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Public Ownership and the WTO in a Post Covid-19 Era: From Trade Disputes to a 'Social' Function

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**PUBLIC OWNERSHIP AND THE WTO IN A POST-COVID-19 ERA:
FROM TRADE DISPUTES TO A ‘SOCIAL’ FUNCTION[^]**

Paolo Davide Farah & Davide Zoppoloto***

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I. INTRODUCTION

Public ownership is closely bound to the need of the government to protect and guarantee the well-being of its citizens.¹ Where the market cannot, or does not want to,² provide goods and services, the State uses different tools to intervene, influence, and control some aspects of the private sphere of expression of its citizens. Although, in the past century, this behavior was accepted as one of the expressions of the public authority and part of the social contract, this

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¹ See generally art. 42 COST. (It.) ("Private property is recognised and guaranteed by the law, which prescribes the ways it is acquired, enjoyed and its limitations so as to ensure its social function and make it accessible to all."). This article is an outcome of mediation between the different ideological compositions of the drafters of the Italian Constitution. See also 2 UGO MATTEI, ALESSANDRA QUARTA, RODOLFO SACCO & EMANUELE ARIANO, TRATTATO DI DIRITTO CIVILE-I DIRITI REALI: LA PROPRIETÀ 109–19 (UTET 2015) (an account on the "social function" of private property).

² The provision of public and quasi-public goods and services to solve market failures is a common behavior in market and non-market economies. See generally Joseph E. Stiglitz, *Markets, Market Failures, and Development*, 79 AM. ECON. REV. 197, 201–02 (1989) (information on the preferred choice of developing countries to rely on government intervention for provision of public but also private goods and its link with market failure).

perception has shifted in accordance with the wave of privatization programs initiated in the 1980s and the advent of economic neoliberalism.³

For the international community, one of the first attempts to regulate state interference in the supposedly private economy was the Havana Charter for an International Trade Organization (Charter or ITO). The Charter, while recognizing the need to regulate restrictive business practices, left ample room to maneuver for contracting parties' industrial policies aimed at economic development and industrial reconstruction. It also highlighted that public ownership, in some instances, held a social function.⁴

The establishment of the World Trade Organization⁵ (WTO), after the conclusion of the Uruguay Round on January 1, 1995, signaled the triumph of Western economic theories on a global scale. The system covered, in a semi-universal way, both tariff and non-tariff barriers (NTBs) to the trade of goods and services. It also enforced dispute settlement mechanisms in the event of trade disputes amongst parties.

In fact, the discipline for state involvement in the market and the regulation of State-Owned Enterprises (SOEs) under the WTO system are insufficient to deal with the fast-changing role of SOEs in the world economy and in the geopolitical landscape. Several WTO provisions allow developing countries, economies in transitions, and non-market economies some flexibility to adopt temporary measures for the transformation into a market economy.⁶ But no specific set of rules exist on SOEs. SOEs are partially covered by: the General Agreement on Tariffs and Trade (GATT)⁷ Article XVII on state trading enterprises, the concept of "public body" under the Agreement on Subsidies and

³ THOMAS BIEBRICHER, *THE POLITICAL THEORY OF NEOLIBERALISM* 33–79 (Stan. Univ. Press 2018) (on the role of the State on developing and implementing neoliberal policies).

⁴ Yet, the structure envisaged for negotiating advancement in trade regulations between its members was more formalized and stricter in comparison with the following system. Such lack in a flexible approach to trade negotiation has been credited as a cause of failure for the ITO attempt. Richard Toye, *Developing Multilateralism: The Havana Charter and the Fight for the International Trade Organization, 1947–1948*, 25 *INT'L HIST. REV.* 282, 305 (2003).

⁵ See generally PETER VAN DEN BOSSCHE & WERNER ZDOUC, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS* (4th ed. 2017); MITSUO MATSUSHITA, THOMAS J. SCHOENBAUM, PETROS C. MAVROIDIS & MICHAEL J. HAHN, *THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY* (3d ed. 2015); *THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS* (Patrick F.J. Macrory, Arthur E. Appleton & Michael G. Plummer eds., 2005) [hereinafter *WTO: LAW*].

⁶ See Agreement on Subsidies and Countervailing Measures art. 29.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14. [hereinafter *SCM Agreement*] ("Members in the process of transformation from a centrally-planned into a market, free-enterprise economy may apply programmes and measures necessary for such a transformation.").

⁷ General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 187 [hereinafter *GATT 1994*].

Countervailing measures (SCM), and by the protocols of accession of non-market economies to the WTO.

Rather than focusing on the owner of the entity, the traditional neutral stance on ownership under the WTO is primarily aimed at regulating the entities' behavior in a universally applicable manner. Thus, the WTO is not against public ownership *per se* but provides instruments to offset illicit government behaviors, mainly in the form of subsidies, that unduly favor public enterprises at the expense of the private sector.

The growing importance of SOEs as global economic actors and the advances in the world economy of what has been labelled as "state capitalism"⁸ has put into discussion this somewhat naïve stance of the WTO over ownership. State capitalism has been defined as a "system in which the state functions as the leading economic actor and uses markets primarily for political gain."⁹ SOEs are one of the main actors involved that shape the system along with privately owned "national champions,"¹⁰ sovereign wealth funds (SWF), and national oil corporations.¹¹ China has been understood to be a leading example of this "new" form of capitalism, which benefitted the national economy with over two decades of double-digit economic growth.¹² While the correct characterization of the Chinese economic system is beyond the scope of this research, the challenges to the WTO system that are rooted in this "guided" role of the state are fundamental

⁸ Ian Bremmer, *State Capitalism Comes of Age: The End of the Free Market?*, 88 FOREIGN AFFS. 40, 43 (2009); *contra* the concept of "fragmented authoritarianism" that does not consider China as a top-down machine that acts as a single entity. KENNETH G. LIEBERTHAL & MICHEL OKSENBURG, *POLICY MAKING IN CHINA* (1988); and the concept of "Developmental State." Instead of focusing on a global and all-embracing trend, as in the case of "state capitalism," the concept of "Developmental State" is specific to East Asian Countries mainly Japan, China, South Korea, and Taiwan. The concept underlines that the governments of these countries use industrial policies and regulation to cooperate and lead private enterprises. CHALMERS JOHNSON, *MITI AND THE JAPANESE MIRACLE* (1982).

⁹ Bremmer, *supra* note 8, at 41 (emphasis added).

¹⁰ See Li-Wen Lin & Curtis J. Milhaupt, *We Are the (National) Champions: Understanding the Mechanisms of State Capitalism in China*, 65 STAN. L. REV. 697 (2013) (highlighting that a key feature of state capitalism is the intimate relation between the party with the corporate sector and especially with SOEs). Peter Nolan expanded the reasoning by assessing how large private corporations have been captured in a discourse that places emphasis on the possibilities of Chinese enterprises to compete at the international level. In particular, he highlights the efforts of the government to promote and internationalize Chinese national champions. PETER NOLAN, *CHINA AND THE GLOBAL ECONOMY* (2001).

¹¹ Ian Bremmer, Commentary, *The End of the Free Market: Who Wins the War Between States and Corporations?*, 9 EUR. VIEW 249, 250 (2010).

¹² See BARRY J. NAUGHTON, *THE CHINESE ECONOMY* 85–110 (2007) (pointing out that the importance of SOEs, as a consequence, downsizes the state sector in China which had drastically decreased since the opening up reform of Deng Xiaoping). The transition towards a market economy has been fueled by an increasingly competitive private sector similar to other Non-Market economies experiences. NICHOLAS R. LARDY, *MARKETS OVER MAO* (2014).

for our analysis in this article. Although SOEs are a key tool in both developing and developed countries,¹³ as they contribute to the provision of public goods and services, some issues regarding this “new” type¹⁴ of SOEs arise. Because of the internationalization of businesses, the fragmentation of Global Value Chains, and the increasingly intertwined dynamics of the global economy, countries started to include specific commitments on the matter under their free trade agreements (FTAs). The Trans-Pacific Partnership (TPP) is the first trade agreement that regulates SOEs among the parties with a coherent and comprehensive set of rules.¹⁵ The European Union (EU) followed suit with its trade agreements with Vietnam¹⁶ and Japan¹⁷ but no discipline is included under the FTAs and RTAs which involve China as a Party.

State-Owned enterprises have, since the establishment of the People’s Republic of China (China or PRC), been a characteristic and defining feature of its economic system. The pragmatic approach¹⁸ to socialism undertaken by China shaped the Chinese economic system and legislation regarding State-Owned

¹³ THE SIZE AND SECTORAL DISTRIBUTION OF SOES, ORG. FOR ECON. COOP. & DEV. 11 (2017), https://read.oecd-ilibrary.org/governance/the-size-and-sectoral-distribution-of-state-owned-enterprises_9789264280663-en#page4 [hereinafter OECD] (stressing that SOEs are providing 2 to 3% of the total employment in OECD area and are mainly concentrated in electricity, gas transportation finance, and telecom).

¹⁴ There are three main characteristics of new SOEs when compared to the state ownership in Europe up until the privatization wave of the 1990s which could be identified. First, ownership of SOEs is, in some cases, shared with the private sector. Second, listing and full or partial privatization of SOEs created a situation in which different interests should be considered alongside the public interest (i.e., shareholders and investment funds). Third, SOEs coming from transitioning economies increased their presence and importance in outward foreign direct investment (FDI) in both developed and developing countries. Aldo Musacchio & Sergio G. Lazzarini, *State-Owned Multinationals: Theory and Research Directions*, in STATE-OWNED MULTINATIONALS 255–57 (Alvaro Cuervo-Cazurra ed., 2017).

¹⁵ See Trans-Pacific Partnership Agreement ch. 17, Feb. 4, 2016, Exec. Off. Pres.: Off. U.S. Trade Rep, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> (last visited Oct. 1, 2022).

¹⁶ Free Trade Agreement Between the European Union and the Socialist Republic of Viet Nam, E.U.-Viet., June 30, 2019, 2020 O.J. (L 186) 63, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/vietnam/eu-vietnam-agreement/texts-agreements_en [hereinafter EVFTA].

¹⁷ Agreement Between the European Union and Japan for an Economic Partnership, EU-Japan, July 17, 2018, 2018 O.J. (L 330) 1.

¹⁸ For an analysis of how this pragmatism played out in the development of the Chinese energy sector, see Davide Giacomo Zoppoloto & Shisong Jiang, *China-MENA Energy Cooperation Under the Belt and Road Initiative: Megaprojects, Economic Planning, and a Pragmatic Approach to the ‘Green’ Transition*, J. WORLD ENERGY LAW BUS., Nov. 2022, at 4–8.

Enterprises in a unique way.¹⁹ The intervention and influence of the national economy is not only a direct consequence of a specific ideology (i.e., Socialism with Chinese Characteristics), but is also a way for the leading party to retain power and legitimize its position in the country. Since the Deng Xiaoping's Reform and Opening-up, SOEs have witnessed a process of reform and corporatization, but instead of disappearing, they have holed up in strategic sectors of the economy and partnered with private enterprises to promote state interests.

Despite best efforts, SOEs in China are circumventing, indirectly, the letter of trade law (i.e., WTO obligations—at least its *ratio legis*). The role of SOEs in the country is at the center of critiques from China's trade partners, which stress the importance of guaranteeing a level playing field²⁰ and the need to complete the transition towards a market economy. Protectionist measures enacted across the globe, the distrust in multilateralism to solve trade disputes, the fragmentation of international economic law, and the rush of integrating non-market economies into the global economy without appropriate preparation are all factors that should be addressed in order to re-establish trust in the WTO system. SOEs are, therefore, taken by this research as a testing ground in order to understand: (a) the WTO's adaptability to respond to the new challenges posed by SOEs, especially by SOEs in state capitalist countries; (b) the need to rely on FTAs and Regional Trade Agreements (RTAs) to provide additional obligations on SOEs; and (c) the "elusiveness"²¹ of Chinese SOEs from any legislation and regulation addressing the matter because of the peculiarity of the country's economic and political system.

