and tools. For more information, visit us at <http://www.ccsi.columbia.edu>.

Most recent *Columbia FDI Perspectives*

- No. 251, Karl P. Sauvant, “Promoting sustainable FDI through international investment agreements,” May 6, 2019
- No. 250, Qianwen Zhang, “The next generation of Chinese investment treaties: A balanced paradigm in an era of change,” April 22, 2019
- No. 249, Andrew Kerner, “How to analyze the impact of bilateral investment treaties on FDI,” April 8, 2019
- No. 248, Stephan W. Schill and Geraldo Vidigal, “Investment dispute settlement à la carte within a multilateral institution: A path forward for the UNCITRAL process?,” March 25, 2019
- No. 247, Karl P. Sauvant, “The state of the international investment law and policy regime,” March 11, 2019

All previous *FDI Perspectives* are available at <http://ccsi.columbia.edu/publications/columbia-fdi-perspectives/>.