

An overview of the Transpacific Partnership Agreement: the most significant discriminatory trade and investment agreement in history

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Brett Williams, 22 June 2016

1

What is TPP and what is in the TPP?

- A discriminatory trade and investment agreement
- but it is the most significant discriminatory trade and investment agreement ever in terms of ambition of liberalization and coverage of subject matter
- Some obligations in areas covered by WTO obligations plus some obligations not covered by WTO
- Provisions similar to many Discriminatory Trade Agreements (DTA) – liberalization of goods and services with rules limiting the benefits to non-Members BUT more liberal than WTO and more liberal than most DTAs
- Investment provisions - not in WTO but similar to provisions in some existing DTAs or BITs – including consent to claims by Investors v States.
- No new organization or secretariat but a Trans Pacific Commission through which Parties could create additional organizational features
- A single system for state v state disputes allowing for suspension of obligations toward violating Parties including allowing cross-sectoral retaliation.

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2

12 countries – all are WTO members

- 4 original parties to the 1st Transpacific Partnership Agreement: Singapore, New Zealand, Chile and Brunei
- + 3 NAFTA countries: USA, Mexico, Canada
- + Australia (already DTA with USA, Aust-NZ-ASEAN)
- + Peru (already has DTA with USA)
- + Vietnam, + Malaysia (so 4 of 10 ASEAN countries are parties to TPP)
- + Japan (already in ASEAN-Japan DTA)

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3

The TPP Chapters

- Ch1 General
- Ch2 Goods: National Treatment and Market Access
- Ch3 Rules of Origin
- Ch4 Textiles
- Ch5 Customs Administration
- Ch6 Trade Remedies
- Ch7 Sanitary and Phytosanitary Measures
- Ch8 Technical Barriers to Trade

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4

The TPP Chapters - more

- Ch9 Investment
- Ch10 Services
- Ch11 Financial Services
- Ch12 Movement of Natural Persons
- Ch13 Telecommunications services
- Ch14 Electronic Commerce
- Ch15 Government Procurement
- Ch16 Competition
- Ch17 State Owned Enterprises and Monopolies
- Ch18 Intellectual Property

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5

The TPP chapters – even more

- Ch19 Labour
- Ch20 Environment
- Ch21 Cooperation and Capacity Building
- Ch22 Competitiveness and Business Facilitation
- Ch23 Development
- Ch24 Small and Medium Sized Enterprises
- Ch25 Regulatory Coherence
- Ch26 Transparency and Anti-corruption

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6

The TPP – final chapters

- Ch27 Administrative and Institutional Provisions
- Ch28 Dispute Settlement
- Ch29 Exceptions and General Provisions
- Ch30 Final Provisions

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7

Institutional Set up

- The TPP does not create an international organization
- Ch 27 creates a Trans Pacific Partnership Commission ('TPPC') – making decisions by consensus – makes the Rules of Procedure for Dispute Settlement
- The TPP does not create a secretariat nor does it provide for budgetting or financial contributions
- Under 27.2(d) The TPP Commission has power to “make arrangements for implementing this Agreement “.

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8

Institutions for Dispute Settlement

- Parties must create a roster of Panel Chairs – but if Parties cannot, then TPPC can establish the roster of Panel Chairs
- Requests to establish a panel are directed to the other Party – the establishment occurs under 28.7.5
- To compose a panel – each party nominates a panellist; there is no rule that a Panellist cannot be a national of a disputing Party
- To choose the Chair – either the Parties agree, the 2 panellists agree or two parties can agree on an independent person to choose the Chair or can agree on a random selection of the Chair: Art 27.9.2
- The Panel report is submitted to the Parties who are required to make it public

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9

Institutions for Dispute Settlement cont'd

- Under Art 28.10 Panellists shall:
- (c) be independent of, and not be affiliated with or take instructions from, any Party:
- The TPP does not say that the Commission will provide secretarial assistance to the Panellists
- Art 27.1 “Each party shall:
- (a) designate an office to provide administrative assistance to a panel established under Chapter 28 (Dispute Settlement) for a proceeding in which it is a disputing Party and to perform such other related functions as the Commission may direct ...”
- 27.2 Each Party shall be responsible for the operation and costs of its designated office.