This paper is structured as follows. After the introductory remarks, Section II covers the relationship between public ownership and international

¹⁹ Peter Nolan described, in-depth, the situation of a socialist economy in transition. Two main approaches could be identified for the transition. The first one known as "shock therapy," fashionable in ex-Soviet Countries and Latin America, and the second, the gradual approach undertaken by China. At the core of the reform plan of SOEs, and broadly of the national economy, there was the need to protect state assets on one hand, and to integrate into the reform "cautious, incremental and experimental" policies on the other. This pragmatic and gradual approach to the transition has been also possible for the Author because "China's low level of international debt enabled her leaders to resist the 'advice' from, for example, the World Bank and the IMF, and to follow an independent, incremental path of industrial reform towards a market economy." PETER NOLAN, *STATE AND MARKET IN THE CHINESE ECONOMY* 173–326 (1993).

²⁰ European Commission Press Release STATEMENT/18/5915, Joint Statement on Trilateral Meeting of the Trade Ministers of the United States, Japan, and the European Union (Sept. 26, 2018) ("[T]he Ministers highlighted the importance of securing a level playing field given the challenges posed by third parties developing State Owned Enterprises into national champions and setting them loose in global markets – resulting in distortions that negatively affect farmers, industrial producers, and workers in the Ministers' home countries.").

²¹ Here, elusiveness refers to the current WTO regime's inability to regulate the peculiarities of the Chinese SOEs.

economic law. Section II expounds the existing and historical regulatory framework on a state's interference into the market. It begins with an overview of the pre-WTO system with a focus on the Havana Charter and its regulation of monopolies. The section further highlights how, under the WTO, the regulation of SOEs is both sparse and unorganized. More specifically, references to SOEs could be found under the General Agreement on Tariffs and Trade XVII 'state trading enterprises,' in the concept of 'public body' of the Agreement on Subsidies and Countervailing Measures (SCM) Article 1(a)(1)²² and in the Protocols of Accession of Non-Market Economies (NMEs) such as those of China, Russia, and Vietnam. More recently, a novel impetus to regulate SOEs could be found in bilateral and regional FTAs. This approach to SOEs is based on the assumption that only via a general definition of SOEs, accompanied by a specific set of rules, it is possible to ensure a level playing field between SOEs and private enterprises in the global competition and market economy context. Section III moves the analysis to China and highlights the challenges to international economic law brought on by Chinese SOEs and the lack of regulation in this context. Lastly, the article analyzes the increase in the use of SOEs to counteract the COVID-19 pandemic and assesses how the relationship between the state and the market will likely change as a result.

II. INTERNATIONAL TRADE AND PUBLIC OWNERSHIP

A. *Pre WTO—Public Commercial Enterprises and State Trading*

The Charter called for the establishment of an International Trade Organization (ITO)²³ as a key component for post-World War II recovery. The Charter recognized, in several provisions, the need to regulate and coordinate State behavior when operating in the market.²⁴ The Charter offered, for the first time, a comprehensive framework for the regulation of international trade. Yet, the Charter never entered into force due to the withdrawal of the United States.²⁵ Some of the provisions contained in the Charter have been used as a basis for

²² SCM Agreement, *supra* note 6, at art. 1.1(a)(1).

²³ See generally Richard Toye, *The International Trade Organization*, in THE OXFORD HANDBOOK ON THE WORLD TRADE ORG. (Martin Daunton, Amrita Narlikar & Robert M. Stern eds., 2012); see also DOUGLAS A. IRWIN, PETROS C. MAVROIDIS & ALAN O. SYKES, THE GENESIS OF THE GATT (2008).

²⁴ Daniel Drache, *The Short But Amazingly Significant Life of the International Trade Organization (ITO) Free Trade and Full Employment: Friends or Foes Forever?* 37 (Univ. of Warwick, Ctr. for the Stud. of Globalization and Regionalisation, Working Paper No. 62, 2000).

²⁵ TOYE, *supra* note 23, at 95–100; WILLIAM DIEBOLD, THE END OF THE I.T.O. (Int'l Fin. Section, Dep't of Econ. & Soc. Inst., 1952) (analyzes the reasons why the U.S. withdrew support from the Charter including: governmental control and interference with private business, along with the impossibility of bridging the differences within such a diverse economic system).

subsequent agreements,²⁶ while others, such as the section on public commercial enterprises, have not been reused.²⁷

The importance of allowing its Members to rely on industrial policy and state enterprises for enabling post-war recovery arise from the Charter. The Charter, in fact, attempts to regulate two different types of distortive state intervention into the market: state trading enterprises and monopolies on one hand and the business practices of private and public enterprises that might undermine international trade on the other.

The Charter followed a neutral stance on the owner of the enterprise, and the link²⁸ between the enterprise and the government is the basis of the discipline. The aim of the regulation as spelled out by the Charter was twofold: ensure non-discriminatory treatment to foreign enterprises²⁹ and to provide adequate opportunity for foreign enterprises to compete with state trading enterprises. Relevant exceptions are provided under the chapter for the imports of products for governmental purposes³⁰ and in the event that governmental assistance is needed for economic development and industry reconstruction.³¹ The latter exception highlights the willingness of the drafters to not interfere on national industrial policy by allowing governmental assistance for a limited time.

The second form of state intervention was state restrictive business practices in the market. Chapter V of the Charter was to provide mechanisms of

²⁶ The cardinal principle of trade regulations, such as the Most-Favoured-Nation and the National Treatment, have been included under the GATT.

²⁷ DIEBOLD, *supra* note 25, at 25–26.

²⁸ This link could be: (a) direct ownership in the case of State enterprise, (b) a grant of exclusive or special rights to a private enterprise, (c) Marketing Boards in the case of monopoly. Havana Charter for an International Trade Organization art. 29 ¶ 1(a), U.N. Doc. E/Conf. 2/78 (Mar. 24, 1948) [hereinafter Havana Charter].

²⁹ The proposal to be compliant to Most-Favored-Nation (MFN) and national treatment was criticized in the United States by different delegates during the second session of the Preparatory Committee of the United Nations Conference on Trade and Employment in June 1947. More specifically, the United States' proposal seeks to include MFN and national treatment into the procurement by governmental agencies. The delegate of South Africa stressed that

the other point could very well be met under section 31 which limits the state-trading to Most-Favoured-Nation treatment and not to national treatments it does here. The government in South Africa, and I think the same applies in a number of other countries, produces a large number of veterinary medicines E/PC/T/A/SR/10 page 35 These medicines are used for government purposes but they are also sold for farmers. As long as the government uses a particular bottle of medicine for veterinary purposes these rules would not apply, but as soon as a bottle is sold to a farmer, then a different set of rules applies. I think you have got to stick to Most-Favoured-Nation treatment as you have in state-trading.

U.N. ECOSOC, 2d Sess., 10th mtg. at 34–35, U.N. Doc. E/PC/T/A/SR/10 (June 6, 1947).

³⁰ Havana Charter, *supra* note 28, at art. 29 ¶ 2.

³¹ *Id.* at art. 13, ¶ 1.

cooperation and transparency to diminish the harmful effects that contracting parties' trade policies could have on the market. "Public commercial enterprises" were one of the possible actors that could cause trade restrictions and are defined as "(i) agencies of governments in so far as they are engaged in trade, and (ii) trading enterprises mainly or wholly owned by public authority, provided the Member concerned declares that for the purposes of this Chapter it has effective control over or assumes responsibility for the enterprises."³²

Instead of a universal definition, the Charter follows a conciliatory approach by allowing contracting parties to list their public commercial enterprises that should abide by the discipline. Although the state trading provision was included under GATT Article XVII, restrictive business practices were not incorporated because its Members preferred to conclude an agreement on the most pressing issues (i.e., reduction of tariffs). The exclusion of these rules signaled that the discipline of government intervention in the market was faltering and incomplete. Thus, Members were not ready to introduce a common legal framework on the matter.³³ The opening of the Charter allowed industrial policies great flexibility in facilitating economic development and recovery. Particularly, the Charter acknowledged the social functions attached to public ownership.³⁴ The ITO was conceived as part of the larger effort of the international community³⁵ to reach peace and stability in the international order after the Second World War. Trade was, therefore, conceived as an enabler of economic and social development and not merely as a means to raise real income and "full use" of the resources as established under the GATT 1947.³⁶ During the preparatory work of the ITO and the GATT, the contracting parties had two contrasting positions on the topic. The U.S. favored strict control over a State's interference in the economy, while Western European Countries believed that cooperation between the State and the market was deemed to be essential for

³² *Id.* at art. 54, ¶ 2(b) (emphasis added).

³³ Andrea Mastromatteo, *WTO and SOEs: Article XVII and Related Provisions of the GATT 1994*, 16 *WORLD TRADE REV.* 601, 618 (2017).

³⁴ Havana Charter, *supra* note 28, at art. 31 ¶ 6 (recognizes that monopolies "are established and operated mainly for social, cultural, humanitarian, or revenue purposes.").

³⁵ *See* U.N. Charter art. 55 ("With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: a. higher standards of living, full employment, and conditions of economic and social progress and development; b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.").

³⁶ General Agreement on Tariffs and Trade, at 1, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

recovery.³⁷ To accommodate this latter request, the GATT 1947 left ample room for maneuvering toward the industrial policy of the contracting parties.³⁸ The various exceptions under the GATT 1947 expanded during the following years to accommodate the need for more flexibility for developing countries and to extend the GATT membership to non-market economies. The accession terms to the GATT for non-market economies³⁹ under the influence of the Soviet Union placed particular emphasis on the role of the State in the market. In particular, Eastern European countries committed to gradually opening their markets. They have been granted sufficient flexibility to avoid any immediate phasing out of their industrial policy non-compliant with the GATT principles and their support towards state enterprises. In addition, the Western Countries continued to maintain quantitative restrictions towards the newly acceded Members.⁴⁰ Consequently, even after the accession, the increase of East–West trade was limited. However, the GATT pushed its Members’ trade policies, although in the long run, toward those of a market economy.

B. WTO

1. GATT–State Trading Enterprises

State Trading Enterprises (STEs) are regulated by Article XVII of the GATT 1994 with two main objectives: regulating STEs’ behavior (non-discrimination and commercial consideration) and making the state accountable for undue interference in the market (i.e., national treatment, governmental assistance, and quantitative restrictions). While a definition of STEs in the GATT 1947 was considered unneeded,⁴¹ the Uruguay Round followed a different stance.

The Understanding on the Interpretation of Article XVII of the GATT offered for the first time a working definition of STEs: “[g]overnmental and non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional

³⁷ TOYE, *supra* note 23, at 85–90.

³⁸ Exceptions to direct trade in the form of quantitative restrictions were, in fact, allowed under the GATT 1947 based on the economic sector involved (Agriculture) Balance of Payment, and infant industry. M.M. KOSTECKI, *EAST-WEST TRADE AND THE GATT SYSTEM* 51–52 (1979).

³⁹ *See generally id.* at 65–66 (in depth overview of the accession of Poland (1967), Romania (1971), and Hungary (1973)).

⁴⁰ *Id.* at 114–33. Leah Haus, *The East European Countries and GATT: The Role of Realism, Mercantilism, and Regime Theory in Explaining East-West Trade Negotiations*, 45 *INT’L ORG.* 163 (1991).

