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**The Trans-Pacific Partnership as a Development of the
Australia–United States Free Trade Agreement:
Services Liberalization and Investment Protection**

Tania Voon and Andrew D Mitchell*

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I INTRODUCTION

The *Trans-Pacific Partnership Agreement* ('TPP')¹ is lauded as the quintessential 21st century preferential trade agreement ('PTA') and, moreover, 'mega-regional' trade and investment agreement. TPP negotiations were concluded in October 2015 between 12 Pacific-Rim countries,² which together are said to account for 40 per cent of global gross domestic product.³ The TPP aims to set a 'new standard for global trade',⁴ with participating States suggesting that it will play a significant role in achieving the 'ultimate goal of open trade and regional integration' across the Asia-Pacific region.⁵ Yet despite its signing in February 2016, the TPP faces ratification difficulties in several countries, including Australia (where the parliamentary consultation process lapsed upon the dissolution of both houses of Parliament before the 2016 federal election)⁶ and the United States (where both leading presidential candidates have avowed not to proceed with the treaty).⁷

The controversy surrounding the TPP in Australia⁸ is reminiscent of the public reception of the *Australia–United States Free Trade Agreement* ('AUSFTA'),⁹ which entered into force a decade ago in 2005.¹⁰ Although the Australian government has declared the AUSFTA a 'landmark in improving Australia's trade and investment relationship' with the United States ('US'),¹¹ community concerns centred on AUSFTA obligations going beyond the World Trade Organization ('WTO') equivalents, particularly where they required changes to the Australian

¹ *Trans Pacific Partnership Agreement*, text released following legal review 26 January 2016 (signed 4 February 2016, not yet in force) ('TPP').

² Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Viet Nam.

³ Department of Foreign Affairs and Trade, Australia ('DFAT') *Trans-Pacific Partnership Agreement* <<http://dfat.gov.au/trade/agreements/tpp/pages/trans-pacific-partnership-agreement-tpp.aspx>>; Office of the United States Trade Representative ('USTR'), *Overview of TPP* <<https://ustr.gov/tpp/overview-of-the-TPP>>.

⁴ USTR, 'Summary of the Trans-Pacific Partnership Agreement' (Press Release, 4 October 2015).

⁵ DFAT, *Summary of the Trans-Pacific Partnership Agreement* <<http://dfat.gov.au/trade/agreements/tpp/outcomes-documents/Pages/summary-of-the-tpp-agreement.aspx>>.

⁶ See Joint Standing Committee on Treaties, 'Treaty tabled on 9 February 2016' <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/9_February_2016>.

⁷ See, eg, 'Seven-Step Trump Economic Plan Includes Threat of NAFTA Renegotiation, Withdrawal' (1 July 2016) 34.26 *Inside US Trade* (online); Len Bracken, 'Clinton Won't Support TPP, Campaign Says' (27 July 2016) *International Trade Daily* (online). But see Brett Fortnam, Jack Caporal and Jenny Leonard, 'USTR Sends TPP Draft Statement of Administration Action to Congress' (19 August 2016) 34.33 *Inside US Trade* (online).

⁸ See, eg, Kimberlee Weatherall, 'Copyright in the *Trans Pacific Partnership* Echoes Past Mistakes' (24 October 2014) *The Conversation* (online); Thomas Faunce, 'Australia's Embrace of Investor State Dispute Settlement: A Challenge to the Social Contract Ideal?' (2015) 69 *Australian Journal of International Affairs* 595.

⁹ *Australia–United States Free Trade Agreement*, signed 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005) ('AUSFTA').

¹⁰ On the negotiation of AUSFTA see Andrew Mitchell and Tania Voon, 'Australia–United States Free Trade Agreement' in Simon Lester and Bryan Mercurio (eds), *Bilateral and Regional Trade Agreements* (Cambridge University Press, 2009) 6, 9-12 (reprinted in Simon Lester, Bryan Mercurio and Lorand Bartels (eds), *Bilateral and Regional Trade Agreements: Case Studies* (Cambridge University Press, 2015)).

¹¹ DFAT, *Overview of Australia–United States Free Trade Agreement* <<http://dfat.gov.au/trade/agreements/ausfta/fact-sheets/Pages/overview.aspx>>

legal system, and especially in relation to intellectual property provisions and Australia's Pharmaceutical Benefits Scheme ('PBS').¹²

The impact of the AUSFTA in creating meaningful and efficient trade and investment opportunities for Australia is uncertain.¹³ In 2010, the Australian Productivity Commission suggested that changes made to Australia's intellectual property regime in order to implement the AUSFTA had imposed a 'net cost on Australia'.¹⁴ In 2015, Shiro Armstrong argued that the AUSFTA as had a negative impact on trade between Australia and the US and on trade between those two countries and the rest of the world, with an estimated USD53.12 billion of trade diverted.¹⁵ Yet the Australian government has continued to promote the benefits of the AUSFTA, underlining in 2015 that two-way trade in goods and services between Australia and the US had increased from AUD41 billion in 2004 (before the AUSFTA) to more than AUD60 billion in 2014, while two-way investment had more than doubled, from AUD642 billion in 2004 to over AUD1.3 trillion in 2014.¹⁶

Although both the AUSFTA and the TPP are modelled on pre-existing US PTAs and contain significant WTO-plus obligations, a range of factors help explain differences between them. The AUSFTA was negotiated within only a year, within the broader context of Australia's support to the US government during the Iraq war and with the imperative of opening agricultural markets.¹⁷ The US was the most powerful negotiating party in both the AUSFTA and the TPP, but the TPP negotiations process was much longer and more complex as it involved countries with considerable variation in levels of development and political systems. The US motives for concluding the TPP include not only securing access to markets in the fastest growing developing countries in the Asia-Pacific region but also containing China's influence in Asia and the global marketplace.¹⁸ In this regard, Australia plays a pivotal role as one of seven states included in both the TPP and in ongoing

¹² See, eg, Tom Faunce, 'How the *Australia–United States Free Trade Agreement* Compromised the Pharmaceuticals Benefits Scheme' (2015) 69 *Australian Journal of International Affairs* 473; Kimberlee Weatherall, 'The *Australia–United States Free Trade Agreement*'s Impact on Australia's Copyright Trade Policy' (2015) 69 *Australian Journal of International Affairs* 538. See also below n 54.

¹³ See, eg, Julian Alston et al, 'Supply and demand for commodity components: implications of free trade versus the AUSFTA for the US dairy industry' (2006) 50 *Australian Journal of Agricultural and Resource Economics* 131.

¹⁴ See Productivity Commission, *Bilateral and Regional Trade Agreements*, Research Report (November 2010) 259.

¹⁵ Shiro Armstrong, 'Economic Impact of the *Australia–US FTA*' (2015) 69 *Australian Journal of International Affairs* 513, 520.

¹⁶ Minister of Trade and Investment, '10 Years of Australian Businesses Making Use of AUSFTA', Media Release (2 July 2015). See also DFAT, *AUSFTA Joint Committee Meeting* (5 May 2016) <<http://dfat.gov.au/trade/agreements/ausfta/pages/australia-united-states-fta.aspx>>.

¹⁷ Andrew Mitchell and Tania Voon, '*Australia–United States Free Trade Agreement*' in Simon Lester and Bryan Mercurio (eds), *Bilateral and Regional Trade Agreements* (Cambridge University Press, 2009) 6, 8.

¹⁸ Barack Obama, 'President Obama: The TPP would let America, not China, lead the way on global trade' (2 May 2016) *The Washington Post* (online). See also Meredith Kolsky Lewis, 'Trans-Pacific Partnership: New Paradigm of Wolf in Sheep's Clothing' (2011) 34 *Boston College International and Comparative Law Review* 27, 37; Ming Du, 'Explaining China's Tripartite Strategy toward the Trans-Pacific Partnership Agreement' (2015) 18 *Journal of International Economic Law* 407, 411-14.

negotiations towards the *Regional Comprehensive Economic Partnership* ('RCEP'),¹⁹ which also includes India, China, and the Republic of Korea. Developments in the TPP may also affect the ongoing negotiations towards the *Trade in Services Agreement* ('TiSA'), which are led by the US, Australia and the European Union ('EU'), and in which eight of the 12 TPP parties are participating.²⁰

The TPP contains provisions concerning several contemporary trade issues that the AUSFTA does not address, such as chapters on regulatory coherence,²¹ cooperation and capacity-building,²² development,²³ small and medium enterprises ('SMEs'),²⁴ state-owned enterprises ('SOEs'),²⁵ and competitiveness and business facilitation,²⁶ and new rules on anti-corruption²⁷ (going beyond the AUSFTA transparency requirements).²⁸ The chapter on SMEs is of special interest to Australia as 97 per cent of Australian businesses are SMEs.²⁹ However, in this chapter, we focus on services and investment provisions in the TPP and AUSFTA to identify differences between the two agreements with a focus on the implications of the TPP for the Australia–US relationship and the development of international investment law.

In part II, we briefly take note of the outcomes on agriculture and 'biologics' because of their particular significance in Australia–US negotiations. In part IV, we assess the development of services liberalisation through the two agreements, taking separate note of the new provisions on electronic commerce. Part IV compares the investment chapters of the TPP and AUSFTA, including substantive obligations and dispute settlement provisions. Our comparative analysis confirms that the TPP is a more modern PTA than the AUSFTA and that it makes several improvements to that earlier agreement, including clarifications to services obligations and investment protections that provide greater recognition to the need for policy space in regulatory matters. However, these are incremental changes that may ultimately be overshadowed by the questionable introduction of an investor-State dispute settlement ('ISDS') mechanism between Australia and the US.

¹⁹ The other six states in both the TPP and RCEP are Brunei Darussalam, Japan, Malaysia, New Zealand, Singapore, and Viet Nam.

²⁰ The four non-participating parties are Brunei Darussalam, Malaysia, Singapore, Viet Nam.

²¹ TPP ch 25.

²² TPP ch 21.

²³ TPP ch 23.

²⁴ TPP ch 24.

²⁵ TPP ch 17.

²⁶ TPP ch 22.

²⁷ TPP ch 26, s C.

²⁸ AUSFTA ch 20.

²⁹ DFAT, *TPP Outcomes: Small and Medium Sized Enterprises* (fact sheet updated 18 July 2016).

