

**National Interest Analysis [2018] ATNIA 1
With attachments**

**Comprehensive and Progressive Agreement for Trans-Pacific Partnership
between the Government of Australia and the Governments of:**

**Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand,
Peru, Singapore and Vietnam**

and associated side letters

(Santiago, 8 March 2018)

[2018] ATNIF 1

Attachments:

Attachment I	Analysis of Regulatory Impact on Australia
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NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

SUMMARY PAGE

Comprehensive and Progressive Agreement for Trans-Pacific Partnership between the Government of Australia and the Governments of:

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Nature and timing of the proposed treaty action

1. The proposed treaty action is to notify the Depositary (New Zealand) in writing of the completion of Australia's legal procedures necessary to implement the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (the TPP-11 Agreement), between the Government of Australia and the Governments of Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam signed on 8 March 2018 in Santiago.
2. Article 3 (Entry into Force) of the TPP-11 Agreement provides that the TPP-11 Agreement will enter into force 60 days after the date on which a simple majority of signatories to the TPP-11 Agreement have notified the Depositary in writing of the completion of their applicable legal procedures. Article 3.2 provides that in the event a signatory to the TPP-11 Agreement has not completed its applicable legal procedures upon entry into force, the Agreement will enter into force for that signatory 60 days after it has notified the Depositary in writing of the completion of its applicable legal procedures.
3. It is proposed that Australia provide such notification as soon as practicable following consideration by the Joint Standing Committee on Treaties (JSCOT), the passing of legislative amendments and the enactment of any necessary regulations.
4. The Government of Australia and the Governments of Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam are working towards entry into force of the TPP-11 Agreement as soon as their respective domestic legal procedures will allow, in order to maximise the economic advantages to all Parties of the Agreement.

5. Ministers agreed that the side letters agreed by the Parties under the original Trans-Pacific Partnership (TPP) Agreement should be maintained in principle. As such the TPP-11 Agreement's entry into force will terminate or alter a number of Australia's existing treaties or treaty obligations as provided in a suite of new side letters to the TPP-11 Agreement. These side letters are detailed below at paragraph 57.

6. Australia will also lodge a notification, as expressly permitted under Article 29.5 of the TPP, electing to prevent any and all Investor-State Dispute Settlement (ISDS) challenges to Australia's tobacco control measures under the TPP-11 Agreement.

Background – from TPP to TPP-11

7. The Government tabled the TPP in the Parliament on 9 February 2016. Following its inquiry, JSCOT recommended Australia take binding treaty action (Report 165 of 30 November 2016). The Government tabled its response to JSCOT's report on 6 July 2017.¹

8. On 30 January 2017, the then acting United States Trade Representative (USTR) wrote to the representatives of other TPP signatories advising that the United States did not intend to become a Party to the TPP.² The provisions of the TPP preclude that Agreement entering into force without ratification by the United States³ as the Gross Domestic Product threshold set for entry into force cannot in practice be met without the participation of the United States.

9. On 21 May 2017, ministers from the remaining 11 TPP signatory countries issued a joint statement⁴ reaffirming the strategic and economic significance of the TPP as a way to promote regional economic integration and economic growth. The ministers agreed to launch a process of consultations among senior officials to assess options to bring the TPP into force expeditiously.

10. This process culminated in agreement by TPP-11 ministers to the core elements of the TPP-11 Agreement, which were announced on 11 November 2017 in Da Nang, Vietnam.⁵ A subsequent meeting of senior officials on 22-23 January 2018 settled the outstanding issues and reached agreement on a final deal.

¹Australian Government response to the Joint Standing Committee on Treaties report 165: Inquiry into the Trans-Pacific Partnership Agreement available at <http://dfat.gov.au/about-us/publications/Pages/australian-government-response-to-the-jscot-report-165-inquiry-into-the-tpp.aspx>

² Copy of letter available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/US-Withdraws-From-TPP>

³Article 30.5.3 (Entry into Force) of the TPP provides that should not all original TPP signatories have ratified the TPP within two years of the date of signature of the TPP, the Agreement "shall enter into force 60 days after the date on which at least six of the original signatories, which together account for at least 85 per cent of the combined gross domestic product of the original signatories in 2013, have notified the Depositary in writing of the completion of their applicable legal procedures".

⁴Trans-Pacific Partnership Ministerial Statement of 21 May 2017, Hanoi, available at: <http://dfat.gov.au/trade/agreements/tpp/news/Pages/news.aspx#tpp-news-20170521>

⁵Trans-Pacific Partnership Ministerial Statement of 11 November 2017, Da Nang, available at: <http://dfat.gov.au/trade/agreements/tpp/news/Pages/trans-pacific-partnership-ministerial-statement.aspx>

Key differences between the TPP-11 Agreement and original TPP Agreement

11. The TPP-11 Agreement is a separate legal instrument from the TPP.⁶ It incorporates all of the provisions of the TPP, with the exception of certain mechanical provisions, specifically those relating to accession, entry into force, withdrawal and authentic texts. Specific provisions addressing these aspects have been agreed and incorporated in the TPP-11 Agreement. In addition, a number of provisions of the TPP have been suspended in the TPP-11 reflecting the changed metrics of the deal following the withdrawal of the United States (see paragraphs 16-19).

12. Incorporating the substantive provisions of the TPP in the TPP-11 reflects the objective of the TPP-11 countries to maintain the high standards, overall balance and integrity of the original TPP. It is significant that the TPP-11 countries have agreed to maintain and honour their market access commitments from the original deal, among themselves (excluding the United States), covering goods, services and investment.

13. Australia and the other TPP-11 countries are working towards entry into force of the Agreement as soon as practicable in order to realise its economic benefits. To that end, it is proposed that, in line with Article 3 of the Agreement, Australia notify the Depository following consideration by JSCOT, the passage of legislative amendments and the enactment of necessary regulations.

14. Ministers agreed that the side letters that were concluded by the Parties under the TPP should be maintained in principle. As such, the TPP-11 Agreement's entry into force will terminate or alter a number of Australia's existing treaties or treaty obligations.

