



Secret Trans-Pacific Partnership Agreement (TPP) Treaty: State-Owned Enterprises (SOE) Issues for Ministerial Guidance

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Description

This is a secret December 2013 paper from the negotiations of the Trans-Pacific Partnership Agreement (TPP). The Trans Pacific Partnership Agreement is an international treaty currently under secret negotiation by delegations from the United States, Mexico, Canada, Australia, Japan, Malaysia, Chile, Singapore, Peru, Vietnam, New Zealand and Brunei Darussalam. The Agreement will create a transnational legal regime, initially covering all 12 countries, encompassing 40 per cent of global GDP and one-third of world trade.

The paper was drafted for a meeting of ministers from the TPP countries in early December 2013. It seeks ministerial guidance on a number of issues which emerged at the negotiating level relating to state-owned enterprises (SOEs).

The text reveals that the Competition Chapter of the TPP aims to place stringent requirements and restrictions on TPP governments in how they use and finance state-owned enterprises, including where SOEs are used to provide vital public services, support local businesses or encourage social, cultural or economic development. SOEs would be obliged to act on commercial considerations only, and would be prohibited from discriminating in favour of local goods and services.

This text dates from the ministers' meeting, held 7–10 December 2013 in Singapore.

SOE Issues for Ministerial Guidance

December 7-10, 2013

The majority of TPP countries have supported additional disciplines on the commercial activities of SOEs and Designated Monopolies that go beyond existing obligations in the WTO and in FTAs, including obligations with respect to:

- Ensuring that SOEs and monopolies act on the basis of commercial considerations and accord non-discriminatory treatment in purchases and sales;
- Ensuring that SOEs comply with the obligations in the Agreement when acting under delegated governmental authority;
- Providing courts with jurisdiction over claims involving commercial activities of SOEs;
- Impartial regulation of commercial SOEs and private competitors;
- Transparency; and
- Committee to monitor and review the implementation of the Chapter.

Technical issues remain in these areas, but we expect them to be resolved at the negotiators' level.

The discussion of effective enforcement of IP laws with respect to SOEs has been moved to the IPR group.

Four broad areas require ministerial guidance/decisions:

- How to address government support for SOEs that cause adverse effects to trading partners;
- The exceptions or other forms of flexibility that may be required if government support disciplines are applied broadly (*i.e.*, to goods and services, trade and investment);
- The definition of SOE and application of SOE disciplines to all levels of government; and
- Dispute settlement.

1. Government support

All Parties already have obligations in the WTO with respect to subsidies that affect trade in goods. TPP countries are considering extending similar rules regarding government support for SOEs to a broader set of circumstances, including 1) government support affecting trade in services and 2) government support that affects competition between SOEs and covered

investments within a Party's territory (both goods and services). The proposed disciplines only limit government support for SOEs to the extent that the support causes adverse effects to the interests of another TPP country.

2. Exceptions and other flexibility

If broad disciplines on government support for SOEs are included, Parties will need to determine what exceptions or other flexibilities may be necessary to provide governments the appropriate policy space without undermining the disciplines. For example, there are no general exemptions for WTO subsidies disciplines with respect to trade in goods – how should the TPP deal with government support affecting trade in services? How should the TPP address flexibility with respect to disciplines affecting competition between SOEs and covered investments within a country's territory? Parties have proposed general policy exceptions, scope exclusions, and the possibility for negotiated country-specific flexibility.

3. Definition of SOE and application to all levels of government

What criteria should be used to define covered SOEs for the purposes of new disciplines – *i.e.*, government ownership, the ability to exercise control? What criteria can be best used to determine effective control?

How should the disciplines apply to SOEs and monopolies established or designated at different (sub-central and central) levels of government? Should countries take commitments with respect to sub-central jurisdictions now or as part of a built-in agenda?

4. Application of dispute settlement

Proponents have stressed the importance of meaningful, enforceable disciplines, which should be subject to the standard state-to-state dispute settlement mechanism used for other Chapters. Parties are considering whether an additional process of dialogue and review should be required before initiating a formal dispute under the general dispute settlement mechanism and whether additional dispute settlement elements should be included.