II KEY TPP ISSUES FOR THE AUSTRALIA–UNITED STATES RELATIONSHIP

A *Opening US Agricultural Markets*

Agriculture is a crucial sector for both Australia and the United States, in both political and economic terms. USTR highlights in connection with the TPP that more than 20 per cent of US farm production is exported and the Asia-Pacific represents the world's largest market for food and agriculture.³⁰ DFAT emphasises that 34 per cent of Australia's agricultural exports in 2015 were to TPP countries.³¹ From the Australian perspective, AUSFTA outcomes in agriculture were disappointing, particularly in relation to beef and also sugar, which was excluded from the agreement.³² Some improvements have been achieved in the TPP. In general, the TPP does not change Australia's applied tariff rates across the agricultural sector (as most tariffs were already zero), meaning that the treaty is likely to have a fairly limited impact in terms of opening Australian markets for US agricultural producers/exporters or reducing the price of imported agricultural products for consumers in Australia. Australia's declarations regarding the benefits of the TPP in agriculture (and more generally) have therefore focused on Australian exports.

Under the TPP, Australian exporters would enjoy greater access to certain US agricultural sectors, for example due to the elimination of the AUSFTA³³ price-based safeguard for beef,³⁴ additional sugar quota allocations³⁵ (although apparently below those sought by Australia),³⁶ and elimination of all tariffs on certain dairy products (eg milk powders, infant formula) and in-quota tariffs for all other dairy products.³⁷ The Australian Sugar Industry Alliance has expressed support for the TPP, highlighting the additional access it provides to the US sugar market.³⁸ Australian industry bodies with respect to red meat and dairy made a similar submission to the relevant Australian parliamentary inquiry.³⁹ Nevertheless, red meat and livestock industry organisations noted that under the TPP 'the Australian industry will lose [its] current tariff preference (albeit small) on both

³⁰ USTR, *TPP – Benefits for US Agriculture – Fact Sheet* (online).

³¹ DFAT, *TPP Outcomes: Goods Market Access Outcomes: Goods Market Access* (fact sheet updated 18 July 2016) 1.

³² See Parliament of the Commonwealth of Australia, Joint Standing Committee on Treaties, *Report 61: The Australia–United States Free Trade Agreement* (June 2004) [7.19], [7.32], [7.35], [7.67], [7.69].

³³ AUSFTA annex 3-A, s C.

³⁴ Exchange of letters between Andrew Robb, Minister for Trade and Investment, Australia, and Michael Froman, USTR (4 February 2016) [2].

³⁵ DFAT, *TPP Outcomes: Goods Market Access Outcomes: Goods Market Access* (fact sheet updated 18 July 2016); Bryce Baschuk, 'USTR Announces FY16 Sugar Quotas' (8 March 2016) *International Trade Daily* (online).

³⁶ Cullen Hendrix and Barbara Kotschwar, 'Agriculture' in Peterson Institute for International Economics, *Assessing the Trans-Pacific Partnership Volume 1: Market Access and Sectoral Issues* (February 2016) 41, 51.

³⁷ Exchange of letters between Andrew Robb, Minister for Trade and Investment, Australia, and Michael Froman, USTR (4 February 2016) [1].

³⁸ Submission by the Australian Sugar Industry Alliance to the Joint Standing Committee on Treaties (22 February 2016) 1.

³⁹ See also Submission by National Farmers' Federation to the Joint Standing Committee on Treaties (February 2016).

beef and sheepmeat into the US as similar New Zealand products will secure duty free status'.⁴⁰ While fully supporting implementation of the TPP in its current form, the Australian Dairy Industry acknowledged 'modest but important gains' from the agreement while noting a concern regarding US-subsidised exports competing with Australian products in Japan and more generally that 'the prohibition on government financed export subsidy schemes was not extended to privately financed schemes, which cooperatively owned processors in the US can take advantage of'.⁴¹

B Data Exclusivity Period for Biologic Medicines

One of the most controversial issues between Australia and the US during the TPP negotiations (perhaps even 'the single most controversial provision of the entire agreement')⁴² was the treatment of certain medicines known as 'biologics',⁴³ meaning, 'at a minimum, a product that is, or, alternatively, contains, a protein produced using biotechnology processes, for use in human beings for the prevention, treatment, or cure of a disease or condition'.⁴⁴ The costs of clinical trials are particularly high for biologics.⁴⁵

Under the TPP, a party may 'exclude from patentability', *inter alia*, 'animals other than microorganisms, and essentially biological processes for the production of plants or animals, other than nonbiological and microbiological processes'.⁴⁶ Separately, under TPP art 18.50.1, if 'a Party requires, as a condition for granting marketing approval for a new pharmaceutical product, the submission of undisclosed test or other data concerning the safety and efficacy of the product', the party must not permit third persons to rely on such data or such approval to market the product without the original applicant's consent for at least *five years* following the date of such marketing approval. Exceptions apply under TPP art 18.50.3 regarding certain flexibilities for public health⁴⁷ under the WTO's *Agreement on Trade-Related Aspects of Intellectual Property Rights* ('TRIPS Agreement').⁴⁸

⁴⁰ Submission on behalf of the Red Meat Advisory Council, Cattle Council of Australia, Australian Lot Feeders' Association, Sheepmeat Council of Australia, Australian Meat Industry Council, and Australian Livestock Exporters' Council to the Joint Standing Committee on Treaties (7 March 2016) 1.

⁴¹ Submission by Australian Dairy Industry Council Inc and Dairy Australia to the Joint Standing Committee on Treaties (March 2016) 2-3.

⁴² Lee Branstetter, 'TPP and the Conflict Over Drugs: Incentives for Innovation Versus Access to Medicines' in Jeffrey Schott and Cathleen Cimino-Isaacs (eds), *Assessing the Trans-Pacific Partnership Volume 2: Innovations in Trading Rules* (Peterson Institute for International Economics, 2016) 20, 22.

⁴³ Ruth Lopert, 'Why Biologics were such a Big Deal in the *Trans Pacific Partnership*' (6 October 2015) *The Conversation* (online).

⁴⁴ TPP art 18.51.2.

⁴⁵ Kristina M Lybecker, 'Intellectual Property Protection for Biologics: Why the *Trans Pacific Partnership Agreement* Fails to Deliver' (2016) 22 *Journal of Commercial Biotechnology* 42, 43.

⁴⁶ TPP art 18.37.1.

⁴⁷ See Andrew Mitchell and Tania Voon, 'Patents and Public Health in the WTO, FTAs and Beyond: Tension and Conflict in International Law' (2009) 43(3) *Journal of World Trade* 571.

⁴⁸ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 1C ('*Agreement on Trade-Related Aspects of Intellectual Property Rights*') ('TRIPS Agreement').

The key provision on biologics relates to the period of data exclusivity for biologics and represents a major compromise by the US in comparison to initial calls for a 12-year period.⁴⁹ TPP art 18.51.1 requires TPP parties to provide ‘effective market protection’, ‘with respect to the first marketing approval in a Party of a new pharmaceutical product that is or contains a biologic’, either: (a) ‘for a period of at least *eight years* from the date of first marketing approval of that product in that Party’ through the implementation of arts 18.50.1 and 18.50.3; or (b) (i) through the implementation of those provisions for a period of at least *five years*, and (ii) ‘through other measures, and’ (iii) ‘recognising that market circumstances also contribute to effective market protection’, ‘to deliver a comparable outcome in the market’.

Australia maintains that it already complies with art 18.51.1(b) by providing to biologics an effective period of data protection of eight years, through five years of data exclusivity together with other regulatory requirements to obtain marketing approval.⁵⁰ This position, and the biologics provision itself, have hindered ratification of the TPP in the US, with some US Senators contending that ‘other measures’ in art 18.5.1(b) must be defined for particular countries, for example through side letters.⁵¹ Conversely, Australia’s Department of Foreign Affairs and Trade (‘DFAT’) has touted the result on biologics as a major achievement for Australia in the negotiation of the TPP.⁵² Indeed, DFAT generally characterises the TPP IP provisions as beneficial to Australia because they allegedly require no change to Australia’s current laws⁵³ (which already had to be changed in order to comply with the AUSFTA IP chapter).⁵⁴

⁴⁹ Lee Branstetter, ‘TPP and the Conflict Over Drugs: Incentives for Innovation Versus Access to Medicines’ in Jeffrey Schott and Cathleen Cimino-Isaacs (eds), *Assessing the Trans-Pacific Partnership Volume 2: Innovations in Trading Rules* (Peterson Institute for International Economics, 2016) 20, 20-21.

⁵⁰ Evidence to the Joint Standing Committee on Treaties, Australian Parliament, Canberra, 22 February 2016, 7-8 (Elizabeth Ward, First Assistant Secretary; TPP Chief Negotiator, Office of Trade Negotiations, DFAT). See also Ryan Rainey and Matthew Schewel, ‘Australia, Chile Say TPP Biologics Deal Will Not Require Them to Change’ (9 October 2015) 33.39 *Inside US Trade* (online); ‘Australian Official Offers Detailed Interpretation of TPP Biologics Provision’ (26 February 2016) 34.8 *Inside US Trade* (online).

⁵¹ ‘Hatch Continues to Take Hard Line On Data Exclusivity for Biologics in TPP’ (31 July 2015) 33.30 *Inside US Trade* (online); ‘Froman: Biologics is the Major Outstanding TPP Issue for Congress’ (17 June 2016) 34.24 *Inside US Trade* (online).

⁵² See, eg, DFAT, *TPP Outcomes: Biologics* (fact sheet updated 6 October 2015) 2; ‘Australia, Chile Say TPP Biologics Deal Will Not Require Them to Change’ (9 October 2015) 33.39 *Inside US Trade* (online).

⁵³ See, eg, DFAT, *TPP Intellectual Property FAQs* (fact sheet updated 15 October 2015) 1; Prime Minister and Minister for Trade and Investment, Australia, ‘Historic Asia-Pacific Trade Agreement Opens New Era of Opportunities’, Joint Media Release (6 October 2015); *TPP National Interest Analysis* [2016] ATNIA 4 [39], [42]. But see Submission by Kimberlee Weatherall to the Joint Standing Committee on Treaties (treaty tabled on 9 February 2016, submission 168) 3.

⁵⁴ See, eg, Matthew Rimmer, ‘Robbery under arms: Copyright law and the Australia–United States Free Trade Agreement (2006) 11(3) *First Monday* (online). In relation to health, see, eg, Bryan Mercurio, ‘The Impact of the Australia–United States Free Trade Agreement on the Provision of Health Services in Australia’ (2005) 26 *Whittier Law Review* 1051; Peter Sainsbury, ‘Australia–United States Free Trade Agreement and the Australian Pharmaceutical Benefits Scheme’ (2004) 4 *Yale Journal of Health Policy, Law, and Ethics* 387. See also above n 12.

