

# The Trans Pacific Partnership – Some selected aspects

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## The Politically Sensitive Agricultural Products - Background

- Some WTO members have very high tariff bindings on some agricultural products
- USA
- Sugar– around 100%
- Japan
- Rice – 700%; range of high rates on dairy products.
- Canada
- Some dairy products, & poultry 350%
- Draft WTO texts would allow Members to choose products to which the cut would be only 23% accompanied by an expansion of volume of a Tariff Rate Quota & they have strongly resisted the addition of a tariff cap to the draft rules
  
- So what happens to these products under the TPP?
  
- How would you look that up?

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## Finding the Tariff Binding?

- Each Member has a Tariff Elimination Schedule
- Look up the product classification
- Then the base rate
- Then the staging category
- Then whether the product classification line is divided into rates for some parties and rates for others
- May need to refer to an additional schedule of TRQs
- And may need to refer to another annex reserving right to apply a special safeguard.

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## United States Tariff Elimination Schedule

Class #	product	Base rate	Staging category	Remarks	yr1	...	Yr 29	Yr30 & after
	Beef carcass		EIF	SG				
0201.150	Beef carcass	26%	B5	MY, NZ				
0201.10.50	Beef carcass	26%	US13	AU				

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## The USA Annex A on TRQs

- With a few exceptions, products designated TRQ do not have any reductions to the out of quota bound duty rate.
- The liberalization is only in the form of giving additional volumes of imports to which an in-quota rate applies – that is a zero rate or near zero rate.
- The commitments on expanding volumes of TRQs is sometimes given on the basis that it applies to imports from any TPP member in which case you need to check whether the Schedule refers to a method of allocation of that volume - there is likely a clause saying that it is allocated on a first come first serve basis – but in some cases, the expansion of the TRQ volume is given on a country specific basis

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## Outcomes on Politically Sensitive Agricultural Products - US

- US - on sugar - no reduction of out of quota duty rate but gives Australia country specific TRQ on Raw sugar 60,500 MT (plus 14.7% of the any volume increase given under any other US trade agreement)
- TRQ on certain listed sugar containing products of 4,500 MT
- TRQ on cream and ice-cream – a volume initially less than TQ under AUSFTA but + 6% per year
- TRQ on condensed milk – as under AUSFTA but +6% per year
- TRQ on butter - 2400 MT in 2022 +3% per year
- Milk powder – as under AUSFTA + 6% per year + elimination of out of TQ Volume over 30 years.
- Other Dairy - 3811MT in 2021 + 3% per year

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## Outcomes on Japan's politically sensitive agricultural products

- Equally or more complicated number of staging categories
- Most staging categories eventually eliminate duties but not all go to zero (but importantly beef goes to 9% after 15 years)
- There is a category governed by an annex on TRQs
- For rice – no reduction to out of quota rate but a country specific quota for US reaching 70,000 MT by year 13; and a country specific quota for Australia reaching 8,400 MT by year 13.
- Other products for which there is no reduction in out of TQ rate (the MFN rate) but commitments to allow TRQ volumes on a first come first serve basis (mostly by year 6) including – for wheat (10,000 MT), food made primarily of wheat (22,500MT), for uncooked udon (100MT), food prepared from barley (115 MT), barley flour (500 MT) , barley (65,000MT by year 9),
- Cheese – TRQ based on a ratio of 3.5 times estimate prospective production
- Butter: by year 11 – in quota rate of 35% on 45,898 MT
- Skim milk powder by year 11 in quota rate between 25 and 35% on 24,102 MT
- Milk powder – duty free TRQ by year 11 of 60,000 MT
- Condensed milk = duty free on 750 MT

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## Will there ever be any further reduction of import barriers to these politically sensitive products?

- TPP accessions will likely accord some exceptions for new members
- TPP members may never have a further round of liberalization of these products
- WTO negotiation might be completed that reduces the most protected products – but only say 20-25% cuts for developed countries and possible zero cuts for developing countries

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## Dispute Settlement

- The process is roughly similar to the WTO
- There is a right to withdraw obligations owed to a defaulting party but not until after a TPP Panel has found that there is a breach and there is a failure to remove the breach
- There is a requirement that the withdrawal of obligations should affect benefits of the Respondent of equivalent effect to the benefits of the Complainant lost as a result of the Respondents breach.
- This dispute settlement rules of Chapter 28 apply to most but not all breaches of the TPP.
- Chapter 28 does not apply to Regulatory Coherence, Competition Law, obligations under TBT chapter that relate to obligations incorporating of under TWO TBT Agreement,

## **Positive List System under GATS (also used in JAEPA, ASEAN Economic Community)**

- For service sub-sectors and modes of services listed in a schedule, certain rules apply:
- Article XVI:2 prohibition of 4 forms of quantitative restrictions and restrictions on legal entities and foreign equity
- Article XVII prohibition derogations from national treatment
- Article XVI:1 prohibiting treatment less favourable than specified in the Schedule
- BUT ALL subject to any qualification recorded in the Member's schedule.

