

# TPP: REGULATORY COHERENCE

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Legal Briefings - By **Donald Robertson**

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## THE TPP AS AN ECONOMIC CONSTITUTION

The TPP is not a Free Trade Agreement in its traditional sense. Nor is it an Investment Treaty in any simple sense. Whilst it has important features of both, the correct characterisation of the TPP is not even that of a preferential trade agreement. The TPP is a new generation of document that manages its members' trade and investment relations. 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.

This new form of document responds to the modern form of globalisation. 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 goods and services 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. These global value chains have been shown to appear in geographic clusters.

## THE RULES OF TRADE

The TPP contains rules that seek to guarantee the integrity of market processes. For example, it contains rules about levelling the playing field with respect to state-owned enterprises. SOEs should not be given any preferential treatment in the way they operate as market participants, although if they are states themselves, they may obtain immunities and privileges not otherwise available to them. States generally are encouraged to adopt competition rules in relation to the market activity that occurs within their territory so as to ensure that trade is free and fair. The TPP also provides for the protection of property rights (including intellectual property rights) and anti-corruption. The TPP thus seeks to promote free trade in the traditional sense, both internally and externally.

However, not all markets work perfectly. Regulation is an essential element of well-functioning economy. But the 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. Those strong rules are important because of the need for consistent treatment of property rights and consistent regulatory regimes across entire global value chains.

## **REGULATORY BEST PRACTICE**

Chapter 25 of the TPP encourages states adopt “good regulatory practices”, affirming the importance of regulatory coherence and building regulatory cooperation and capacity building between states. The concept of good regulatory practice has a long and well-established meaning in OECD developed economies and elsewhere.

Such practice may require: identification of the market failure or other matter intended to be dealt with; that regulation be dealt with by 'sound science'; cost benefit or similar analysis; risk assessment or other objective evidence; consultative mechanisms and other matters that increase 'regulatory coherence'; and periodic reviews or sunset mechanisms.

The hope is that by establishing a common procedure and approach to “rational” regulation-making, the regulatory regimes that apply to those engaging in cross-border trade (especially those in global value chains) will be at least consistent, if not identical. The objective of trade and investment promotion will be stifled if burdened by multiple regulatory regimes.

The “right to regulate” is recognised by the TPP, by many express provisions that identify the importance of regulation for the establishment of public welfare goals. However, not every regulation is beneficial, and some are harmful. The TPP expressly contemplates the risk of states retreating from the over-arching objectives of the TPP by subtle, or not-so-subtle forms of regulatory controls. That temptation will be curbed by the processes set up in this chapter.

# THE PROCESS OF ACHIEVING THE AIMS

Although cast in aspirational terms, the mechanisms set up by this chapter demonstrate that the TPP is to be seen as a “living” document whose objectives are worked out through dialogue and transparent interaction with all those interested.

- each state will endeavour to establish mechanisms to facilitate effective inter-agency coordination and review and are to consider the establishment of a national or central coordinating body for this purpose
- whilst varying between states (recognising the different social, cultural, legal and developmental circumstances), these mechanisms are to review proposed regulatory measures to determine the extent to which they adhere to good regulatory practices and make recommendations for systemic regulatory improvements and also report on those matters
- regulatory agencies are to be encouraged to conduct regulatory impact statements for matters above a threshold of economic impact or other regulatory impact
- new regulatory measures are to be plainly written and are clear, concise, well-organised and easy to understand
- regulatory measures are to be reviewed at intervals to determine if they should be modified, streamlined, expanded or repealed

One of the most important bodies established by the TPP is the Committee on Regulatory Coherence, to consider issues with the implementation and operation of this chapter of the TPP. The parties are to cooperate in the exchange of information, training programs and other assistance and strengthening of cooperation between regulatory agencies.

The work of the Committee on Regulatory Coherence is to be transparent, with mechanisms for the interested persons to provide input on matters relating to regulatory coherence.

Regulatory best practice cannot be achieved by the publication of a long agreement, or even the statement of principles. The engagement among states and with interested parties, with transparent reporting of progress made in this area, will help embed a culture of rational regulation that is suited to a globalising world.

This chapter, although short, is one of the most important because it embodies the key focus of the TPP in encouraging rational rules of engagement amongst interlinked economies and the collaborations that are essential in modern, global trade.



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