III TPP DEVELOPMENTS IN SERVICES

A *Similar Scope of the Services Chapters*

The scope and nature of obligations on cross-border trade in services are broadly similar in the TPP (ch 10) and AUSFTA (ch 10). In both agreements, the services chapter applies to measures affecting cross-border trade in services, meaning:

- ‘supply of a service from the territory of one Party into the territory of another Party’ (cross-border = mode 1, using the categorisation in the WTO’s *General Agreement on Trade in Services* (‘GATS’));⁵⁵
- ‘in the territory of a Party to a person of another Party’ (consumption abroad = mode 2);
- or ‘by a national of a Party in the territory of another Party’ (movement of natural persons = mode 4).⁵⁶

Under the TPP and the AUSFTA, measures affecting cross-border trade in services are expressed to include measures affecting the presence in the party’s territory of a service supplier of another party.⁵⁷ However, only certain obligations under TPP ch 10 and AUSFTA ch 10 extend to measures of a party ‘affecting the supply of a service in its territory by a covered investment’ (commercial presence = mode 3) (other than cross-border supply), namely market access, domestic regulation, transparency, and (in the TPP) express delivery services.⁵⁸ These chapters otherwise do not cover mode 3,⁵⁹ which is instead covered by the investment chapters (including, in the case of the TPP, the ISDS mechanism (as discussed further below)). That mechanism does not apply to the TPP ch 10 obligations.⁶⁰

These services chapters do not apply to certain categories of services such as financial services,⁶¹ government procurement,⁶² ‘services supplied in the exercise of governmental authority’,⁶³ and government subsidies or grants.⁶⁴ The chapters also do not generally apply to ‘air services, including domestic and international air transportation services, whether scheduled or non-scheduled, and related services in support of air services’,⁶⁵ but do apply to certain specified categories of air services. Under the AUSFTA, the exceptions are aircraft repair and maintenance services and speciality air services.⁶⁶ Under the TPP, the exceptions extend to aircraft repair and

⁵⁵ *Marrakesh Agreement*, annex 1B (‘*General Agreement on Trade in Services*’) (‘GATS’).

⁵⁶ TPP arts 10.2, 10.1 (definition of ‘cross border trade in services or cross-border supply of services’); AUSFTA arts 10.1.1, 10.14.1.

⁵⁷ TPP art 10.2.1(d); AUSFTA art 10.1.1(d).

⁵⁸ TPP art 10.2.2; AUSFTA art 10.1.3.

⁵⁹ TPP art 10.1; AUSFTA art 10.14.

⁶⁰ TPP art 10.2.2(a), n 1.

⁶¹ TPP art 10.2.3(a); AUSFTA art 10.1.4(a).

⁶² TPP art 10.2.3(b); AUSFTA art 10.1.4(b).

⁶³ TPP art 10.2.3(c); AUSFTA art 10.1.4(e) (defined in the same way in TPP art 10.1; AUSFTA art 1.2.22).

⁶⁴ TPP art 10.2.3(d); AUSFTA art 10.1.4(d).

⁶⁵ TPP art 10.5; AUSFTA 10.1.4(c).

⁶⁶ AUSFTA art 10.1.4(c)(i), (ii).

maintenance services, selling and marketing of air transport services, computer reservation system services, speciality air services, airport operation services, and ground handling services.⁶⁷

Separate chapters in each agreement deal with financial services,⁶⁸ telecommunications,⁶⁹ and economic commerce as addressed below, while the TPP adds a new chapter on temporary entry for business persons.⁷⁰

B *Modifications to Non-Discrimination Obligations*

The core services obligations under the TPP and the AUSFTA relate to non-discrimination (namely national treatment and most-favoured-nation treatment ('MFN')), market access, and local presence. The TPP provisions on market access and local presence are identical to those in the AUSFTA. In relation to market access, a party must not adopt or maintain a measure that limits, for example, the number of service suppliers or employees, the value of transactions or assets, the number of service operations, or the quantum of service output.⁷¹ In relation to local presence, a party must not require a service supplier of another party 'to establish or maintain a representative office or any form of enterprise, or to be resident, in its territory as a condition for the cross-border supply of a service'.⁷²

The non-discrimination obligations with respect to services (national treatment and MFN) are slightly modified in the TPP. The national treatment obligation under the AUSFTA requires each party to 'accord to *service suppliers* of the other Party treatment no less favourable than that it accords, in like circumstances, to its own service suppliers'.⁷³ The TPP national treatment provision extends this obligation beyond 'service suppliers' to 'services': 'Each Party shall accord to *services and service suppliers* of another Party treatment no less favourable than that it accords, in like circumstances, to its own services and service suppliers'.⁷⁴ The same extension to 'services' applies to the MFN obligation as well: 'Each Party shall accord to *services and service suppliers* of another Party treatment no less favourable than that it accords, in like circumstances, to services and service suppliers of any other Party or a non-Party'.⁷⁵

The TPP adds clarity regarding the application of the national treatment obligation to treatment by a regional level of government⁷⁶ and the identification of 'like circumstances', which 'depends on the totality of the circumstances, including whether the relevant treatment distinguishes between services or service suppliers on the basis of legitimate public welfare objectives'.⁷⁷ This

⁶⁷ TPP art 10.5(a)-(f). See also TPP arts 10.2.6, 10.2.7.

⁶⁸ TPP ch 11; AUSFTA ch 13.

⁶⁹ TPP ch 13; AUSFTA ch 12.

⁷⁰ TPP ch 12.

⁷¹ TPP art 10.5, AUSFTA art 10.4.

⁷² TPP art 10.6, AUSFTA art 10.5.

⁷³ AUSFTA art 10.2 (emphasis added).

⁷⁴ TPP art 10.3.1 (emphasis added).

⁷⁵ TPP art 10.4 (emphasis added); cf AUSFTA art 10.3.

⁷⁶ TPP art 10.3.2.

⁷⁷ TPP n 2 to art 10.3.

clarification in footnote 2 of TPP chapter 10 departs from the general approach in WTO law, where the aim of a measure is not relevant⁷⁸ to whether the measure accords less favourable treatment under the non-discrimination obligations (national treatment and MFN treatment) of GATT⁷⁹ or GATS.⁸⁰ The TPP footnote is closer to the WTO analysis under Article 2.1 of the *Agreement on Technical Barriers to Trade* ('TBT Agreement')⁸¹ (which incorporates both national treatment and MFN treatment in relation to matters such as ingredients and labelling of traded goods). The WTO Appellate Body has consistently held that a measure's detrimental impact on imported products compared to other imported or domestic products does not amount to discrimination contrary to TBT art 2.1 where the detrimental impact 'stems exclusively from legitimate regulatory distinctions'.⁸² The Appellate Body has justified its refusal to adopt a similar approach under GATT by highlighting the general exceptions in GATT art XX (corresponding to the general exceptions in GATS art XIV), which do not appear explicitly in the TBT Agreement.⁸³ Similarly, the TPP and AUSFTA have lists of non-conforming measures (as discussed below) rather than general exceptions in the chapter on cross-border trade in services, meaning that additional leeway of the kind found in footnote 2 may be valuable in ensuring sufficient party autonomy in regulating for public welfare purposes.

C *Negative List Approach: Non-Conforming Measures (Services)*

With respect to national treatment, MFN treatment, market access, and local presence, the TPP and the AUSFTA adopt a 'negative list' approach, meaning that these obligations apply to all service sectors and measures covered by the treaties except to the extent expressly excluded by the relevant party. Conversely, a 'positive list' approach means that an obligation applies only in service sectors specified by the party. In principle, a negative and positive list approach could be used to the same effect; that is, either approach could be used to achieve the same results in terms of the obligations undertaken by each party. In practice, behavioural analysis suggests that a negative list approach may be more liberalizing and transparent.⁸⁴ The net effect of the listing approach adopted is likely to depend on the manner in which parties undertake commitments.⁸⁵

⁷⁸ But see generally Robert E Hudec, 'GATT/WTO Constraints on National Regulation: Requiem for an "Aims and Effects" Test' (1998) 32 *International Lawyer* 619.

⁷⁹ Appellate Body Reports, *EC – Seal Products*, [5.90], [5.93], [5.117], [5.125], [5.130].

⁸⁰ See Appellate Body Report, *EC – Bananas III*, [216], [241].

⁸¹ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 1A ('*Agreement on Technical Barriers to Trade*') ('TBT Agreement').

⁸² Appellate Body Report, *US – Clove Cigarettes*, [174]. See also Appellate Body Report, *US – COOL*, [271]; Appellate Body Report, *US – Tuna II (Mexico)*, [215].

⁸³ Appellate Body Reports, *EC – Seal Products*, [5.125].

⁸⁴ Tomer Broude and Shai Moses, 'The Behavioral Dynamics of Positive and Negative Listing in Services Trade Liberalization: A Look at the Trade in Services Agreement (TiSA) Negotiations', *International Law Forum*, Faculty of Law, Hebrew University of Jerusalem, Research Paper No 01-15 (April 2015) (draft chapter for Martin Roy and Pierre Sauvé (eds), *Research Handbook on Trade in Services* (Edward Elgar, forthcoming)).

⁸⁵ Organisation for Economic Co-operation and Development ('OECD'), *International Investment Law: Understanding Concepts and Tracking Innovations* (OECD, 2008) 281-83.

