

# Chapter 2

## Background

### Introduction

- 2.1 This chapter will provide a brief background to the TPP including:
- the negotiation and agreement of the TPP;
  - a summary of the TPP's chapters;
  - the inquiry by the Joint Standing Committee on Treaties (JSCOT); and
  - other recent events.

### Negotiation and agreement

2.2 The TPP is a regional trade agreement between the governments of Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam.

2.3 Negotiations for the TPP were commenced in 2008 and concluded on 5 October 2015. The TPP text was then subject to a process of legal review, translation and verification. The legally-verified English-language version of the TPP text was released on 26 January 2016. On 4 February 2016, the TPP was formally signed in Auckland by representatives of participating countries, including the then Minister for Trade and Investment, the Hon Andrew Robb AO.<sup>1</sup>

- 2.4 The Ministers' statement released following the signing of the TPP included:

After more than five years of intensive negotiations, we have come to an agreement that will support jobs, drive sustainable growth, foster inclusive development, and promote innovation across the Asia-Pacific region. Most importantly, the agreement achieves the goal we set forth of an ambitious, comprehensive, high standard and balanced agreement that will benefit our nation's citizens.

TPP brings higher standards to nearly 40 percent of the global economy. In addition to liberalizing trade and investment between us, the agreement addresses the challenges our stakeholders face in the 21st century, while taking into account the diversity of our levels of development. We expect this historic agreement to promote economic growth, support higher-paying jobs; enhance innovation, productivity and competitiveness; raise living standards; reduce poverty in our countries; and to promote transparency, good governance, and strong labor and environmental protections.<sup>2</sup>

---

1 Department of Foreign Affairs and Trade (DFAT), 'Background Document: Implementation Timeline – Trans-Pacific Partnership Agreement', 9 February 2016, p. 1, available at: <http://dfat.gov.au/trade/agreements/tpp/> (accessed 16 January 2017).

2 'Minister's statement' available at <http://dfat.gov.au/trade/agreements/tpp/outcomes-documents/Pages/ministers-statement.aspx> (accessed 16 January 2017).

## **Trans-Pacific Partnership Agreement**

2.5 The text of the TPP comprises 30 Chapters, with associated Annexes and schedules, and four separate Annexes (including Schedules of Commitments for all TPP parties). The National Interest Analysis (NIA) contains an overview of the chapters of the TPP. This has been extracted below.

2.6 The TPP is a broad and comprehensive agreement that will liberalise and facilitate trade and investment between all TPP Parties. Upon entry into force, or over time, each Party is required to eliminate or reduce specified tariffs and non-tariff barriers or restrictive policies on imports of goods from the other Parties.

2.7 The elimination and reduction of tariffs on goods (Chapter 2) that meet the agreed Rules of Origin criteria (Chapter 3) is in accordance with each Party's Schedule of tariff commitments, and with Tariff Rate Quotas specified. Article 2.4.3 (Elimination of Customs Duties) affords any one or more of the Parties with the ability to request consultations with a view to accelerating tariff elimination as set out in their respective Schedules. Under Chapters 10 and 11 of the TPP, Parties will also be required to eliminate barriers or restrictive policies on foreign services and service suppliers.

2.8 Under the Investment (Chapter 9), Cross-Border Trade in Services (Chapter 10) and Financial Services (Chapter 11) chapters, each Party is required to grant market access and non-discriminatory treatment (known as national treatment and most favoured nation (MFN) treatment) to investments and services from the other Parties. In Australia's case, national and MFN treatment will apply unless otherwise specified in the non-conforming measures annexes to the TPP (Annexes I and II). In the Investment Chapter, each Party is also required not to expropriate or nationalise a covered investment unless in certain circumstances; and to treat a foreign investor or investment in accordance with customary international law, including fair and equitable treatment and full protection and security.

