

TPP STATE OF PLAY AFTER SALT LAKE CITY 19-24 NOVEMBER 2013 ROUND OF NEGOTIATIONS

This document is excerpts from internal government commentary on the state of the TPP negotiations. Extracts have been selected and minor editing of the material has been undertaken to protect the identity of the author country. Wording in square brackets has been added for clarification.

Key to abbreviations: Countries are identified in text by the following: AU= Australia, BN=Brunei, CA=Canada, CL=Chile, JP=Japan, MX= Mexico, MY= Malaysia, NZ=New Zealand, PE=Peru, SG=Singapore. Other key terms: CN=chief TPP negotiator, ISDS=investor-state dispute resolution, MFN = most-favoured nation, NCM=non-conforming measure, IP=intellectual property, SLC =Salt Lake City, SOE=state owned enterprise, TBT=technical barriers to trade]

[Overview and Process]:

...As an overview, it should be mentioned that the U.S. is exerting great pressure to close as many issues as possible this week. However the Chapters that were reviewed by the CNs [Chief Negotiators] today did not record much progress. This pressure will increase with every passing day...

...[U.S. Chief] met with all twelve countries and said that they were not progressing according to plan. One country remarked that up until now there had not been any perceivable substantial movement on the part of the U.S., and that is the reason for this situation. The intensity of the meetings, both at level of the CNs as well as the technical groups, increased during the last two days as expected. The pressure to conclude as many issues before Singapore increased. The results are mediocre, although there was a little more progress in the following areas: access for goods (text), e-commerce, Investment, TBT and Public Procurement (text)...

...Before entering into specific detail in some areas of negotiation, it is noted that the scenario for Singapore seems uncertain given the number of outstanding issues that still remain. The aforementioned, even leaving aside the more complex issues (IP, SOEs and Environment), demonstrates a situation that makes it very difficult to think of a complete closure in December. Some suggested the need to prepare different scenarios, in order to not suffer surprises that affect the process. This involves being prepared for a partial closure scenario or even a failure in December...

[Intellectual Property]:

...Intellectual Property Group to review the work that had developed during the previous days in SLC. This work is reflected in the Non Paper from the Chair (USA) which includes "landing zones" in each of the pending Chapter issues Some countries reinserted their positions or brackets on all these issues in order to display a more objective assessment in each one of them In general, the "landing zones" from the Chair showed a solution coming from the U.S. position. Therefore, it was crucial for other countries to reinsert their positions to avoid losing their positions in a text that can be used by the United States, later, to try to reach agreement. ...

...As a general consideration, the meeting served to confirm the large differences that continue in most areas of the chapter, which introduces serious doubts as to what will happen in Singapore. Clearly this Non Paper cannot be presented for consideration by the Ministers. What the U.S. aims for is that the Ministers adopt directives or

guidelines on which the Group can then continue working to reach a conclusion. Similar to what happened in SOEs, implicitly, it is admitted that it will not be possible to conclude this issue in Singapore. However, countries must be prepared for attempts deployed by the U.S. to force closure of different areas of the Chapter during that time...

...In IP, the CNs got together with the Chair and Leads to organise work for the coming days. With respect to the Non Papers / Landing Zones, ... they should not supplant the positions of the countries and it does not seem right ... to not have a clear attribution of the positions. The Chair aims to reduce the number of the 119 outstanding issues. It was agreed that there will be ongoing communication with CNs and daily updates about the progress of the Group. The United States indicated that the idea is to leave the most important or sensitive for Singapore

...In connection with the discussion of pharmaceuticals, U.S. and JP presented their non paper to the rest of the delegations... It is worth noting that delegations AU, SG and CL made interventions pointing out that there were elements and language from the proposal that they recognized from their respective standards from bilaterals with U.S., but that in the majority of these obligations, these were above the agreed standard. In this context, none of the three delegations indicated that they were in conditions to go beyond its bilateral....

... In this context, delegations made comments on the submitted text and presented language to be able to reflect the standards from their respective bilaterals or legislation ...

...Singapore said to the rest of the small Group that it will work on the basis of ideas of the U.S., which means it is leaving the Group. In the same vein, Canada has also been receiving high-level pressure to not file a counterproposal. Finally, the Australian position is unclear and begins to show some weakness in its support of the small Group. In conclusion, cracks in the Group cohesion were noticed...

[Transparency Annex on Medicines]:

...Some bad news was that the United States revived the Transparency Annex on Medicines now in a revised version that it had worked on with Australia and Japan. Some countries expressed annoyance for the way that they resubmitted a text that had been strongly rejected in the past.... The U.S. reiterated that it does not apply to all countries and was asked to put a footnote that says that. That's where it was left...

[Investment]:

...The most important issue for the majority of members... is the proposal by the U.S. to apply ISDS to Investment Agreements and Investment Authorisations. The United States, as in previous rounds, has shown no flexibility on its proposal, being one of the most significant barriers to closing the chapter, since under the concept of Investment Agreement nearly all significant contracts that that can be made between a State and a foreign investor are included.

...It covers important concessions including mining, administrative or special operating contracts for hydrocarbon exploration, public works concessions (roads, highways, bridges, infrastructure, etc.) and it would override the choice of forum provisions in these contracts ...

...Only the U.S. and Japan support the proposal, while the rest expressed their objections to the proposal and have tried to explore ideas to refine the concept and

make some reservations about the choice of forum in contracts, but the U.S. has shown no signs of flexibility ...

