



PANEL DISCUSSION:

“Leveling the Playing Field: The State-Owned Enterprise (SOE) Challenge”

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Ronald Reagan Building and International Trade Center
Washington, DC

Participants:

Moderator: Richard O’Toole, Chairman, Policy Committee, European Services Forum

-Crawford Falconer, Deputy Secretary of Foreign Affairs and Trade, New Zealand

-Shanker Singham, Partner, Squire Sanders

-James Campbell, Adjunct Professor, George Mason University

Rapporteur: Stephen Kho, Senior Counsel, Akin Gump

Moderator Richard O’Toole introduced the issues by noting:

- Decisions and policies by state actors which can give rise to public sector restraints of trade are increasingly of concern to the global trading system. Some jurisdictions have begun to address the issue. For example, the European Union treaties are neutral on the existence of public sector or private sector enterprises but they focus on behavior with SOEs generally being subject to the normal rules of commercial behavior with exceptions limited only to what is absolutely necessary to deliver services of general or public interest and then only with safeguards for competition. The panel would seek to identify the issues, illustrate the experience of one particular industry and identify principles of an approach to address the concerns identified.

Mr. Shanker Singham outlined the main issues related to SOEs:

- It is difficult to define SOEs by their structure, as there is a spectrum of SOE-type structures. At one extreme, you have the fully government owned and run entity, at the other a seemingly private company that benefits from all kinds of government supports, preferred licensing mechanisms and other market distortions. It is thus better to regulate SOEs based on behavior. The wider context for this is some form of discipline on public sectors restraints of trade that are anti-competitive in effect.
- Certain practices reduce the cost of operations, e.g., favorable access to low cost-loans or interest free loans from the government, regulatory exemptions or waivers, predatory pricing, special tax benefits. These activities often have the “intended” consequence of being revenue – but not profit – maximizers.
- Several WTO and some bilateral trade agreements have SOE provisions that deal with the problem tangentially. For instance, they address the “discriminatory” nature of SOE treatment, but not their anti-competitive nature. An SOE regulation might not discriminate, however, it may damage competition.
- International rules on SOEs should therefore focus more on ensuring open competition, protecting consumer welfare, and liberalizing markets.

- Over the years, the WTO has evolved in this respect. For example, the GATT Article III (non-discrimination) “test” has changed from a focus on intent of regulations to the effect of regulation on competition. This is where the discussion on SOEs needs to go.

Mr. James Campbell discussed the effect of SOEs on one particular industry, express delivery:

- International air couriers, forerunners of modern express delivery services, arose in a market that was dominated by SOEs, the national post offices, with regulations such as those on air transport, postal, and customs that favored SOEs. Although couriers provided a service that the post offices could not provide and had no desire to provide traditional postal services, the SOEs jealously guarded the peripheries of their markets.
- The fight to open the express delivery market was ultimately decided in the U.S. and the EU. Because SOEs were involved, it was the legal and political arguments – not the commercial competition – that brought about the opening of this market. In the U.S., laws were eventually passed to exempt “time sensitive” letters from the U.S. postal monopoly law. In the EU, the Commission took the position that the competition law allowed for express delivery companies to co-exist with postal monopolies.
- This same fight continues today in many developing countries (and some developed countries still), as SOEs hold tight to their markets. In these countries, laws such as those related to customs and VAT still provide preferences to public operators.
- There is a growing recognition that laws protecting these SOEs might have outlived their usefulness. As trade laws modernize, they should seek to protect and consolidate national measures which provide for fair competition in delivery services.

Amb. Crawford Falconer suggested new principles in trade policy for SOEs:

- The World Bank notes that 8-10% of industrialized countries’ GDP is from SOEs, in China and Russia a third of GDP is attributed to SOEs, in low income countries 15% of GDP is estimated to originate from SOEs..
- Numerous studies show that if SOEs were made more competitive, national economies and national welfare would benefit.
- To really bring about change, however, there needs to be “buy-in” from countries that champion SOEs. They need a demonstration of the benefits of making SOEs competitive as well as developmental assistance on the regulatory side.
- Currently, WTO rules do not get at the SOE issue. Countries should consider putting in place new “principles” that will properly address the issue, such as requiring (1) tax neutrality; (2) debt neutrality (e.g., ensure that loans are made on a commercial basis); (3) regulatory neutrality (i.e., no preferential regulations or exemptions for SOEs); (4) SOE demonstration of a commercial rate of return on investments; (5) pricing policy ensuring prices reflect costs; (6) independent corporate governance with limited government intervention; and (7) full application of antitrust rules for SOEs. Several countries have put in place such “principles” with some success, including the EU and Australia.
- In sum, governments should seek market access vis a vis SOEs and demonstrate how SOE competitiveness is beneficial for countries. Governments can undertake this multilaterally, via a treaty, or simply as agreed-to “best practices.”