⁴¹ *See generally* TRENDS IN INTERNATIONAL TRADE, *GEN. AGREEMENT ON TARIFFS & TRADE* (1958).

powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports.”⁴²

Accordingly, STEs are the beneficiaries of “exclusive or special rights or privileges.” Even if noteworthy, the attempt did not solve the definitory thorny issue. First, the requirement of “exclusive or special rights or privileges” unduly limits the scope of coverage of Article XVII, 1(a) that instead identifies two different entities: (a) State enterprises and (b) any enterprises that receive exclusive or special privileges. “By narrowing down coverage to the latter option, state enterprises could escape from Article XVII. If a government does not bestow “exclusive or special rights or privileges” to an STE, the enterprise is not covered by the working definition even if it influences “the level or direction of imports or exports.”⁴³ Second, the working definition is not explicit about what is meant by “exclusive or special rights or privileges.” While some indications could be drawn from the two additional examples of constitutional and statutory power, the coverage is vague.⁴⁴ Problems arise when an STE—granted with “exclusive or special rights or privileges”—acts as a holding company and does not directly influence the level or direction of imports or exports. In this case, subsidiary companies are not the beneficiaries because they have a legal identity that is different from the holding company. Thus, it is difficult to admit that STE subsidiaries fall under the scope of Article XVII. The vagueness of the definition could also be an obstacle to the notification system implemented under the GATT 1994.⁴⁵

Under the auspices of the Committee on Agriculture, an attempt has been made to formulate a clear and satisfactory definition of an STE. The Chair’s reference paper defines agricultural exporting state trading as follows:

Any governmental or non-governmental enterprise, including a marketing board, which has been granted, or which enjoys de facto as a result of its governmental or quasi-governmental status, exclusive or special rights, privileges, or advantages with respect to exports of agricultural products, including statutory or

⁴² Understanding on the Interpretation of art. XVII of the General Agreement on Tariffs and Trade 1994 ¶ 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 202. [hereinafter Understanding] (emphasis added).

⁴³ Steve McCorrison & Donald MacLaren, *Redistribution, State Trading Enterprises and “Politically Optimal” Tariffs*, 46 CANADIAN J. OF ECON. 1351 (2013).

⁴⁴ Mastromatteo, *supra* note 33, at 606.

⁴⁵ Steve McCorrison & Donald MacLaren, *State Trading, the WTO and GATT Article XVII*, 25 WORLD ECON. 107, 133 (2002).

constitutional powers, in the exercise of which the enterprise influences exports of agricultural products.⁴⁶

In the drafters' minds, the first sentence in brackets was likely essential to capture a wide array of enterprises that, currently, due to the vagueness of the definition, do not fall under Article XVII. In fact, this slight difference could cover enterprises that *de jure* are not the recipients of exclusive or special rights or privileges but *de facto* have a monopoly position. This is further strengthened by the use and the wording of the concept included in the following part "or advantages with respect to exports of agricultural products." This proposal collapsed because of a stalemate in the WTO negotiations over agriculture.⁴⁷

According to the Understanding on the Interpretation of Article XVII of the GATT (Understanding), a Working Group on STEs has been established to better the discipline.⁴⁸ More specifically, the Working Group: (a) reviews notifications and counter notifications, (b) evaluates the adequacy of the questionnaire system,⁴⁹ and (c) develops a list of the possible relations between the government and STEs.

This broad mandate under paragraph five of the Understanding was first aimed at enhancing and "ensur[ing] transparency of the activities of state trading enterprises."⁵⁰ To do so, the notification system requires that every three years, Members must disclose each state trading enterprise operating in its territory to the Working Party on State Trading Enterprises. In the event that a country fails to comply with the notification duty, other Members could intervene. First, they

⁴⁶ *Exporting State Trading Enterprises*, WORLD TRADE ORG.: COMM. ON AGRIC. (May 10, 2006), https://www.wto.org/english/tratop_e/agric_e/ref_paper_ste_r1_e.pdf.

⁴⁷ On Agricultural Exporting State trading enterprises, a joint proposal to add Article 10-b is to the Agreement on Agriculture has been submitted to the Committee on Agriculture on behalf of Brazil, the European Union, Argentina, New Zealand, Paraguay, and the Republic of Moldova. The proposal covers only state trading enterprises engaged in the export of agricultural products and is limited to the working definition of State trading enterprises set forth in the Interpretative note. The objective of the proposal is to eliminate subsidies contingent on export performance and not all "trade-distorting practices" as in the Chair's reference paper. Special Session of the Comm. on Agric., *Proposal on Export Competition from Brazil, European Union, Argentina, New Zealand, Paraguay, Peru, Uruguay and The Republic of Moldova*, WTO Doc. JOB/AG/48/Corr.1 (Nov. 16, 2015).

⁴⁸ Understanding, *supra* note 42, at ¶ 5.

⁴⁹ GATT members, since the 1960s, were required to report their operating STEs every three years to the Secretariat. The self-reporting system was based on a questionnaire consisting of a wide array of questions ranging from the number of the STEs, sectors and reasons behind the establishment and maintenance of STEs, and statistical information. This form of self-reporting was not successful and obtained little follow-up. One of the reasons behind the failure of the initiative has also been identified in the difficulties of defining a state trading enterprise. McCorrison & MacLaren, *supra* note 45, at 111–13.

⁵⁰ Understanding, *supra* note 42, at ¶ 1 (emphasis added).

could try to resolve the issue with the concerned Member and, if no meaningful agreement could be reached, then they could raise the question to the Working Party through a counter-notification procedure.

To date, more than 750 communications⁵¹ have been submitted to the Working Party on State Trading Enterprises by WTO members. Since 2012, the notification pursuant to Article XVII, 4(a) must now be submitted every two years by June 30th,⁵² which has the goal of improving transparency on the topic. Although the system has improved in comparison with the previous period (1996–2012) the communications are often not completed of all the elements required.⁵³ As examples, the enumeration of state trading enterprises is often non-exhaustive and does not cover the real situation occurring in Member Countries. A review of the notifications has been carried out by the Working Party on State trading in 2017⁵⁴ and has been at the center of the latest Report of the Working Party.⁵⁵

Under the document, the concept of types of relationships is key. They are “possible indications of the existence of a state trading enterprise,”⁵⁶ but the identification is not automatic. In fact, even if the state is engaged with one of these activities, an STE should fulfill the requirements of Article XVII: “exclusive or special rights or privileges” and influence over international trade. The government, in acting *iure privatorum*, might bestow more favorable

⁵¹ See Communications to the Working Party on State Enterprises, WORLD TRADE ORG., https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S001.aspx (enter “G/STR/N/*” in Document symbol box; then click “search”; then select “Notification” on left-hand side) (last visited Oct. 14, 2022).

⁵² See Working Party on State Trading Enters., *Notifications Pursuant to Article XVII:4(a) of the GATT 1994 and Paragraph 1 of the Understanding on the Interpretation of Article XVII*, WTO Doc. G/STR/N/14 (Feb. 9, 2012); *State Trading Enterprises*, WTO, <https://notifications.wto.org/en/notification-requirements/state-trading-enterprises>.

⁵³ See *Communications*, *supra* note 51. (207 communications (34.5 per year) were made to the Working Party from Feb. 9, 2012 to June 20, 2018, while 440 (27.5 per year) were made in the 1996–2012 time period. This amounts to approximately an 20% increase).

⁵⁴ Working Party on State Trading Enters., *Status of notifications submitted by WTO Members under article XVII:4(a) of the GATT 1994 and paragraph 1 of the Understanding on the Interpretation of Article XVII of the GATT 1994*, WTO Doc. G/STR/17 (Nov. 6, 2017) https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=239963,236029,232247,135115,128546,120024,97419&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True#. 45 out of 136 Members submitted the notifications for the 2016 notification period.

⁵⁵ Working Party on State Trading Enterprises, *Report of the Working Party on State Trading Enterprises*, WTO Doc. G/L/1196, G/STR/18 (Sept. 11, 2017).

⁵⁶ Working Party on State Trading Enterprises, *Illustrative List of Relationships Between Governments and State Trading Enterprises and the Kinds of Activities Engaged in by These Enterprises*, ¶ 8, WTO Doc. G/STR/4 (July 30, 1999).

treatment to enterprises operating in its territory and, therefore, nullify the efforts to maintain competitive neutrality. For this reason, a clarification of the types of governmental support⁵⁷ and the activities engaged in⁵⁸ by state trading enterprises is enclosed in the list. No precise definition of STEs allows members to have more room to maneuver to implement industrial policies.⁵⁹ State trading, in fact, is more pronounced where the government believes that its intervention is necessary to safeguard public health⁶⁰ (i.e., Tobacco, Alcohol), support national production in sectors deemed to be strategic (Energy and National Resources), support local communities, or strengthen a specific company position in international trade.⁶¹

2. SCM–Public Body

The Agreement on Subsidies and Countervailing Measures (SCM)⁶² regulates another possible type of state intervention that could cover SOEs. Under Article I, 1.1(a)(1) of the SCM,⁶³ the possible grantor of a subsidy is a government, a public body, or a private body entrusted or directed by a government. The term “government” is defined by the Black’s Law Dictionary as “the machinery by which sovereign power is expressed” and “refers collectively to the political organs of a country regardless of their function or level, and regardless of the subject matter they deal with.”⁶⁴ Therefore, the concept of “government” encompasses all entities which exercise public powers

⁵⁷ *Id.* at ¶ 8(ii) (identifying the following types of government support: budget allocations; interest rate/tax concessions; guarantees (e.g., for loans or against business failure); revenue from the collection of tariffs; preferential access to foreign exchange; any off-budget support or assistance).

⁵⁸ *Id.* at ¶ 9.

⁵⁹ Mastromatteo, *supra* note 33, at 607–08.

⁶⁰ Working Party on State Trading Enterprises, *State Trading: New and Full Notification Pursuant to Article XVII:4 of the GATT 1994 and Paragraph 1 of the Understanding of the Interpretation of Article XVII-European Union*, ¶ 2.1, WTO Doc. G/STR/N/15/EU (June 30, 2014) (“The reason for the monopoly is that the alcohol-related problems are reduced if alcohol is sold in the absence of a profit motive. Systembolaget aims to reduce total alcohol consumption by limiting availability. Systembolaget further strives to help limit the medical and social harm caused by alcohol, and thereby improve public health.”).

⁶¹ Working Party on State Trading Enterprises, *State Trading: Updating Notifications Pursuant to Article XVII:4(a) of the GATT 199 and Paragraph 1 of the Understanding on the Interpretation of Article XVII-India*, ¶ 3 C, WTO Doc. G/STR/N/8/IND (May 6, 2010) (“The objective of granting exclusive exporting right for minor forest produce is to provide marketing assistance to poor tribes and to obviate/alleviate the possible exploitation of the poor indigenous tribes by middlemen.”).

⁶² SCM Agreement, *supra* note 6.

⁶³ *Id.* at art. 1(a)(1).

⁶⁴ *Government*, BLACK’S LAW DICTIONARY (11th ed. 2019).

in their operation. Considering this definition, a public body, by its intrinsic nature, is already part of the term “government” because it exercises public powers. However, the WTO jurisprudence on the concept considers a public body as a separate entity.⁶⁵

The Appellate Body (AB) interpreted in *Korea—Commercial Vessels* the term “public body” as follows:

*[A]n entity will constitute a ‘public body’ if it is controlled by the government (or other public bodies). If an entity is controlled by the government (or other public bodies), then any action by that entity is attributable to the government and should therefore fall within the scope of Article 1.1(a)(1) of the SCM Agreement.*⁶⁶

Governmental authority plays a key role in both identifying the coverage of Article 1.1(a)(1) of the SCM and pointing out the necessity to base every possible finding on a case-by-case analysis. Although the body’s ownership is not important *per se*, it may be a relevant, but not sufficient, criterion to assess the three different functions by which governmental authority is conferred to an entity: possession, exercise, and vesting. Further, any assessment of the “public body” should be based on positive evidence and not on the inference that state control implies on a public body. If no positive evidence is furnished by the investigating authority, then the entity must be considered as a private entity.⁶⁷ The reference to the governmental authority, as recalled by the United States in the first written submission, might create loopholes that undermine the “strength and effectiveness of the subsidy disciplines and inhibits circumvention [of the SCM agreement].”⁶⁸ Even the academic world strongly criticised the AB for its trivial finding on the “public body” issue, going so far as to question the stability of the entire dispute settlement mechanism. The main concerns were that the judicial activism of the AB along with the reliance on an excessively academic interpretation may cause an unreasonable and illogical deviation from the main

⁶⁵ The French version of the SCM seems to support the comprehensive definition of government and the correlative nature of the conjunction “or.” See *Présentation de l’Accord sur les subventions et les mesures compensatoires*, WTO, https://www.wto.org/french/tratop_f/scm_f/subs_f.htm#:~:text=%E2%80%9CAccord%20SMC%E2%80%9D (last visited Oct. 17, 2022) (“[D]es pouvoirs publics ou de tout organisme public du ressort territorial d’un Membre.”).