15. Australia will also lodge a notification, expressly permitted under Article 29.5 of the TPP, electing to prevent any and all Investor-State Dispute Settlement (ISDS) challenges to Australia's tobacco control measures under the Agreement. Parties' inherent right to regulate, including setting legislative and regulatory priorities, will be preserved in the TPP-11.

TPP provisions suspended in the TPP-11 Agreement

16. TPP-11 Parties have agreed by consensus to suspend the application of a small number (totalling 22) of TPP provisions incorporated in the TPP-11 Agreement (Article 2). These provisions will, therefore, have no effect as a matter of international law until the Parties agree to end the suspension, which would also be by consensus. The limited number of suspensions reflect a shared desire by TPP-11 countries to strike a balance between maintaining the overall high standards of the deal, while ensuring that only Parties to the TPP-11 Agreement benefit. Australia's position throughout the TPP-11 process was to preserve the deal's market access package, which represents major economic opportunities for Australia.

⁶Text of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership available at: <http://dfat.gov.au/trade/agreements/tpp/official-documents/Documents/tpp-11-treaty-text.pdf>

17. The suspensions cover a range of issues, and are listed in the Annex to the TPP-11 Agreement. Information on the suspensions are outlined in **Attachment III**. Many suspensions are related to intellectual property including:

- certain pharmaceutical provisions [(e.g. protections afforded to test or other data for pharmaceutical products (Article 18.50), protections afforded to biologic pharmaceutical products (Article 18.51), provisions governing pharmaceutical patent term adjustments in relation to the pharmaceutical product marketing approval process (Article 18.48)];
- certain copyright provisions [e.g. the term of protection for copyright (Article 18.63), technological protection measures (Article 18.68), Rights Management Information (Article 18.69)];
- provisions governing patent term adjustments in relation to granting authority delays (Article 18.46);
- provisions governing the protection of satellite and cable signals (Article 18.79); and
- provisions relating to internet service provider liability (Article 18.82).

18. None of the suspended intellectual property provisions would have required changes to Australia’s intellectual property legislation. Provisions governing the protection of satellite and cable signals (Article 18.79) would have required minor regulatory amendments.

19. A number of other non-intellectual property articles have also been suspended, including a commitment to commence further negotiations on government procurement. Another suspension narrows the scope of claims that can be made under the ISDS mechanism, specifically precluding ISDS claims for a breach of a private investment contract or for a violation of an investment authorisation granted by the government. In addition, foreign investors in financial institutions can no longer bring an ISDS claim for a breach of the minimum standard of treatment related to those investments.

Overview and national interest summary

20. Even without the United States, the TPP-11 Agreement will be one of the most ambitious global trade deals concluded since 1994. Ratification of this Agreement will signal Australia’s commitment to ambitious trade liberalisation and reform, and create a high standard hub that will shape future regional economic integration in a direction that promotes trade, investment and growth.

21. The TPP-11 Agreement is a highly significant outcome in advancing Australia’s long-term objective of achieving a single, high standard, rules-based trading system spanning the Indo-Pacific region, which was articulated in the Foreign Policy White Paper 2017. Strong outcomes from the ongoing negotiations for a Regional Comprehensive Economic Partnership (RCEP) and in Australia’s free trade agreement (FTA) negotiations with the Pacific Alliance would represent further progress toward this goal.

22. JSCOT's report on the TPP recognised that the TPP will address some of the 'noodle bowl' inefficiencies often associated with multiple bilateral FTAs.⁷

23. The TPP-11 Agreement will significantly enhance Australia's economic relationships in the region: supporting more seamless preferential supply chains; opening new market access opportunities in those countries with which Australia already has FTAs; and establishing new, high quality FTAs with Mexico and Canada. These gains exceed anything that could be generated from other current multilateral or plurilateral negotiations.

Reasons for Australia to take the proposed treaty action

24. The TPP-11 Agreement supports the Government's economic plan to ensure Australia continues to successfully transition from the mining investment boom to a stronger and more diversified economy. It will promote capital accumulation, higher productivity and improve resource utilisation levels.

25. In 2016-17, Australia's total goods and services exports to TPP-11 Parties were worth nearly \$88 billion⁸ – or around 23.7 per cent of Australia's total goods and services exports. The Agreement will eliminate 98 per cent of tariffs in the TPP-11 region. Coupled with the market access openings in services and investment, the TPP-11 will open substantial new trade and investment opportunities for Australian business.

26. The TPP-11 Agreement will further integrate the Australian economy into supply chains in a dynamic, changing and strategically important region which accounts for around 13.5 per cent of the world economy and includes four of the world's top 20 economies (Japan [3rd], Canada [10th], Australia [14th] and Mexico [15th]⁹) and six of Australia's top 20 goods and services export destinations in 2016-17 (Japan [2nd], New Zealand [7th], Singapore [9th], Malaysia [11th], Vietnam [13th] and Canada [19th]).

27. The TPP-11 Agreement market access outcomes build on, and supplement, the existing access conditions Australia has negotiated with its FTA partners, Japan, Chile, New Zealand, Malaysia, Singapore, Peru, Brunei and Vietnam. The Agreement also creates valuable new market access opportunities in the two TPP-11 markets where Australia does not have a FTA, namely Canada and Mexico.

28. By setting common international trade and investment standards between member countries, the TPP-11 Agreement will make doing business across the region easier, reduce red tape and business costs. Many of the rules incorporated in the TPP-11 address contemporary realities in the international business environment and improve transparency and predictability in the regulatory climate which will assist Australian businesses reduce costs and manage risks.

29. Modelling by the Peterson Institute for International Economics (PIIE) (2017) found that the TPP-11 would increase Australia's income by 0.5 per cent by 2030

⁷ Joint Standing Committee on Treaties: *Report 165: Trans-Pacific Partnership Agreement*. Page 99.

⁸ All figures in Australian dollars unless otherwise specified.