...A second area where there was a convergence of positions was regarding the application of general exceptions (GATT and GATS) for the Investment Chapter. Although the discussion is not finished, the United States submitted a proposal that the proponents are now analysing. The problems with the proposal are that it partially solves the issue, ie it only responds to the interests of Australia and New Zealand, in the sense that it applies the exceptions to the obligations of National Treatment, MFN and Senior Management and Boards of Directors, through the inclusion of a clarifying footnote in the article on National Treatment and an individual note on the t NCMs [non-conforming measures] of each country ...

...For countries such as Chile, Japan, Brunei, Malaysia and Vietnam that support the application of these exceptions to the whole chapter, language has been proposed to be included as a preamble or as objectives of the chapter. This proposal is not sufficient because any preambular language could only be used as an element of interpretation and would not be binding language as currently proposed. In addition, the U.S. noted that the proposed preambular language should be accompanied by additional language that recognises the other underlying objectives of the chapter, that is, the promotion and protection of investments. This would make the preamble have circular language that would lose all the purpose for the Parties wishing to incorporate an exception as a concrete tool that a State can actually use...

...Another of the most contested topics was the scope of the application of Investor-State dispute settlement (ISDS). Only Vietnam maintains its position to apply ISDS only to the post-establishment phase. During this round, Malaysia (MY) and Brunei (BN) agreed to support both pre- and post-establishment for ISDS, subject to the condition that they obtain an annex which would exclude pre-establishment for ISDS for its country (BN) or reserve the right to adopt a screening mechanism in the future (MY). This issue is far from being agreed, given that there are fundamental differences among the members ...

[State-Owned Enterprises (SOEs)]:

Peru has joined the negotiation. Malaysia said it could join this week. The Group made progress in the discussion of the text. ...

...Malaysia agreed to negotiate so we have the twelve within the text. The Group made progress in the technical discussion. However, the CNs recognised that the Ministers will not be in a position to agree to the text entirely in Singapore, so we decided that the Group make a list of questions (no more than four) that in a binary way, pose decisions arising around the central issues of the text: sub-national level, disciplines on subsidies or competitive advantages; treatment of exceptions or restricting the scope of application. The idea is that Ministers answer these questions and on that basis the Group works - in Singapore - to reflect those answers in the text. ... this is a huge task, considering the level of immaturity of the negotiations of the text...

...The common factor in other conversations (MX, SG, PE) is the shared idea that this is very far from closed, and there is little room to make progress on a possible meeting in Singapore ...

[Market Access in Goods]:

On Friday October 25, prior to the SLC round, milestone 3 was met, which involved revealing 95% of the offers. All but Japan complied, as JP had that "right" since it had started only recently the negotiating process... Countries were asked to intensify bilateral negotiations to reach concrete results at the Singapore Ministerial ..

... The panorama with Japan in particular looks very difficult. There should be a high-level instruction to confirm the understanding of the – no exclusions -so that JP (and several other countries) will move...

...On tariff negotiation, Milestone 4 is not fulfilled, because the U.S. prefers to leave it for Singapore where it can know what is the overall package that it would be closing. NZ, CA, CL, AU and PE indicated frustration with the aforementioned and with the continued lack of transparency ... CL said it is necessary to have more transparency before Singapore, it is not adequate to learn of the status of offers in Singapore. United States outlined that the use of quotas would be the way to address certain sensitivities of some countries. That would be the way to grant access to Australia in sugar. The CNs gave instructions to intensify bilateral meetings and in those meetings countries to provide more information on the process of their offers. However, there is not much expectation that the situation on this point will improve...

...As for the text, while some provisions were closed, issues on agriculture which the U.S. rejects remain pending. Regarding distinctive products, the U.S. is planning to address this issue through Annexes to the Chapter where products of interest to the countries are recognised...

[Rules of Origin]:

Very little progress in Sections A and B. Vietnam and Mexico with very little movement in areas of concern to them

[Specific Rules of Origin]:

...Much work remains and it is unclear whether we will be able to finish within the set timeframe, especially when you consider that what is left is the most sensitive ...

[Textiles] :

...There was a major crisis after Mexico reported that it was leaving the Short Supply List because their interests have not been addressed by other countries, particularly Vietnam. This implies that Mexico applies the strictest general rule (Yarn Forward) and does not accept cumulation for the 187 products included in the list. Peru reacted strongly because it causes problems in their private sector....There was an impression that this from Mexico was "cooked up" by the U.S. previously. This crisis is evolving...

[Sanitary and Phytosanitary Standards]:

...The only outstanding issue is dispute settlement, where the United States suggested that it can accept the application of the general scheme on the condition that said scheme/regime applies to all Chapters of the Agreement. All delegations except Australia which supports exclusion, were open to seeing the U.S. proposal. ..

...the U.S. has also reopened several disciplines of the Chapter in the direction of decreasing its level of ambition. This is concerning because the U.S. is not demonstrating flexibility and because we could end up with a Chapter of little value.

[Temporary Entry]:

United States continues to state the impossibility of presenting an offer of market access

[Environment]:

Meeting was interrupted because we could not get past the second issue [on] the definition of environmental law....

[Legal and Institutional]:

Regarding Exceptions no progress was made and virtually all provisions are pending. In tobacco, United States tabled a new proposal ... Malaysia maintains its proposal, but is considering, seriously, to leave tariffs out of its exclusion

[Financial Services]:

Inadequate progress. The positions are still paralysed. United States shows zero flexibility ...

[Agricultural Export Subsidies]:

All TPP countries except the U.S. commit to eliminate them .

[ITA (Trade in Information Technology Products)]:

The countries pledge to be part of this multilateral agreement, which involves giving tariff concessions on a list of technology products.