2.9 The TPP also contains the Parties' commitments and disciplines on:

- (a) Textiles and Apparel (Chapter 4);
- (b) Customs Administration and Trade Facilitation (Chapter 5);
- (c) Trade Remedies (Chapter 6);
- (d) Sanitary and Phytosanitary Measures (Chapter 7);
- (e) Technical Barriers to Trade (Chapter 8);
- (f) Temporary Entry of Business Persons (Chapter 12);
- (g) Telecommunications (Chapter 13);
- (h) Electronic Commerce (Chapter 14);
- (i) Government Procurement (Chapter 15);
- (j) Competition Policy (Chapter 16);
- (k) State-Owned Enterprises and Designated Monopolies (Chapter 17);

- 
- (l) Intellectual Property (Chapter 18);
  - (m) Labour (Chapter 19);
  - (n) Environment (Chapter 20);
  - (o) Cooperation and Capacity Building (Chapter 21);
  - (p) Competitiveness and Business Facilitation (Chapter 22);
  - (q) Development (Chapter 23);
  - (r) Small and Medium-Sized Enterprises (Chapter 24);
  - (s) Regulatory Coherence (Chapter 25);
  - (t) Transparency and Anti-corruption (Chapter 26); and
  - (u) Administrative and Institutional Provisions (Chapter 27).

2.10 Chapter 28 (Dispute Settlement) of the TPP contains a binding State-to-State dispute settlement mechanism modelled on previous FTAs and the WTO system. Most substantive obligations under the TPP will be subject to this mechanism, except those in the chapters on Competition Policy, Cooperation and Capacity Building, Competitiveness and Business Facilitation, Development, Small and Medium-Sized Enterprises, and Regulatory Coherence, and Annex 26-A (Transparency and Procedural Fairness for Pharmaceutical Products and Medical Devices) to the Transparency and Anti-Corruption Chapter. There is also an ISDS Mechanism.

2.11 Chapter 29 (Exceptions and General Provisions) is consistent with the approach taken in other FTAs in setting out several WTO-style general and security exceptions which apply to a number of chapters of the TPP. Such exceptions ensure FTA obligations do not unreasonably restrict government action in key policy areas, including action to protect essential security interests, the environment and health.

2.12 Chapter 30 (Final Provisions) provides for matters such as entry into force, amendments, accession, withdrawal and the Depository of the TPP. In particular, Article 30.5.1 (Entry into Force) provides that the TPP will enter into force 60 days after the date on which all original signatories have notified the Depository in writing of the completion of their applicable legal procedures. If not all original signatories have completed their applicable legal procedures within a period of two years, the TPP will enter into force, if at least six of the original signatories, which together account for at least 85 per cent of the combined gross domestic product (GDP) of the original signatories in 2013, have notified the Depository in writing of the completion of their applicable procedures within this period.

2.13 A number of side letters entered into with TPP participating countries mean that entry into force of the TPP will alter a number of Australia's existing treaties or treaty obligations. Seventeen of these side letters are of treaty status and are legally binding between the parties. An example is the agreement between Australia and the US suspending provisions in the Australia-United States Free Trade Agreement (AUSFTA) providing tariff rate quotas for beef and dairy and agricultural safeguards, and confirming that the applicable tariff rate quotas are those set out in the TPP. A further ten are of less-than-treaty status. These include a memorandum of

understanding with Vietnam to provide technical assistance regarding distance and blended education, and for a pilot program under which Australian universities will deliver online education into Vietnam.<sup>3</sup>

### **Joint Standing Committee on Treaties inquiry**

2.14 The TPP was tabled in Parliament on 9 February 2016 and referred to the Joint Standing Committee on Treaties (JSCOT). Following the federal election, the TPP was re-referred to JSCOT at the beginning of the 45<sup>th</sup> Parliament.

2.15 JSCOT tabled its report on the TPP on 30 November 2016. The majority report made six recommendations including that 'binding treaty action be taken' in relation to the TPP. In particular, the committee noted its concern that 'Australia's long-term commitment to free trade, from which Australia benefits immensely, is currently at risk from a resurgence of nationalism and isolationism internationally'.<sup>4</sup> Additional comments from Opposition members of JSCOT highlighted a number of 'process and substance concerns' regarding ratifying the TPP. These included:

- the need for independent economic analysis of treaties;
- the weakening of labour market testing and skills assessments; and
- the inclusion of ISDS provisions.

