

Establishing Rules of the Road Commercial SOEs & Private Actors



100 Years Standing Up for American Enterprise
U.S. CHAMBER OF COMMERCE

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Central Questions

- Why are SOEs important?
- What are our concerns?
- Why do this in the TPP?
- What do we seek?

Why are SOEs Important?

Growing Phenomenon – SOEs Include:

- The world's 13 biggest oil firms
- The world's biggest natural-gas company
- A mobile-phone company with 600m customers
- One of the world's most profitable chemical companies
- The world's third-largest ports operator
- One of the world's fastest growing airlines
- The world's largest bank
- The world's largest insurance company

Why are SOEs Important?

- State companies make up 80% of the value of the stock market in China, 62% in Russia and 38% in Brazil
- They accounted for one-third of the emerging world's foreign direct investment between 2003 and 2010
- India has some of the world's biggest state-owned companies, a legacy of the License Raj

Why are SOEs Important?

The Growth Curve -

- The size and breadth of industries affected has grown markedly in the last ten years alone
- There are rapidly expanding effects on world trade and investment
- The measures used by governments to foster SOEs have become more pervasive and sophisticated
- SOEs can be powerful commercial competitors

What are our concerns?

Principle Concerns -

- Lack of transparency in the relationship between an SOE and its government
- Preferential treatment by government
- Subsidization in its various forms
- Ensure SOE's operate commercially

What are our concerns?

Preferential Treatment Examples –

- Regulations designed to favor SOEs
- Exemption from law (e.g. competition laws)
- Exemption from regulatory or judicial enforcement (e.g. intellectual property)
- Exemption from criminal prosecution
- Access to controlled networks or distribution channels on a preferential or exclusive basis

What are our concerns?

- Preferential access to/or control granted over needed supplies
- Expeditious or favorable licensing treatment
- Preferential access to information
- Beneficiaries of “shot-gun JV’s” and forced technology transfer
- Ability to participate in the formation of discriminatory national standards

What are our concerns?

Subsidization Examples –

- Direct subsidies
- Favorable access to capital
- Preferential access to export credits
- Favorable tax treatment
- Access to below-market cost for inputs to SOEs
- Absence of a need to earn profits, enjoy government guarantees
- Exemption from bankruptcy laws

What are our concerns?

SOE Operation Examples -

- Use of administrative guidance
- Benefitting from legacy assets
- Discriminatory sales and purchases by SOEs
- Buy-national policies implemented by SOEs
- Corruption and bribery

What are our concerns?

- The Life Insurance Corporation (LIC) in India, a government-owned company, has a direct sovereign guarantee backing the life insurance products that it sells; private sector competitors have no access to such a guarantee.

What are our concerns?

- Japan Post is an SOE that
 - Benefits from legacy assets
 - Has preferential access to 24,000 post offices and where access is granted, there is still discrimination against foreign companies' products
 - Was given a “deemed” license
 - Enjoys differential favorable regulation
 - Is regulated in part by a “patron” ministry that is responsible for its commercial success
- Other countries are following this model in this and other sectors.

What are our concerns?

Challenges –

- We need to ensure that we maintain a fair trading system if some companies enjoy the support (overtly or covertly) of a national government
- We must prevent increased scrutiny due to legitimate worries about fairness from shading into xenophobia and protectionism
- Trade agreements are not to dictate the organization of an economy -- whether commercial activities are to be wholly private or a mixture of private and SOE activity. That is a matter of national choice. This is NOT about privatization.

Why the TPP?

- The absence of clear rules contribute to
 - Unfair advantages allowing SOEs to harm private competitors and even other TPP members' SOEs
 - Responses curbing SOE activities outside of their home market will become increasingly a matter of largely unregulated national choice
 - Trade conflicts will increase, diminishing international trade and cross-border investment

Why the TPP?

