

IMPACT OF TRANS-PACIFIC PARTNERSHIP ON THE ENERGY SECTOR

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Legal Briefings - By **Donald Robertson**

IN BRIEF

- TPP negotiations concluded on 5 October 2015. The full text is expected to be released in November 2015.
- The TPP is the largest regional and investment deal made, spanning 12 Pacific Rim states, encompassing approximately 40% of global GDP and worth approximately US\$28 trillion. Indonesia, a country whose economy is worth US\$ 1 trillion, with a population of 250 million people, has recently announced its firm intention to join the TPP members.
- It is not a traditional free trade agreement; it is a form of 'economic constitution' that provides the foundational rules for the governance of cross-border trade and investment in the Pacific region.
- It will affect a number of industries, including the energy sector.

SUMMARY OF THE TPP

The TPP is an ambitious and comprehensive mega-regional agreement, finally agreed on 5 October 2015 after years of hard negotiations. It was prompted in part by the changing nature of 'globalisation', which is now characterised by the creation and sustaining of global value chains, by which goods and services 'intertwine' the economies of a number of different countries. The Pacific Rim is a cluster of global value chains and intertwined marketplaces.

The TPP is unprecedented in its scope and complexity. Not only does it cover a wide range of market access issues for both goods and services, it also contains provisions in relation to issues that go well beyond traditional free trade agreements. Among the TPP's sector-specific rules are regulations addressing 'modern economy' industries and issues, such as financial services, telecommunications, intellectual property and e-commerce. The TPP deals with the integrity of market processes (anti-corruption, competition, government procurement and preferential status of state-owned enterprises); the economic regulation of markets (best practice regulation and regulatory coherence); and environmental, labour and other human rights issues. It also, controversially, provides protection for investors in the form of Investor-State Dispute Settlement (**ISDS**) provisions.

The TPP will affect the energy sector.

THE TPP'S IMPACT ON THE ENERGY SECTOR

- The agreement will eliminate tariffs on major Australian energy products, which will give certainty and market access gains to Australian energy producers and exporters.
- The TPP seeks to regulate the conduct of large state-owned enterprises (**SOEs**) that are principally engaged in commercial activities. The SOE provisions 'will level the playing field between Australian...oil and gas companies and the large SOEs that dominate these sectors in some TPP countries'.
- The TPP will create new exploration, extraction and production opportunities for Australian companies. For example, Mexico has permitted foreign participation in its energy sector for the first time.
- The TPP reproduces the familiar promises made in bilateral investment treaties in relation to foreign investments into host states, including non-discriminatory treatment, the prohibition of expropriation and free transfer of funds related to an investment.
- It also includes ISDS provisions, which give investors the right to bring claims against host states directly. Investor protections under the agreement will promote investment by Australian energy companies in TPP countries and allow them to better manage their risk.
- The TPP will also encourage foreign investment in energy in Australia by increasing the screening threshold at which private foreign investments in the energy sector are considered by the Foreign Investment Review Board.
- The chapter of the TPP on environmental regulation is of great relevance to the energy sector. TPP countries are required to promote cooperative efforts to address (among

other issues) energy efficiency and the development of cost-effective, low-emissions technologies and alternative, clean and renewable energy sources.

- The chapter addressing government procurement markets will provide greater opportunities for Australian energy suppliers to bid for government contracts in other TPP countries.
- The chapter relating to the temporary entry of business persons will allow Australian energy companies to transfer their executives and managers to work in TPP countries for extended periods more easily and to obtain visas for Australian contractors working on a temporary basis.

KEY MESSAGE

The TPP will have a multifaceted impact on the energy sector. Crucially, the agreement will eliminate tariffs on key energy exports; promote Australian investment overseas and foreign investment in the Australian energy sector, and encourage energy efficiency and the development of renewable energy.

This article was written by Donald Robertson, Partner, Sydney.

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