⁶⁶ Panel Report, *Korea—Measures Affecting Trade in Commercial Vessels*, ¶ 7.50, WTO Doc. WT/DS273/R (adopted Mar. 7, 2005).

⁶⁷ See Third Oral Statement of Korea, *United States—Countervailing Duty on Certain Products from China*, ¶ 4, WTO Doc. WT/DS437/R/Add/1 Annex E-6 (July 14, 2014).

⁶⁸ Executive Summary of the First Written Submission of the United States, *United States—Countervailing Duty on Certain Products from China*, ¶ 16, WTO Doc. WT/DS437/R/Add.1 Annex B-2 (July 14, 2014).

aims of both the business community and the WTO. The aims are to facilitate international trade and understand the AB's function as a last resort, while preferring mutually agreed solutions.⁶⁹

3. Protocol of Accession to the WTO—State-Owned and State-Invested Enterprises

The terms State-Owned enterprises (SOEs) and State-Invested enterprises (SIEs) were used interchangeably for the first time in WTO legal jargon in the Protocol of Accession of China to the WTO.⁷⁰ The WTO does not even define SOEs, but they are normally regarded as a legacy of a centrally-planned economy. Although Eastern Europe and former USSR economies put in place extensive privatization programs prior to, or immediately after, their accession to the WTO, Chinese SOEs/SIEs are relevant economic actors and a feature of the economy.⁷¹ During the time of China's Accession, SOEs were one of the main concerns for the U.S., EU, and Japan. These concerns are part of the *Report of the Working Party on the Accession of China*,⁷² and therefore could be used by the Dispute Settlement Mechanism (DSM) in its reasoning.

While STEs are considered under the *Report of the Working Party* as “internal policies affecting foreign trade in goods,” SOEs/SIEs are listed under the heading of “Economic Policies.”⁷³ Accordingly, SOEs and STEs are two different entities because they each affect international trade in a different manner. STEs undermine the market for trade in goods, while SOEs affect goods, services, technology transfers, and intellectual property rights. SOEs, although different from STEs under the Protocol, are not subjected to a specific set of rules and are not even defined.⁷⁴ Regarding the substantial obligations applicable to

⁶⁹ Michael Cartland, Gérard Depayre & Jan Woznowski, *Is Something Going Wrong in the WTO Dispute Settlement?*, 46 J. WORLD TRADE 979 (2012).

⁷⁰ World Trade Organization, *Protocol on the Accession of the People's Republic of China*, WTO Doc. WT/L/432 (Nov. 23, 2001) [hereinafter *Protocol*].

⁷¹ Mark Wu, *The “China, Inc.” Challenge to Global Trade Governance*, 57 HARV. INT'L L.J. 261 (2016).

⁷² See Working Party on the Accession of China, *Report of the Working Party on the Accession of China*, ¶ 44, WTO Doc. WT/ACC/CHN/49 (Oct. 1, 2001), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/ACC/CHN49.pdf&Open=True>, (“[S]ome members of the Working Party expressed concerns about the continuing governmental influence and guidance of the decisions and activities of such enterprises relating to the purchase and sale of goods and services. Such purchases and sales should be based solely on commercial considerations, without any governmental influence or application of discriminatory measures.”).

⁷³ *Id.*

⁷⁴ Mastromatteo, *supra* note 33, at 617–18.

SOEs, the Protocol of Accession extends to SOEs, the disciplines of STEs,⁷⁵ and the regulation on subsidies of the ASCM. A subsidy is considered specific⁷⁶ in China when “state-owned enterprises are the predominant recipients of such subsidies or state-owned enterprises receive disproportionately large amounts of such subsidies.”⁷⁷ Similarly, the central issues in the accession of other non-market and transitioning economies, such as Vietnam and Russia, to the WTO have been SOEs and state trading. The commitments undertaken, for instance, by Vietnam, contain specific obligations on SOEs that can be summarized as follows: an overall reform of SOEs *via* corporatization or privatization; extension of trading rights to foreign enterprises; elimination of subsidies and explanation of the rationales for the sector on which the government retains public ownership; and transparency commitments.⁷⁸

C. FTA, RTA

The decision to increase recurring Free Trade Agreements (FTAs) and Regional Trade Agreements (RTAs) to regulate SOEs and, broadly, trade relations, is justified in several ways. First, the negotiation stalemate in the Doha Round has resulted in a drastic increase in the number of FTAs chosen as a preferred tool to further liberalize the world economy.⁷⁹ Figure 1 highlights the drastic increase in FTAs and RTAs over the past two decades. The scope also expanded from mostly trade in goods to now covering services.

⁷⁵ Julia Ya Qin, *WTO Regulation of Subsidies to State-Owned Enterprises (SOEs)—A Critical Appraisal of the China Accession Protocol*, 7 J. INT’L ECON. L. 863, 884 (2004) (“[A]pparently extends the discipline of GATT Article XVII on state trading enterprises to all state-owned and state-invested enterprises in China, regardless of whether they are engaged in imports or exports.”).

⁷⁶ The SCM identified one of the elements for the scope of coverage of the WTO as subsidy discipline specificity. If a subsidy is not specific, no countervailing duties might be applied to offset the support measure. See Jong Hee Park, *What Determines the Specificity of Subsidies?*, 56 INT’L STUD. Q. 413 (2012).

⁷⁷ *Protocol*, *supra* note 70, ¶ 10 (emphasis added).

⁷⁸ Working Party on the Accession of Vietnam, *Report of the Working Party on the Accession of Vietnam*, WTO Doc. WT/ACC/VNM/48 (Oct. 27, 2006).

⁷⁹ Shujiro Urata, *Mega-FTAs and the WTO: Competing or Complementary?*, 30 INT’L ECON. J. 231, 235–37 (2016).

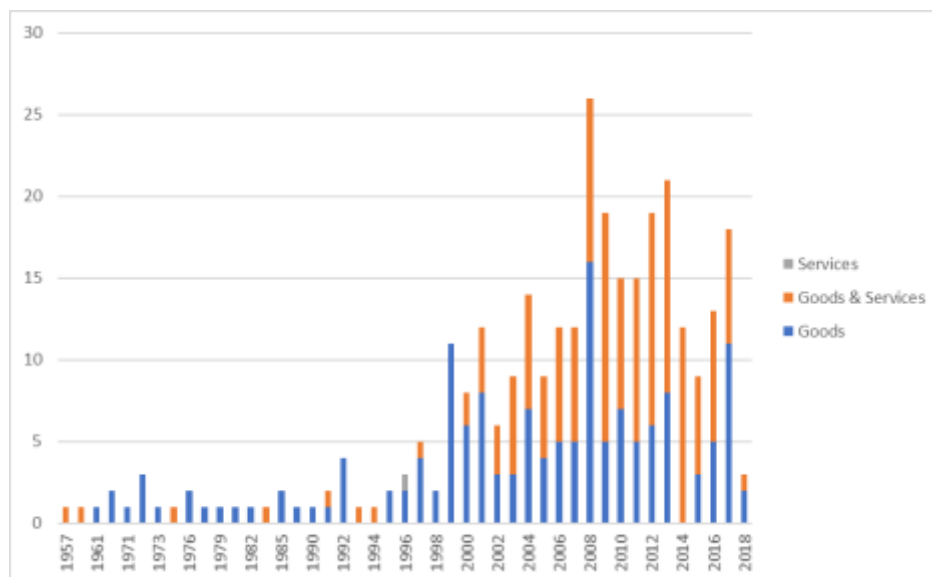


Fig. 1. Authors' elaboration based on the WTO RTA Notifications Database.

Second, the lack of an ad-hoc discipline under the WTO framework of SOEs gradually became a matter of great concern for developed countries, specifically the U.S. and EU. For this reason, different proposals and specific clauses to advance the objective of trade liberalization have been included in FTAs and RTAs. Third, the slowdown of the global economy prompted governments across the globe to the use of protectionist measures⁸⁰ as a recourse, with trade retaliation from the countries affected as an obvious consequence. Different positions, based on the negotiating countries' national interests, emerged in regard to SOEs. While the positions are not frozen and often respond to contingent issues and to a need of bridging the differences between the members, the elements, or lack of elements in some cases, are important to draw some conclusions about the attempt to strengthen the WTO regime on SOEs.

RTAs and FTAs contain, compared to the WTO framework, the following new aspects: (a) universal definition, (b) "WTO-Plus" Obligations on

⁸⁰ The Global Trade Alert analyzes the current situation of the global economy by identifying different national laws and regulations that are harmful to the economy of a country. As of 2022, the most affected sectors are iron and steel, other metal products, automotive, and chemicals; China implemented, from 2008, 5934 interventions affecting global trade. See *Total Number of Implemented Interventions Since November 2008*, GLOBAL DYNAMICS, https://www.globaltradealert.org/global_dynamics (last visited Oct. 17, 2022).

SOEs (i.e., substantial obligations), and (c) exceptions. Each of these will be discussed in turn.

1. Universal Definition

Distinguishing public and private under international law should, theoretically, be the first step to finding the meaning of SOEs.⁸¹ SOEs are, indeed, positioned in the intersection between public and private. However, the difficulties related to this divide are not limited to international trade law because not even national legislation has meaningful ways and methods to clearly separate SOEs from the government.⁸² Similarly, a semiotic interpretation of the terms owned and controlled does not offer any critical element to conceptualize the issue at stake. Ownership seems to imply the possession of company shares that, in theory, should be the sole relation between the company and the State. Instead, control could also cover a form of indirect and *de facto* influence. Thus, in this second case, the control is not based on the direct ownership of company shares but on other elements that make the control possible and effective.

Bilateral and Regional Trade agreements took a pragmatic stance on the matter and included different degrees of specification ranging from no definition to multi-layered and complex definitions. The differences are also a reflection of the different priorities and negotiating powers of the members. The largest is the presence and role of SOEs in the national economy. The lesser is the willingness to further WTO disciplines. For instance, in China, where SOEs still play a relevant role,⁸³ FTAs limit their commitments to the WTO obligations by simply recalling *mutatis mutandis* Article XVII of GATT or the disciplines on subsidies. Although the Singapore issues (Competition Policy, Investment, Transparency,

⁸¹ To overcome the divide, it has been suggested by Gregory Messenger to use a teleological approach to better the definition of public body. Based on the starting point that the WTO should be considered as a political association, the author believes that each provision of the WTO must be read considering the organization's aims and objectives. Therefore, Messenger suggests to consider an entity public when the national state is seeking to reach the common good in the common interest of its citizens. Gregory Messenger, *The Public-Private Distinction at the World Trade Organization: Fundamental Challenges to Determining the Meaning of "Public Body"*, 15 INT'L J. CONST. L. 60 (2017).

⁸² *Id.* at 69.