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10

Retaliation

- When a panel finds a violation
- Respondent fails to eliminate the non-conformity
- Respondent is obliged to try to agree on compensation
- If, within 30 days, parties have not agreed on compensation, then Complainant can give notice it “intends to suspend the application to the responding Party of benefits of equivalent effect
- 30 days later the Complainant can begin suspending benefits.
- (Articles 28.19.1, 28.19.2, 18.19.2bis)

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11

the quantum of retaliation

- Art 28.19.5 Respondent can ask for the Panel to be reconvened to determine if the level of benefits proposed to be suspended is manifestly excessive
- If the 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
- Complainant must delay the suspension until 30 days after the reconvened panel’s determination

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12

the subject matter of the retaliation?

- If the Complainant chooses to suspend benefits in the same subject matter as the non-conformity, then the rules do not constraint the Complainants choice of the subject matter of the suspension. (Art 28.19.4)
- (same rule as in WTO DSU Article 22)
- (where same subject matter means:
 - All goods,
 - All Financial services under Ch11
 - All services other than financial services; and
 - Each separate section in the IP Ch18

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13

Cross Retaliation can be permitted

- Art 28.19.4 the Complainant can choose to suspend benefits in a different subject matter, if the complainant takes into account:
 - The trade in the good, services or subject matter and the importance of such trade to the Complainant;[corresponds to WTO DSU 22.3(d)(i)]
 - The broader economic elements related to the N&I and the broader economic consequences of the suspension of benefits; [corresponds to WTO DSU 22.3(d)(ii)]
- And concludes that “it considers that it is not practicable or effective to suspend benefits in the same subject matter. And that the circumstances are serious enough”. [corresponds to WTO DSU 22.3(c)].
- Respondent can ask for Panel to be reconvened to consider whether the procedures of para 4 have been complied with, and if not, the Panel can decide the extent to which the Complainant can suspend benefits in each subject matter.

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14

Trade in Goods

- More access than under Members GATT schedules
- Extensions of SPS rules
- Extensions of TBT rules
- Rules on customs administration
- Rules, as in all DTAs, limiting benefits to goods originating in parties, that is, rules of origin, but some aspects more open to goods with non-Party content than other DTAs.
- Familiar GATT exceptions – plus an additional exception for safeguards on TPP imports; plus a special safeguard clause for textiles.

Recall Market Access rules under GATT

- Recall structure under GATT in WTO
- GATT Article II – cannot charge customs duties in excess of rates in Schedule upon imports from any WTO member
- GATT Article XXVIII – providing for modifications to Schedules, subject to compensation or retaliation
- Several rules maintaining the integrity of tariff bindings :
- GATT Article XI – prohibits measures on imports or exports other than duties or charge
- Which prohibits any requirement to have an import license which is not automatically approved
- GATT Article VIII – prohibits any charges on importation or exportation in excess of the approximate cost of services rendered
- GATT Article III – prohibits treatment less favourable of imported products than treatment of domestic products under internal taxes or other internal measures
- GATT Article I – prohibits treatment less favourable than treatment of imports from any other country

Market Access rules under TPP

- 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

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17

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.

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18

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 | | | | |

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19

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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20

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

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21

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

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22

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!

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23

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

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24

Trade in Services

- **Trade in services includes:**
- More access than under Members GATS Schedules
- Extension of rules on financial services
- Extension of rules on telecoms services
- Clause, as in all DTAs, for Denial of Benefits to suppliers from non-Parties

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25

Recall Rules under GATS is a Positive List System (also ASEAN Economic Community)

- For service subsectors 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 on foreign equity
- Article XVII prohibiting 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.

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26

TPP Rules for Trade in Services Negative List system (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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27

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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28

Format of Schedule to Annex 1

- | Sector | |
|-----------------------|--|
| Obligations Concerned | |
| Level of Government | |
| Source of Measure | |
| Description | |

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29

Example of Australia's Schedule to Annex 1

- | Sector | All sectors |
|-----------------------|---|
| Obligations Concerned | Market access (Article 9.3) National Treatment |
| Level of Government | Central and regional |
| Source of Measure | Australia's Foreign Investment policy, which includes <i>Foreign Acquisitions and Takeovers Act 1975</i> (Cth) and |
| Description | The following investment may be subject to objections ... or notifications |

