

MEGA-REGIONAL DEAL A GAME CHANGER

07 October 2015 | South East Asia, The Americas
Legal Briefings - By **Donald Robertson**

Donald Robertson outlines the significance of the TPP in the Sydney Morning Herald.

The Trans-Pacific Partnership (TPP) is an ambitious and comprehensive mega-regional agreement. Finally sealed in the early hours of Monday morning (US time), it is complex in its scope, spanning 12 diverse Pacific Rim nations, and worth approximately \$US28 trillion.

This encompasses approximately 40 per cent of global GDP, creating enormous political, economic and legal consequences.

Opponents need to go beyond slogans aimed against "free trade agreements", and understand that the TPP is much more than this.

AN 'ECONOMIC CONSTITUTION'

Criticism of the TPP as a free, or even preferential, trade agreement misses the point. The TPP is not so much a free trade agreement as an agreement dealing with the "economic governance" of member state markets. It is a form of economic constitution for the region, and should be judged as such. It is the most modern of its kind and responds to a number of discrete factors.

This includes the failure of the World Trade Organisation (**WTO**) Doha round, which became bogged down in its effort to secure an easing of global trade restrictions. Only now is the WTO catching up on the need for trade agreements to cover a broad range of issues that govern the infrastructure of trade and investment (the rules by which they are governed) to maintain their integrity.

"Globalisation" is another factor the TPP is responding to, but not globalisation in any simple sense. The predominant pattern of globalisation now is trade in production processes rather than trade in finished products. This is variously called "offshoring" or "supply chain trade", resulting from the great unbundling of production processes.

Global trade is no longer just about importing and exporting from one country to another, but about creating and sustaining global value chains, by which goods and services intertwine the economies of a number of different countries. In the context of the TPP, the Pacific Rim is a cluster of value chains and intertwined marketplaces.

REAL REGIONAL GAINS

The true gains to be had from trade will no longer be obtained at a global level, but at the regional level. The WTO may be structurally incapable of dealing with the regionality of trade patterns.

As a result, the TPP properly contains, for example, provisions in relation to corruption of market processes as well as strong rules in relation to protection of intellectual property. Importantly, it contains provisions on "regulatory coherence" to ensure a common set of rules govern the way member states regulate markets. Those strong rules are important because of the need for consistent treatment of property rights and consistent regulatory regimes across entire global value chains.

Corruption within developing economies needs to be reduced to allow market forces to truly identify where value can be added. The market should also not be distorted by special privileges applying to state-owned enterprises, which are nominally "sovereign" but, in truth, market players.

IMPORTANT SAFEGUARDS

The often-criticised Investor-State Dispute Settlement (ISDS) provisions are important safeguards of these economic governance provisions. There will be express carve-outs from those provisions (if they are even needed – general legal principles suggest not) to preserving the public interest in regulating markets and activities that affect the public interest, such as the environment and health.

Criticism of the TPP (especially around ISDS provisions) claiming that it interferes with the sovereignty of nation states is misplaced. It is true that any form of constitution regulates the sovereign powers of the member states. But this blurring of the lines of autonomous states is a necessary consequence of globalisation and the intertwining of markets, not of the TPP itself.

Importantly, the TPP illustrates an understanding among nation states that in a globalised world, their future health depends on that of their neighbours and they need to act accordingly, not out of a desire to advance only their own welfare.

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

This article was first published in the Sydney Morning Herald on 7 October 2015 [here](#).

LEGAL NOTICE

The contents of this publication are for reference purposes only and may not be current as at the date of accessing this publication. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

© Herbert Smith Freehills 2021

SUBSCRIBE TO STAY UP-TO-DATE WITH INSIGHTS, LEGAL UPDATES, EVENTS, AND MORE

Close

© HERBERT SMITH FREEHILLS LLP 2021