⁹ Based on World Bank GDP 2016 rankings

(compared to 0.6 per cent under the original TPP).¹⁰ The Canada West Foundation modelling (2017) found that Australia's exports to other TPP-11 Parties would grow by 0.12 per cent under the TPP-11, compared with a reduction of 0.14 per cent in Australian exports to other TPP Parties under the TPP¹¹, likely due to increased competition with the United States in Japan and other Asian markets under the original TPP.

30. The economic benefits to Australia can be expected to increase in the event that other significant economies join the TPP-11. The PIIE's modelling showed that in a TPP-16 scenario (TPP-11 plus Indonesia, the Republic of Korea, Philippines, Taiwan and Thailand), Australia's income would increase by 0.7 per cent by 2030.¹² Some of these economies, such as Indonesia, the Republic of Korea and the Philippines, have publicly shown interest in the TPP in the past.

31. The key outcomes and impacts are set out in detail in **Attachment I** (Analysis of Regulatory Impact on Australia) and **Attachment II** (Fact Sheet) to this National Interest Analysis (NIA). Sectoral outcomes are summarised below.

Agriculture

32. Australia exported around \$12 billion worth of agricultural goods, covering cover agriculture, forestry and fishing, to TPP-11 countries in 2016, representing close to 23 per cent of Australia's total exports of these products. Australia enjoys a reputation as a reliable high quality producer of agricultural commodities and processed foods in the region. The Agreement will eliminate tariffs on more than US\$2.5 billion of Australia's dutiable exports of agricultural goods to TPP-11 countries upon entry into force of the Agreement. A further US\$2 billion of Australia's dutiable exports will receive significant preferential access through new quotas and tariff reductions. Specific outcomes include:

- (a) **beef**: significant reductions and elimination of tariffs on beef and beef products into Japan (building on the Japan-Australia Economic Partnership Agreement (JAEPA) outcomes); and elimination of tariffs on beef and beef products into Mexico over 10 years and Canada over 5 years¹³;
- (b) **sugar**: tariff elimination and levy reduction for high polarity sugar into Japan adding further to the competitive advantage of JAEPA; elimination of the tariff on refined sugar into Canada within five years of entry into force;
- (c) **rice**: for the first time in over 20 years, quota expansion for Australian rice into Japan and agreement to new administrative arrangements to facilitate trade. Mexico will eliminate its rice tariffs over 10 years;

¹⁰ Peterson Institute for International Economics Working Paper, *Going It Alone in the Asia-Pacific: Regional Trade Agreements Without the United States* – October 2017 – available at: <https://piie.com/system/files/documents/wp17-10.pdf>

¹¹ Canada West Foundation, *The Art of the Trade Deal: Quantifying the Benefits of a TPP without the United States* – June 2017 – available at: http://cwf.ca/wp-content/uploads/2017/06/TIC_ArtTradeDeal_TPP11_Report_JUNE2017.pdf

¹² Peterson Institute for International Economics Working Paper, *Going It Alone in the Asia-Pacific: Regional Trade Agreements Without the United States* – October 2017

¹³ Under bilateral side-letters exchanged between Australia and Canada on 8 March 2018, Canada has agreed to accelerate the tariff phase-out period of 10 years for Australian beef under the original TPP to five years under the TPP-11.

- (d) **dairy**: elimination of tariffs on a range of cheeses covering over \$100 million in existing trade with Japan, new preferential access for a further estimated \$100 million of trade, building substantially on JAEPA and new quota arrangements for Australia on butter and skim milk powder. New preferential access into Mexico and the highly-protected Canadian market;
- (e) **cereals**: elimination of tariffs on wheat and barley into Mexico (within 10 years) and Canada (upon entry into force). Reduction of the mark-ups applied to wheat and barley in Japan and the creation of new quota arrangements above and beyond JAEPA;
- (f) **wine**: elimination of tariffs into Mexico (between 3 to 10 years) and Canada (upon entry into force), and, for the first time, Malaysia (within 15 years) and Vietnam (within 11 years); and
- (g) **seafood**: elimination of all tariffs into Canada and Vietnam on entry into force, and Mexico and Japan within 15 years.

33. Risk-based quarantine measures in the Sanitary and Phytosanitary Chapter [herein after, references to “Chapters” are references to chapters of the TPP rather than the Agreement] are not subject to the TPP’s Dispute Settlement mechanism. The TPP-11 Agreement will not affect Australia’s risk-based quarantine measures.

Resources, Energy and Manufactured Goods

34. Australian exports of resources, energy, and manufactured products generally face far lower tariff barriers than agricultural goods. Nonetheless, the TPP-11 Agreement will eliminate all remaining tariffs on Australian exports of non-agricultural products to TPP-11 countries and create new opportunities for Australian exports.

35. Australia’s exports of resources and energy products to TPP-11 countries were worth over \$43 billion in 2016-17, representing around 62 per cent of Australia’s total goods exports to these countries. This includes around \$35 billion of resources and energy exports to Japan.

36. While the majority of Australia’s major exports, such as coal, iron ore and liquefied natural gas already enter TPP-11 countries duty-free, the TPP-11 Agreement has secured additional market access, including:

- (a) elimination of tariffs on **butanes, propane and liquefied natural gas** to Vietnam over 7 years; and
- (b) elimination of Vietnam’s 20 per cent tariffs on refined petroleum over 10 years – Australian exports were valued at \$9.5 million in 2016-17.

37. Australia’s exports of **manufactured goods** to TPP-11 countries were worth an estimated \$14 billion in 2016-17. New market access outcomes include:

- (a) immediate elimination of tariffs on **iron and steel products** into Canada and into Vietnam within 10 years;
- (b) elimination of **ship tariffs** into Canada over 5 to 10 years;
- (c) elimination of tariffs on **pharmaceuticals, machinery, mechanical and electrical appliances, and automotive parts** to Mexico within 10 years;

- (d) elimination of tariffs on **automotive parts** to Vietnam over 10 years;
- (e) a requirement for Malaysia to cease providing excise tax credits for locally produced **automotive parts**, which had favoured the use of Malaysian components over parts imported from Australia; and
- (f) Australian businesses will now be able to bid for tenders to supply goods (such as **pharmaceutical products, electronic components and supplies**) used for government purposes in Brunei Darussalam, Canada, Malaysia, Mexico and Vietnam.