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30

Format of Schedule in Annex 7

| | |
|-----------------------|--|
| Sector | |
| Obligations concerned | |
| Description | |
| Existing Measures | |

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31

Example of Australia Schedule in Annex 7

| | |
|-----------------------|--|
| Sector | All Sectors |
| Obligations concerned | Market access (Article 9.3) |
| Description | Australia reserves the right to adopt or maintain any measures with respect to the supply of a service by the presence of natural persons, subject to the provisions on Chapter 12 (Movement of Natural Persons) |
| Existing Measures | |

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32

TPP – Services – Denial of Benefits

- Obligations of TPP Parties only relate to service suppliers of other TPP Parties
- Most important limit is Article 10.10
- “A Party may deny the benefits of this chapter to a services supplier of another Party if the service supplier is an enterprise owned or controlled by persons of a non-Party or by persons of the denying Party that has no substantial business activities in the territory of any Party other than the denying Party.”
- Eg. Malaysia is not obliged to accord the benefits to a company incorporated in Australia which is:
 - majority owned by nationals of a non-TPP country; and
 - Has no substantial business activities in the territory of any TPP party other than Malaysia.

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33

Example of Liberalization of Trade in Services –the legal services sector

- 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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34

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, New Mexico, North Carolina, Missouri and Utah

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35

Trade in Legal Services - Malaysia

- Malaysia's commitments under WTO and under Aust Malaysia FTA quite 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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36

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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37

Movement of Natural Persons – The Framework

- A separate chapter on MNP in Ch 12
- Art 12 provides that MNP chapter and not services or 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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38

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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39

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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40

Ch9 on Investment

- Obligations have similarities to provisions in NAFTA and to provisions in ASEAN Investment Agreement.
- Art 9.4 national treatment
- Art 9.5 Most favoured nation treatment
- Art 9.6 Minimum standard of treatment under customary international law rules relating to fair and equitable treatment and full protection and security
- Art 9.7 prohibition of expropriation except for a public purpose, in a non-discriminatory manner accompanied by prompt, adequate and effective compensation
- Art 9.10 prohibiting performance requirements as conditions of approval of investments;
- Rules apply to all sectors unless:

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41

Exceptions to the rules :

- Art 9.11.1 that 9.4 (NT), 9.5 (MFN), 9.9 (Performance Requirements) and 9.10 (Senior Management and Board of Directors) 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 9.4, 9.5, 9.9 & 9.10 (so list in Annex I can narrow over time as a result of this ratchet clause)
- Art 9.11.2 that 9.4, 9.5, 9.9 & 9.10 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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42

Exceptions to the Ch9 Rules

- Art 9.15 “Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to environmental, health, or other regulatory objectives.”

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43

2 tracks for disputes under the Investment Chapter

- State v State dispute settlement under Ch28 may apply to a measure that is inconsistent with Ch9
- Investor v State dispute settlement under Section B of Chapter 9

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44

Investor State Claims under Section B of Chapter 9

- For any breach of an obligation under Section A, an investment authorisation, or an investment agreement – causing loss to an investor, the Investor may claim directly against the State.
- Claim may be made under procedures of ICSID, or UNCITRAL arbitration rules or in any other way agreed between the parties.
- Art 9.19 The TPP Parties consent to submission of such claims.

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45

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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46

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, directly or indirectly, 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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47

Intellectual Property Rules include:

- Art 18.2 Parties must ratify some existing treaties including:
 - Madrid Treaty on Trademark
 - Convention on Plant Breeders Rights (UPOV1991)
- Art 18.9 enhanced transparency – making IP law available online
- The requirement to provide for criminal penalties is broader than in TRIPS.
- Art 18.77 elaborates upon meaning of “wilful trademark counterfeiting” and “copyright or related rights piracy on a commercial scale”
- Art 18.77.4 requires Members to have criminal penalties for unauthorised copying of a cinematographic work in a movie theatre
- Art 18.78 requires Members to have criminal penalties for some disclosures of trade secrets
- Art 18.79 requires Members to have criminal penalties for receiving or further distributing an encrypted program –carrying satellite signal knowing that it has been decrypted without the authorisation of the lawful distributor of the signal .

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48

Trademarks

- Article 18.27 requires Parties to provide for a trademark term of no less than 10 years (is 7 years under TRIPS)
- Art 18.30 allows protection of GIs through trademarks or sui generis system for GIs.

