

APPENDIX 10

TISA ANNEX ON STATE-OWNED ENTERPRISES

In mid-2016 the US belatedly tabled an Annex on State-owned Enterprises that draws on the SOE chapter in the TPP. The EU responded to that text in October 2016.¹ The latest text from November 2016 has no square brackets and appears to be the US revision in light of the EU's comments; it shows few changes from the earlier text.²

Defining an SOE

A number of criteria determine whether an enterprise would fall under the annex:

- The annex only applies to enterprises owned by **central** government.³ The EU wants it to apply at all levels, as did parties to the TPP. However, the US cannot bind its states to these rules without their consent.
- The enterprise must be 'principally' engaged in 'commercial activities'. These are defined vaguely as activities undertaken 'with an orientation towards profit-making'⁴ and which produce a good or service in quantities and at a price that the SOE itself determines. Banks, insurance companies, telcos and post offices could all be caught.
- To be *state* owned the central government must hold more than 50% voting rights or the power to appoint 50% of the board of directors.⁵ Whether that includes a golden share which gives the state voting rights and veto powers on strategic matters is unclear. The status of public-private partnerships (PPPs) in which the state has a majority stake is also uncertain, because they take various legal forms. The EU wants the definition to include any enterprise the government has the possibility to exercise control over, which is much broader.
- Most rules do not apply to an SOE that has derived annual revenue of less than 200 million IMF special drawing rights (about USD270 million)⁶ from its commercial activities in *any one* of the three preceding years.
- Most of the rules do not apply to a sovereign wealth fund or independent pension fund whose investments are not directed from the government (which may preclude governments from giving instructions on ethical investments).⁷

What the rules require

There are three significant protections from these rules:

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- 1 TISA, Annex on State-owned Enterprises, dated November 2016.
 - 2 TISA, Annex on State-owned Enterprises, September 2015 [with EU comments October 2016].
 - 3 TISA, Article X.1, Annex on State-owned Enterprises, dated November 2016.
 - 4 Footnote 1 of the SOE Annex, dated November 2016, says this does not include an enterprise that operates on not-for-profit or cost-recovery basis.
 - 5 TISA, Article X.1, Annex on State-owned Enterprises, dated November 2016.
 - 6 TISA, Article X.7, Annex on State-owned Enterprises, dated November 2016. The threshold is adjusted every 3 years.
 - 7 TISA, Article X.2.4, Annex on State-owned Enterprises, dated November 2016.

1. The November 2016 text would allow each country to have a schedule of SOE activities that would otherwise breach the **non-discrimination** rule.⁸ The schedule would not protect them from other rules in the annex, such as the requirement to operate on the basis of commercial considerations. The content of the schedule would have to be negotiated and agreed by the parties; the US bargained very hard over the SOE list in the TPP. The EU is considering how that annex would relate to countries' schedules of commitments on market access and national treatment.
2. An SOE would be allowed to apply non-commercial considerations (such as the need to ensure public access, affordability, or cultural sensitivities) where it is fulfilling a '*public service mandate*'. A public service mandate is defined as a government mandate under which an SOE makes a service available to the public, directly or indirectly, within its territory and includes the distribution of goods and the supply of general infrastructure services.⁹ The EU suggests an alternative right to deviate from commercial considerations for a 'legitimate public service obligation'.¹⁰ Even where that explicit 'mandate' (US) or broader 'obligation' (EU) exists, the SOE must not discriminate against services and service suppliers from other TISA countries, meaning they get the benefit of the taxpayer-funded mandate. This protection only applies to domestic services and excludes any cross-border activity. This assumes, often unrealistically, that SOEs will maintain a distinct firewall between domestic services that are mandated and those that are not, between domestic and international services, and between the goods, services and IT components of their operations.
3. A government or an SOE can make a temporary response to a national or global economic emergency that breaches the non-discrimination and commercial considerations obligations in the annex.¹¹ This provision is designed to protect the kind of corporate bailouts the US made during the Global Financial Crisis. Key terms, including 'temporary' and 'economic emergency' are not defined, but unlike the general security exception, and the stronger exception in the e-commerce annex, this is not self-judging. It does not protect responses to other emergencies, such as natural disasters or civil strife; in those situations, a government would have to rely on the inadequate general exception, discussed in Chapter 5.
4. The exclusion for government procurement is limited,¹² in the same way as the core text. It effectively only applies to procurement conducted for the internal non-commercial purposes of government agencies.

8 TISA, Article X.5, Annex on State-Owned Enterprises, dated November 2016

9 TISA, footnote 4, Core Text, dated 14 July 2016.

10 TISA, Article X.2.1 and X.4, Annex on State-owned Enterprises, September 2015 [with EU comments October 2016].

11 TISA, Article X.7.3, Annex on State-Owned Enterprises, dated November 2016.

12 TISA, Article X.2.6, Annex on State-Owned Enterprises, dated November 2016.