Services

38. In 2016, TPP-11 countries accounted for 11 per cent of the world's trade in services, with Australian services exports to TPP-11 countries worth over \$18 billion in 2016-17 (over 22 per cent of total Australian services exports).

39. The TPP-11 Agreement will contribute to a significant expansion and diversification of Australian services exports to Asia-Pacific countries by liberalising key barriers, providing more transparent and predictable operating conditions in TPP-11 countries, and capturing future services sector reforms. Examples include:

- (a) **mining equipment, technologies and services (METS) and oilfield service providers:** major new commercial opportunities for our world class service providers, including through:
 - i. Mexico's historic liberalisation of its energy sector;
 - ii. Vietnam opening its mining investment regime;
 - iii. Brunei Darussalam and Vietnam locking in future reforms to local content regimes or otherwise committing to a level playing field between Australian and foreign suppliers providing goods and services in the mining, oil and gas sectors; and
 - iv. new rules on large state-owned enterprises such as PEMEX in Mexico, VINACOMIN and PETROVIETNAM in Vietnam, which will help ensure that Australian goods and service providers can compete fairly for contracts;
- (b) **professional services:** Malaysia has locked in recent reforms to the legal, architectural, engineering and surveying services sectors, removing a number of restrictions that have long been of concern to Australian businesses;
- (c) **financial services:** new opportunities for Australian exporters to TPP-11 countries, with guaranteed ability to provide the following cross-border services:
 - i. investment advice and portfolio management services to a collective investment scheme; and
 - ii. insurance of risks relating to maritime shipping and international commercial aviation and freight, and related brokerage;
- (d) **temporary entry of business persons:** preferential temporary entry arrangements for Australian business people and their spouses into key TPP-11 markets, including the waiving of work permits and provision of work rights for spouses in Brunei Darussalam, Canada and Mexico. Reciprocal TPP-11 commitments on temporary entry of skilled business persons will support greater trade and investment opportunities in the Asia-Pacific region. The ability of business persons to move across borders is an integral feature of

- modern business and a crucial contributor to growth in Australia's commercial relations;
- (e) **education services:** Australian universities and vocational education providers will benefit from guaranteed access to a number of existing and growth markets in Brunei Darussalam, Japan, Malaysia, Mexico and Vietnam. Australian providers will also be well placed to supply online education services across the region;
 - (f) **transport services:** Australian freight and logistics companies stand to benefit from enhanced commitments that support integrated logistics supply chains. Australian providers of transport and logistics services in Malaysia and Vietnam will gain strong trade and investment protections for the first time. The Agreement will capture future liberalisation of investment regulations in aviation in Vietnam and freight trucking in Malaysia and Vietnam, which are key markets for our airlines and logistics providers;
 - (g) **telecommunications services:** Australian companies stand to benefit from the phasing out of foreign equity limits in Vietnam's telecommunications sector five years after the entry into force of the TPP-11 Agreement and the ability to apply to wholly-own telecommunications ventures in Malaysia;
 - (h) **health services:** Australian providers of private health and allied services will benefit from greater certainty regarding access and operating conditions in Malaysia, Mexico and Vietnam; and
 - (i) **hospitality and tourism services:** Australian suppliers of travel agency and tour operator services will benefit from guaranteed access in Brunei Darussalam, Canada, Chile, Japan and Mexico and greater certainty regarding access and operating conditions in Malaysia and Vietnam. Increased trade and investment among TPP-11 countries will also increase demand for domestic tourism services and support the development of Australia's tourism sector, particularly in regional Australia.

Government procurement

40. New opportunities for Australian businesses to bid for government procurement services contracts, such as:

- (a) accounting, auditing and taxation services in Brunei Darussalam, Canada, Malaysia, Mexico and Vietnam;
- (b) management consulting services in Brunei Darussalam, Malaysia and Mexico;
- (c) computer and related services offers by all TPP-11 Parties, along with maintenance of office machinery in Brunei Darussalam, Canada, Malaysia, Mexico and Vietnam;
- (d) architectural engineering and other technical services in Brunei Darussalam, Canada, Malaysia and Mexico;
- (e) land and water transport services in Brunei Darussalam, and Malaysia;
- (f) telecommunication and related services in Brunei Darussalam, Canada and Malaysia;
- (g) environmental protection services in Brunei Darussalam, Canada, Malaysia, Mexico and Vietnam;
- (h) education services in Brunei Darussalam, Canada, Japan, Malaysia and Mexico; and
- (i) health and social services in Brunei Darussalam and Malaysia.

41. For the first time, Australian METS and oilfield service suppliers will also be eligible to bid for government procurement opportunities with Mexico for PEMEX and with Peru for PETROPERU, along with other entities in Peru's government-owned electricity and hydropower sectors.

Investment

42. The TPP-11 Agreement will create new investment opportunities and provide a more predictable and transparent regulatory environment for investment. In 2016, the total stock of Australian foreign investment in TPP-11 countries was valued at \$339 billion, representing an increase of nearly 7 per cent from 2015, and doubling since 2006. Australian investment in TPP-11 countries represents 15.6 per cent of Australia's total outward investment. Investment in Australia from TPP-11 countries tripled in the last decade to reach \$424 billion in 2016, an increase of 6 per cent over the previous year. Investment from TPP-11 countries represents 13.3 per cent of all foreign investment in Australia.