## **Negative List system for Services under TPP (as in NAFTA, AusUSFTA)**

- Article 10.3 national treatment
- Article 10.4 most favoured nation treatment
- Article 10.5 market access, that is a prohibition in form like GATS Article XVI:2 covering quantitative restrictions, and limits on foreign equity
- Article 10.6 local presence – prohibiting a Member from requiring a services supplier of another Party to maintain a local office or enterprise or be resident in its territory as a condition for cross-border supply of a service.
- Apply to all sectors unless ....

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## **Exceptions to the rules arise from 2 clauses:**

- Art 10.7.1 that 10.3 (NT), 10.4 (MFN), 10.5 (Market access) and 10.6 (local presence) do not apply to
  - Existing non-conforming measures set out in the Member's Schedule to Annex I; or
  - An amendment to that measure "to the extent that the amendment does not decrease the conformity of the measures as it existed immediately before the amendment with 10.3, 10.4, 10.5 & 10.6 (so list in Annex I can narrow over time as a result of this ratchet clause)
- Art 10.7.2 that 10.3, 10.4, 10.5 & 10.6 shall not apply to any measure that a Party adopts with respect to sub-sectors or activities, as set out by that Party in its Schedule to Annex II. (no ratchet clause in this exception)

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## Trade in Services – Background to the dual regulation of legal services

- Traditionally countries have tended to have a single regulation that prohibits unlicensed persons from carrying on legal practice. The legal effect of that prohibition varied depending on how it defined legal practice – whether it included advising on non-contentious as well as litigious matters, and whether it was limited to practising the law of the host country or whether it purported to cover practice relating to any kind of law.
- Australia has been part of a push toward countries having dual legal regulation – a distinction between full licensing for the practice of host country law, but limited licensing or even no licensing requirements for a person to practice of law of another country where they are fully licenced to practice.
- A transition is happening but it has been gradual and varies from country to country.

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## Trade in Legal Services - USA

- The commitments by the US In the WTO:
- There is a commitment on services relating to foreign and international law but it does not apply to 35 out of 50 states – so US committed to permit foreign lawyer to practice foreign law in 15 of 50 states; 35 states reserved the right to require lawyers to obtain a local practising certificate in order to be able to practice foreign or international law on any basis, whether through commercial establishment of fly-in fly-out.
- US commitments under AUSFTA – were limited by an exclusion from the obligations of any regulation of legal services at the sub-national level – so it did not create any obligations on the USA going beyond those under WTO
- In TPP – US commits to permit foreign lawyers of TPP parties to practice foreign law in an additional 8 states [8 in addition to the 15 states subject to the WTO commitments] . Arizona, Indiana, Louisiana, Massachusetts, Nex Mexico, North Carolina, Missouri and Utah

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## Trade in Legal Services - Malaysia

- Malaysia's commitments under WTO and under Aust Malaysia FTA quote limited
- TPP commitments:
- To allow legal advice on foreign or international law on fly in fly out basis
- Possibility of establishing a 100% foreign owned "Qualified law firm that can enter into an International Partnership with a Malaysian law firm which can practice aspects of Malaysian law
- [source DFAT website: "Outcomes: Professional and other business services"]
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## Other Services Outcomes

- See DFAT highlights in document available at <http://dfat.gov.au/trade/agreements/tpp/Documents/outcomes-services-market-access.pdf>
- Better access in financial – including investment advice and portfolio management
- Removal of foreign equity caps in Malaysia
- Access to cross border insurance in Singapore
- Access to mining services in Mexico

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## Movement of Natural Persons – The Framework

- A separate chapter on MNP in Ch 12
- Art 12 provides that MNP chapter and not services of investment chapters impose obligations regarding immigration measures.
- Art 12.4 A party shall grant temporary entry or extension of temporary stay to business persons of another Party to the extent provided in [that party's commitments in its Annex 12-A] ... provided that those business persons
  - (a) follow the Party's application procedures ; and
  - (b) meet all eligibility requirements for temporary entry or extension of temporary stay.

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## Movement of Natural Persons – The Commitments

- USA – The USA did not give any schedule of commitments on MNP
- Australia's schedule:
  - Business Visitors who do not derive financial support in Australia – 3 months ; or 6 -12 months if selling supply of services.
  - Installers / servicers – 3 months for persons installing or providing services for equipment sold in Australia
  - Contractual services suppliers – covers persons employed by an entity that does not have a commercial presence but has a contract to supply a service and person engaged by an enterprise in Australia to supply a service (and their spouses) – subject to Australia's list of eligible occupations and requirements for employer sponsorship – 12 months + extension.
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## Movement of natural Persons – Australia's commitment continued

- Independent executives – for persons seeking to establish a commercial presence of an enterprise which has its head of operations in the territory of another party (+ spouse and dependents) subject to eligible occupations list and employer sponsorship – up to 2 years.
- Intra-corporate transferees (+ spouse and dependents) – existing employees of a enterprise of another Party which has established a commercial presence in Australia, covering
- Executives – up to 4 years + extension
- Specialists – a person already a employee for 2 years, who has with advanced skills and experience assessed as meeting Australia' s domestic standards for the occupation
- Subject to employee sponsorship requirements including a list of eligible occupations.
- Does not contain the express prohibition on imposing quantitative limits on the number of temporary visas that is contained in the Japan and Korea FTAs.