2.16 A dissenting report by the Australian Greens also outlined several concerns with the TPP and recommended 'no measures are taken towards Australia's acceptance or ratification of the TPP'.<sup>5</sup>

### **Recent events**

2.17 On 8 November 2016, Mr Donald Trump was elected as the 45<sup>th</sup> President of the United States. Prior to his election, President Trump had indicated his administration would withdraw the United States from the TPP as part of several 'actions to protect American workers'.<sup>6</sup> On 23 January 2017, President Trump signed an executive order withdrawing the United States from the TPP.<sup>7</sup>

2.18 Due to the structure of the entry into force provisions in the TPP, it is unlikely the TPP will enter into force without ratification by the United States. However, the Australian Government has continued to express hope that the TPP will enter into force. On 22 November 2016, the Trade Minister, the Hon Steven Ciobo MP,

---

3 *Submission 83*, 'National Interest Analysis' (NIA), pp 14-15.

4 JSCOT, *Trans-Pacific Partnership Agreement*, Report 165, November 2016, p. 101.

5 JSCOT, *Trans-Pacific Partnership Agreement*, Report 165, November 2016, p. 139.

6 Donald Trump, 'Donald J Trump Contract with the American voter', available at [https://assets.donaldjtrump.com/CONTRACT\\_FOR\\_THE\\_VOTER.pdf](https://assets.donaldjtrump.com/CONTRACT_FOR_THE_VOTER.pdf) (accessed 12 January 2017).

7 Conor Duffy, 'Donald Trump signs executive order withdrawing US from Trans-Pacific Partnership', ABC News, 24 January 2017.

---

indicated that the Australian Government would 'press ahead with our domestic processes' for ratification of the TPP'. Minister Ciobo stated:

The agreement as it currently stands allows 24 months for countries to ratify. We need the United States to ratify in order for the agreement to come into effect...[W]e need to give the US time. And ultimately as well, obviously the other member countries that agreed to the TPP will continue discussions, will continue discussions around what shape it should take going forward. And we have the option, as I said, of looking to drive the TPP forward without the United States, if that's what came to pass.<sup>8</sup>

2.19 On 14 January 2017, the Prime Minister, the Hon Malcolm Turnbull MP, indicated that Australia and Japan would coordinate toward the early entry into force of the TPP and the prompt conclusion of the RCEP [Regional Comprehensive Economic Partnership].<sup>9</sup> On 22 January 2017, Minister Ciobo issued a media release on the TPP which noted that while President Trump's decision not to ratify the TPP at this time was disappointing it was 'not unexpected'. The Minister stated that ratification was the strongest message Australia could send on the importance of the TPP. However, he also outlined that other options were being pursued:

This week at the World Economic Forum I met with Japan, Canada, Mexico, Singapore, New Zealand and Malaysia to discuss alternatives. The shape this takes will be the subject of discussion over coming months. A number of options are available to us and there is a strong desire to ensure the benefits of the TPP are not lost.<sup>10</sup>

2.20 On 26 January 2017, Prime Minister Turnbull indicated the Australian Government's decision on the legislation to ratify the TPP will depend on discussions with other TPP members and the position of the Senate.<sup>11</sup>

---

8 The Hon Steven Ciobo MP, Minister for Trade, Tourism and Investment, *Transcript*, 22 November 2016.

9 'Malcolm Turnbull, Shinzo Abe agree to push for TPP despite Trump scepticism' ABC News,

10 The Hon Steven Ciobo MP, Minister for Trade, Tourism and Investment, 'Trans-Pacific Partnership', *Media Release*, 22 January 2017.

11 AAP, 'Turnbull remains committed to TPP', *Sky News*, 27 January 2017 available at <http://www.skynews.com.au/news/politics/federal/2017/01/27/turnbull-remains-committed-to-ttp.html> (accessed 27 January 2017).

