

Key issues for Local Government in the Trans-Pacific Partnership Agreement

The focus of the TPPA is on 'behind the border' disciplines on government, not commodity trade, as there is already an extensive network of FTAs among the parties.

The rules aim to constrain policy and regulatory options of central, regional and local govt in what is known as closure of policy space. Application to local government is likely to be stricter than in previous agreements, except where the US has constitutional constraints.

Some of these chapters are completely new, and will provide commercial players with rights to access domestic decision making processes, documents and reasons, with greater opportunities and leverage to pressure local government decisions.

Key areas of significance to local government include:

Intellectual property – longer and stricter monopoly rights and restrictions especially impact on innovation, costs, and knowledge facilities like libraries and universities.

Public procurement – prevents local preferences and offsets above a threshold and subject to negative list of exceptions.

Investment – applies to a wide range of investment, from PPP contracts and concessions, to property developers, to purchasers of local government bonds. Rules include non-discrimination, restrictions on performance requirements, and protections against new regulations that significantly impact on value or profits. Investors have the power to sue the government directly in private offshore arbitral tribunals, often utilised to have a chilling effect on regulatory decisions. (Most of) these obligations will be subject to a negative list of existing regulations that cannot be made more restrictive, or subject areas that are carved out altogether; what has not been listed will be subject to the rules, even if circumstances change or new contexts or technologies arise. The exceptions provisions, which are contingent and rarely successful, do not apply to the investment chapter.

Cross-border services, including local commercial presence of foreign services suppliers (ie foreign firms in services sectors, from construction, retail and refuse disposal to facilities management, transport operators or education). Rules prevent quantitative restrictions, including bans; local preferences; and require light-handed regulation of professional qualifications and registration, technical standards and licensing. (Most of?) these obligations will be subject to a negative list of existing regulations that cannot be made more restrictive, or subject areas that are carved out altogether.

State owned enterprises, a novel area that would require competitive neutrality between state-controlled entities, including non-commercial entities that engage in some activities that compete with private interests. Preferences could include access to public land, implied government guarantees, subsidies and cheaper finance through bonds ... How these will be enforced and by whom is unclear.

Transparency and Regulatory coherence, mandate 'best practice' approaches to regulation based on RIS processes, cost benefit analyses and evidence based decisions that favour light-handed regulation, with extensive obligations of reporting, responses to commercial intervenors and submissions, reviews of decisions, and ex post reviews of existing regulation. Potentially enforceable and US wants to make implementation and compliance subject to regular, mandatory peer review. Material provides evidence for subsequent state pressure or investor-state disputes.