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## Regulatory Coherence - Background

- **Existing WTO obligations:**
- TBT – obliges members to explain their objectives, and give other Members an opportunity to consider proposed measures, and to maintain only measures that are no more restrictive than necessary to fulfil a legitimate objective.
- SPS – requires a measures (unless conforming to an international standard) to be based upon a risk assessment and to choose the least trade restrictive measure which achieves the desired level of protection which involves a comparison between alternative ways of achieving the protection.
- **In Australia – Competition Policy** deriving from the Hilmer Report of 1994 – states and Cth entered into the Competition Principles Agreement providing for review of state regulations . Art 5.1: the guiding principle is that “legislation should not restrict competition unless it can be demonstrated that
  - The benefits of the restriction outweigh the costs; and
  - the objective of the legislation can only be achieved by restricting competition.
- Outcomes in annual reports by the National Competition Council.

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## Regulatory Coherence – The obligations

- Key obligation is in Article 25.2
- 25.2.1 members should encourage agencies to conduct regulatory impact assessments on proposed covered regulatory measures
- 25.5.2 that a regulatory impact assessment should
  - Describe the problem to be address by the regulation.
  - Examine feasible alternative ways of addressing the problem.
  - Explain the grounds for choosing the selected alternative.
 Members are allowed to make a declaration about what scope of regulatory measures are covered by the Chapter.  
 Not subject to Ch 28 dispute settlement.

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## State Owned Enterprises – Background on WTO regulation of subsidies

- TPP does not affect the continuance of WTO disciplines on industry specific subsidies granted either:
  - By a government or any public body; or
  - A private body entrusted or directed by a government.
- WTO rules allow for the possibility of:
  - unilaterally determined countervailing duties against subsidies that cause injury; or
  - multilaterally authorised retaliation against subsidies that cause serious prejudice (which is defined mostly in terms of causing displacement of trade of another Member)

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## Obligations on State Owned Enterprises

- The GATT does not contain a prohibition on granting an entity an exclusive right to import.
- If a Member does grant an exclusive right to import a bound product , then GATT does prohibit the charging of a mark-up above the bound rate
- Bit no discipline on an entity with exclusive import rights deciding not to import a market clearing quantity.
- Some limited advances on that achieved in dispute settlement *Korea Beef, & Turkey Rice*
- China alone among WTO Members is obliged to allow any entity the right to import any product (so a law giving SOEs exclusive right to import magazines and audiovisual products was a violation in *China Audiovisuals*).
- Question: What does TPP do to regulate the grant of exclusive import rights and to stop such entities from surreptitiously limiting the quantity of imports?

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## Obligations on State Owned Enterprises – on trading

- 17.3 obliges Parties to ensure that any SOE exercising governmental functions does so in accordance with the agreement
- 17.4 obliges parties to ensure that SOEs and designated monopolies
- Act in accordance with commercial considerations
- In purchases of imports of goods and services from TPP parties – accord NT and MFN
- In purchases of goods or services of investments of a TPP party – accord NT and MFN
- In sale of goods or services, accord NT and MFN to enterprises of another TPP party or a covered investment of a TPP party.

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## Obligations on State Owned Enterprises - on subsidies

- Obligations on causing injury or causing adverse effect
- 17.6.2 & 17.7 prohibit causing adverse effects to the interests of another Party through the use of any non-commercial assistance to any of its SOEs with respect to production, sale of goods or supply of services
- Art 17.7 defines adverse effects in terms similar to the definitions of serious prejudice in WTO SCM Agreement Article 6

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## Impact of TPP on WTO

- Background is very limited progress in achieving multilateral liberalization in negotiations which commenced in 2001.
- No deal on NAMA, Agricultural Market Access, or Trade in Services
- Dec 2015 – some limited progress
- Elimination of export subsidies
- Broader approach to assisting LDC cotton producers
- Which may make it easier to reach agreement on bigger issues.
- But otherwise WTO initiatives are focussed on creating space not to liberalize:

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## Impact on Incentives

- Some Countries in both TPP and RCEP may want to see TPP completed first.
- Some Countries in TPP may want TPP completed before any major WTO deal.
- Some Countries in RCEP may want RCEP. completed before any WTO major WTO deal.
- TPP may expand:
- Easily - Korea, post-Brexit U.K.
- With more difficulty – Thailand, The Philippines, Indonesia, Colombia, China,
- It may become the new WTO or the second WTO!