

# Introduction to Trade in Goods under Bilateral and Regional Trade Agreements

Dr Brett Williams  
Principal, Williams Trade Law

[www.williamstradelaw.com](http://www.williamstradelaw.com)

Honorary Lecturer, School of Law, University of Sydney

# Australia's Discriminatory Trade Agreements in force

- The Australia New Zealand Closer Economic Relations Trade Agreement 1983 which relates to trade in goods and the 1998 Protocol relating to trade in services and the 2013 Protocol dealing with investment.
- The Papua New Guinea Trade and Commercial Relations Agreement 1991, in force, 20 September 1991;
- The Singapore Australia Free Trade Agreement, in force 28 July 2003;
- The Thailand Australia Free Trade Agreement, 2004, in force 1 January 2005;
- The Australia United States Free Trade Agreement, 2004, in force 1 January 2005;
- The Australia Chile Free Trade Agreement in force 1 May 2009;
- The ASEAN – Australia – New Zealand FTA, done 27 February 2009, in force for all 12 parties since 10 January 2012; (ASEAN 10) upgraded 2019
- The Malaysia – Australia Free Trade Agreement, done 22 May 2012, Kuala Lumpur, in force 1 January 2013;
- The Korea Australia Free Trade Agreement, done 8 April 2014, Seoul, in force 12 December 2014;
- The Japan Australia Economic Partnership Agreement, done 8 July 2014, Canberra, in force 15 January 2015;
- China-Australia Free Trade Agreement signed in June 2015, in force December 2015

# Australia is negotiating Agreements including:

- There is one agreement signed but not as yet ratified: the ***Trans Pacific Partnership Agreement*** signed 9 February 2016
- Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) in force for Australia 30 December 2018 (for all 11 original parties on 12 July 2023). Note: CPTPP brings text of TPP into force subject to list excluding some provisions in the TPP text.
- Australia-Hong Kong FTA and associated Investment Agreement, in force 17 January 2020.
- Peru-Australia FTA, in force 11 February 2020,
- Indonesia- Australia Comprehensive Economic Partnership Agreement in force 5 July 2020,
- Pacific Agreement on Closer Economic Relations (PACER Plus), in force 13 December 2020
- Regional Comprehensive Economic Partnership Agreement (RCEP), in force for Australia 1 January 2022, for all 14 parties on 2 June 2023.
- Australia- India Economic Cooperation and Trade Agreement (ECTA), in force 29 December 2022.
- Australia- United Kingdom FTA, in force 31 May 2023

## Negotiations Completed by not yet signed or ratified

- Australia – United Arab Emirates Comprehensive Economic Partnership (CEPA) , negotiation completed

## Negotiations not completed

- Australia- European Union Free Trade Agreement (27 countries)
- Australia-India Comprehensive Economic Cooperation Agreement
- Australia-Gulf Cooperation Council (GCC) Free Trade Agreement (UAE, Saudi Arabia, Bahrain, Kuwait, Oman, Qatar)

# No Fixed format

- Could be
- One big agreement with several chapters covering different subject matter: eg. Australia – NZ – ASEAN FTA
- One Framework agreement followed by several separate agreements covering different subject matter: e.g. ASEAN Economic Community under the ASEAN Charter

# The exemption from MFN in GATT

- An exception from the MFN rule in GATT Article I:
- Article XXIV:5 The GATT does not prevent formation of a free trade area or customs union as defined:
  - FTA – eliminates barriers to substantially all trade
  - Customs union – eliminate barriers and creates a common external tariff
  - Provided the duties and regulations affecting trade of non-parties is not raised above the level prior to the agreement.

# **A good starting point is NAFTA 1993 which has chapters on the following:**

- Chapter 1 Objectives
- Chapter 2 Definitions
- Chapter 3 National Treatment and Market access for goods
- Chapter 4 Rules of Origin
- Chapter 5 Customs Procedures
- Chapter 6 Energy and Basic Petrochemicals
- Chapter 7 Agriculture and Sanitary and Phytosanitary Measures
- Chapter 8 Emergency Action
- Chapter 9 Technical Barriers to Trade
- Chapter 10 Government Procurement

# The chapters of NAFTA continued

- Chapter 11 Investment
- Chapter 12 Cross-Border Trade in Services
- Chapter 13 Telecommunications
- Chapter 14 Financial Services
- Chapter 15 Competition Policy, Monopolies and State Enterprises
- Chapter 16 Temporary Entry for Business Persons
- Chapter 17 Intellectual Property
- Chapter 18 Publication, Notification and Administration of Laws
- Chapter 19 Review and Dispute Settlement in Antidumping and Countervailing Duty Matters
- Chapter 20 Institutional Arrangements and Dispute Settlement Procedures
- Chapter 21 Exceptions
- Chapter 22 Final Provisions