The GATS adopts a negative list approach with respect to MFN treatment⁸⁶ (like the TPP and the AUSFTA), but a positive list approach with respect to national treatment⁸⁷ and market access.⁸⁸

Pursuant to the negative list approach, the TPP and AUSFTA obligations on national treatment, MFN, market access and local presence do not apply to ‘any existing non-conforming measures’ listed in each country’s individual schedule to Annex I and Annex II.⁸⁹ These non-conforming measures are also partially exempt from domestic regulation obligations⁹⁰ and are used for exemptions from investment obligations as discussed further below. The non-conforming measures listed by a party in its schedule to Annex I will remain exempt from the relevant obligations if they are continued or promptly renewed,⁹¹ or if they are amended without decreasing their conformity with the relevant obligation.⁹² These conditions effectively create a ‘ratchet’ mechanism, whereby an amendment to an existing non-conforming measure that increases the measure’s conformity with the relevant obligation continues to be exempt from the obligation, but the measure cannot then be amended again in a manner that returns the measure to the original lower degree of conformity. In contrast, non-conforming measures listed by a party in its schedule to Annex II will remain exempt if amended as long as they still fall within the description in the schedule.⁹³

In relation to non-conforming measures, the TPP provides an additional consultation mechanism not available under the AUSFTA. A TPP party may request consultations with another TPP party if it believes that a non-conforming measure listed in the party’s schedule to Annex I and maintained by either a regional level of government or the central government ‘creates a material impediment to the cross-border supply of services’ in relation to the requesting party.⁹⁴ The parties are to enter consultations ‘with a view to exchanging information on the operation of the measure and to considering whether further steps are necessary and appropriate’.⁹⁵ Apart from this consultation requirement, the TPP and the AUSFTA both list in Annex I for the US and Australia all existing regional (ie sub-national) non-conforming measures.⁹⁶ Australia also lists in Annex II an exemption for all regional level measures that comply with the GATS art XVI market access obligation,⁹⁷ subject in the TPP to listed ‘market access improvements’ in its Appendix A to Annex II.⁹⁸ The corresponding listing for the US extends beyond regional measures to all art XVI-

⁸⁶ GATS art II.

⁸⁷ GATS art XVI.

⁸⁸ GATS art XVII.

⁸⁹ TPP art 10.7; AUSFTA art 10.6.

⁹⁰ TPP art 10.8.8; AUSFTA art 10.7.1.

⁹¹ TPP art 10.7.1(b); AUSFTA art 10.6.1(b).

⁹² TPP art 10.7.1 (c); AUSFTA art 10.6.1(c).

⁹³ TPP art 10.7.2; AUSFTA art 10.6.2.

⁹⁴ TPP art 10.7.3 including n 5.

⁹⁵ TPP art 10.7.3.

⁹⁶ TPP, *Annex I: Schedule of the United States*, 16; AUSFTA, *Annex I: Schedule of the United States*, 12; TPP, *Annex I: Schedule of Australia*, 2; AUSFTA, *Annex I: Schedule of Australia*, 1.

⁹⁷ TPP, *Annex II: Schedule of Australia*, 4; AUSFTA, *Annex II: Schedule of Australia*, 2.

⁹⁸ TPP, *Annex II: Schedule of Australia*, 20-29.

consistent measures,⁹⁹ again subject in the TPP to market access improvements specified in its Appendix II-A.¹⁰⁰

Many of the other non-conforming measures listed by Australia and the US are similar in the AUSFTA and the TPP. Australia lists under Annex II of both treaties, for example, local content in relation to broadcasting and audiovisual services (with more limited restrictions in the AUSFTA),¹⁰¹ and wholesale and retail trade services of tobacco products, alcoholic beverages or firearms,¹⁰² The US lists in Annex I, for example,¹⁰³ foreign/residential restrictions on licences for software exports.¹⁰⁴ Both parties list nationality restrictions in relation to patent attorneys,¹⁰⁵ customs brokers,¹⁰⁶ and indigenous/minority peoples,¹⁰⁷ as well as measures with respect to services such as law enforcement, correctional services, social security, public education, health, and child care.¹⁰⁸ In the TPP, Australia adds to this last reservation ‘public utilities’ and explicitly mentions blood and blood-related products,¹⁰⁹ as well as Australia’s PBS,¹¹⁰ perhaps in response to the controversy concerning the AUSFTA’s impact on that scheme.¹¹¹ The non-conforming measure listed by Australia in the AUSFTA requiring the consent of the Wheat Export Authority to export wheat¹¹² does not appear in the TPP, as the successor to that body has been abolished.¹¹³ Australia and the US have both added a reservation for betting and gambling services in the TPP¹¹⁴ that does not appear in the AUSFTA, presumably as a result of the WTO Appellate Body’s ruling against the US in a case brought by the Dominican Republic in *US – Gambling*, which was circulated on 7 April 2005, shortly after the AUSFTA entered into force on 1 January 2005.

⁹⁹ TPP, *Annex II: Schedule of the United States*, 11; AUSFTA, *Annex II: Schedule of the United States*, 9.

¹⁰⁰ TPP, *Annex II: Schedule of the United States*, 13-16.

¹⁰¹ TPP, *Annex II: Schedule of Australia*, 9-10; AUSFTA, *Annex II: Schedule of Australia*, 5-7.

¹⁰² TPP, *Annex II: Schedule of Australia*, 13; AUSFTA, *Annex II: Schedule of Australia*, 9.

¹⁰³ See also Gary Clyde Hufbauer, ‘Liberalization of Services Trade’ in Peterson Institute for International Economics, *Assessing the Trans-Pacific Partnership Volume I: Market Access and Sectoral Issues* (February 2016) 81, 87.

¹⁰⁴ TPP, *Annex I: Schedule of the United States*, 4; AUSFTA, *Annex I: Schedule of the United States*, 3.

¹⁰⁵ TPP, *Annex I: Schedule of the United States*, 14; AUSFTA, *Annex I: Schedule of the United States*, 9; TPP, *Annex I: Schedule of Australia*, 7; AUSFTA, *Annex I: Schedule of Australia*, 6.

¹⁰⁶ TPP, *Annex I: Schedule of the United States*, 10; AUSFTA, *Annex I: Schedule of the United States*, 6; TPP, *Annex I: Schedule of Australia*, 11; AUSFTA, *Annex I: Schedule of Australia*, 12.

¹⁰⁷ TPP, *Annex II: Schedule of the United States*, 4; AUSFTA, *Annex II: Schedule of the United States*, 4; TPP, *Annex II: Schedule of Australia*, 3; AUSFTA, *Annex II: Schedule of Australia*, 1.

¹⁰⁸ TPP, *Annex II: Schedule of the United States*, 3; AUSFTA, *Annex II: Schedule of the United States*, 3; TPP, *Annex II: Schedule of Australia*, 8 (see also 14); AUSFTA, *Annex II: Schedule of Australia*, 4 (see also 10).

¹⁰⁹ TPP, *Annex II: Schedule of Australia*, 8, n 7; cf Exchange of letters between Mark Vaile, Minister for Trade, Australia, and Robert Zoellick, United States Trade Representative (18 May 2004) re blood fractionation in the context of government procurement; see also TPP annex 9-B n37.

¹¹⁰ TPP, *Annex II: Schedule of Australia*, 8, n 8; cf Exchange of letters between Mark Vaile, Minister for Trade, Australia, and Robert Zoellick, United States Trade Representative (18 May 2004) re PBS under AUSFTA annex 2-C (pharmaceuticals).

¹¹¹ See above n 8 and corresponding text.

¹¹² AUSFTA, *Annex I: Schedule of Australia*, 11.

¹¹³ Wheat Export Marketing Amendment Act 2012 (Cth). See also Productivity Commission, Australian Government, *Wheat Export Marketing Arrangements* (Inquiry Report No 51, 1 July 2010); Wheat Industry Advisory Taskforce, *Final Report* (30 June 2014).

¹¹⁴ TPP, *Annex II: Schedule of the United States*, 10; TPP, *Annex II: Schedule of Australia*, 15.

Australia and the US both include a general MFN reservation in relation to other ‘bilateral or multilateral international agreement[s]’ in their schedules to Annex II of the AUSFTA and the TPP.¹¹⁵ These allow preferential treatment pursuant to such agreements signed or in force before the entry into force of the relevant treaty (AUSFTA or TPP), as well as preferential treatment pursuant to such agreements signed after entry into force with respect to aviation, fisheries, or maritime matters including salvage. The US TPP entry adds to the latter list of subject matter ‘launch of satellites in the international commercial space launch market’.¹¹⁶ The Australian TPP entry adds ‘more favourable treatment to any service supplier or investor taken as part of a process of economic integration or trade liberalisation’ between Australia and New Zealand,¹¹⁷ with reference to the *Australia New Zealand Closer Economic Relations Trade Agreement* (‘ANZCERTA’).¹¹⁸ Australia also adds ‘more favourable treatment to any service supplier or investor of a Pacific Island Forum member state’ under future international agreements,¹¹⁹ presumably with a view to the ongoing negotiations towards the *Pacific Agreement on Closer Economic Relations* (‘PACER Plus’).¹²⁰

D Domestic Regulation of Services and Service Suppliers

The obligations regarding domestic regulation of services and service suppliers are generally more extensive in the TPP than in the AUSFTA. For example, under the TPP, each party must ensure that ‘all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner’.¹²¹ A corresponding obligation exists under the AUSFTA only under the specific chapter on financial services.¹²² However, this difference is of limited significance, since all TPP parties are also WTO Members, and the GATS contains a similar obligation with respect to those service sectors in which WTO Members have made commitments.¹²³ The TPP also imposes more detailed procedural requirements than the AUSFTA¹²⁴ or the GATS¹²⁵ regarding authorization of service suppliers, such as requiring the

¹¹⁵ TPP, *Annex II: Schedule of the United States*, 12; AUSFTA, *Annex II: Schedule of the United States*, 10; TPP, *Annex II: Schedule of Australia*, 19; AUSFTA, *Annex II: Schedule of Australia*, 14.

¹¹⁶ TPP, *Annex II: Schedule of the United States*, 12.

¹¹⁷ TPP, *Annex II: Schedule of Australia*, 19.

¹¹⁸ *Australia New Zealand Closer Economic Relations Trade Agreement*, signed 28 March 1983 (entered into force 1 January 1983) (‘ANZCERTA’). See also *Protocol on Trade in Services to the Australia New Zealand Closer Economic Relations—Trade Agreement*, signed 18 August 1988 (entered into force 1 January 1989); *Protocol on Investment to the Australia—New Zealand Closer Economic Relations Trade Agreement*, signed 16 February 2011 (entered into force 3 January 2013).

¹¹⁹ TPP, *Annex II: Schedule of Australia*, 19.

¹²⁰ See New Zealand Ministry of Foreign Affairs and Trade, *PACER Plus* <<https://www.mfat.govt.nz/en/trade/free-trade-agreements/agreements-under-negotiation/pacer/>> (last visited 19 August 2016).

¹²¹ TPP art 10.8.1.

¹²² AUSFTA art 13.11.2.

¹²³ GATS art VI:1.

¹²⁴ AUSFTA art 10.7.1.