⁸³ In 2017, the OECD Secretariat presented an update of a previous report "The Size and Sectoral Distribution of State-Owned Enterprises in OECD and Partner Countries" originally published in 2014. The report analyzes state ownership by company values and the employment generated in the country and, for the first time, also includes China, Saudi Arabia, Argentina, and India. In the sample area, there are 53,467 commercially oriented SOEs (of which 51,000 are Chinese SOEs) valued at 31.6 trillion USD (of which 29.2 trillion from Chinese SOEs) and employing 29.4 million people (20.2 million in China). OECD, *supra* note 13; *contra* LARDY, *supra* note 12.

and Public Procurement)⁸⁴ are included under Chinese FTAs, no clause specifically deals with SOEs. While no reference to the meaning of SOEs has been offered by China under its FTAs and RTAs, a measure of the Ministry of Finance could shed some light on what type of enterprises the Chinese government considers as belonging to the SOEs' general definition. The Measures for the Financial Management of the Overseas Investments by State-owned Enterprises clarified that, for the Chinese government, the entities covered are the ones in which the State council or local governments perform the function of investors and include SOEs under the State-owned Assets Supervision and Administration Commission (SASAC) and other departments supervision.⁸⁵

The U.S.–Singapore FTA, under its Chapter 12, after recognizing that government enterprises designated as monopolies and anticompetitive businesses “[have] the potential to restrict bilateral trade and investment,”⁸⁶ set forth a specific set of rules applicable to these entities. Although the provisions on Government and Designated Monopolies offer a common definition for both parties,⁸⁷ the definition of SOEs follows a double-track approach. Government Enterprises are defined as “(a) for the United States, an enterprise owned, or controlled through ownership interests, by that Party; and (b) for Singapore, an enterprise in which that Party has effective influence.”⁸⁸ The differences lie in the role of the government. In the United States, the government acts as an owner⁸⁹ and in Singapore, as an “effective” influencer.⁹⁰

Although different attempts have been made on the matter, the first comprehensive and universal definition is provided by the Comprehensive and

⁸⁴ See generally Simon J. Evenett, *Five Hypotheses Concerning the Fate of the Singapore Issues in the Doha Round*, 23 OXFORD REV. ECON. POL'Y 392 (2007).

⁸⁵ Guoyou Qiye Jingwai Touzi Caiwu Guanli Banfa (国有企业境外投资财务管理办法) [Measures for the Financial Management of the Overseas Investments of State-Owned Enterprises] (promulgated by the Ministry of Fin., June 12, 2017, effective Aug. 1, 2017), art. 2, CLI.4.299146 (EN) (Lawinfochina), <https://www.lawinfochina.com/display.aspx?id=28037&lib=law&SearchKeyword=&SearchKeyword=>

⁸⁶ United States–Singapore Free Trade Agreement, U.S.–Sing., art. 12.1, May 6, 2003, Temp. State Dep't No. 04-36, Hein's No. KAV 6376 [hereinafter SFTA].

⁸⁷ *Id.* at art. 12.8 (“[G]overnment monopoly means a monopoly that is owned, or controlled through ownership interests, by the national government of a Party or by another such monopoly.”).

⁸⁸ *Id.* (emphasis added).

⁸⁹ The reference to the “control through ownership” interests in the U.S.’s definition is enabling the definition to encompass all the cases that escape the regulations of the ASCM.

⁹⁰ Ines Willems, *Disciplines on State-Owned Enterprises in International Economic Law: Are We Moving in the Right Direction?*, 19 J. INT'L ECON. L. 657, 665 (2016).

Progressive Agreement for Trans-Pacific Partnership (CPTPP).⁹¹ If we compare the TPP and the new chapters of the CPTPP, it appears they may not be aligned. However, the CPTPP maintains, without altering, Chapter 17 on SOEs. SOEs are placed together with, or immediately after, the other Singapore issues and, according to a systemic interpretation, this is an interesting signal of the increasing importance of the matter for economies across the globe.

At Article 17.1, SOE is defined as:

an enterprise that is principally engaged in commercial activities in which a Party: (a) *directly* owns more than 50 percent of the share capital; (b) *controls*, through ownership interests, the exercise of more than 50 percent of the voting rights; or (c) *holds the power to appoint* a majority of members of the board of directors or any other equivalent management body.⁹²

Three types of state behavior are relevant for the definition: ownership of share capital, control of voting rights, and control of the appointment of the management. The 50% threshold in (a) and (b) fails to cover entities that are effectively controlled, but not owned, and that could be used as a proxy by the state.⁹³ Further, point (c) of Article 17 uses the term “*holds the power to appoint*” and seems to recall the case of statutory governmental power and not the

⁹¹ After the U.S. withdrew from the TPP on January 23, 2017, the other Members decided to keep the TPP alive and signed the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). Some of the most controversial provisions that the US pushed for, including the regime on Intellectual Property Rights, government procurement, and Telecoms, have been suspended or changed. However, the CPTPP maintains, without altering, Chapter 17 on SOEs. For an in-depth and critical overview of how the TPP regulates SOEs, please refer to Willemyns, *supra* note 90; Mitsuo Matsushita, *State-Owned Enterprises in the TPP Agreement*, in PARADIGM SHIFT IN INTERNATIONAL ECONOMIC RULE-MAKING 187–203 (Julien Chase, Henry Gao & Chang-fa Lo eds., 2017); Mikyung Yun, *An Analysis of the New Trade Regime for State-Owned Enterprises Under the Trans-Pacific Partnership Agreement*, 20 J.E. ASIAN ECON. INTEGRATION 3 (2016); Peter Baker, *Trump Abandons Trans-Pacific Partnership, Obama’s Signature Trade Deal*, N.Y. TIMES (Jan. 23, 2017), <https://www.nytimes.com/2017/01/23/us/politics/tpp-trump-trade-nafta.html>; Colin Dwyer, *The TPP Is Dead. Long Live the Trans-Pacific Trade Deal*, NPR (Mar. 8, 2018, 4:00 PM), <https://www.npr.org/sections/thetwo-way/2018/03/08/591549744/the-tpp-is-dead-long-live-the-trans-pacific-trade-deal>.

⁹² Along with SOEs, Chapter 17 of the CPTPP defines sovereign wealth fund, monopoly, independent pension fund, government monopoly, and designated monopoly. Comprehensive and Progressive Agreement for Trans-Pacific Partnership art. 17, Mar. 8, 2018, <https://www.dfat.gov.au/trade/agreements/not-yet-in-force/tpp/Pages/tpp-text-and-associated-documents> [hereinafter CPTPP] (the CPTPP incorporated most of the articles of the Trans-Pacific Partnership by reference).

⁹³ The SCM could help to cover these “proxy” entities with the recourse of the use of the anticircumvention provision of 1.1(a)(1)(iv). However, the coverage is limited to subsidies and, therefore, to be considered a subsidy the financial contribution bestowed by the government to the “proxy” should also confer a benefit and be specific.

effectiveness of the influence over the decision of personnel appointments and allocation of financial resources. The presence of private shareholders or listings in the stock market are not *per se* elements that guarantee autonomy of operation from the government. Informal power of the state and external factors such as industrial crisis, corporatization, and internationalization strategy make SOEs dependent on and controlled by the state and consequently void of the distinction between public and private.⁹⁴ Therefore, the concept of “effective influence” and, in general, *de facto* forms of control that are beyond simple ownership-based definition are crucial to capture SOEs.

Singaporean definitions of government enterprise center around the notion of “effective influence.” Instead of merely focusing on the formal power to appoint members of management, the definition also covers all the situations where the government may “have the ability to determine the outcome of decisions on the strategic, financial, or operating policies or plans of an entity, or otherwise to exercise substantial influence over the management or operation of an entity.”⁹⁵ Further, the FTA provides a scheme to address the problem of governmental cross-ownership amongst different enterprises.⁹⁶ The noteworthy attempt allows the presumption that a government enterprise exists when two or more government enterprises, in combination, own more than 20% of the company’s shares. If this enterprise owned by the government with 20% of shares, in turn owns more than 20% of any other enterprise, the target would be deemed to be a government enterprise. In this case, the total “direct” ownership via the holding company of the state of the target company would be less than the 20% threshold.⁹⁷

Similarly, the EU–Vietnam free trade agreement (EVFTA)⁹⁸ and the EU–Japan Economic Partnership Agreement (EU–Japan EPA)⁹⁹ pay attention to the informal power of the government to influence and control private enterprises. The definition provided by the EVFTA covers *de facto* forms of ownership by stating “SOEs means an enterprise, including any subsidiary, in

⁹⁴ S. Lioukas, D. Bourantas & V. Papadakis, *Managerial Autonomy of State-Owned Enterprises: Determining Factors*, 4 ORG. SCI. 645, 661 (1993). (“[I]t has been found that the proportion of private capital in SOEs is a rather weak explanator of autonomy differences across SOEs. So, ownership as such may be a less important variable for explaining SOE autonomy.”).

⁹⁵ SFTA, *supra* note 86, at art. 12.8.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See generally EVFTA, *supra* note 16.

⁹⁹ *Annex to the Proposal for a Council Decision on the Conclusion of the Economic Partnership Agreement between the European Union and Japan*, COM (2018) 192, https://eur-lex.europa.eu/resource.html?uri=cellar:cf1c4c42-4321-11e8-a9f4-01aa75ed71a1.0001.02/DOC_2&format=PDF [hereinafter EU–Japan EPA].

which a Party, directly or indirectly owns.”¹⁰⁰ The situation where the government exercises control over strategic decisions of the enterprise is also covered by letter (c) of Article 1 of the EVFTA. On strategic decisions, the EU–Japan EPA goes further in Article 13.1 and also covers those situations when the government “has the power to legally direct the actions of the enterprise or otherwise exercises an equivalent degree of control in accordance with its laws and regulations.” The Comprehensive Economic and Trade Agreement (CETA) between Europe and Canada instead opted for the more straightforward definition of State enterprise as “an enterprise that is owned or controlled by a Party.”¹⁰¹

2. “WTO-Plus” Obligations on SOEs—i.e., Substantial Obligations

FTAs and RTAs spell out the general obligations of SOEs and overcome the lack of clarity that arises from the provision on State trading enterprises under Article XVII of the GATT. While Most-Favoured-Nation (MFN) status is applicable to STEs, no univocal indications have been offered on National Treatment by the DSM. To solve this situation, the most recent agreements set forth a discipline that contains both MFN and National Treatment. Additionally, SOEs should act in accordance with commercial consideration and, in a non-discriminatory manner,¹⁰² follow market economy principles in their operations.¹⁰³ The non-discrimination duty applies to purchases and sales of goods or services and investments made by SOEs. TPP and EVFTA also cover the equity participation of SOEs. Instead of following this approach, the EU–Japan EPA took a different tactic on the matter and excluded the application of non-discrimination if an SOE purchases equity participation in another

¹⁰⁰ EVFTA, *supra* note 16, at art. 1.1. The importance of the terms “directly” and “indirectly” is also underlined by a comment of the EU on the draft proposal of the chapter on SOEs under the “Trade in Services Agreement”. A leaked draft of the chapter with EU Comments highlights EU opposition to the term “directly own,” suggesting strengthening TiSA coverage by removing “directly.” See *Trade in Services Agreement—Draft Annex on State-Owned Enterprises with EU Comments*, BILATERALS (Oct. 2016) <https://www.bilaterals.org/IMG/pdf/soe.pdf>.

¹⁰¹ See Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part, Can.–E.U., Oct. 30, 2016, 2017 O.J. (L 11) 582, art. 1 [hereinafter CETA].

¹⁰² Trans-Pacific Partnership, art. 17.4, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> (last visited Oct. 1, 2022) [hereinafter TPP]; EVFTA, *supra* note 16, at art. 4; EU–Japan EPA, *supra* note 99, at art. 13.5; CETA, *supra* note 101, at arts. 18.4, 18.5.

¹⁰³ EVFTA and EU–Japan EPA specifically refer to market economy principles while the TPP generally refers to the behavior of privately-owned enterprises. See EVFTA *supra* note 16; see generally EU–Japan EPA *supra* note 99.

enterprise.¹⁰⁴ If not explicitly excluded, SOEs are subjected to all obligations contained in the FTA.