# **27 years later NAFTA replaced by US, Mexico, Canada Agreement USMCA 2020**

**By then the FTAs of the US were covering more subject areas:**

- Separate chapters for Agriculture and Textiles and Apparel
- New chapter on Origin Procedures (for Rules of Origin)
- Customs Administration and Trade Facilitation
- Recognition of Mexican Ownership of Hydrocarbons
- Sectoral Annexes
- Digital Trade
- Labour
- Environment
- Small and Medium-Sized Enterprises
- Competitiveness
- Anticorruption
- Good Regulatory Practices
- Exceptions and General Provisions
- Macroeconomic Policies and Exchange Rate Matters



# Aust – UK FTA 2023

- 1. Initial provisions and General Definitions
- 2. Trade in Goods
- 3. Trade Remedies
- 4. Rules of Origin and Origin Procedures
- 5. Customs Procedures and Trade Facilitation
- 6. Sanitary and Phytosanitary Measures
- 7. Technical Barriers to Trade
- 8. Cross-Border Trade in Services
- 9. Financial Services
- 10. Professional Services and the Recognition of Professional Qualifications
- 11. Temporary Entry for Business Persons
- 12. Telecommunications
- 13. Investment
- 14. Digital Trade
- 15. Intellectual Property
- 16. Government Procurement

# Aust-UK FTA chapters continued

- 17. Competition Policy and Consumer Protection
- 18. State-Owned Enterprises and Designated Monopolies
- 19. Small and Medium-Sized Enterprises
- 20. Innovation
- 21. Labour
- 22. Environment
- 23. Development
- 24. Trade and Gender Equality
- 25. Animal Welfare and Antimicrobial Resistance
- 26. Good Regulatory Practice
- 27. Cooperation
- 28. Transparency and Anti-Corruption
- 29. Administrative and Institutional Provisions
- 30. Dispute Settlement
- 31. General Provisions and Exceptions
- 32. Final Provisions

# A Clause to confirm rights and obligations under WTO, eg:

- NAFTA Article 103.1 “The parties affirm their existing rights and obligations with respect to each other under the General Agreement on Tariffs and Trade and other agreements to which such Parties are party”
- No equivalent in *Aust – Thailand* 2004
- *Aust Malaysia*, 2012: Article 21
- 21.1 Each Party reaffirms its existing rights and obligations under the WTO Agreement and other agreements to which both Parties are party.”
- 21.2 Nothing in this Agreement shall be construed to derogate from any existing right or obligation of a Party under the WTO Agreement and other agreements to which the Parties are party
- *Aust –UK* 2023, Article 1.2, para 1
- “The Parties affirm their existing rights and obligations with respect to each other under existing international agreements to which both Parties are party, including the WTO Agreement.”

# Accession Clauses: how other Parties can Accede

- Look for an accessions clause
- Usually not in bilaterals, Usually are in plurilaterals
- Look for any procedure, the agreement may not specify one; depends on whether and how the agreement establishes any decision-making bodies
- Look for decision making mechanism – does it specify that all existing parties must agree;
- Look to see whether it refers to States, countries, or customs territories
- RCEP, Article 20.9 including para 1
- “This Agreement shall be open for accession by any State or separate customs territory 18 months after the date of entry into force of this Agreement. Such accession shall be subject to the consent of the Parties and any terms or conditions that may be agreed between the Parties and the State or separate customs territory.”
- CPTPP, Article 5
- “After the date of entry into force of this Agreement, any State or separate customs territory may accede to this Agreement, subject to such terms and conditions as may be agreed between the Parties and that State or separate customs territory.” (by article 1, the accessions clause in the TPP is not incorporated into the provisions of CPTPP).