¹²⁵ GATS art VI:3.

relevant authorities to provide an indicative timeframe for processing applications, reasons for rejecting an application, and the opportunity to correct minor errors in an application.¹²⁶

Despite the increased detail of these provisions, the TPP contains less stringent domestic regulation obligations than the AUSFTA in some respects. With regard to qualifications and licensing, the TPP and the AUSFTA both impose ‘best endeavours’ type obligations on parties ‘[w]ith a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services’.¹²⁷ Both treaties require parties to ‘endeavour to ensure’ that such measures are ‘based on objective and transparent criteria’ and, with respect to licensing, ‘not in themselves a restriction on the supply of the service’.¹²⁸ The TPP removes the AUSFTA requirement to endeavour to ensure that such measures are ‘not more burdensome than necessary to ensure the quality of the service’.¹²⁹ However, that obligation already applies under GATS.¹³⁰ The TPP also further softens the requirement to ‘endeavour to ensure’ by explicitly recognising parties’ ‘right to regulate and to introduce new regulations on the supply of services in order to meet its policy objectives’.¹³¹ The TPP also explicitly recognises the relevance of ‘international standards of relevant international organisations’ applied by the relevant party in determining whether the party complies with these obligations—a recognition that already appears in GATS.¹³²

E *Enhanced Disciplines on Electronic Commerce*

The TPP is the first trade agreement to contain a comprehensive chapter on electronic commerce, building on the US experience in its previous PTAs including the AUSFTA.¹³³ The electronic commerce chapter in AUSFTA (chapter 16) has a narrow scope centred on non-discriminatory treatment of ‘digital products’,¹³⁴ defined as ‘the digitally encoded form of computer programs, text, video, images, sound recordings, and other products, regardless of whether they are fixed on a carrier medium or transmitted electronically’.¹³⁵ In contrast, TPP chapter 14 applies to ‘measures adopted or maintained by a Party that affect trade by electronic means’¹³⁶ (excluding government procurement and information held or processed by or on behalf of a Party).¹³⁷ The TPP electronic

¹²⁶ TPP art 10.8.4.

¹²⁷ TPP art 10.8.2; AUSFTA art 10.7.2.

¹²⁸ TPP art 10.8.2; AUSFTA art 10.7.2.

¹²⁹ AUSFTA art 10.7.2(b).

¹³⁰ GATS arts VI:4(b), VI:5(a)(i).

¹³¹ TPP art 10.7.2.

¹³² GATS art VI:5(b).

¹³³ AUSFTA ch 16.

¹³⁴ AUSFTA art 16.4.

¹³⁵ AUSFTA art 16.8.4, footnotes omitted.

¹³⁶ TPP art 14.2.2.

¹³⁷ TPP, art 14.2.3.

commerce chapter addresses several matters that are not covered in the AUSFTA, such as online consumer protection,¹³⁸ net neutrality,¹³⁹ spam,¹⁴⁰ and involuntary access to source code.¹⁴¹

With the growth of electronic commerce, the flow of data across borders has become increasingly important to global trade.¹⁴² Article 14.11.2 of the TPP therefore requires parties to ‘allow the cross-border transfer of information by electronic means, including personal information, when this activity is for the business of a covered person’. The term ‘covered person’ is defined to include investors, investments and service suppliers but to exclude financial institutions, investors in financial institutions, and cross-border financial service suppliers.¹⁴³ In addition, art 14.13.2 prohibits parties from ‘requir[ing] a covered person to use or locate computing facilities in that Party’s territory as a condition for conducting business in that territory’.¹⁴⁴

The data transfer obligation in art 14.11.2 is subject to a general exception in art 14.11.3, which allows parties to adopt and maintain a measure inconsistent with that provision ‘to achieve a legitimate public policy objective’, provided that the measure:

- (a) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and
- (b) does not impose restrictions on transfers of information greater than are required to achieve the objective.

(The localization prohibition in art 14.13.2 is also subject to an exception in similar terms.)¹⁴⁵ Paragraph (a) of art 14.11.3 draws on the *chapeau* of GATT art XX and GATS art XIV, while paragraph (b) appears to draw on TBT art 2.2. This ‘borrowing’ of language could suggest that, in a TPP state-state dispute,¹⁴⁶ relevant WTO jurisprudence might be persuasive in interpreting and applying this exception. The WTO Appellate Body has generally adopted a strict approach to the GATT/GATS general exceptions (including the *chapeaux*), making it difficult for WTO Members to rely on them where, for example, they involve discrimination.¹⁴⁷ In contrast, the Appellate Body has been relatively deferential in its approach to TBT art 2.2, not yet finding a violation of that

¹³⁸ TPP art 14.7.

¹³⁹ TPP art 14.10.

¹⁴⁰ TPP art 14.14.

¹⁴¹ TPP art 14.17.

¹⁴² Lee Branstetter, ‘TPP and Digital Trade’ in Jeffrey Schott and Cathleen Cimino-Isaacs (eds), *Assessing the Trans-Pacific Partnership Volume 2: Innovations in Trading Rules* (Peterson Institute for International Economics, 2016) 72, 74.

¹⁴³ TPP art 14.1.

¹⁴⁴ Computing facilities are defined as ‘computer servers and storage devices for processing or storing information for commercial use’: TPP art 14.1.

¹⁴⁵ TPP art 14.13.3.

¹⁴⁶ See TPP ch 28.

¹⁴⁷ See, eg, Appellate Body Report, *Brazil – Retreaded Tyres*, [230], [232].

requirement, even in cases where it has found a violation of the non-discrimination obligation in TBT art 2.1.¹⁴⁸

The data transfer obligation in art 14.11.2 and the localization prohibition in art 14.13.2 are both subject to the non-conforming measures listed by countries under the general services chapter as discussed above.¹⁴⁹ This list provides a more certain basis for ensuring permission to adopt particular data transfer restrictions or localization requirements. For example, in its schedule to TPP Annex II, Australia ‘reserves the right to adopt or maintain any measure with respect to’ health (among other services), ‘to the extent that they are social services established or maintained for a public purpose’.¹⁵⁰ A footnote confirms that such measures ‘include measures for the protection of personal information relating to health’.¹⁵¹ Australia is therefore permitted to maintain its policy of restricting transfers of its citizens’ electronic health records abroad.¹⁵²

Australia and the US also agreed in a side letter to the TPP that if the US undertakes ‘any relevant additional commitments’ beyond the TPP regarding ‘the treatment of personal information of foreign nationals in another free trade agreement, it shall extend any such commitments to Australia’.¹⁵³ Effectively, this imposes an MFN-type obligation as between Australia and the US in relation to the protection of personal information, with respect to future PTAs. The side letter also includes a best-endeavours type national treatment obligations, stating that the US ‘will also endeavour to apply extensions of privacy protections with respect to personal information of foreign nationals held by the United States Government to Australian citizens and permanent residents’.¹⁵⁴

IV TPP DEVELOPMENTS IN INVESTMENT PROTECTION

A *Further Clarification of Investment Obligations*

The AUSFTA investment chapter represented the first comprehensive set of investment obligations for Australia in a PTA¹⁵⁵ (as opposed to a BIT). At that time, Australia also had PTAs with New Zealand and Singapore, but investment was added to the New Zealand agreement only in recent years,¹⁵⁶ and the investment provisions in the agreement with Singapore were more limited (eg excluding an MFN obligation and a prohibition on performance requirements).¹⁵⁷ The investment chapters in the TPP (ch 9) and the AUSFTA (ch 11) have a broad scope of application

¹⁴⁸ See, eg, Appellate Body Report, *US – Tuna II (Mexico)*, [331] cf [297].

¹⁴⁹ TPP arts 14.2.5, 14.2.6.

¹⁵⁰ TPP, *Annex II: Schedule of Australia*, 8.

¹⁵¹ TPP, *Annex II: Schedule of Australia*, 8, n 6.

¹⁵² See *Personally Controlled Electronic Health Records Act 2012* (Cth) s 77.

¹⁵³ Exchange of letters between Andrew Robb, Minister for Trade and Investment, Australia, and Michael Froman, United States Trade Representative (4 February 2016).

¹⁵⁴ *Ibid.*

¹⁵⁵ Thomas Wescott, ‘Foreign Investment Issues in the *Australia-United States Free Trade Agreement*’ in (Summer 2005) *Economic Round-up* 70.

¹⁵⁶ See above n **Error! Bookmark not defined.**

¹⁵⁷ See *Singapore–Australia Free Trade Agreement*, signed 17 February 2003 (entered into force 28 July 2003).

based on their wide definitions of ‘investor’, ‘investment’ and ‘covered investment’.¹⁵⁸ The primary change in those definitions is the TPP’s exclusion from the definition of investment of ‘an order or judgment entered in a judicial or administrative action’.¹⁵⁹ The investment chapters do not apply to measures of a party covered by the financial services chapter.¹⁶⁰

The TPP makes a number of important changes to the core AUSFTA investment obligations, generally in the direction of enhancing state regulatory autonomy through clarification of the scope of obligations. In relation to the non-discrimination obligations (national treatment and MFN treatment), the TPP adds a footnote clarifying the meaning of ‘like circumstances’,¹⁶¹ similar to that discussed above in relation to the chapter on cross-border trade in services.¹⁶² The TPP also adds a clarification similar to that found in the services chapter regarding the application of the national treatment obligation to treatment by a regional level of government.¹⁶³ In addition, a separate TPP ‘Drafters’ Note’ makes clear that the national treatment and MFN obligations ‘do not prohibit all measures that result in differential treatment. Rather, they seek to ensure that foreign investors or their investments are not treated less favourably on the basis of their nationality’.¹⁶⁴ With respect to the MFN obligation, the TPP also specifies, ‘[f]or greater certainty’, that the relevant treatment ‘does not encompass international dispute resolution procedures or mechanisms, such as’ ISDS.¹⁶⁵ Thus, an investor could not use the TPP MFN obligation to invoke more favourable dispute settlement provisions from other PTAs or BITs, a technique that some tribunals have allowed in previous ISDS proceedings.¹⁶⁶

TPP art 9.6.1 requires parties to ‘accord to covered investments treatment in accordance with applicable customary international law principles, including fair and equitable treatment and full protection and security’. AUSFTA art 11.5.1 is in similar terms. The two agreements also specify, ‘[f]or greater certainty’, that these concepts ‘do not require treatment in addition to or beyond that which is required’ by the customary international law minimum standard of treatment,¹⁶⁷ and explain further in annexes the meaning of ‘customary international law’ in this context.¹⁶⁸ The TPP and the AUSFTA also: identify denial of justice as an example of a breaches of the fair and equitable treatment (‘FET’) standard;¹⁶⁹ specify that full protection and security requires each

¹⁵⁸ TPP arts 9.1, 9.2.1; AUSFTA arts 11.1.1, 11.17.4, 11.17.6.