Copyright

- Comprehensively sets out the rights of authors, performers and producers of phonograms to prevent reproduction: Article 18.58 – 18.62
- Art 18.63 minimum copyright term is the life of author plus 70 years
- (under TRIPS it is life of the author plus 50 years)

Patents

- For registration, requires Parties to allow a 12 month grace period – in assessing novelty or inventive step, ignore public disclosures during the past 12 months (18.38)
- no change to minimum term under TRIPS of 20 years from the filing date
But:
- Art 18.46 requires Parties to adjust the Patent term to compensate for unreasonable or unnecessary delay in the processing of a patent application
- Art 18.47 – for agricultural chemical products – requires Parties to give 10 years of exclusive use of test data submitted for regulatory approval of the product
- Article 18.48 – for pharmaceutical products – requires Parties to adjust the patent term to compensate the owner for unreasonable curtailment of the patent term as a result of the marketing approval process.
- Art 18.50 - for pharmaceutical products – 5 years exclusive use of test data submitted for regulatory approval – see next Slide
- Art 18.51 – for biologics – either 5 or 8 years exclusive use of test data submitted for regulatory approval – see next Slide

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51

Protection of undisclosed test data in art 18.50

- If a Party requires, as a condition of granting marketing approval for a new pharmaceutical product, the submission of undisclosed test or other data concerning the safety and efficacy of the product, that Party shall not permit third persons, without the consent of the person that previously submitted such information, to market the same or a similar product on the basis of:
 - i) that information; or
 - ii) The marketing approval granted to the person that submitted such information
- For at least **5 years** from the date of marketing approval of the new pharmaceutical product in the territory of the Party.
- And for Biologics:

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52

Protection of undisclosed test data with respect to approval of Biologics: art 18.51

- With regard to protecting new biologics, a Party shall either:
- (a) with respect to the first marketing approval in a Party of a new pharmaceutical product that is or contains a biologic, provide effective market protection through the implementation of Article 18.50 ... for a period of at least **8 years** from the date of first marketing approval of that product in that Party; or, alternatively,
- (b) with respect to the first marketing approval in a Party of a new pharmaceutical product that is or contains a biologic, provide effective market protection:
 - (i) through the implementation of Article 18.50.1 ... for a period of at least **5 years** from the date of first marketing approval of that product in that Party,
 - (ii) through other measures, and
 - (iii) recognising that market circumstances also contribute to effective market protection
- to deliver a comparable outcome in the market.

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53

Some obligations not existing under WTO

- Government procurement (WTO allows opt out)
- Environmental chapter – obligation to comply with specified treaties; obligation to publish complaints
- Labour chapter – obligation to comply with obligations set out in ILO 1998 Declaration
- Competition chapter – obligations regarding enforcement of existing competition laws
- And E-Commerce – see next Slide

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54

E- Commerce

- Includes:
- Article 14.11.2 Each Party shall allow the cross-border transfer of information by electronic means, including personal information, when this activity is for the conduct of the business of a covered person.
- Article 14.13.2 No Party shall require a covered person to use or locate computing facilities in that Party's territory as a condition for conducting business in that territory.
- [Both with an exception for restrictions that are no more than necessary to achieve a legitimate public policy objective]

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55

Impact of TPP on WTO

- Background is very limited progress in achieving multilateral liberalization in WTO negotiations which commenced in 2001.
- No deal on NAMA, Agricultural Market Access, or Trade in Services
- Nairobi Ministerial in Dec 2015 – some limited progress including:
 - 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 from Nairobi in Dec 2015 are focussed on creating space not to liberalize!

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56

Impact on Incentives

- Some Countries in TPP may want TPP completed before any major WTO deal.
- Some Countries in RCEP may want RCEP. completed before any major WTO deal.
- Some Countries in both TPP and RCEP may want to see TPP completed first.
- Countries outside TPP are disadvantaged, and GSP countries lose their margin of preference – so they may want to join:
- Easily - Korea, possibly a post-Brexit U.K.
- With more difficulty – Thailand, The Philippines, Indonesia, Colombia, China, Sri Lanka, Cambodia – others?
- It may become the second WTO or the new WTO
- BUT without the protection of the WTO's MFN rule for treatment of non-TPP WTO Members.