# Dispute Settlement clause:

## What is the remedy for a violation?

- Usually there is a provision similar to Article 22.2 of the *WTO Understanding on Dispute Settlement* giving a Complainant, in the absence of the Respondent complying with a ruling, the right to suspend obligations otherwise owed to the Respondent.
- Eg NAFTA Article 2019 “Complaining Party may suspend the application to the Party complained against of benefits of equivalent effect until such time as they have reached agreement.”
- Eg JAEPA Article 19.15.2 “... complaining party may notify .. That it intends to suspend ... concessions or other obligations” and may suspend 30 days after the notice

# Dispute Settlement clause: is there a constraint on the size of retaliation?

- Usually there is something like WTO DSU Article 22.4 clause limiting the permissible level of retaliation to the extent of the nullification or impairment; and a mechanism for resolving a dispute about whether the retaliation or proposed retaliation is beyond the permissible level like in WTO DSU article 22.6
- Eg NAFTA limited to “benefits of equivalent effect” & 2019.3 provides for a “panel to determine whether the level of benefits suspended is manifestly excessive.”
- Eg USMCA Art 31.19.2 Respondent can ask the Panel to reconvene “If the panel considers that the level of benefits the Complaining Party proposes to suspend is manifestly excessive, it shall provide its view as to the level of benefits it considers to be of equivalent effect.”
- Eg JAEPA Article 19.15.2 – limited to “equivalent to the nullification or impairment caused by the failure to comply; & 19.15.4 provides for an arbitrator to determine the “appropriate level of suspension”
- Eg RCEP Art 19.1. 10 “In the event the panel reconvened pursuant to paragraph 9 determines that the level of suspension is not equivalent to the level of nullification or impairment, it shall determine the appropriate level of suspension it considers to be of equivalent effect.”
- Eg CPTPP adopts TPP Ch 28 without any changes or suspensions. Art 28.19.5 “If the [reconvened] panel determines that the level of benefits proposed to be suspended is manifestly excessive, it shall determine the level of benefits it considers to be of equivalent effect.”
- Note that CTPPP has a provision allowing for payment of monetary compensation to avoid the suspension of concessions: art 28.19.7.

# Dispute Settlement clause: coverage & special dispute provisions

- Check whether the Dispute Settlement Clause provides that it does not apply:
  - to specified obligations in certain Chapters; or
  - As indicated in other Chapters.
- Eg NAFTA Ch 20 does not apply to the chapter on antidumping which has its own dispute mechanism.
- Eg JAEPA Ch15 on Competition and Consumer Protection is not covered by the Dispute procedure in Chapter 19.
- Eg CPTPP Ch 28 does not apply to ch16 on Competition Policy (art 16.9), ch28 can't be used under ch19 on Labour until DS processes under ch19 have been tried or under ch20 on environment until processes under ch20 have been tried; and for some countries Ch 28 does not apply for breaches of some provisions of the e-commerce chapter (art 14.18)

# Chapter on Trade in Goods: elimination of tariffs

- A provision to eliminate or progressively eliminate import duties on goods originating in the other party – usually in accordance with a Schedule (or could be subject to a negative schedule)
- But other provisions may refer to:
  - stages or reductions
  - Different rules for certain goods
  - Different rules for different parties



# Chapter on Trade in Goods: elimination of tariffs: examples

- NAFTA Article 302.2 “Except as other wise provided in this Agreement, each Party shall progressively eliminate its customs duties on originating goods in accordance with its Schedule to Annex 302.2”
- JAEPA 2015 Article 2.4.1 “Except as otherwise provided for in this Agreement, each Party shall eliminate or reduce its customs duties on originating goods of the other Party in accordance with its Schedule in Annex 1 (Schedules in Relation to Article 2.4 (Elimination or Reduction of Customs Duties)).”

# Chapter on Trade in Goods: elimination of tariffs: more examples

- **RCEP Article 2.4**
- 1. Except as otherwise provided in this Agreement, each Party shall reduce or eliminate its customs duties on originating goods of other Parties in accordance with its Schedule in Annex I (Schedules of Tariff Commitments).
  
- **CPTPP Article 2.4**
- 1. Except as otherwise provided in this Agreement, no party may increase any customs duty, or adopt any new customs duty, on an originating good.
- 2. Except as otherwise provided in this Agreement, each Party shall progressively eliminate its customs duties on originating goods in accordance with its Schedule to annex 2-D (Tariff Elimination)

# The content of Australia's goods schedule under JAEPA

- Category A already at zero duties
- Category B reduced to zero on entry into force
- Category C reduced to duty free 1 April of 3<sup>rd</sup> year (2018)
- Category C1 mixed duties where specific components of duties will not be reduced but ad valorem component reduce to zero 1 April 2018
- Category D reduced to 4% on entry into force and to zero on 1 April 2020
- Category E reduced to 8% on entry into force and to zero on 1 April 2020
- Category F reduced in 5 instalments starting 1 April 2019 reaching zero on 1 April 2023
- Category G reduced in 5 instalments starting 1 April 2019 reaching zero on 1 April 2023.
- Summary: on 1 April 2023, everything is bound at zero except for the specific duties on products in Category C1.