The framework for non-commercial assistance is a distinctive feature of the CPTPP. It regulates the interference of the government through its ownership and/or control on the market economy.¹⁰⁵ To define commercial assistance, TPP drafters chose language similar to the one used under the SCM to define financial contribution.¹⁰⁶ The relationship between the target of the assistance, in this case the SOEs, and the assistance provider—the government—is captured by an explication of the potential internal and external links between the two parties.¹⁰⁷ The disciplines also cover, for the first time, the supply of services that are excluded from the scope of coverage of the SCM.¹⁰⁸ The regulatory framework created is able to capture situations previously excluded from the agreements. As an example, even if the subsidy grantor is not a public body in the meaning of the SCM, the provisions on governmental assistance could be applied.¹⁰⁹

3. Exceptions

The exceptions are based on: (a) the rationales for the establishment of SOEs; (b) the degree of adverse effect on the market; and (c) the need for the country to protect specific SOEs or an economic sector against competition.

i. The Rationales for the Establishment of SOEs

The rationales for establishing and operating SOEs are fully incorporated under FTAs. First, the majority of FTAs recognize that SOEs could be a crucial tool used by the state to promote and protect national interests from

¹⁰⁴ EU–Japan EPA, *supra* note 99, art. 13.5, at n.1. (“[S]hall not apply with respect to the purchase or sale of shares, stock or other forms of equity by a state-owned enterprise, an enterprise granted special rights or privileges or a designated monopoly as a means of its equity participation in another enterprise.”), *See* Negotiation Round Report n. 15, ¶ 10 at https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/japan/eu-japan-agreement/documents_en

¹⁰⁵ Yoshinori Abe & Takemasa Sekine, *Non-Commercial Assistance Rules in the TPP: A Comparative Analysis with the SCM Agreement*, in *THE COMPREHENSIVE AND PROGRESSIVE TRANS-PACIFIC PARTNERSHIP* 542 (Jorge A. Huerta-Goldman & David A. Gantz eds., 2021).

¹⁰⁶ Willemys, *supra* note 90, at 671.

¹⁰⁷ TPP, *supra* note 102, at art. 17.1 (“(i) [E]xplicitly limits access to the assistance to the Party’s state-owned enterprises; (ii) provides assistance which is predominately used by the Party’s state-owned enterprises; (iii) provides a disproportionately large amount of the assistance to the Party’s state-owned enterprises; or (iv) otherwise favors the Party’s state-owned enterprises through the use of its discretion in the provision of assistance.”).

¹⁰⁸ CPTPP, *supra* note 92, at art. 17.6.

¹⁰⁹ Abe, *supra* note 105, at 5.

market competition. In certain cases, SOEs act as providers of public goods and services and the publicness is usually linked to the fulfillment of a public mandate or to the exercise of a governmental function.¹¹⁰ The aim of protecting this public function is attained *via* the exclusion of the application of discipline on SOEs (i.e., nondiscrimination, commercial consideration, and transparency),¹¹¹ or is limited to the non-applicability of the “commercial consideration.”¹¹² Another mechanism to protect SOEs is the exclusion of discipline for sub-central owned SOEs that could be found under Annex 17-D of the CPTPP.¹¹³ In parallel to the public mandate, there is a recognition¹¹⁴ of the existence of a state capitalism economic system.¹¹⁵ This is also an indication of the opening of international trade to the issue of SOEs and a gradual overcoming of the classic WTO neutral stance on ownership. Under this exception, SOEs are linked to broader policy objectives and are not limited to the provisions of public goods and services, the stability of the economic and financial system,¹¹⁶ or the support of infant industries.¹¹⁷ In these latter cases, the exception is subjected to a limited period.

¹¹⁰ CPTPP Article 17.1 defines a public service mandate as “a government mandate pursuant to which a state-owned enterprise makes available a service, directly or indirectly, to the public in its territory.” See CPTPP, *supra* note 92, at art. 17.1. The EVFTA instead recalls, *mutatis mutandis*, the definition and interpretation set forth in General Agreement on Trade in Services (GATS). See EVFTA, *supra* note 16, at art. 3.9.

¹¹¹ EVFTA, *supra* note 16, at art. 5.

¹¹² CETA, *supra* note 101, at art. 18.5.2. (“The obligation contained in paragraph 1 (commercial consideration) does not apply [. . .] in the case of a state enterprise, to the fulfilment of its public mandate.”); see also CPTPP, *supra* note 92, at art. 17.4(a).

¹¹³ Municipalities and local governments are the first providers of public goods and services. An extension of the duty of transparency, non-discrimination, and commercial assistance to these entities could be problematic from a practical perspective. The CPTPP allowed each contacting party to decide whether the obligations on sub-central-owned SOEs is applicable. CPTPP, *supra* note 92, at art. 17.12.

¹¹⁴ Although there is an opening in EVFTA for the existence and use of SOEs, the government of Vietnam embarked on an extensive corporatization and privatization program more aligned with that of a market economy. Duane Morris, *Vietnam Steps Up Sale of SOEs*, MONDAQ (Dec. 5, 2017) <https://www.mondaq.com/investment-strategy/652888/vietnam-steps-up-sale-of-soes>.

¹¹⁵ The major part of FTAs and RTAs that provide a specific regulation on SOEs usually contain this recognition in the form of “nothing in this Chapter prevents a Party from designating or maintaining a state enterprise or a monopoly or from granting an enterprise special rights or privileges.” CETA, *supra* note 101, at art. 18.3.

¹¹⁶ EVFTA, *supra* note 16 at Annex II-A, 2 (national or global economic emergency); CPTPP, *supra* note 92, at art. 17.13 (the resolution of a failing or failed financial institution).

¹¹⁷ Agreement Establishing the African Continental Free Trade Area, art. 24, (Mar. 21, 2018) https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf.

ii. *The Degree of Adverse Effect on the Market*

A second set of exceptions covers the different interferences of state ownership on the market. There is a certain tolerance for the SOEs that have annual revenues inferior to a fixed amount or for those SOEs that are owned by local governments, usually for the provision of public services. If the annual revenue is lower than \$200 million Special Drawing Rights¹¹⁸ for the three previous consecutive years, the specific discipline on SOEs is not applicable.¹¹⁹ The threshold covers only the commercial part of the activities of SOEs, and therefore, a wide array of revenues is not included. Instead of following the size-based approach for the exclusion, the CETA set a threshold for government procurement. In doing so, even entities that are relatively small are covered when they act as a state “proxy” for government procurement. Excluding SOEs based on their annual revenues might cause some problems if the government relies on a central holding company to control its SOEs, as is happening in several regions in China.¹²⁰ The threshold will only be applied to each subsidiary company individually and not to the parent company. This is even more complicated due to the proliferation of subsidiaries with separate legal entities wholly or partially owned by a central holding. For example, China’s SINOPEC owns more than 100 subsidiaries 121 that, in turn, own several companies that operate in completely different industries compared to the parent company’s scope.

iii. *Protection of Specific SOEs or an Economic Sector from Foreign Competition*

The need to protect national champions and certain industries is clear from FTAs and RTAs. Several agreements carve out exclusions for the application of discipline on a list of SOEs that are considered “national champions” or strategic.

The CPTPP provides a country-specific exception for SOEs to Singapore (Annex 17-E) and Malaysia (Annex 17-F). The Singaporean Annex covers the operation of its two Sovereign Wealth Funds (SWFs): GIC Private Limited and Temasek Holdings. Nondiscriminatory treatment and Commercial

¹¹⁸ As of September 30, 2022, \$256 million (1 SDR equals 1.28 United States Dollar).

¹¹⁹ EU–Japan EPA, *supra* note 99, art. 13.2.5; *see* EVFTA, Art. 13.2.3. *supra* note 16; CPTPP, *supra* note 92, at art. 17.13.5. Annex 17-A of the CPTPP also provides the methods to calculate and adjust the threshold to inflation. *Id.* at Annex 17-A.

¹²⁰ Several countries reorganized their SOEs under a central single entity that acts as a holding company. This habit is common in Asia. *See SASAC in China, State Capital Investment Corporation in Vietnam, Permodalan Nasional Berhad in Malaysia, and Temasek in Singapore.* Hyungon Kim & Kee Hoon Chung, *Can State-Owned Holding (SOH) Companies Improve SOE Performance in Asia? Evidence from Singapore, Malaysia and China*, 11 J. ASIAN PUB. POL’Y 206 (2018) (for a comparison between Singapore, Malaysia, and China).

consideration are excluded if a SOE is owned by a SWF.¹²¹ The provision on commercial assistance is applied only if one or more of the conditions set forth in Article 3 of the Annex are fulfilled. The conditions range from the appointment of the management or the board of directors to the exercise of governmental authority, in different forms, over the decision of the SOE. Although the article seeks to translate the concept of “effective influence” in a normative way and with specific requirements, the exception fails to capture the intertwined relationship between politics and business in Singapore.¹²²

For Malaysia, the exclusion of discipline is, instead, justified by the activities performed by the two SOEs: Permodalan Nasional Berhad¹²³ (a collective investment scheme for the general public) and Lembaga and Tabung Haji¹²⁴ (management of personal savings and investments of Muslims and pilgrims).¹²⁵

The exclusion of the application of the “commercial consideration” and “non-discriminatory treatment”¹²⁶ under EVFTA is limited to the type of activities carried out by the parent company and its subsidiaries but only when they pursue the same public mandate. As an example, for PETROVIETNAM, commercial consideration and non-discrimination should be applied to all the subsidiaries and equity participation that do not carry out one of the following activities: prospecting, exploration and exploitation of oil and gas, and other oil

¹²¹ CPTPP, *supra* note 92, Annex 17-E, art. 2 (“Article 17.4.1 (Non-discriminatory Treatment and Commercial Considerations) shall not apply with respect to a state-owned enterprise owned or controlled by a sovereign wealth fund of Singapore.”).

¹²² Until 2021, the CEO of Temasek was Ho Ching, wife of the current Singapore Prime Minister Lee Hsien Loong. Even in *bona fide* and with the recourse of the use of soft law instruments such as the Santiago Principles or the membership to the International Forum of SWF, it is difficult to admit that the SOEs owned by Temasek are not “indirectly” influenced by the government. The exception of Annex 17-E should be therefore not applied to these SOEs.

¹²³ See PERMODALAN NASIONAL BERHAD, https://www.pnb.com.my/index_EN.php (last visited Oct. 5, 2022).

¹²⁴ See TABUNG HAJI, <https://www.tabunghaji.gov.my/> (last visited Oct. 17, 2022).

¹²⁵ There is also a further specification on the concept of governmental direction/guidance: “Investment direction from the Government: (a) does not include general guidance of the Malaysian Government with respect to risk management and asset allocation that is not inconsistent with usual investment practices; and (b) is not demonstrated, alone, by the presence of Malaysian government officials on the enterprise’s board of directors or investment panel.” CPTPP, *supra* note 92, Annex 17-F, at n.40.

¹²⁶ EVFTA, *supra* note 16, at Annex 4. Vietnam Oil and Gas Group (PETROVIETNAM), Vietnam Electricity (EVN), Vietnam National Coal–Minerals Holding Corporation Limited (Vinacomin), State Capital Investment Corporation (SCIC) (the carve-outs do not include SCIC’s portfolio investments), Debt and Asset Trading Corporation (DATC), Airport Corporation of Vietnam and SOEs in the printing, publishing, mass communication, and audio-visual services sectors.

and gas activities.¹²⁷ The exception does not cover joint ventures and equity participation of PETROVIETNAM in other enterprises.

III. THE CHALLENGES OF CHINESE SOEs TO INTERNATIONAL ECONOMIC LAW

A. *Legitimization, Supervision and Management of State Assets in China*

1. State-Owned Assets: Between Economic Profit and Public Goods

The Constitution of the People's Republic of China considers socialist public ownership of the means of production, that take the forms of ownership of the whole people and collective ownership by the working people, as the basis of the Chinese economic system and a guarantor of social justice.¹²⁸ The 1993 amendment to China's Constitution included the "socialist market economy"¹²⁹ and strengthened party leadership over SOEs. Parallely, the amendment also signaled a change of perspective on the role of the government in public ownership from state-owned (国有) to state-run enterprises (国营).¹³⁰

On the rationales for the establishment of the "public ownership system," some elements could be drawn from the *1988 Law on Industrial Enterprises Owned by the Whole People*¹³¹ The Law granted a "right of

¹²⁷ For instance, amongst the wholly owned subsidiaries of Vietnam Oil and Gas Group (PETROVIETNAM), the followings are not covered by the exception: Vietnam Steel Gas Pipeline Joint-Stock Corporation (PV Pipe), Petrovietnam Power Corporation (PV Power), and Petec Trading and Investment Corporation. *See generally About Us*, PETROVIETNAM OIL CORP., <https://www.pvoil.com.vn/en-US/about-us> (last visited Oct. 17, 2022).

