THE TRANS-PACIFIC PARTNERSHIP: AN ECONOMIC CONSTITUTION FOR THE PACIFIC RIM

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Legal Briefings – By **Donald Robertson, Partner and Leon Chung, Partner**

In this edition partners Don Robertson and Leon Chung discuss the breadth and impact of the world's largest trade partnership.

A TRANSFORMING WORLD OF TRADE AND INVESTMENT

We are witnessing a revolution in the governance of international commerce, with 3 major regional trade and investment agreements actively being pursued. The Transatlantic Trade and Investment Partnership (TTIP) is being negotiated between the EU and the United States of America. The Regional Comprehensive Economic Partnership (RCEP) will extend the existing ASEAN-Australia-New Zealand Free Trade Agreement into other Asia-Pacific countries, including China.

The third – the Trans-Pacific Partnership (TPP) – currently looks like being the first of these three treaties to be implemented. On 5 October 2015, the Trade Ministers negotiating the TPP agreed the last small number of items, after many years of hard talks.

Each of the three treaties seeks to liberalise trade and set out rules to govern that trade. They all have, or are likely to have, an investment protection chapter with dispute resolution provisions.

WHAT IS THE TTP?

The TPP is an agreement (still subject to ratification) between twelve countries around the Pacific Rim: the United States, Canada, Australia, New Zealand, Japan, Singapore, Malaysia, Vietnam, Mexico, Chile, Peru and Brunei.

A number of other states have expressed interest in acceding to the agreement, including Taiwan, South Korea, Thailand, India, Costa Rica, Bangladesh, Indonesia, the Philippines, Laos, Colombia and Uruguay.

The TPP is one route towards a free trade area of the Asia-Pacific.

China is not currently part of the TPP negotiations, although no longer hostile to it. Like other states in the region, China is actively pursuing trade and investment agreements. The RCEP is not a competing, but a complementary, trade and investment agreement.

The free trade area created by the TPP is worth nearly US$28 trillion (approximately 40% of global GDP), and covers 11% of global population. Trade between TPP countries amounts to 25% of global trade volume.

THE SPECIAL FEATURES OF THE TPP

The TPP is almost unrivalled in its complexity and scope. It is designed to bring together key Asia Pacific and North and South American countries, liberalising trade in nearly all goods and services. It will provide the foundational rules for the governance of cross-border trade and investment.

The TPP is much more than a traditional FTA. Although containing many usual FTA elements, of both a general and industry-specific character, it also contains "state of the art" provisions appropriate to the modern globalizing world and trade patterns. Global value chains ("offshoring" of manufacturing processes) now dominate those trade patterns and are one possible justification for the controversial strong "property rights" and regulatory controls contained within the draft text.

The treaty sets out the basic principles as to how countries will govern their markets, insofar as they affect cross-border flows of trade and capital. Those provisions amount to a form of "economic constitution" for the region as they will fundamentally shape the way in which markets operate and are regulated.

(a) Regulatory coherence and best practice

The TPP will require adherence to a form of best-practice regulation within each state. Best-practice under the TPP requires a transparent decision-making process, the testing of regulations by reference to the goals set, and a form of cost-benefit assessment. The intention is that, if each state follows the same approach to decision-making and has a common understanding of what market regulation is for and how it is designed, the regulatory measures taken by each state should cohere, based on objective criteria of rationality.

To many this proposal has been viewed as a restraint upon a sovereign state's "right to regulate" their own markets. However, the discipline required by best-practice regulation is not intended to be a restriction on sovereign rights of states, but rather to enhance the ability of host states to engage in international trade. The TPP contains express carve outs that preserve states' rights to regulate markets where there is a public interest in doing so.

(b) Competitive markets

The TPP seeks to eliminate competitive advantages accruing to enterprises simply by reason of state-ownership. It will do within the Pacific Rim area what OECD countries have achieved over decades of market reforms.

(c) Anti-corruption

The TPP will contain rules in relation to anti-corruption, extending the steady push towards transparent and fair trade based on the underlying real economic value of goods and services, undistorted by false market signals sent by bribes.

(d) Protection for investors

The TPP contains the familiar promises made in bilateral investment treaties in relation to foreign investments into host states, including promises to give investors Fair and Equitable Treatment, Full Protection and Security of investments, and to not discriminate against foreign investors.

INVESTOR-STATE-DISPUTE SETTLEMENT (ISDS)

Despite public anxiety about state sovereignty, the TPP contains strong ISDS provisions, allowing investors direct rights of action against host states. Although arguably not strictly necessary under public international law, the TPP expressly provides carve outs for matters of public interest. Certain sectors get particular carve outs. It contains rules to prevent abusive and frivolous disputes and prevents the pursuit of the claim in parallel proceedings. Investment Protections will be enforced by investors through international arbitration.

WHAT DOES IT MEAN FOR YOU?

The TPP will impact on most industry areas and is relevant to almost every key sector of the global economy. States will amend their domestic legislative and regulatory regimes to be consistent with the commitments in the TPP (although this may happen over the course of a transitional period). They will also be required to take these commitments into account in creating new legislation, regulations and trade policies going forward.

It will therefore impact on anyone doing business within the signatory states but also from outside the TPP area but with any one of those signatory states.

The sectors and areas which will be significantly impacted include:

- **Energy**, through preferential trading arrangements, as well as changes in cross-border service provision, environmental standards and the conduct of state-owned enterprises;
- **Technology, media and telecommunications**, through new intellectual property regulations, data protections rules and access regimes for telecommunications providers;
- **Consumer products**, through changes in e-commerce rules, sanitary and phytosanitary standards and customs regulations;
- **Mining**, through changes in labour standards and environmental standards;
- **Infrastructure and transport**, through changes in government procurement regimes and visa regulations for workers providing technical cooperation;
- **Financial services**, through changes in cross-border service provision, e-commerce rules and data protection regimes; and
- **Pharmaceuticals and healthcare**, through the removal of protectionist domestic regimes and new rules regarding patent recognition.

If you would like to speak to one of our regional or sector specialists about how the TPP may affect your business, please do not hesitate to contact one of the TPP key contacts. Further information about the TPP can be found on our hub: Trans-Pacific Partnership - Navigating a New Era Together.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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