43. The TPP-11 Agreement will promote further growth and diversification of Australian outward investment by liberalising investment regimes in key sectors for which the TPP-11 region accounts for an important share of global investment, such as mining and energy, telecommunications and financial services. Mining and energy exploration efforts are centred on the Asia-Pacific region: the four TPP-11 Parties from the Americas (Canada, Chile, Mexico and Peru) accounted for an estimated 32 per cent of worldwide exploration budgets in 2016 and Australia, a further 13 per cent. Under the Agreement, Canada will allow Australian investors to apply for an exemption from the 49 per cent foreign equity limit on foreign ownership of uranium mines, without first seeking a Canadian partner. Australian investors will also benefit from preferential investment screening thresholds. Australian investments into Canada below CA\$1.5 billion and into Mexico below USD\$1 billion will not be screened. Australian investors will also benefit from commitments offered by Japan, Vietnam and Brunei Darussalam to only impose conditions on foreign investment on the initial sale of interests or assets owned by the government.

44. The TPP-11 Agreement will also promote further growth and diversification of foreign investment in Australia by liberalising the screening threshold at which private foreign investments in non-sensitive sectors are considered by the Foreign Investment Review Board (FIRB), increasing the threshold from \$261 million to \$1,134 million (indexed) for all TPP-11 countries.

45. Under the TPP-11 Agreement, Australia has retained the ability to screen investments in sensitive sectors to ensure they do not raise issues contrary to the national interest. All investments by foreign governments will continue to be examined by FIRB and lower screening thresholds will apply to investments in agricultural land and agribusiness.

46. The Agreement's investment obligations include high quality, modern rules governing the treatment of investors and their investments, balanced with robust safeguards to preserve the right of the Government to continue regulating in the

public interest. Investment obligations can be enforced directly by Australian and other TPP-11 investors through an ISDS mechanism.

47. A number of important safeguards are built into the rules guiding ISDS, making this one of the most protective treaties in existence in terms of its protections for legitimate regulation. Procedural safeguards in the Agreement provide enhanced levels of transparency in the management of ISDS claims. In addition, specific Australian policy areas are carved-out from certain ISDS claims including: social services established or maintained for a public purpose, such as social welfare, public education, health and public utilities; measures with respect to creative arts, Indigenous traditional cultural expressions and other cultural heritage; and Australia's foreign investment policy, including decisions of the FIRB. Australia's tobacco control measures as defined under the Agreement will not be able to be challenged. **Attachment IV** (Investment FAQs) provides further detail on the TPP-11's ISDS mechanism.

48. Australia has existing FTAs and bilateral investment treaties (BITs) that contain ISDS mechanism with all TPP-11 countries, except Canada.¹⁴ Australia has agreed to bilateral agreements with Mexico, Peru and Vietnam to terminate current BITs with those countries once the TPP-11 enters into force (see paragraph 57 below).

Lowering the Cost of Doing Business

49. The Agreement includes additional commitments which will **lower the costs of doing business**. Highlights include:

- (a) more transparent and efficient **customs procedures** making it easier for Australian companies to export and do business in the region. For example, TPP-11 Parties will be required to provide an advance ruling on the tariff classification of a good, how it should be valued, whether a good is originating and how to claim preference;
- (b) regional **rules of origin** and a single set of documentary procedures for products traded under the Agreement. These arrangements will support the development of regional supply chains by encouraging 'cumulation', which permits inputs used in the production of a good from one TPP-11 Party to be treated as the same as inputs from any other TPP-11 Party when making a good. The arrangements will also allow businesses to save on administrative costs by allowing them to trade under the one set of rules, rather than under existing multiple bilateral FTAs;
- (c) **duty-free temporary admission of pallets and containers**. This TPP-11 commitment will provide significant cost and administrative savings for Australian businesses engaged in providing transport logistics services in the Asia-Pacific;

¹⁴ The applicable FTAs and BITs are: *Agreement between Australia and the Socialist Republic of Vietnam on the Reciprocal Promotion and Protection of Investments 1991*; *Agreement between Australia and the Republic of Peru on the Promotion and Protection of Investments, and Protocol 1997*; *Singapore–Australia Free Trade Agreement 2003, as amended, including in 2017*; *Agreement with the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments, and Protocol 2007*; *Australia–Chile Free Trade Agreement 2009*; and *ASEAN–Australia–New Zealand Free Trade Agreement 2010*.

- (d) mechanisms to address **non-tariff barriers** (NTBs) impeding trade, which will give Australia an important avenue to address NTBs affecting our exports in the region. The Agreement will enhance transparency, cooperation and promote good practice with regard to establishment and maintenance of technical regulations. A better understanding of each Party's regulatory systems will improve public safety and benefit Australian consumers; and
- (e) simplified rules and **technical requirements** for several products, including wine and spirits. For example, the Australian wine industry will be able to use the same label on bottles of wine for export to all TPP-11 countries, saving money on marketing and distribution costs.

50. As a regional FTA, the Agreement will create additional and longer term benefits for consumers and businesses that are not possible to achieve under a bilateral FTA. Even though Australia has relatively low tariffs, products created via an international supply chain are taxed at the borders over which they pass before they get to our shores. Under the Agreement, producers will be able to use inputs from any of the 11 participating countries and trade the good under the TPP-11 preferential trading arrangements. This means lower tariff rates on inputs as well as the final product.

Addressing contemporary trade challenges

51. The TPP-11 Agreement tackles new trade challenges by promoting innovation, productivity, and competitiveness by addressing issues which are emerging and changing the way business is conducted. These include:

- (a) commitments ensuring **State-Owned Enterprises and government designated monopolies** engaged in commercial activities make purchasing and sales decisions on a commercial basis and do not discriminate against Australian suppliers of goods and services. These rules will promote competition, trade and investment in TPP-11 Parties and ensure Australian exporters will be able to compete on a level playing field;
- (b) high quality standards for **government procurement** that are robust, transparent and allow suppliers to participate fairly in procurement processes. The rules will ensure that governments do not discriminate against foreign suppliers when assessing tenders and awarding contracts. Governments must follow world-class procurement processes that provide increased levels of transparency and greater certainty for businesses, big and small, across TPP-11 Parties. All Parties will be required to establish a review mechanism so that suppliers (both foreign and domestic) can challenge government procurements that do not follow proper processes;
- (c) state of the art **e-commerce** provisions driving the information economy and facilitating trade among TPP-11 Parties. For the first time, certainty for business about their ability to move information across borders and make investment decisions about data storage facilities. Australia's regulatory framework, including the *Privacy Act 1988*, will not be affected;
- (d) **enhancing the online environment for consumers in TPP-11 markets**, including commitments to personal information protection, enforceable consumer rights and addressing 'spam'. Under the Agreement, Australia will have a forum to exchange views with other TPP-11 countries about the