¹⁵⁹ TPP art 9.1 (definition of ‘investment’).

¹⁶⁰ TPP art 9.3.3; AUSFTA art 11.2.3.

¹⁶¹ TPP n 14 to art 9.4.

¹⁶² See above n 77 and corresponding text.

¹⁶³ TPP art 9.4.3.

¹⁶⁴ TPP, *Drafters’ Note on Interpretation of ‘In Like Circumstances’ Under Article 9.4 (National Treatment) and Article 9.5 (Most-Favoured-Nation Treatment)* [2] (‘TPP Drafters’ Note’).

¹⁶⁵ TPP art 9.5.3.

¹⁶⁶ See, eg, *Maffezini v Spain (Decision of the Tribunal on Objections to Jurisdiction)*, ICSID Case No ARB/97/7, 25 January 2000 [54], [56]. See also, eg, Pavel Šturma, ‘Goodbye, *Maffezini*? On the Recent Developments of Most-Favoured-Nation Clause Interpretation in International Investment Law’ (2016) 15 *The Law and Practice of International Courts and Tribunals* 81.

¹⁶⁷ TPP art 9.6.2; AUSFTA art 11.5.2.

¹⁶⁸ TPP annex 9-A; AUSFTA annex 11-A.

¹⁶⁹ TPP art 9.6.2(a); AUSFTA art 11.5.2(a).

party to provide the level or police protection required under customary international law;¹⁷⁰ and make clear that a breach of another provision of the agreement or another treaty does not establish a breach of the obligation to accord the minimum standard of treatment.¹⁷¹

The TPP adds two important clarifications to this obligation, ‘[f]or greater certainty’. First, the TPP states that ‘the mere fact that a subsidy or grant has not been issued, renewed or maintained, or has been modified or reduced, by a Party, does not constitute a breach of this Article, even if there is loss or damage to an investment as a result of the covered investment as a result’.¹⁷² Second, the TPP specifies that ‘the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor’s expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result’.¹⁷³ This wording may be useful in combating some investment treaty decisions suggesting a significant or even determinative role for ‘legitimate expectations’ in the FET obligation.¹⁷⁴ However, the TPP could have protected the regulatory autonomy of host states even further in this provision by narrowing the scope of FET to reduce the discretion left to arbitrators in resolving FET claims. For example, the *Comprehensive Economic and Trade Agreement between Canada and the European Union* (‘CETA’)¹⁷⁵ provides an *exhaustive* list of conduct in breach of the FET standard such as denial of justice, fundamental breach of due process, manifest arbitrariness, targeted discrimination, and abusive treatment of investors,¹⁷⁶ while leaving scope for the treaty parties to review that content periodically.¹⁷⁷

The expropriation obligations in the TPP and the AUSFTA are broadly similar. However, the TPP adds a footnote defining the meaning of ‘public purpose’, which is one of the requirements of a lawful expropriation under both treaties:

For greater certainty, for the purposes of this Article, the term ‘public purpose’ refers to a concept in customary international law. Domestic law may express this or a similar concept by using different terms, such as ‘public necessity’, ‘public interest’ or ‘public use’.¹⁷⁸

More significantly, mirroring the FET provision, the TPP clarifies that a ‘decision not to issue, renew or maintain a subsidy or grant’ or to modify or reduce a subsidy or grant is not *per se*

¹⁷⁰ TPP art 9.6.2(b); AUSFTA art 11.5.2(b).

¹⁷¹ TPP art 9.6.3; AUSFTA art 11.5.3.

¹⁷² TPP art 9.6.5.

¹⁷³ TPP art 9.6.4.

¹⁷⁴ See, eg, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc v Canada*, PCA Case No 2009-04, UNCITRAL, Award on Jurisdiction and Liability (17 March 2015) [282], [445], [447]-[449], [453], [455]; cf Dissenting Opinion of Professor Donald McRae (10 March 2015) [5], [33], [36].

¹⁷⁵ *Comprehensive Economic and Trade Agreement between Canada and the European Union*, revised text released by the European Commission, 29 February 2016 (not yet signed or entered into force) (‘CETA’).

¹⁷⁶ CETA art 8.10.2.

¹⁷⁷ CETA art 8.10.3.

¹⁷⁸ TPP n 17 to art 9.8.1(a).

expropriation, ‘in the absence of any specific commitment under law or contract’ to do so, or in accordance with relevant terms or conditions attached to the subsidy or grant.¹⁷⁹

TPP annex 9-B adds in relation to expropriation:

Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances.¹⁸⁰

AUSFTA includes a provision in similar terms in annex 11-B.¹⁸¹ The inclusion in both treaties of the words ‘except in rare circumstances’ detracts from the force of this provision as a means of ensuring policy space for host states. The TPP parties did not choose to take advantage of this opportunity to remove or modify these words, as some other states have done in their model¹⁸² or concluded treaties, including in Australia’s PTA with Malaysia.¹⁸³ Nevertheless, the TPP does add a footnote here identifying a number of examples of health regulations, ‘[f]or greater certainty’, including measures ‘with respect to the regulation, pricing and supply of, and reimbursement for, pharmaceuticals (including biological products)’ (presumably reflecting Australia’s specific concern about its PBS) ‘and blood and blood-related products’ (again reflecting Australia’s particular concerns in this area).¹⁸⁴

The annexes on expropriation also differ in two other ways. First, the AUSFTA sets out the parties’ understanding that the expropriation obligation ‘is intended to reflect customary international law’,¹⁸⁵ similarly to that statement in relation to the minimum standard of treatment. That understanding does not appear in the TPP. However, it is not commonly included in BITs or PTAs. Second, both treaties refer to factors relevant to the identification of indirect expropriation including ‘the extent to which the government action interferes with distinct, reasonable investment-backed expectations’.¹⁸⁶ The TPP adds a footnote here, explaining:

For greater certainty, whether an investor’s investment-backed expectations are reasonable depends, to the extent relevant, on factors such as whether the government provided the investor with binding written assurances and the nature and extent of governmental regulation or the potential for government regulation in the relevant sector.¹⁸⁷

This wording may be helpful in enhancing regulatory autonomy of host states by implying that general assurances to the public (as opposed to ‘binding written assurances’ to a specific investor) may not give rise to legitimate expectations of investors relevant to expropriation, and by

¹⁷⁹ TPP art 9.8.6.

¹⁸⁰ TPP annex 9-B [3(b)].

¹⁸¹ AUSFTA annex 11-B [4(b)].

¹⁸² See, eg, Model Text for the Indian Bilateral Investment Treaty (December 2015) art 5.5.

¹⁸³ MAFTA annex on expropriation [4].

¹⁸⁴ TPP annex 9-B n 37; see also above nn 109-111 and corresponding text.

¹⁸⁵ AUSFTA annex 11-B [1].

¹⁸⁶ TPP annex 9-B [3(a)(ii)]; AUSFTA annex 11-B [4(a)(ii)].

¹⁸⁷ TPP annex 9-B n 36.

emphasising that investors cannot assume that an area will remain free of regulation or frozen in its current regulated state.¹⁸⁸

B *Exceptions and Non-Conforming Measures (Investment)*

Unlike, for example, the CETA,¹⁸⁹ the TPP contains no general exception akin to GATT art XX that applies to the investment chapter. Instead, TPP art 29.1.1 applies GATT art XX *mutatis mutandis* to a range of TPP chapters but not the investment chapter, while TPP art 29.1.3 applies GATS art XIV *mutatis mutandis* to other chapters including ch 10 (cross-border trade in services) and ch 14 (electronic commerce) but not the investment chapter. The investment chapter itself contains some GATT art XX-like language, but only in providing limited exceptions specifically regarding the prohibition of performance requirements.¹⁹⁰ The AUSFTA adopts a similar approach.¹⁹¹ Also in the investment chapter, TPP art 9.16 provides:

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 in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.

This provision acknowledges a wider (non-exhaustive) range of regulatory objectives in comparison with AUSFTA art 11.11, which is similarly worded but restricted to ‘environmental concerns’. However, both these provisions are not true exceptions because they include the words ‘any measure otherwise consistent with this Chapter’, thus not offering a defence to a breach of an obligation in the investment chapter. The TPP also adds a hortatory provision in the investment chapter ‘reaffirm[ing] the importance of each Party encouraging enterprises ... to voluntarily incorporate ... internationally recognised standards, guidelines and principles of corporate social responsibility’.¹⁹²

As noted above, the schedules of Australia and the US to Annexes I and II of the TPP are broadly similar to those in the AUSFTA and apply to both the general services chapters (TPP ch 10; AUSFTA ch 10) and the investment chapters (TPP ch 9; AUSFTA ch 11). Specifically, the investment obligations regarding non-discrimination (national treatment and MFN treatment), performance requirements, and senior management do not apply to the listed non-conforming measures¹⁹³ (subject to the relevant qualifications regarding consultations¹⁹⁴ and amendments as discussed above in relation to services). The US lists in Annex I in both treaties, for example,

¹⁸⁸ See, eg, *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7, Award (8 July 2016) [269].

¹⁸⁹ CETA art 28.3.

¹⁹⁰ TPP arts 9.10.3(d), 9.10.3(h).

¹⁹¹ AUSFTA arts 11.9.3(c), 22.1.1, 22.1.2.

¹⁹² TPP art 9.17.

¹⁹³ TPP arts 9.12.1-9.12.2; AUSFTA arts 11.13.1-11.13.2.