# The content of Japan's goods schedule under JAEPA

- Category A reduced to zero on entry into force
- Category A\* reduced to zero on entry into force but with some additional conditions indicated in column 5
- Category B3 reduced to duty free 1 April of 4<sup>th</sup> year (2019)
- Category B4 reduced to duty free on 1 April of 5<sup>th</sup> year (2020)
- Category B5 reduced to duty free on 1 April of 6<sup>th</sup> year (2021)
- Category B7 reduced to duty free on 1 April of 8<sup>th</sup> year (2023)
- Category B7\* reduced to zero on terms indicated in column 5
- Category B10 reduced to in 11 instalments to be zero on 1 April of 11<sup>th</sup> year 2026
- Category B10\* reduced in 6 instalments starting 1 April 2021 reaching zero on 1 April 2026
- Category B10\*\* reduced in 9 instalments starting 1 April 2018 reaching zero on 1 April 2026.
- Etc etc

## Chapter on Trade in Goods: Prohibition on Restrictions on Imports other than Duties or taxes

- WTO Members are bound by GATT Article XI:1, the prohibition on restrictions other than taxes or charges on imports or exports.
- FTAs generally have a provision which makes the content of GATT Article XI part of the FTA.
- usually there are no exceptions other than those that would be consistent with the GATT and the other Multilateral Agreements on trade in goods binding on WTO members
- But some have exception clauses and you need to look for a ratchet clause

# Chapter on Trade in Goods: Prohibition on Restrictions on Imports other than duties or taxes: examples:

- **NAFTA**, Article 309 which became
- **USMCA** Art 2.11
- 2.11.1 “Except as otherwise provided in this Agreement, no Party shall adopt or maintain any prohibition or restriction on the importation of any good of another Party or on the exportation of sale for export of any good destined for the territory of another party, except in accordance with Article XI of the GATT 1994, including its interpretative notes, and to this end Article XI of the GATT 1994 and its interpretative notes are incorporated into and made a part of this Agreement mutatis mutandis.”
- BUT Art 2.1.7 “Paragraphs 1 through 6 do not apply to the measures set out in Annex 2-A (Exceptions to Article 2.3 (National Treatment) and Article 2.11 (Import and Export Restrictions)).
- In **Annex 2-A**, there are lists of excluded measures relating to certain specified products in Article 2.A.2 for Canada, art 2.A.3 for Mexico and Art 2.a.4 for USA.
- **paragraph 1** “Article 2.3 (National Treatment) and Article 2.11 (Import and Export Restrictions) do not apply to the continuation, renewal, or amendment made to any law, statute, decree, or administrative regulation giving rise to a measure set out in the articles of this Annex to the extent that the continuation, renewal, or amendment does not decrease the conformity of the measure listed with Article 2.3 (National Treatment) and Article 2.11 (Import and Export Restrictions).

## Chapter on Trade in Goods: Prohibition on Restrictions on Imports other than duties or taxes: examples:

- KAFTA Article 2.6.1 – is almost identical wording to NAFTA Article 309.
- RCEP Article 2.17 (no exceptions other than those in GATT Art XI itself)
- CPTPP Article 2.10.1 incorporates GATT Art XI but see 2.10.5 “Paragraphs 1 and 2 shall not apply to the measures set out in Annex 2A (National Treatment and Import and Export Restrictions)”
- Ratchet clause in Annex 2A
- UK-Aust FTA Article 2.9 incorporates Article XI, (no exceptions other than those in GATT Art XI)

# Chapter on Trade in Goods – National Treatment

- Is there a provision setting out a national treatment rule or a provision which incorporates GATT Article III?
- Taxes, other regulation, affecting sale, transport, distribution, use
- Origin specific measures giving rise to de jure or direct discrimination
- Origin neutral measures giving rise to de facto or indirect discrimination
- Is there a provision to exclude the National Treatment rule from any listed goods or listed measure?
- If so, does an exclusion for a list of non-conforming measures apply to renewal or amendment of the non-conforming measure ?
- If so, is there a ratchet clause so that when a non-conforming measure is amended to reduce the extent of the derogation from national treatment, that become the new outer boundary of what is excluded?