- experiences of Australian consumers when accessing products and services offered online;
- (e) for the first time, a provision seeking to address the high costs of **international mobile roaming**. Parties will work cooperatively to promote transparent and reasonable rates for international mobile roaming services. The Agreement also ensures TPP-11 countries are able to enter into arrangements to regulate rates and conditions for wholesale international mobile roaming services, should they wish to do so;
 - (f) assisting **Small and Medium-Sized Enterprises (SMEs)** to reap the benefits of the Agreement, with an emphasis on moving to paperless trading, making customs and export delivery more effective and efficient, user-friendly websites targeted at SMEs to provide easily accessible information about the Agreement as well as only requiring one certificate of origin for exports to all TPP-11 markets which can be self-certified;
 - (g) promoting high levels of **environmental protection**, including by liberalising trade in environmental goods and services, and ensuring TPP-11 Parties effectively enforce their domestic environmental laws. TPP-11 Parties must also take measures in relation to a number of important environmental challenges, such as protecting the ozone layer, protecting the marine environment from ship pollution, combatting illegal wildlife trade and combatting overfishing and illegal fishing. Subsidies for fishing that negatively affect overfished stocks and subsidies for vessels engaged in illegal fishing will be prohibited;
 - (h) recognition and emphasis by TPP-11 parties on the importance of internationally-recognised **labour rights**. Each Party is required to adopt and maintain in its legislation and practices the rights contained in the International Labour Organization Declaration, such as elimination of forced labour, abolition of child labour, freedom of association and the right to collective bargaining. The Agreement will also enhance cooperation and consultation on labour issues, and effective enforcement of labour laws in the Parties; and
 - (i) encouraging Parties to address **corruption** through the promotion of integrity, honesty and responsibility among its public officials and to adopt a range of related measures, including: training of individuals in public positions considered especially vulnerable to corruption; promoting transparency amongst officials in the exercise of their public functions; identifying and managing actual or potential conflicts of interests; requiring senior and other public officials to make public declarations on relevant matters including their outside investments, assets or gifts received; and facilitating reporting by public officials of corruption to appropriate authorities.

Intellectual Property

52. The Agreement establishes a common set of rules amongst the Agreement's Parties on intellectual property protection and enforcement which aims to encourage investment in new ideas, support creative and innovative industries, address and prevent piracy and counterfeiting, and promote the dissemination of information, knowledge and technology. These rules will help streamline intellectual property transactions, increase transparency and lower the costs of doing business, and support Australia's creative and innovative industries by promoting certainty and

opportunities for trade and investment in the region. Australian businesses and consumers will also benefit from increased access to legitimate products and services.

53. The intellectual property provisions of the Agreement affirm and build on the *WTO Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS Agreement), covering: copyright, trade marks, geographical indications, patents, industrial designs, confidential information, plant variety protection, and civil, border and criminal enforcement. The Agreement also covers 21st century issues such as cybersquatting of domain names and trade secrets theft. The Agreement retains a limited number of pharmaceutical intellectual property provisions from the TPP. As with the TPP, the TPP-11's Intellectual Property Chapter is consistent with Australia's existing intellectual property regime and will not require any changes to Australia's legislation. **Attachment V** (Intellectual Property FAQs) provides further detail.

54. The Agreement does not require an increase in the term of **copyright protection** in Australia, nor any other changes to Australia's copyright regime. The TPP-11 outcome will not require any changes to Australia's **patent system**, including the term of protection. The Agreement will not have any impact on Australia's Pharmaceutical Benefits Scheme or timely access to affordable medicines – this was also the case under the original TPP.

55. The Agreement will not require any changes to Australia's **industrial designs** system or **trademark** system, including with respect to how Australia protects geographical indications. The Agreement will not require the introduction of new **civil remedies** or **criminal penalties** for intellectual property infringement in Australia, including with respect to the protection of trade secrets. The Intellectual Property Chapter does not impose any new restrictions on Australia's ability to allow for **parallel imports**. These were also the case under the original TPP.

Key Australian Commitments

56. Under the TPP-11, Australia has agreed to honour its original TPP market access commitments to the other TPP-11 Parties. Likewise, TPP-11 Parties will honour their original TPP market access commitments for Australia under the TPP-11. This means that:

- (a) Consistent with other Australian FTAs and our trade policy settings, 93 per cent of all of Australia's tariff lines will be eliminated or bound at zero tariff rates upon entry into force of the Agreement. Virtually all remaining tariffs, covering those sectors where tariffs still provide some level of protection against imports, are eliminated in either three or four years. This includes tariffs of mostly 5 per cent on plastics and rubber, textiles, clothing and footwear, iron and steel, motor vehicle components and some machinery and furniture tariffs. The phased elimination of these tariffs aligns with existing FTAs and will not undercut any existing tariff phasing arrangements for sensitive products with existing FTA partners.
- (b) The only tariffs in Australia's offer that are not eliminated are those on used car imports. Although the 5 per cent ad valorem tariff is eliminated immediately, consistent with our FTAs with Korea and Japan, the larger

\$12,000 specific tariff is maintained. These tariffs represent only 0.1 per cent of Australia's total tariff lines.