¹⁹⁴ See TPP art 9.12.3.

foreign/residential restrictions on licences for nuclear facilities¹⁹⁵ and radio.¹⁹⁶ Under Annex I in both treaties, Australia's non-conforming measures related to investment include its foreign investment policy (in particular those investments requiring notification and approval by the Australian Government),¹⁹⁷ and foreign ownership/management restrictions on Telstra (with respect to telecommunications services),¹⁹⁸ Commonwealth Serum Laboratories (with respect to health services),¹⁹⁹ and Qantas²⁰⁰ and other Australian international airlines.²⁰¹ Under Annex II in both treaties, Australia lists restrictions on foreign investment in urban land.²⁰² Australia also lists in the TPP non-conforming measures related to agricultural land and agribusinesses,²⁰³ and privatization of government owned entities or assets.²⁰⁴

C *The Introduction of ISDS in the Australia–US Relationship*

The AUSFTA is the only US PTA lacking an ISDS mechanism, a result that recognises, according to Australia, 'the Parties' open economic environments and shared legal traditions, and the confidence of investors in the fairness and integrity of their respective legal systems'.²⁰⁵ Various US interests had objected to this outcome during the AUSFTA negotiations.²⁰⁶ Australia or the US could nevertheless raise a concern about compliance with the AUSFTA investment chapter pursuant to the AUSFTA state to state dispute settlement provisions.²⁰⁷ The parties also agreed in the AUSFTA that, if either of them 'considers that there has been a change in circumstances affecting the settlement of disputes on matters within the scope of' the investment chapter, the party may request consultations with the other party with a view towards allowing an investor to submit a claim to arbitration and establishing appropriate procedures in this regard.²⁰⁸

The parties' confidence in each others' legal systems (which would include, for example, the ability of a foreign investor to bring an administrative or constitutional claim within domestic courts) might have been expected to lead to the exclusion of ISDS from the TPP, or at least its exclusion as between the US and Australia. This result would have accorded with the trade policy

¹⁹⁵ TPP, *Annex I: Schedule of the United States*, 21; AUSFTA, *Annex I: Schedule of the United States*, 1.

¹⁹⁶ TPP, *Annex I: Schedule of the United States*, 12-13; AUSFTA, *Annex I: Schedule of the United States*, 10.

¹⁹⁷ TPP, *Annex I: Schedule of Australia*, 3-6; AUSFTA, *Annex I: Schedule of Australia*, 2-5.

¹⁹⁸ TPP, *Annex I: Schedule of Australia*, 13; AUSFTA, *Annex I: Schedule of Australia*, 13.

¹⁹⁹ TPP, *Annex I: Schedule of Australia*, 14; AUSFTA, *Annex I: Schedule of Australia*, 17.

²⁰⁰ TPP, *Annex I: Schedule of Australia*, 18; AUSFTA, *Annex I: Schedule of Australia*, 20.

²⁰¹ TPP, *Annex I: Schedule of Australia*, 17; AUSFTA, *Annex I: Schedule of Australia*, 19.

²⁰² TPP, *Annex II: Schedule of Australia*, 5; AUSFTA, *Annex II: Schedule of Australia*, 3.

²⁰³ TPP, *Annex II: Schedule of Australia*, 6.

²⁰⁴ TPP, *Annex II: Schedule of Australia*, 7.

²⁰⁵ DFAT, *Australia–United States Free Trade Agreement: Guide to the Agreement* (March 2004) 121. See also Parliament of the Commonwealth of Australia, Joint Standing Committee on Treaties, *Report 61: The Australia–United States Free Trade Agreement* (June 2004) [4.23]-[4.24].

²⁰⁶ See, eg, William H Cooper, *The US–Australia Free Trade Agreement: Provisions and Implications*, CRS Report for Congress (Library of Congress, 12 January 2005) 16.

²⁰⁷ AUSFTA art 11.16.2.

²⁰⁸ AUSFTA art 11.16.

statement released by Julia Gillard’s Labor government in 2011, which involved a departure from previous Australian approaches to ISDS:

[T]he Government does not support provisions that would confer greater legal rights on foreign businesses than those available to domestic businesses. ... In the past, Australian Governments have sought the inclusion of investor-state dispute resolution procedures in trade agreements with developing countries at the behest of Australian businesses. The Gillard Government will discontinue this practice. ...²⁰⁹

This anti-ISDS approach of the Australian government led to the exclusion of ISDS from Australia’s PTA with Malaysia, concluded in 2012.²¹⁰ That approach was also initially reflected in the TPP negotiations²¹¹ and in a leaked draft of the TPP investment chapter in 2012, which excluded Australia from the ISDS mechanism.²¹² However, following federal elections in Australia in 2013, the new Liberal/National coalition government reverted to an ad hoc approach to ISDS, to be assessed on a case by case basis.²¹³ Pursuant to that ad hoc approach, ISDS has since been included in Australia’s PTAs with the Republic of Korea²¹⁴ and China²¹⁵ but not with Japan.²¹⁶

A 2015 leak of the TPP investment chapter suggested that the Australian position on ISDS had changed somewhat in the context of the TPP, with the footnote excluding Australia from ISDS now including the note: ‘<<xx note: deletion of footnote is subject to certain conditions>>’.²¹⁷ Evidently, ISDS had become a bargaining chip for Australia—perhaps one that the Australian government ultimately cashed in for a ‘win’ on biologics as discussed above. The final inclusion of ISDS in the TPP,²¹⁸ including with respect to Australia, is therefore not surprising, despite being at odds with the underlying rationale for excluding ISDS from the AUSFTA. Consistent with ANZCERTA, Australia and New Zealand exclude ISDS as between themselves in the TPP,

²⁰⁹ DFAT, *Gillard Government Trade Policy Statement: Trading our way to more jobs and prosperity* (April 2011) 14.

²¹⁰ *Malaysia–Australia Free Trade Agreement*, signed 22 May 2012 (entered into force 1 January 2013) (‘MAFTA’).

²¹¹ See, eg, ‘Business Pushes Back on Australia’s Objection to Investor-State in TPP’ (2 March 2012) 30.9 *Inside US Trade* (online).

²¹² Citizens Trade Campaign, ‘Newly Leaked TPP Investment Chapter Contains Special Rights for Corporations’ (13 June 2012) *Investment* n 20: ‘[Section B does not apply to Australia or an investor of Australia. Notwithstanding any provision of this Agreement, Australia does not consent to the submission of a claim to arbitration under this Section.]’

²¹³ See, eg, Julie Bishop, ‘Free Trade Focus’ (28 March 2013) *On Line Opinion*; ‘Australia May be More Open to ISDS in TPP with Government Change’ (15 March 2013) 31 *Inside US Trade* (online).

²¹⁴ *Korea–Australia Free Trade Agreement*, signed 8 April 2014 (entered into force 12 December 2014) (‘KAFTA’) ch 11 s B.

²¹⁵ *Free Trade Agreement between the Government of Australia and the Government of the People’s Republic of China*, signed 17 June 2015 (entered into force 20 December 2015) (‘ChAFTA’) ch 9 s B.

²¹⁶ *Agreement between Australia and Japan for an Economic Partnership*, signed 8 July 2014 (entered into force 15 January 2015).

²¹⁷ WikiLeaks, ‘Trans-Pacific Partnership treaty: Advanced Investment Chapter working document for all 12 nations (January 20, 2015 draft)’ (25 March 2015) *Investment* n 29 (emphasis in original).

²¹⁸ TPP ch 9 s B.

pursuant to a side letter,²¹⁹ but no such side letter exists between Australia and the US or between any other TPP parties. This outcome is particularly significant for Australia as a potential respondent to ISDS claims because of US investors' experience with ISDS through the *North American Free Trade Agreement*,²²⁰ and the fact that 'the United States is the largest investor in Australia'.²²¹

A return to an Australian Labor government in the 2016 elections might have raised additional concerns about TPP ratification in view of its inclusion of ISDS, given that party's continued opposition to ISDS,²²² but the Coalition government prevailed. DFAT maintains that ISDS in the TPP will 'provide Australian investors with the ability to enforce these protections in many of Australia's key capital export markets, as well as many of the rapidly growing economies in the Asia-Pacific region'.²²³ DFAT also emphasises²²⁴ that Australia has excluded from ISDS in the TPP 'decision[s] under Australia's foreign investment policy ... on whether or not to approve a foreign investment proposal'.²²⁵

Some progressive features of the TPP enhance transparency and procedural aspects of the ISDS mechanism and might therefore alleviate some concerns with ISDS. For example, the TPP explicitly provides that:

- a tribunal 'may accept and consider written *amicus curiae* submissions ... from a person or entity that is not a disputing party but has a significant interest in the arbitral proceedings';²²⁶
- a tribunal may appoint experts to report on scientific matters;²²⁷
- hearings are to be open to the public;²²⁸
- the respondent is to make available to the public documentation including written submissions, transcripts of hearings, and orders and decisions of the tribunal (subject to appropriate procedures regarding confidential business information, classified government information or other protected information);²²⁹

²¹⁹ Exchange of letters between Andrew Robb, Minister for Trade and Investment, Australia, and Todd McClay, Minister of Trade, New Zealand (4 February 2016).

²²⁰ *North American Free Trade Agreement*, signed 17 December 1992, [1994] CTS 2 (entered into force 1 January 1994) ('NAFTA') ch 11 s B.

²²¹ Minister of Trade and Investment, '10 Years of Australian Businesses Making Use of AUSFTA', Media Release (2 July 2015).

²²² Australian Labor Party, *National Platform: A smart, modern, fair Australia* (July 2015) [71]: 'Labor in government will review ISDS provisions in existing trade and investment agreements and seek to work with Australia's trading partners to remove these provisions'.

²²³ DFAT, *Chapter Summary: Investment* (fact sheet updated 6 July 2016) 3.

²²⁴ See, eg, DFAT, *Chapter Summary: Investment* (fact sheet updated 6 July 2016) 5; DFAT, *TPP Outcomes: Investment* (fact sheet updated 12 October 2015) 1.

²²⁵ TPP art 9.19.1, n 31; TPP ch 9 annex 9-H, [1].

²²⁶ TPP art 9.23.3.

²²⁷ TPP art 9.27.

²²⁸ TPP art 9.24.2.

²²⁹ TPP arts 9.24.1, 9.24.4, 9.1 (definition of 'protected information').

