

Trade Liberalisation and International Co-operation: A Legal Analysis of the Trans-Pacific Partnership Agreement.

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Recent years have seen the emergence of new so-called “mega-regional” trade agreements. The two most prominent mega-regionals currently being negotiated in the Asia-Pacific region are the Trans-Pacific Partnership (TPP) and the Regional Comprehensive Economic Partnership (RCEP). Both these arrangements encompass countries that comprise a major share of world trade and are intended to be deep integration partnerships which will not only reduce tariffs on traded goods but also improve regulatory compatibility and provide a rules-based framework for foreign investment.

TPP negotiations currently involve twelve countries: eight countries in the Asia-Pacific region—Australia, Brunei Darussalam, Japan, Malaysia, Mexico, New Zealand, Singapore, and Viet Nam—and four countries across the Americas—Canada, Chile, Peru, and the United States. With some overlap in membership, the RCEP negotiations are between the ten members of the Association of South-east Asian Nations (ASEAN) and the six economies with which ASEAN currently has trade

agreements, which includes India and China. As the TPP involves the United States and RCEP includes China, the two agreements are sometimes portrayed by commentators as extensions of the superpowers’ geo-political rivalry, though some regional discussions have also considered linking the two agreements into an even broader trade arrangement encompassing both these large economies.

One characteristic of the TPP process has been a lack of public information on the proposals being hammered out by negotiators behind closed doors. This has raised fears amongst both domestic constituencies, who fear losing out from greater foreign competition, and also in non-participating countries who would be excluded from the benefits of any agreement. This volume, edited by Tania Voon, attempts to shed light on some of the major legal and public policy issues raised by the TPP based on what is currently known or can be surmised.

The book consists of 11 distinct papers each covering a major topic or theme. Of particular note is Chapter 3, by Meredith Kolsky Lewis, which discusses the role of developing countries in the TPP negotiations. She argues that multilateral trade negotiations—through the WTO—are more likely to deliver on developing countries’ interests than the TPP. First, as the WTO operates on a consensus basis, developing countries can negotiate together in a bloc thereby increasing their negotiating power in comparison with the bilateral negotiations which underpin the TPP process. Second, the

expansion of the TPP into areas like intellectual property rights (IPR) and labour and environmental provisions that go beyond WTO commitments is likely to limit the policy space available for developing countries. Further, she notes that under the WTO agreements the burden of commitments on developing countries, as well as the provision of technical assistance, may be more favourable than under the TPP.

Intellectual property rights are considered in more depth in chapter 4 by Kimberlee Weatherall. She describes how the changing global context for IPRs will shape the TPP negotiations. While the US is expected to push for stringent IPR commitments, growing scepticism about strengthening IPR protections among the public and commentators in some developing countries is making the work of negotiators in reaching a mutually acceptable deal harder. Weatherall also notes the increased complexity and fragmentation of the international IPR legal environment which is complicating negotiations. Overall, she suggests that the RCEP negotiations may offer an IPR framework more beneficial to regional developing economies.

Environmental issues are also likely to feature explicitly in the TPP. In chapter 10, Joshua P. Meltzer provides an overview of the approach taken by the United States' in its most recent FTAs as a guide to understanding how they will be tackled in the TPP. He notes that generally these FTAs have mentioned the enforcement of national environmental laws and have enhanced various transparency provisions but have not made environmental provisions subject to dispute settlement mechanisms. Meltzer believes the TPP could play a positive role in addressing illegally harvested timber, but he sees the prospects of a deal on

ending harmful fisheries subsidies as more remote given the gaps between the parties. He suggests that other TPP rules outside the environment chapter could help achieve a range of green goals, such as assisting countries' transition on to low-carbon pathways by improving access to relevant goods, services and investment.

One of the most controversial issues in contemporary trade agreements is investor-state dispute settlement (ISDS). Under ISDS mechanisms international investors can potentially demand compensation from national governments if changes to policies or regulations are deemed by international arbitration panels to harm their interests. Many governments are increasingly concerned that their policy space is being unduly restricted by these arrangements. Australia, for instance, has been challenged by tobacco producer Philip Morris over its decision to mandate plain cigarette packaging. Chapter 9 by Leon Trakman's suggests that TPP will provide for investor-state arbitration with Australia seemingly likely to be the only country seeking an exception. It is, however, likely that the negotiating parties will seek to set a strict range of qualifications and restrictions regarding the application of ISDS, though whether these will satisfy the vocal critics of ISDS remains to be seen.

Recent news reports suggest that the TPP may be concluded in the first half of 2015. However, as discussions are subject to considerable secrecy, it is not yet known the extent to which the final agreement will address the issues raised in this volume. Some leaks of draft agreement chapters, for instance on IPRs, do suggest that TPP will go well beyond WTO TRIPS commitments in areas including patent linkages, patent term extensions and the granting of new monopolies based on clinical data

exclusivity. The leaked environment chapter indicates that TPP will cover climate change, biodiversity, fishing stocks, and trade and investment in environmental goods and services. However, meaningful enforcement measures seem absent and proposed dispute settlement mechanisms are non-binding.

Overall, this volume provides an excellent coverage of the issues raised by the TPP. In addition to the areas discussed here, additional chapters cover controversies in agriculture, services, and services among others. The debates over these questions will no doubt continue well after the conclusion of the agreement.

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