¹²⁸ XIANFA (中华人民共和国宪法) [Constitution of the People's Republic of China] art. 6 (2004) ("The system of socialist public ownership supersedes the system of exploitation of man by man (社会主义公有制消灭人剥削人的制度).").

¹²⁹ *See generally* XUE MUQIAO, CHINESE ECONOMISTS ON ECONOMIC REFORM: COLLECTED WORKS OF XUE MUQIAO (2011) (discussing theoretical implications of a "socialist market economy"); YU GUANGYUAN, CHINESE ECONOMISTS ON ECONOMIC REFORM—COLLECTED WORKS OF YU GUANGYUAN (2014).

¹³⁰ *See generally* JIANFU CHEN, CHINESE LAW (3d ed. 2015) at 92–93.

¹³¹ *See* Zhonghua Renmin Gongheguo Quanmin Suoyouzhi Gongye Qiye Fa (中华人民共和国全民所有制工业企业法) [Law on Industrial Enterprises Owned by the Whole People] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 13, 1988, effective Aug. 1, 1988), CLI.1.3789(EN) (Lawinfochina).

operation”¹³² to the enterprises¹³³ but simultaneously stresses their social function. Due to the fact that the ownership is of the whole people (全民所有), these enterprises should be aimed at “satisfying society’s growing material and cultural requirements”¹³⁴ and “promot[ing] socialist cultural and ideological progress and build[ing] up a contingent of well-educated and self-disciplined staff and workers with high ideals and moral integrity.”¹³⁵ These social goals and the importance of SOEs as economic actors are still one of the main curtailments for a full transformation of China into a market economy. The process of reform of Chinese SOEs¹³⁶ has been balanced by the need to retain strict control over large and strategic SOEs deemed to be essential for the internationalization of the Chinese Economy.¹³⁷

The guidelines for the reform of the state sector are at the center of the 2015 Guiding Opinions of the Communist Party of China (CPC) Central Committee and the State Council on Deepening the Reform of State-owned Enterprises (Guiding Opinions).¹³⁸ In order to distinguish and clarify the

¹³² The right of operation has been widely discussed by legal scholars in Socialist Countries but without reaching a satisfying conceptualization. In China “right of operation” is still a matter of great debate today. *See id.* at 366–72 (discussing the influence of the right of operation on property).

¹³³ Law of Industrial Enterprises Owned by the Whole People, *supra* note 131, at art. 2 (“The Enterprises Owned by the Whole People, can possess, use and dispose the property conferred by the State (企业对国家授予其经营管理的财产享有占有、使用和依法处分的权利.)”).

¹³⁴ Zhonghua Renmin Gongheguo Gongsifa (中华人民共和国公司法) [Company Law of the People’s Republic of China] (promulgated by Order No. 16 of President of the People’s Republic of China on December 29, 1993), CLI.1.7672(EN) (Lawinfochina) at art. 3.

¹³⁵ *Id.* at art. 4.

¹³⁶ The first complete and specific plan for the reform of the state sector has been, however, set forth under the ninth five-year economic plan adopted on September 28, 1995, under Jiang Zemin (江泽民), which followed the political motto “grasping the large, letting go off the small (抓大放小).” After recognizing that SOEs are the backbone of the national economy, the reform was directed to modernization and by the end of the 1990s large SOEs should: establish a modern enterprise system; become independent in their operation; become responsible for its profits and losses; and become competitive on the market. For modern enterprise is intended an enterprise which has the following features: clearly established ownership, well-defined power and responsibility, separation of enterprise from administration. (产权明晰、权责明确、政企分开、科学管理).

¹³⁷ *See generally* Nolan, *supra* note 10, at 16–20.

¹³⁸ The following objectives guided the reform: improvement of the modern enterprise system and of the State-owned asset management; classification of SOEs, development of the mixed ownership economy, enforcement of the regulations on state-assets loss; and the strengthening and improvement of party leadership over SOEs. *See generally* Zhonggong Zhongyang Guowuyuan Guanyu Shenhua Guoyou Qiye Gaige De Zhidao Yijian (中共中央、國務院關於深化國有企業改革的指導意見) [Guiding Opinions of the CPC Central Committee and the State Council on Deepening the Reform of State-owned Enterprises] (promulgated by CPC Central Committee &

different types of SOEs, the Guidelines call for the implementation of what has been labelled as “Categorized management” (分类推进国有企业改革). SOEs are divided in two main types—Commercial SOEs (商业类国有企业) and Public Welfare SOEs (公益类国有企业).¹³⁹ Based on these different types of SOEs, paths to reform are established. Although Commercial SOEs should follow market principles in their daily operations, Public Welfare SOEs should “protect people’s livelihood, serving the society at large, and providing public goods and services.”¹⁴⁰ SOEs are not always, in practical terms, easily classified in these two divisions. Often, they work at the intersection. For this reason, a sub-category for Commercial SOEs has been created and titled “strategic”¹⁴¹ The assessment of these SOEs’ performance is based not only on business performance and the appreciation of state assets (as in Commercial SOEs) but should also focus on different evaluation metrics such as the ones used for Public Welfare SOEs.¹⁴² The Guiding Opinions invoke neither the privatization nor the corporatization of State-assets,¹⁴³ but attempt to implement private enterprise forms of control, supervision, governance, and management in SOEs to fortify their position in the market. In a similar way, the Guiding Opinions seek to strengthen party leadership over SOEs to strengthen their performance.¹⁴⁴ Therefore, at the center of regulators’ concerns there is, on the one hand, the willingness to adjust SOEs to the challenges brought by international markets and, on the other, to still retain control over important sectors of the national economy.

The “uniqueness” of Chinese SOEs is a consequence of both the “socialist market economy” and the relations developed amongst the principal—

the State Council on Deepening the Reform of State-Owned Enterprises, Aug. 24, 2015), CLI.16.256926(EN) Lawinfochina (People’s Republic of China) [hereinafter CPC SOE Guidance]; *id.* art. 1.

¹³⁹ See generally Deng Feng, *Indigenous Evolution of SOE Regulation*, in REGULATING THE VISIBLE HAND? 3 (Benjamin L. Liebman & Curtis J. Milhaupt eds., 2015).

¹⁴⁰ CPC SOE Guidance, *supra* note 138, at art. 2.6.

¹⁴¹ The Guiding Opinions do not refer directly to strategic commercial SOEs but covers the SOEs that operate in the following sectors: major industries and key fields concerning national security or national economic lifeline, major special project tasks, and natural monopolies. *See id.*

¹⁴² *See id.* art. 2.5. (“The assessment of such SOEs shall [. . .] focus on aspects such as their efforts to serve national strategies, safeguard national security and the operation of the national economy, develop cutting-edge strategic industries, and complete special tasks.”).

¹⁴³ *See id.* art. 5. The participation of private sector to SOEs reform is allowed through the notion of mixed ownership (混合所有制经济) that attempts to bring in fresh capital and expertise in the management of SOEs. It is worth noting here that investment of SOEs in private enterprises is also “strongly” encouraged in the guidelines.

¹⁴⁴ *See id.* art. 7. By institutionalizing the presence of the CPC in SOEs, the principles seem to be in contrast with international standards and best practices and could negatively postpone the full implementation of market reforms.

the Communist Party of China (CPC)—and the agent—the SOE. SOEs enjoy a special position¹⁴⁵ in the Chinese legal and political framework. The accession of China to the WTO made it necessary for China to review its trade policy on SOEs mainly with regards to two aspects: government discriminatory intervention in the market and wider market access for goods and services. The commitments undertaken by China have had a positive impact on the process of the national economy reforms, the reduction of subsidies to SOEs, the strengthening of corporate governance, the overall competitive behavior of SOEs with privately owned enterprises, and the inclusion of Non-Trade concerns into the Chinese system.¹⁴⁶ However, quantitative and qualitative restrictions on trade and investment¹⁴⁷ elicit support for SOEs and the limitation on market access, in some sectors, at the expense of foreign and national firms. The CPC embarked on a tumultuous process of reform of its state sector to bring it in compliance with international trade obligations. Management and supervision are critical for the government to put a safety net on SOEs and to offer to China's trade partners the "illusion" of a level playing field.

¹⁴⁵ The rights enjoyed by SOEs could be intended as "patronage" rights bestowed from the CPC. The relational network strengthened by cultural aspects of the Chinese culture, such as Guanxi (关系) and Mianzi (面子), is a key aspect of the preeminence of informal, rather than formal, regulation for SOEs that could have its pros and cons. *See generally* PENG WANG, *Why the State Fails*, in *THE CHINESE MAFIA* 57 (Jill Peay, Tim Newburn, Loraine Gelsthorpe & Alison Liebling et al. eds., 2017) (analyzing the role guanxi plays in the law). The author, however, does not consider the likely positive role that SOEs could have whether the CPC push for an inclusion of Non-Trade concerns in its political agenda. Foreign actors also play a relevant role in shaping formal and informal institution in China. *See generally* Scott Wilson, *Law Guanxi: MNCs, State Actors, and Legal Reform in China*, 17 *J. CONTEMP. CHINA* 25 (2008).

¹⁴⁶ *See* Paolo Davide Farah, *The Development of Global Justice and Sustainable Development Principles in the WTO Multilateral Trading System Through the Lens of Non-Trade Concerns: An Appraisal on China's Progress*, in *CHINA'S INFLUENCE ON NON-TRADE CONCERNS IN INTERNATIONAL ECONOMIC LAW* 10, 10–58 (Paolo Davide Farah & Elena Cima eds., 2016); Paolo Davide Farah, *Five Years of China WTO Membership: EU and US Perspectives About China's Compliance with Transparency Commitments and the Transitional Review Mechanism*, 33 *LEGAL ISSUES ECON. INTEGRATION* 263 (2006); Shanshan Li & Ningxiang Xu, *The Influences of WTO Accession on China's State-Owned Enterprises*, 3 *OPEN J. BUS. & MGMT.* 192, 192 (2015).

¹⁴⁷ On a yearly basis, the National Development and Reform Commission (NDRC) releases a list of the sectors where FDIs are encouraged, restricted, and sensitive. *See* Qian Zhou, *China Further Expands the Encouraged Catalogue to Boost Foreign Investment*, China Briefing (Nov. 1, 2022), <https://www.china-briefing.com/news/china-2022-encouraged-catalogue-updated-implementation-from-january-1-2023/>; *see also* U.S. Dep't of State, Bureau of Econ. and Bus. Affs., 2021 Investment Climate Statements: China, <https://www.state.gov/reports/2021-investment-climate-statements/china/>.

2. Supervision and Management of SOEs in China

SOEs, with the aim of separating ownership from management, were centralized in 2003 under an agency directly controlled by the State Council: the State-owned Assets Supervision and Administration Commission (SASAC).¹⁴⁸ As of this writing, SASAC is in charge of 96 Central Enterprises,¹⁴⁹ and during the first semester of 2018, they made a profit of 887.79 billion Yuan (USD) with a 23% increase compared to the previous year.¹⁵⁰ However, the SASAC did not mark a change of perspective on the need to retain public ownership; rather, it is more the culmination of a long-term strategy characterized by a gradual approach that attempted to shift state intervention from ownership to *de facto* forms of control of SOEs.¹⁵¹ Following the reorganization under SASAC, SOEs are no longer dependent upon the Ministry of Finance for resources. However, they are still heavily influenced, not only by the State Council that oversees the activities of SASAC but also, and with greater effects on SOEs' business decisions, the CPC.¹⁵² The Company Law of China recognizes a double role of SASAC as both

¹⁴⁸ See generally Barry Naughton, *The Transformation of the State Sector: SASAC, the Market Economy, and the New National Champions*, in STATE CAPITALISM, INSTITUTIONAL ADAPTATION, AND THE CHINESE MIRACLE 46 (Barry Naughton & Kellee S. Tsai eds., 2015).