# Chapter on Trade in Goods – National Treatment – Example:

- NAFTA Article 301.1 “Each Party shall accord national treatment to the goods of another Party in accordance with Article III of the General Agreement on Tariffs and Trade (GATT), including its interpretative notes, .. “
- Separate exclusion clause for US, Canada and Mexico all containing this:
- “article 301 ... shall not apply to (a) [certain listed statutes] ... (b) the amendment to a non-conforming provision of any statute referred to in paragraph ... to the extent that the amendment does not decrease the conformity of the provision with Article 301 ...”

# Chapter on Trade in Goods: Is there an MFN clause?

- NAFTA does not have an MFN clause relating to trade in goods
- KAFTA Ch 2 on Trade in Goods does not have an MFN clause
- JAEPA Ch 2 on Trade in Goods does not have an MFN clause

# Chapter on Trade in Goods: other

- Look for
- **Provision incorporating the provisions of certain WTO Agreements:**
- the WTO Agreement on Import Licensing
- the WTO Agreement on Sanitary and Phytosanitary Measures
- The WTO Agreement on Customs Valuation
- The WTO Agreement on Technical Barriers to trade
- **Is there a prohibition on export taxes:**
- See NAFTA articles 314 (with exceptions in Annex 314)
- KAFTA Article 2.9 & JAEPA Article 2.6
- Not in RCEP (Ch 2 on trade in goods);
- CPTPP Art 2.16 “Except as provided for in Annex 2-C (Export Duties, Taxes or Other Charges), no Party may adopt or maintain any duty, tax, or other charge on the export of any good to the territory of another Party, unless such tax, duty or charge is adopted or maintained on any such good when destined for domestic consumption.”
- **Is there a prohibition on export subsidies:**
- NAFTA has no prohibition on export subsidies
- KAFTA has no prohibition on export subsidies
- JAEPA Article 2.7 prohibits export subsidies on an good destined for the other party’s territory.

# Market Access rules under CPTPP

- Art 2.4.1 Parties must not increase any existing customs duty on an “originating good”.
- Art 2.4.2 parties must progressively eliminate customs duties on originating goods in accordance with its Schedule to Annex 2-D.
- And rules protecting integrity of tariff bindings:
- Art 2.11 prohibits any restriction that would be a violation of GATT Article XI.
- Which effectively prohibits non-automatic licencing
- Art 2.15 prohibits fees on importation or exportation not complying with GATT Art VIII + explicitly prohibits fees on charged on an ad valorem basis, + requires all fee information online.
- Art 2.3 requires national treatment in accordance with GATT Article III + expressly prohibits treatment less favourable than a regional government accords to any competitive goods.
- No MFN or non-discrimination clause.
- More GATT plus obligations including:
- Art 2.16 Prohibition on taxes on exports “except as provided for in Annex 2-C”.
- Art 2.6 prohibits customs duty on re-import of a good temporarily exported for repair or alteration
- Art 2.7 prohibits customs duties on import of commercial samples of negligible value regardless of origin
- Art 2.8 prohibits customs duties on containers or pallets used in international trade, regardless of their origin

# CPTPP: 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 TRQ s
- And may need to refer to another annex reserving right to apply a special safeguard.

# TPP Schedules

Eg., 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				

# TPP: 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 are sometimes given on the basis that they 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.

# TPP: 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 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 + 2% per year + elimination of out of TQ Duty over 30 years.
- Other Dairy - 3811MT in 2021 + 3% per year



# CPTPP: Outcomes on Japan's politically sensitive agricultural products

- Even more complicated staging categories than the US
- Most staging categories eventually eliminate duties but not all go to zero (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 estimated 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 power – duty free TRQ by year 11 of 60,000 MT
- Condensed milk = duty free on 750 MT

# **Exclusion of non-originating goods from the preferential duty rates is determined under Rules of Origin in Ch3**

- Art 2.3(c) Goods from a TPP party that contain material originating from a non-TPP party are treated as originating in a TPP party if it meets rules in Annex 3-D.
- These are mostly based on a change of tariff classification due to processing in a TPP country.
- For some products there is a value added test.
- Complicated!

# Exceptions

- Under Ch6 TPP does not limit recourse to ADD or CVD in accordance with WTO rules
- TPP does not limit recourse to safeguards in accordance with WTO rules on imports from all sources
- TPP provides an additional safeguard mechanism
- Under ch29, TPP contains equivalent to GATT Article XX
- TPP does not contain any mechanism like GATT Article XXVIII for renegotiation of schedules.
- Incorporates WTO rules on SPS and TBT restrictions  
Plus Some additional rules, eg Annex on TBT measures on alcoholic beverages