

TPP IMPACT: HUMAN RIGHTS

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Legal Briefings - By **Donald Robertson** and **Laurence Shore**

The Trans-Pacific Partnership (TPP), an ambitious and complex mega-regional agreement, spans 12 Pacific Rim nations, covering a market of approximately US\$28 trillion. It is unprecedented in its scope and coverage.

WHAT DOES SUCH AN AGREEMENT HAVE TO DO WITH HUMAN RIGHTS?

The answer lies in the fact that the TPP is not a free (not even a preferential) trade agreement in any traditional sense. As the critics of the TPP point out, it is a document that contains rules that manage the trade in the region, rewriting the rules about how this economic area operates. It is a form of “economic constitution” providing foundational rules for the governance of cross-border trade and investment.

Markets do not operate in a moral vacuum. If the principles in the *UN Guiding Principles on Business and Human Rights* (states must protect, corporations respect and there be an appropriate remedy) are to be made real, there must be a recognition of the need for rules that govern the global economy. The OECD Guidelines for Multinational Enterprises states that enterprises have an impact on virtually the entire spectrum of internationally recognised human rights.

The rules of trade must be appropriately framed to deal with this broad impact. There are two sorts of rules: those going to the integrity of the process and those addressing directly human rights obligations.

MAINTAINING THE INTEGRITY OF MARKETS

Human rights only flourish in a well-governed market, in which there is fair opportunity for all. Good governance is central to the respecting of human rights in a business context.

Market integrity rules

The TPP contains provisions protecting the proper functioning of market processes, rather than simply access to markets.

Competitive markets tend to be well-governed markets. Rules in relation to State-Owned Enterprises seek to eliminate competitive advantages accruing simply by reason of state-ownership. Rules in relation to anti-corruption extend the steady push towards transparent and fair trade based on the real economic value of goods and services, undistorted by false market signals sent by bribes. Rules protecting property, including intellectual property, are to be consistently applied across the member states. Property rights are foundational to welfare-enhancing market processes.

Regulatory coherence and best practice

Of course, markets do not always work perfectly. Regulation is an essential element of a well-functioning economy. But regulation must be welfare-enhancing, not welfare-destroying. The TPP contains provisions on “regulatory coherence” to ensure a common set of rules that govern the way member states regulate markets.

The TPP will require adherence to a form of best-practice regulation. This requires transparency in decision-making, the testing of regulations by reference to the goals set, and a form of cost-benefit assessment. By following this form of decision-making, regulatory measures should cohere, based on objective criteria of rationality, avoiding discriminatory treatment.

Right to regulate

The TPP contain controversial Investor-State Dispute Settlement (ISDS) provisions. In the area of human rights, the most common criticism is that ISDS provisions infringe upon the “right to regulate” markets in the public interest.

The ISDS provisions expressly respond to legitimate concerns. It opens up “private” arbitration mechanisms so that hearings are in public and the documents filed made public. Third party (amicus curiae and non-disputing party) submissions by individuals and non-governmental organisations are allowed. Abusive proceedings are to be dealt with expeditiously.

The TPP explicitly recognises in Article 9.15 that member states have the right to regulate markets to protect public welfare, including in the areas of health and the environment. The standard set (“that it considers appropriate”) appears to be a relatively low threshold for states to meet.

Further, Article 9.18 expresses the role that corporations play within a market-regulated economy:

“The Parties reaffirm the importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognised standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party.”

Such guidelines no doubt include the UN Guiding Principles on Business and Human Rights (2011) and the OECD Guidelines for Multinational Enterprises (2011), which themselves incorporate reference to the UN Guiding Principles.

Some specific carve outs provide for certain policy areas to be immune from ISDS challenge, including social services maintained for a public purpose (social welfare, public education, public utilities), measures with respect to creative arts, indigenous cultural expressions and other cultural heritage and the national foreign investment review procedures. There are specific carve outs for particular industries.

Specific human rights rules

A number of provisions will directly promote respect for human rights:

Labour rights: the requirement to adhere to the fundamental labour rights recognised by the International Labor Organization.

The environment: strong and enforceable environmental obligations, with dispute resolution mechanisms. The states commit to addressing environmental challenges, such as pollution, illegal wildlife trafficking, illegal logging, illegal fishing, and protection of the marine environment.

Development: parties will align their development efforts, including to help women workers and business owners take advantage of the treaty benefits, promote education, science and technology and enhance broad-based, sustainable growth and development.

The UN Sustainable Development Goals: adopted in New York in the week of the final TPP negotiations, recognises the importance of trade as an engine of economic growth. Such growth is an essential precondition to reducing poverty and fulfilling the other ambitious goals set by the UN.

For more information or if you have any questions please contact the sector experts listed on the side.

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