- (c) Australia will increase FIRB screening thresholds for private investors from TPP countries from 261 million to \$1,134 million (indexed) for investments in non-sensitive sectors. Australia has retained the ability to screen investments in sensitive sectors, including media, telecommunications and defence-related industries at lower levels and reserved policy space to screen proposals for foreign investment in urban land, agricultural land (at \$15 million or above [indexed]) and in agribusiness (at \$55 million or above [indexed]).
- (d) Australia offered commitments to allow the temporary entry of certain categories of business persons from those TPP-11 countries that will provide acceptable levels of access for Australia, namely Brunei, Canada, Malaysia, Mexico, Peru and Vietnam. Australia's TPP-11 commitments are consistent with Australia's existing immigration framework and the approach taken in other FTAs. None of Australia's commitments in this area will affect Australia's qualifications recognition, licensing and related requirements for visa eligibility.

TPP-11 Bilateral Side Letters

57. Alongside the original TPP, Australia negotiated a number of bilateral side letters with original TPP Parties. In line with the ministerial statement of 11 November 2017, TPP-11 countries decided to maintain in principle all the side letters signed under the original TPP, unless decided otherwise. Australia will be maintaining all its original side letters with TPP-11 countries. The following seven side letters either maintain the original TPP side letters or re-sign them in full, and are of treaty-level status:

- (a) Agreement between Australia and Chile to maintain the original TPP bilateral agreements;
- (b) Agreement between Australia and Japan regarding Rice (which is the same in substance as bilateral side letters exchanged in the context of the original TPP);
- (c) Agreement between Australia and Mexico regarding Distinctive Products (which is the same in substance as bilateral side letters exchanged in the context of the original TPP);
- (d) Agreement between Australia and Mexico regarding Termination of Investment Promotion and Protection Agreement (which is the same in substance as bilateral side letters exchanged in the context of the original TPP);
- (e) Agreement between Australia and New Zealand regarding Investor State Dispute Settlement, Trade Remedies and Transport Services (which is the same in substance as bilateral side letters exchanged in the context of the original TPP);
- (f) Agreement between Australia and Peru to maintain the original TPP bilateral agreements; and
- (g) Agreement between Australia and Viet Nam to maintain the original TPP bilateral agreements.

A further four side letters maintain original TPP side letters and are of less-than-treaty status:

- (a) Memorandum of Understanding between Australia and Canada to maintain the original TPP bilateral understandings;
- (b) Memorandum of Understanding between Australia and Malaysia to maintain the original TPP bilateral understandings;
- (c) Memorandum of Understanding between Australia and Peru to maintain the original TPP bilateral understandings; and
- (d) Memorandum of Understanding between Australia and Viet Nam to maintain the original TPP bilateral understandings.

A number of new side letters have been agreed by TPP-11 Parties in the course of assessing options for bringing the original TPP into effect between them. Of the ten new side letters, the following six are of treaty-level status and are legally binding between the parties:

- (a) Agreement between Australia and Canada regarding the Canadian Cultural Industries Sector (which is the same in substance as Canada's bilateral agreements on this matter with all the other TPP-11 countries);
- (b) Agreement between Australia and Canada regarding customs duties on Australian beef;
- (c) Agreement between Australia and Canada regarding automotive rules of origin;
- (d) Agreement between Australia and Viet Nam regarding the Cyber Security Law of Viet Nam (which is the same in substance as Viet Nam's bilateral agreements on this matter with all the other TPP-11 countries);
- (e) Agreement between Australia and Viet Nam regarding disputes related to the Labour Chapter of the TPP (which is the same in substance as Viet Nam's bilateral agreements on this matter with all the other TPP-11 countries); and
- (f) Agreement between Australia and Viet Nam regarding Electronic Payment Services (which is the same in substance as Viet Nam's bilateral agreements on this matter with all the other TPP-11 countries).

A further four new side letters are of less-than-treaty status:

- (a) Memorandum of Understanding between Australia and Chile regarding Electronic Payment Services (which is the same in substance as Chile's bilateral understandings on this matter with all the other TPP-11 countries);
- (b) Memorandum of Understanding between Australia and Chile regarding Article 18.47 (which is the same in substance as Chile's bilateral understandings on this matter with all the other TPP-11 countries);
- (c) Memorandum of Understanding between Australia and Viet Nam regarding Article 18.47 (which is the same in substance as Viet Nam's bilateral understandings on this matter with all the other TPP-11 countries); and
- (d) Memorandum of Understanding between Australia and Viet Nam regarding Article 18.53 (which is the same in substance as Viet Nam's bilateral understandings on this matter with all the other TPP-11 countries).

Each of these bilateral side letters will enter into force or take effect, as appropriate, on the date that the TPP-11 Agreement enters into force for both Australia and the Party with which it has negotiated the side letter.

Obligations

58. The Agreement incorporates the obligations contained in the original TPP by reference. The key obligations of the original TPP were outlined in the National Interest Analysis associated with that treaty.¹⁵ An overview of the suspended provisions under the Agreement is provided at **Attachment III** to this NIA. A brief overview of key obligations contained within the Agreement is below.

59. Article 1 (Incorporation of the Trans-Pacific Partnership Agreement) provides that the Agreement incorporates all of the provisions of the original TPP, with the exception of certain mechanical provisions, specifically those relating to accession, entry into force, withdrawal and authentic texts. The provisions addressing these matters have been agreed specifically for the TPP-11 Agreement. The effect of this article is that the substantive provisions of the original TPP have become a part of the TPP-11 Agreement. These provisions will be binding under international law for Australia once Australia has ratified the Agreement and it has entered into force.

60. Under Article 2 (Suspension of the Application of Certain Provisions), TPP-11 countries have agreed to suspend the application of a small number of the original TPP provisions incorporated into the Agreement. The suspended provisions are set out in the Agreement's Annex. These provisions remain part of the TPP-11, but by agreement of the Parties have no application under international law until the Parties agree to end the suspension by consensus.

61. The effect of Article 3 (Entry into Force) is outlined at paragraph 2 above. This article differs to the entry into force provision of the original TPP which effectively required the United States, Japan and four other original TPP signatories to have ratified the original TPP for it to enter into force.

