

IP Rights Reform Is Price to Pay for Revamped Trans-Pacific Partnership Agreement

IN SHORT

The Situation: Following the U.S. withdrawal from the original Trans-Pacific Partnership ("TPP") agreement last year, the 11 remaining TPP countries agreed to implement the original text in a new "TPP-11" agreement. However, the parties "suspended" provisions in the original text that would have strengthened and harmonized intellectual property rights ("IP Rights") across TPP-11 member countries consistent with Australian and U.S. IP laws.

The Result: Businesses reliant on IP Rights will be denied the benefits associated with strengthened and harmonized IP Rights across TPP-11 countries.

Looking Ahead: It remains unclear whether TPP-11 countries will agree to strengthen and harmonize IP Rights absent an external stimulus such as the United States rejoining the TPP.

The Background

On February 4, 2016, 12 Pacific Rim countries (Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam, and the United States) signed the original Trans-Pacific Partnership free trade agreement.

The Intellectual Property chapter of the original TPP agreement promoted the strengthening and harmonization of IP laws among TPP countries by requiring uniform minimum standards of IP protection and enforcement in domestic laws. Many of these standards were higher than those mandated by the TRIPS Agreement and would have required a number of TPP countries—including Mexico, Canada, Singapore, and Malaysia—to strengthen their IP laws.

Although these so-called "TRIPS-Plus" provisions were strongly backed by the United States, many had been opposed by other TPP countries during negotiations for the original TPP agreement and were criticized by some nongovernmental organizations and domestic commentators. In addition, a number of these provisions were compromise positions that were contentious politically in the United States (e.g., Australia's "other measures" compromise on extended data protection for biological products).



Suspending requirements intended to strengthen and harmonize IP protection across TPP countries will allow existing differences between the standards of IP protection afforded by member states to linger.



On January 23, 2017, U.S. President Trump honored a campaign commitment and withdrew the United States from the original TPP agreement. Negotiations by the 11 remaining TPP countries commenced shortly thereafter, resulting in the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, or TPP-11, being signed on March 8, 2018.

The TPP-11 agreement:

- Incorporates by reference the text of the original TPP agreement;
- Suspends the application of certain provisions of the original TPP agreement, including numerous IP protection provisions, until the parties agree to end suspension of one or more of these provisions; and
- Provides for the commencement of TPP-11 60 days after the date on which at least six member states ratify the agreement.

The suspended IP provisions include the following:

- **Patentable Subject Matter**—that patents be made available for new uses of a known product, for new methods of using a known product or new processes of using a known product, and for inventions derived from plants.
- **Patent Term Adjustments**—to adjust, upon request, a patent's term of protection if there are unreasonable delays by a patent office, or as a result of delays in national regulatory approval for a patented pharmaceutical product.

- **Data Protection**—for the protection of test or other data submitted to a regulatory authority for the purposes of obtaining regulatory approval to market pharmaceutical products (five years) or biological pharmaceutical products (eight years, or five years plus "other measures").
- **Term of Copyright**—for a copyright term of life of the author plus 70 years.
- **Internet Service Provider Liability**—for a legal liability and "safe harbor" framework incentivizing online service providers to cooperate with rights holders in deterring online copyright infringement.

The Issue

Suspending requirements intended to strengthen and harmonize IP protection across TPP countries will allow existing differences between the standards of IP protection afforded by member states to linger. Differences in IP Rights may act as a disincentive or barrier to trade for businesses with high-value IP, thus potentially frustrating certain free-trade objectives of TPP-11. In addition to lost sales and opportunities for businesses, both export and destination countries may forgo some of the benefits of trade, including increased economic activity, employment, and (in the case of the destination country) access to the imported goods.

The Outcome

Many of the suspended IP provisions were pressed by the United States during negotiations for the original TPP agreement but remained highly contentious. The U.S. rationale for stronger IP protections among its trading partners is clear, and the decision by TPP-11 countries to *suspend* instead of *remove* contentious IP provisions leaves the door open for these countries to reach a consensus on the need for harmonized and stronger IP Rights in the region. However, it remains unclear whether this can be achieved in light of the contentious nature of the suspended provisions, and without the incentive of U.S. participation in TPP-11 and preferential access to U.S. markets.

FOUR KEY TAKEAWAYS

1. The Trans-Pacific Partnership is proceeding with 11 remaining countries after the United States withdrew from the free trade agreement in early 2017.
2. The TPP-11 agreement suspends a number of contentious IP provisions that would have required some member states to strengthen and harmonize their domestic laws in line with the IP laws of Australia and the United States.
3. The suspension of contentious IP provisions results in continued differences in IP Rights among TPP-11 countries. These differences may act as a disincentive or barrier to trade for businesses with high-value IP that are reluctant to export to countries that cannot offer "TRIPS-Plus" protections.
4. It is unclear whether TPP-11 countries will continue to work together to end these suspensions absent the United States signaling an interest in rejoining the TPP.

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