- the parties are to provide guidance before TPP entry into force on relevant arbitral guidelines and rules on conflict of interest and any necessary modifications to the general code of conduct for dispute settlement proceedings under TPP ch 28: ‘Arbitrators shall comply with that guidance in addition to the applicable arbitral rules regarding independence and impartiality’;²³⁰ and
- the respondent may make preliminary objections for initial decision by the tribunal, for example that ‘a claim is manifestly without legal merit’.²³¹

Johnson and Sachs argue that these changes are relatively minor and will have a limited impact in reforming the broader investment law regime.²³² The TPP developments in this regard are certainly less radical than those proposed by the EU in conjunction with its negotiations with the United States towards the *Transatlantic Trade and Investment Partnership* (‘TTIP’), including an appellate court for ISDS proceedings.²³³ The TPP merely acknowledges the possibility of an ‘appellate mechanism’, providing for the parties to consider whether such a mechanism should apply to ISDS under the TPP ‘[i]n the event that’ such a mechanism ‘is developed in the future under other institutional arrangements.’²³⁴

D *The ‘Carve-Out’ of Tobacco Control Measures from ISDS*

Article 29.5 of the TPP introduces a novel ‘carve-out’ from ISDS with respect to tobacco control measures. Under that provision, a TPP party ‘may elect to deny the benefits’ of the TPP ISDS mechanism ‘with respect to claims challenging a tobacco control measure’ of that party.²³⁵ ‘Tobacco control measure’ is broadly defined in footnote 12 to art 29.5 as a measure:

related to the production or consumption of manufactured tobacco products (including products made or derived from tobacco), their distribution, labelling, packaging, advertising, marketing, promotion, sale, purchase, or use, as well as enforcement measures, such as inspection, recordkeeping, and reporting requirements’. For greater certainty, a measure with respect to tobacco leaf that is not in the possession of a manufacturer of tobacco products or that is not part of a manufactured tobacco product is not a tobacco control measure.

This provision was heavily pushed by the US in TPP negotiations and has been applauded by US health NGOs.²³⁶ At the same time, within the US, the carve-out has generated considerable debate

²³⁰ TPP art 9.22.6.

²³¹ TPP art 9.23.4.

²³² Lise Johnson and Lisa Sachs, *The TPP’s Investment Chapter: Entrenching, Rather Than Reforming a Flawed System*, Policy Paper, Columbia Centre on Sustainable Investment (November 2015) 19.

²³³ European Union, *Proposal for Investment Protection and Resolution of Investment Disputes* (12 November 2015) art 12.

²³⁴ TPP art 9.23.11.

²³⁵ The provision does not affect the state-to-state dispute settlement mechanism under TPP ch 28. See TPP art 29.5, n 11.

²³⁶ See, eg, Campaign for Tobacco-Free Kids, ‘In Historic Step for Public Health, Trans-Pacific Partnership Protects Health Measures from Tobacco Industry Attack’, Press Release (5 October 2015).

and has been one of the issues affecting the ratification process,²³⁷ particularly given tobacco industry interests in certain US states.

The carve-out is particularly significant in view of the investment treaty claims brought by Philip Morris against tobacco control measures of Australia²³⁸ and Uruguay,²³⁹ both of which failed after the conclusion of TPP negotiations. Australia (and New Zealand) have indicated their intention to elect to deny the benefits in respect of tobacco control measures in general.²⁴⁰ However, the wording of the provision makes clear that a party could make such an election even after a claim has been submitted to arbitration, in which case the claim would be dismissed. The structure of the carve-out thus creates the potential for significant savings in financial and human resources in defending tobacco control measures. In contrast, a reliance on a general GATT art XX-type exception (if it applied to the TPP investment chapter) would likely require the tribunal to first confirm its jurisdiction and then assess the substantive claims before reaching a decision on whether the exception was made out. Nevertheless, the carve-out assists only tobacco control measures rather than public health measures more broadly, without addressing the general need for reform of the international investment regime.²⁴¹

V CONCLUSION

Australia has widely proclaimed the benefits of the TPP, particularly in opening US agricultural markets to Australian producers and exporters, and in terms of its arguably minimal impact on the Australian legal framework with respect to intellectual property in general and biologics in particular. The TPP also generally represents progress compared to the AUSFTA in its more nuanced treatment of services and investment. The clarifications in the TPP to the non-discrimination obligations regarding services, its novel and more detailed provisions on electronic commerce, and its substantive and procedural additions in the investment chapter may help facilitate trade and investment between Australia and the US and the TPP countries more generally, while giving greater recognition to the existence of non-economic policy objectives such as the protection of public health. However, the Australian government has provided no reasons for introducing ISDS in its relations with the US, despite its deliberate exclusion from the AUSFTA in view of the two countries' well-established judicial systems. This step could have a lasting, and potentially negative, impact on regulatory sovereignty in Australia—much greater than the

²³⁷ See, eg, Vicki Needham 'Tobacco "Carve-Out" Sparks Bids to Sink the TPP' (8 November 2015) *The Hill* (online).

²³⁸ *Philip Morris Asia Ltd v Commonwealth of Australia*, PCA Case No 2012-12, UNCITRAL, Award on Jurisdiction and Admissibility (17 December 2015).

²³⁹ *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7, Award (8 July 2016); *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7, Decision on Jurisdiction (2 July 2013).

²⁴⁰ *Notification by Australia pursuant to Article 29.5 of the Trans-Pacific Partnership Agreement* (15 February 2016); 'Australia, NZ Intend to Deny Tobacco ISDS Challenges under TPP' (26 February 2016) 34.8 *Inside US Trade* (online).

²⁴¹ See Andrew D Mitchell, Tania Voon and Devon Whittle, 'Public Health and the Trans-Pacific Partnership Agreement' (2015) 5(2) *Asian Journal of International Law* 279, 290-293; see also Simon Lester, 'The TPP Tobacco Carveout: A Triumph of Politics Over Good Policy' (1 December 2015) *The Huffington Post* (online).

possibly positive effect of allowing TPP countries to preclude ISDS claims against tobacco control measures.

As with the AUSFTA, the broader impacts of the TPP for Australia, the US, and other TPP countries are uncertain. Even assuming ratification, economic studies have come to quite different conclusions about the TPP's significance.²⁴² Moreover, while developing TPP countries such as Malaysia and Viet Nam²⁴³ and perhaps Chile and Peru²⁴⁴ may feel the greatest positive effects, Australia and the US are likely to experience at most minimal benefits from the implementation of the TPP. The World Bank estimates a 0.4 per cent increase in US GDP as a result of the TPP, and a very slightly higher increase for Australia, with these two countries benefiting the least in terms of percentage GDP increases of all the TPP countries from the agreement.²⁴⁵ A study by the Peterson Institute for International Economics puts the figure for the US at 0.5 per cent by 2030,²⁴⁶ while emphasising that the TPP will 'raise real incomes in the United States by \$131 billion in 2030'²⁴⁷ (USD15 billion for Australia)²⁴⁸ and arguing that 'delaying the launch of the TPP by even one year would represent a \$94 billion permanent loss ... to the US economy'.²⁴⁹ In contrast, a study by Tufts University academics suggests instead that implementation of the TPP would lead to a 0.54 per cent decrease in US GDP growth by 2025 and increased growth of only 0.87 per cent for Australia.²⁵⁰

The RCEP negotiations are said to be coming to a close in 2016,²⁵¹ so that RCEP may be ready either to fill the void if TPP is not ratified,²⁵² or to allow China and other Asian countries currently outside the TPP to keep up with the preferential liberalization being implemented through the TPP

²⁴² 'World Bank, Tufts Studies Offer Starkly Different Pictures of TPP's Impact' (15 January 2016) 34.2 *Inside US Trade* (online).

²⁴³ World Bank, *Topical Issue: Potential Macroeconomic Implications of the Trans-Pacific Partnership* (Global Economic Prospects, January 2016) 227; Jeronim Capaldo and Alex Izurieta with Jomo Kwame Sundaram, *Trading Down: Unemployment, Inequality and Other Risks of the Trans-Pacific Partnership Agreement* (Global Development and Environment Institute, Tufts University, Working Paper No 16-01, January 2016) 17.

²⁴⁴ Jeronim Capaldo and Alex Izurieta with Jomo Kwame Sundaram, *Trading Down: Unemployment, Inequality and Other Risks of the Trans-Pacific Partnership Agreement* (Global Development and Environment Institute, Tufts University, Working Paper No 16-01, January 2016) 17.

²⁴⁵ World Bank, *Topical Issue: Potential Macroeconomic Implications of the Trans-Pacific Partnership* (Global Economic Prospects, January 2016) 226-227.

²⁴⁶ Peter A Petri and Michael G Plummer, 'The Economic Effects of the TPP: New Estimates' in Peterson Institute for International Economics, *Assessing the Trans-Pacific Partnership Volume 1: Market Access and Sectoral Issues* (February 2016) 6, 6.

²⁴⁷ *Ibid* 24.

²⁴⁸ *Ibid* 14.

²⁴⁹ *Ibid* 7.

²⁵⁰ Jeronim Capaldo and Alex Izurieta with Jomo Kwame Sundaram, *Trading Down: Unemployment, Inequality and Other Risks of the Trans-Pacific Partnership Agreement* (Global Development and Environment Institute, Tufts University, Working Paper No 16-01, January 2016) 17.

²⁵¹ See, eg, 'RCEP Nations Look to Surpass TPP Effort, Conclude Trade Deal This Year' (12 August 2016) 34.32 *Inside US Trade* (online).

²⁵² See Jenny Leonard, 'US-Australian Business Community Starts Final Push for US TPP Vote' (9 September 2016) 34.35 *Inside US Trade* (online); American Chamber of Commerce in Australia, *Trade and Government Committee: TPP Position Paper* (30 August 2016).

once it enters into force. In that case, the design of the TPP as a treaty open to accession by other countries may assist in gradually working towards a ‘Free Trade Area of the Asia Pacific’.²⁵³ At the same time, the EU is pursuing reform of international investment law as noted above, including through negotiations towards the TTIP and the conclusion of CETA as well as PTAs with other countries such as Viet Nam.²⁵⁴ The US has indicated some resistance to the EU’s investment court proposals in connection with the TTIP.²⁵⁵ The TPP may represent the alternative, ‘public law reformed version of investor-state arbitration’,²⁵⁶ in the event that the EU’s proposal fails to take hold, as well as the basis for TiSA negotiations in the services context. However, the TPP’s significance in both respects is likely to be considerably reduced if it does not enter into force, or if it does so with much delay or amendment.

²⁵³ See generally, eg, Meredith Kolsky Lewis, ‘The TPP and the RCEP (ASEAN+6) as Potential Paths Toward Deeper Asian Economic Integration’ (2013) 8(2) *Asian Journal of WTO & International Health Law and Policy* 359.

²⁵⁴ *European Union–Viet Nam Free Trade Agreement* (text released 1 February 2016 before legal review) arts 12-15.

²⁵⁵ See, eg, Krista Hughes and Philip Blenkinsop, ‘US wary of EU proposal for investment court in trade pact’ (29 October 2015) *Reuters* (online).

²⁵⁶ Stephan W Schill, ‘The European Commission’s Proposal of an “Investment Court System” for TTIP: Stepping Stone or Stumbling Block for Multilateralizing International Investment Law?’ (22 April 2016) 20(9) *ASIL Insights* (online).