62. Articles 4 (Withdrawal), 5 (Accession) and 7 (Authentic Texts) are addressed in paragraphs 74, 72 and 75 below.

63. Article 6 (Review of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership) provides for any Party to trigger a review process for the Parties to consider proposals to modify the Agreement. A review provision is a standard feature in trade agreements, including the original TPP (Chapter 27). A modification of the TPP-11 is a treaty amendment that would be subject to Article 30.2 of the TPP (see paragraph 71).

Implementation

64. Following consideration by JSCOT and prior to treaty action being taken, Australia will need to pass a number of legislative amendments in order to implement

¹⁵ TPP National Interest Analysis available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/9_February_2016/Treaty_under_consideration#nia

the obligations in the Agreement. The *Customs Act 1901*, the *Customs Tariff Act 1995* and relevant customs regulations will need to be amended to incorporate the preferential tariff rates that will apply to goods imported from TPP-11 countries under the Agreement. In addition, new customs regulations will be need to be enacted for the rules of origin set out in Annexes 3-D and 4-A of Chapters 3 and 4 respectively.

65. The *Foreign Acquisitions and Takeovers Regulations 2015* will also require amendment to incorporate the new thresholds for screening investment proposals by investors from Brunei Darussalam, Canada, Malaysia, Mexico, Peru, Singapore and Vietnam.

66. The Government Procurement (Judicial Review) Bill 2017 was introduced in May 2017 to enable implementation of the domestic review obligations in the TPP Government Procurement Chapter. This legislation establishes a mechanism for suppliers to raise complaints about the conduct of procurements in which they have an interest. The Government identified the Federal Circuit Court (FCC) as the preferred entity to implement the domestic review obligation, and the legislation vests the necessary jurisdiction in the FCC.

67. A legislative instrument under the *Public Governance Performance and Accountability Act 2013* will need to be made to replace the Commonwealth Procurement Rules (January 2018) to make the changes required to meet the Agreement's obligations.

68. A Ministerial determination will need to be made under section 140GBA of the *Migration Act 1958* to exempt from labour market testing the intra-corporate transferees, independent executives and/or contractual service suppliers of those TPP-11 Parties to which Australia extended temporary entry commitments.

Costs

69. The estimated loss of tariff revenue for Australia from the TPP is approximately \$30 million in 2018-19 and \$220 million over the forward estimates period (2018-19 to 2021-22). This estimate assumes the TPP will enter into force in early 2019. These cost estimates, however, do not take into account the potential domestic economic growth that the Agreement is expected to generate and any additional taxation revenue resulting from such growth. Overall, given the scale of Australia's trade and investment relationships with the 10 other TPP-11 Parties, the tariff reductions and increased market access Australia will gain under the Agreement and the strong support for the Agreement from the business community, it is assessed that the Agreement represents a net gain to the Australian economy.

Regulation Impact Statement

70. An Analysis of Regulatory Impact on Australia, certified by the Department of Foreign Affairs and Trade as an independent review that undertook a process and analysis equivalent to a Regulation Impact Statement, as required by the Office of Best Practice Regulation, is attached to this NIA (**Attachment I**).

Future Treaty Action

71. Article 30.2 (Amendments) of the original TPP provides that the Parties may agree in writing to amend the Agreement. Any future amendments will be subject to Australia's domestic treaty-making requirements and would enter force 60 days after the date on which all Parties have notified the Depository in writing of the approval of the amendment in accordance with their respective applicable legal procedures, or on such other date as the Parties may agree.

Accession by other States

72. Article 5 (Accession) provides that after the TPP-11 Agreement's entry into force, any State or separate customs territory may accede to the Agreement, subject to such terms and conditions as may be agreed between the Parties and that State or separate customs territory. Unlike the original TPP, the TPP-11's accession provision does not have a specific reference to APEC members. It was determined by the TPP-11 Parties unnecessary to refer to APEC economies because the original TPP allowed for accession by non-APEC economies essentially on the same basis as APEC economies, namely such an accession would be subject to such terms and conditions as may be agreed between the Parties and the new member applicant, for example, by consensus that the new member meets the TPP's standards.

73. The TPP Commission established under Chapter 27 (Administrative and Institutional Provisions) can agree to establish a working group to negotiate the terms and conditions for the accession. Membership of the working group shall be open to all interested Parties. The process for considering and negotiating an acceding country's accession is analogous to the process used in the WTO. Agreement among the Parties to an accession would require treaty action and be subject to domestic legal processes which, once complete, would need to be notified to the Depository in writing. Australia's obligations contained within the TPP-11 Agreement, subject to Australia's schedules and reservations would then extend to the new Parties.

Withdrawal or denunciation

74. Article 4 (Withdrawal) allows any Party to withdraw from the TPP-11 Agreement by providing written notice of withdrawal to the Depository. A withdrawing Party shall simultaneously notify the other Parties of its withdrawal through established contact points in each TPP-11 Party. A withdrawal shall take effect six months after a Party provides written notice to the Depository, unless the Parties agree on a different period. If a Party withdraws, the Agreement remains in force for the remaining Parties.

Authentic texts

75. Article 7 (Authentic Texts) of the TPP-11 Agreement provides that the English, Spanish and French texts are equally authentic. In the event of inconsistency, the English text shall prevail.

Contact details

Office of Trade Negotiations
Department of Foreign Affairs and Trade

ATTACHMENT ON CONSULTATION

**Comprehensive and Progressive Agreement for Trans-Pacific Partnership
between the Government of Australia and the Governments of:**

**Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand,
Peru, Singapore and Vietnam**

and associated side letters

(Santiago, 8 March 2018)

[2018] ATNIA 1

[2018] ATNIF 1

CONSULTATION

The process for engaging stakeholders in relation to the Agreement was an extension of the Government's efforts to bring the original TPP into force. Stakeholders' views were actively encouraged and considered during consultations undertaken in relation to the original TPP, which commenced in 2008. This consultation process culminated in two parliamentary enquiries. The Government continued to consult stakeholders, State and Territory Governments, interested members of the public throughout the TPP-11 negotiation process from February 2017.