Existing commitments governing SOEs in trade agreements:

- GATT – Art. III (national treatment), Art. XVII (state trading); GATS Art. XVII (national treatment), WTO/GATT/SCM Agreement
- WTO accession agreements
- FTAs: EU-Korea

SOEs are also an emerging policy concern:

- OECD - Santiago Principles for SWFs
- OECD - SOE Guidelines
- World Bank Reports, Dec. 2011, Feb. 2012

Why the TPP?

- The current TPP parties are relevant to the question of SOEs:
 - Every TPP party has SOEs, with higher concentrations of SOEs in Malaysia, Singapore, and Vietnam
 - Commitment exists in U.S. –Singapore FTA
 - Australia is home to the concept of competitive neutrality
- TPP has pledged an ambitious/high standard agreement
- Designed for the long term –
 - Accession countries (Canada, Japan and Mexico)
- Potential to become the norm for future FTAs and the WTO's rules for SOEs

What We Seek?

Create and maintain a level playing field as between SOEs and private companies when engaged in commercial competition.

What We Seek?

- While TPP SOE commitments we seek address trade concerns, TPP represents an opportunity to reinforce domestic policy concerns such as inefficiencies, lack of adequate return for government investment, impairment of innovation, undermining of economic growth, lack of accountability of management, etc.
- It is recognized that SOEs may supply services and perform functions that private companies are unable or unwilling to accomplish.

What We Seek?

Definition is Important –

“Commercial” SOE

- Must have a share of government ownership
- Must be engaged in commercial activities
- Must be in competition with other commercial actors

But does not include

- Private companies which may be but subject to government Influence
- SOEs serving a core government function

What We Seek?

Address SOE market effects in-

- Other TPP signatories' markets
- Third country markets
- The home market

What We Seek?

- When government enterprises operate as commercial actors and should be treated accordingly.
- TPP should cover all government enterprises engaging in commercial activities unless an exception is negotiated (that is, the negotiation should proceed on a “negative list: basis.)

What We Seek?

- TPP should not mandate privatization:
 - Curtail behavior that produces advantages in the market whether through regulatory action, financial assistance, or through the steering of purchases or sales of goods or services by an SOE.
 - Address concerns that arise in an investment, cross-border, and third country context.

What We Seek?

- More specifically, it should:
 - Require TPP signatories to ensure that their SOEs comply with the signatories' nondiscriminatory treatment obligation.
 - Subject the behavior of SOEs to a requirement that they act “in accordance with commercial considerations” and spells out what this term means.

What We Seek?

TPP should:

- Distinguish SOE procurement when engaging in commercial transactions from government procurement, which is purchasing goods or services for consumption by the government (this category of transactions may be governed by separate negotiated obligations unrelated to the SOE provisions).

What We Seek?

- Require TPP signatories to ensure that their SOES respect intellectual property laws and antibribery and corruption rules.
- Provide that SOEs are regulated as rigorously as the firms with which they compete, including subjecting the SOEs to full disclosure requirements; and additionally, that a government ministry or agency that is responsible for the promotion of a SOE not be its regulator.

What We Seek?

- Provide that signatories not finance the operations of their SOE on a preferential basis on noncommercial terms, nor provide preferential access to government networks.
- Subject SOEs operating abroad to the laws and regulations of the countries with which they operate.
- Require signatories to enforce their laws and regulations against its SOEs, including competition and securities laws, unless explicitly made exempt by law.

What We Seek?

- Expand significantly the transparency obligations of signatories with respect to their SOEs as the governance relationship SOEs and the state is often opaque and therefore it is difficult to discern trade violations.
- Provide that exemptions any signatory takes with respect to SOEs be targeted, and published (or that the extent of the exemption be otherwise clearly available to interested parties).

What We Seek?

- Create a committee of the agreement's signatories to discuss those SOEs made exempt and implementation of the various obligations in the text.
- Reserve the right all governments have to take prudential measures to protect the safety or soundness of the signatory's financial system or actions to address temporary government interventions in the economy in response to a financial or economic crisis.

Questions?

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