

E-ALERT | International Trade Controls

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U.S. TRADE OFFICIALS SOON TO RELEASE PROPOSED RULES ON SOEs

Across the U.S. political spectrum, there are growing calls for policies aimed at ensuring “competitive neutrality” between state-owned enterprises (SOEs) or state-supported enterprises (SSEs) and private sector companies. The Obama Administration intends to address these concerns, among other ways, through the ongoing Trans-Pacific Partnership (TPP) negotiations. The Administration has prepared a detailed proposal for rules to govern SOEs and SSEs that it reportedly plans to table in time for this week’s TPP negotiations in Peru.

A BROAD POLITICAL COALITION IN THE UNITED STATES SUPPORTS NEW DISCIPLINES ON SOEs

Demands for action regarding SOEs originated in the U.S. business community as firms complained that certain governments were intervening on behalf of their SOEs and SSEs to the detriment of U.S. companies trying to compete with these entities in U.S. and foreign markets. For example, the Coalition of Service Industries and U.S. Chamber of Commerce released a joint report in February 2011 entitled “State-Owned Enterprises: Correcting a 21st Century Market Distortion.” The report alleged that regulatory favoritism, preferential purchasing, financial support, and other discretionary measures place U.S. firms at a disadvantage in China, India, and other markets. As a remedy, the report urged the U.S. government to adopt measures to promote competitive neutrality in regional trade negotiations, bilateral investment treaties, and multilateral institutions such as the OECD and World Trade Organization.

While the U.S. business community has focused on competition with foreign SOEs and SSEs in markets around the globe, labor groups have supported measures to discipline the activities of such companies within the United States. For example, labor groups have reportedly sought to assure that the business decisions of such firms in the U.S. market be based on strictly commercial considerations, and to establish new rules for acquisitions by SOEs and SSEs, with criteria and procedures that go beyond those set out in the Foreign Investment and National Security Act of 2007.¹

In a reflection of the issue’s broad support, there have been bipartisan initiatives to push the Obama Administration to make SOEs and SSEs a priority. Democratic Senator Sherrod Brown and Republican Senator Jon Kyl, for example, signed a joint letter in August urging President Obama to “seize the opportunity in the TPP to establish new and binding commitments that effectively address the potential market-distorting actions of SOEs and SSEs in U.S. and global markets.”² Similarly, a bipartisan task force of experts on U.S. trade and investment policy organized by the Council of Foreign Relations issued a report in September calling for the adoption of “appropriate restraints”

¹ “USTR Under The Gun To Generate Draft TPP Language Dealing With SOEs,” *Inside U.S. Trade* (July 15, 2011).

² Letter from Sens. Sherrod Brown and Jon Kyl to President Obama (Aug. 8, 2011), available at http://insidetrade.com/index.php?option=com_iwprofile&file=aug2011/wto2011_2465.pdf.

and new disciplines on SOEs and SSEs in negotiations regarding the TPP and bilateral investment treaties.³

THE OBAMA ADMINISTRATION HAS DRAFTED A PROPOSAL ON SOEs

Responding to these concerns, the Obama Administration has made the development of new rules for SOEs a policy priority. Secretary of State Clinton last week stated that SOEs pose both economic and strategic challenges to the United States. Clinton first embraced the “commonsense principle” of competitive neutrality, which she said the U.S. is working to promote in a TPP chapter and in new OECD guidelines. Noting that governments “are entering markets directly through their cash reserves, natural resources, and businesses they own and control,” then “shaping these markets not just for profit, but to build and exercise power on behalf of the state,” Clinton also underscored the need “to develop international rules and norms that set the boundaries, police bad behavior, and require transparency so that state-owned entities are clear about their intentions and their actions.”⁴

In the TPP context, U.S. officials have argued that disciplines on SOEs should be a centerpiece of any new agreement. Deputy U.S. Trade Representative (USTR) Demetrios Marantis has stated that after “very robust” consultations with business and labor stakeholders, “[t]here’s a general consensus on what the goal should be,” which is to “ensure that state-owned enterprises and private enterprises are able to compete on a level playing field.”⁵

U.S. officials have reportedly translated that general goal into specific text for the competition chapter of the TPP. The U.S. proposal has been approved during an inter-agency review and shared with leaders on Capitol Hill. U.S. negotiators apparently planned to table the text during the Chicago TPP meetings, consistent with the timetable they set forth months ago, but decided at the last minute not to do so. On the eve of the Chicago talks, a coalition of U.S. business groups expressed concerns that “the final text tabled by the United States in the negotiations may fall short of the robust and detailed disciplines that are needed to ensure that U.S. exporters, investors, and American workers are able to compete on a level playing field against SOEs and the government support which they receive through myriad preferential policies.”⁶

The next round of TPP negotiations will begin this week in Lima, Peru, on October 19. Deputy USTR Marantis stated last week that USTR intends to table its SOE proposal at the Lima meetings.⁷ While there is uncertainty about what the U.S. draft text will include, Marantis has publicly acknowledged that some TPP partners will be “fiercely resistant” to proposed disciplines on SOEs and SSEs.⁸

³ U.S. *Trade and Investment Policy*, Task Force Report No. 67, Council on Foreign Relations (Sept. 2011), available at <http://www.cfr.org/trade/us-trade-investment-policy/p25737>.

⁴ See Speech of Secretary Clinton, Economic Club of New York (Oct. 14, 2011), available at <http://iipdigital.usembassy.gov/st/english/texttrans/2011/10/20111014172924su0.9650494.html>.

⁵ See “USTR: U.S. Facing Resistance On TPP SOE Proposal From Other Countries,” *Inside U.S. Trade* (Aug. 26, 2011).

⁶ See Letter to Obama Administration officials from the Coalition of Service Industries, National Foreign Trade Council, U.S. Chamber of Commerce, and U.S. Council for International Business (Aug. 31, 2011), available at http://www.uscib.org/docs/2011_08_31_tpp_soes.pdf.

⁷ See “Marantis: USTR To Table SOE Proposal At Lima TPP Round, But Not Labor,” *International Trade Daily* (Oct. 14, 2011).

⁸ See “USTR: U.S. Facing Resistance On TPP SOE Proposal From Other Countries,” *Inside U.S. Trade* (Aug. 26, 2011).

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We are closely monitoring developments regarding new proposed limitation on SOEs and SSEs. If the United States proposes such rules in the TPP negotiations and they are ultimately agreed to by TPP members, U.S. law and practices will need to be changed to conform with any new rules. Given the potential implications for SOEs and SSEs doing business in the United States (or in other TPP countries), we want to make sure you are aware of these events. We would be pleased to discuss these matters further as they may relate to your business.

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