¹⁴⁹ The State Council exercises power on behalf of the whole people (全民所有制) on Central Enterprises (中央企业). Central Enterprises are divided in three categories based on the authority in charge of their management: SASAC, Banking regulation authorities, and other corporations managed directly by specific department of the State Council such as Tobacco and Railway. On the role of the central Hujin (中央汇金) and the other mechanisms to control financial institutions, see Wu, *supra* note 71, at 273–75; For an account of the normative documents, speeches, and theoretical discussion on the role of SASAC in national economy, see GUOWUYUAN GUOYOU ZICHAN GUANLI WEIYUANHUI ZHENGCE FAGUI JU, TANSUO YU KUAYUE: ZHONGYANG QIYE FAZHI JIANSHE SHI NIAN FAZHAN BAOGAO (国务院国有资产管理委员会政策法规局, 探索与跨越: 中央企业法制建设十年发展报告) [Policy and Regulation Bureau of State-Owned Assets Management Commission of the State Council, Exploration and Transcendence: Ten-Year Development Report of Legal System Construction of Central Enterprises (经济科学出版社 2013)].

¹⁵⁰ *China Details Regulation on Central SOEs' Asset Management*, CHINADAILY.COM (July 30, 2018), <http://www.chinadaily.com.cn/a/201807/30/WS5b5ef470a31031a351e91066.html>.

¹⁵¹ See generally Doug Guthrie, Zhixing Xiao & Junmin Wang, *Stability, Asset Management, and Gradual Change in China's Reform Economy*, in STATE CAPITALISM, INSTITUTIONAL ADAPTATION, AND THE CHINESE MIRACLE, *supra* note 148, at 75. Further, on the management of SOEs, the main issues could be summarized as follows: imperfect separation between the government and SOEs; preeminence of state interests over commercial consideration; interference and overlapping functions of different Ministries and Agencies on SASAC; and career advancement and incentives linked with CPC decisions. An element of communality is the intermingling of politics with economics and this situation is exacerbated in a country in which the separation of power is still far from a complete realization.

¹⁵² See generally RICHARD MCGREGOR, *THE PARTY: THE SECRET WORLD OF CHINA'S COMMUNIST RULERS* (2010).

governor of SOEs and as a mediator between state interests¹⁵³ and the maximization of profit.

i. SASAC as Supervisor

Corporate governance is an interesting example on how China is characterized by party committee plus three. During the pre-reform system, all enterprises were controlled and their daily operations were carried out by the three “old” committees: party, workers, and trade union.¹⁵⁴ In the wake of the economy opening-up, three “new” committees were established under company law for the replacement of the old system: board of directors, board of supervisors, and shareholders general meeting. Although the board of directors is an important step toward the implementation of an effective and business-oriented system of management for SOEs and alignment of China with internationally recognized best management practices, the CPC still retains crucial control of the Board. The three “old” committees and the CPC generally often overlap within the functions of the three “new” committees, the overruling of the decisions of the board of Directors,¹⁵⁵ the dreaded exercise of governmental authority in the form of personnel selection, and forcing SOEs’ business decisions to be aligned with party priorities.¹⁵⁶ In a similar manner, the system of corporate governance regulates private and state-owned enterprises. However, instead of prompting SOEs to follow private enterprises best-practices, which are aimed at profit maximization, a question of whether private enterprises have to follow and implement discipline specifically conceived for SOEs is created.¹⁵⁷

In the supervisor’s role, SASAC oversees the formulating and approving the articles of association of SOEs (Article 65), appointing the Board of Directors

¹⁵³ This role has been extensively recognized by the literature as a link between public interest and SOEs. See Naughton, *supra* note 148, at 47. SOEs also mobilize huge amount of funding and financing usually associated with overall development strategy and priorities of the politburo. See generally Wu, *supra* note 71, at 12 (discussing how SOEs act as private equity funds supporting the parties’ interests).

¹⁵⁴ Wei Qing Qian, *Guoyou Qiye Gaige Falü Baogao* (国有企业改革法律报告) [Legal Report on State-Owned Enterprise Reform] Volume 1, (中信出版集团 2004) [CITIC PRESS GROUP 2004] 104-107.

¹⁵⁵ See MCGREGOR, *supra* note 152, at 66 (offering an example of how the party committee essentially acted as the board of directors in daily operations and executive appointments).

¹⁵⁶ Donald C. Clarke, *Corporate Governance in China: An Overview*, 14 CHINA ECON. REV. 494, 499 (2003) (“SOEs remain dominated . . . through traditional channels, such as the acknowledged authority of the Communist Party’s organizational department over personnel appointments in key state-owned and state-controlled enterprises, whether or not corporatized and listed on the stock market.”).

¹⁵⁷ *Id.* at 501.

(Article 67) and the Board of Supervisors (Article 70), and regulating possible conflict of interests (Article 69). Article 66 of the company law calls for, if authorized by the SASAC, the establishment of a board of directors in charge of exercising the rights of the single shareholder in the central enterprise: the whole people. Some limitations in the power of the board are set forth in the same Article. In fact, in the event of merger and acquisitions, company establishment, and/or dissolution, the power could not be delegated by the SASAC to the Board of Directors. Decisions related to the strategic management of Central Enterprises require the direct intervention of the state council in such procedures.

The Board of Directors for SOEs is at the center of an internal regulation of SASAC under the *Opinion on the Construction of the Board of Directors of Central Enterprises* (关于国有独资公司董事会建设的指导意见).¹⁵⁸ Although the opinion clarifies the role of the Board of Directors regarding duties and composition in Central Enterprises, there are no specific requirements indicated in that opinion to be elected as a Member of the Board. In several cases, retired CPC members are appointed. This limits the real power of the chairman of the Board of Directors to overcome the one-head one vote requirement of the Company Law.¹⁵⁹ Having more professional members within the Board of Directors and SOEs management is strongly advocated both in China¹⁶⁰ and abroad.¹⁶¹ The same Board of Directors is considered as a way to strengthen CPC party leadership and party ideology in the country.¹⁶²

Party discipline is an additional burden to SOEs in China. Directors and supervisors of Central Enterprises should strictly obey party discipline in their

¹⁵⁸ *Guanyu Guoyou Duzi Gongsi Dongshihui Jianshe De Zhidao Yijian (Shixing)* (关于国有独资公司董事会建设的指导意见 (试行)) [Guiding Opinions on the Construction of the Board of Directors of Wholly State-Owned Companies] (for Trial Implementation), STATE-OWNED ASSETS SUPERVISION & ADMIN. COMM'N OF THE STATE COUNCIL (June 10, 2004), <http://www.sasac.gov.cn/n2588025/n2588119/c2708883/content.html> (People's Republic of China).

¹⁵⁹ Zhao Jinlong & Li Xue, *On The Improvement of the System of Board of Directors in China*, 4 INT'L J. BUS. & SOC. RSCH. 57, 59–60 (2014).

¹⁶⁰ Professional reorganization is a recurring term in SOEs' reform. See *Zhongyang Qiye Chixu Shenhua Gaige Cujin Fazhan* (中央企业持续深化改革促进发展) [Central SOEs Continue to Deepen Reform and Promote Development], STATE-OWNED ASSETS SUPERVISION & ADMIN. COMM'N OF THE STATE COUNCIL (Oct. 22, 2017), <http://www.sasac.gov.cn/n2588035/n2588320/c8081325/content.html>.

¹⁶¹ See generally PROFESSIONALISING BOARD OF DIRECTORS OF STATE-OWNED ENTERPRISES, ORG. FOR ECON. COOP. & DEV. (2018), <https://www.oecd.org/corporate/Professionalising-boards-of-directors-of-SOEs.pdf>.

¹⁶² See Guiding Opinions on the Construction of the Board, *supra* note 158, at art. 20.

public and private conduct, and a violation of party discipline has serious consequences.¹⁶³

ii. *SASAC as Mediator*

This second, and more informal, function of SASAC as a “mediator” in the Chinese Context could be implicitly drawn from two separate and complementary elements: (1) political pressures over SOEs’ executives and (2) SOEs over key sectors of the national economy. The strategies of development and internationalization of SOEs are strongly influenced by the political grip of the CPC.¹⁶⁴ The political careers of SOEs executives are also an important pattern for understanding the indissoluble link between the Party and the top management of SOEs.¹⁶⁵ Being appointed an executive in SOEs is not necessarily the final position held before retirement, but it is a mechanism

¹⁶³ In cases of violation of party discipline rules, the CPC members, first, face the consequences set forth under the CPC rules on disciplinary action (warnings, suspension, expulsion), and then, if the violation constitutes a crime such as bribery, obstruction of justice, abuse of power, loss of state-assets of the judiciary. The CPC rules on disciplinary action, 中国共产党纪律处分条例 (全文), set forth the disciplinary consequences for CPC members that do not follow the party line. For instance, if a party member opposes the Deng Xiaoping four cardinal principles or supports bourgeois liberalization principles, 资产阶级自由主义, democracy and western values) they could be expelled from the party and then charged for criminal offences (Art. 45). The investigation for the violation of party discipline is carried out in secret, and often, due to its nature of extralegal detention in violation of basic guarantees provided by the Chinese system, by the Central Commission for Discipline Inspection (CCDI). This process is known in China by the term *Shuanggui*. See generally Flora Sapio, “*Shuanggui*” and *Extralegal Detention in China*, 22 CHINA INFO. 7 (2008) (discussing the institutionalization of *Shuanggui*). SOE executives were amongst those targeted in the Xi Jinping anti-corruption campaign and some have been investigated and then imprisoned. See Angela Meng, *A Quarter of Chinese SOE Executives Investigated for Corruption Work In Energy Sector*, S. CHINA MORNING POST (Apr. 28, 2015), <https://www.scmp.com/news/china/policies-politics/article/1778702/quarter-chinese-soe-executives-investigated-corruption>.

¹⁶⁴ See generally Mara Faccio, *Politically Connected Firms*, 96 AM. ECON. REV. 369 (2006) (discussing the relationship between SOE executives and the Chinese Government); see also John Child & Suzana B. Rodrigues, *The Internationalization of Chinese Firms: A Case for Theoretical Extension?*, 1 MGMT. & ORG. REV. 381 (2005) (discussing the role of SOEs in balancing national disadvantages such as resources land).

¹⁶⁵ CPC members that serve terms as SOE executives are later promoted, transferred to a similar ranking position, or retire if they reach the mandatory retirement age. Lateral transfer is a particularly interesting feature of this system. See Wendy Leutert, *The Political Mobility of China’s Central State-Owned Enterprise Leaders*, 2018 CHINA Q. 1, 2 (2018). While no SOE executives sit in the Politburo standing committee, even as a consequence of the anti-corruption campaign, several obtain positions at provincial leadership. See Cheng Li & Lucy Xu, *The Rise of State-Owned Enterprise Executives in China’s Provincial Leadership*, BROOKINGS INST. (Feb. 22, 2017), <https://www.brookings.edu/opinions/the-rise-of-state-owned-enterprise-executives-in-chinas-provincial-leadership/>.

through which a party member, having performed well, could get exposure to the government and be transferred to other roles in order to complete the requested *cursus honorum* before the ministerial rank.¹⁶⁶

In 2006, in line with the “grasp the large and release the small (抓大放小),” policy,¹⁶⁷ the SASAC classified SOEs based on the type of control in Key and Pillar. In Key, the Government should have absolute control (armaments, power generation and distribution, oil and petrochemicals, telecommunications, coal, aviation and shipping), while in Pillar it should have an essential role because of the importance of the economic sectors involved for the future of China (machinery, automobiles, IT, construction, iron and steel, and non-ferrous metals). SOEs are compelled to play a leading role, especially where the national interest is stronger. A leading example is the forced participation of SOEs in Strategic Emerging Industries (SEIs)¹⁶⁸ and in important developmental strategies such as the Belt and Road Initiative (BRI).¹⁶⁹ SASAC, even if it is acting as the holding company in charge of administration, management, and supervision of SOEs, differentiates itself from other similar institutions. SASAC is not free to use and distribute dividends.

Historically, revenues from state enterprises were the largest source of funds for the state budget; however, the situation changed due to the 1994 Tax reform. Theoretically, the ownership of state assets is exercised by the government on behalf of its citizens and, therefore, should be subjected to the approval of the National People’s Congress with the budgeting process.¹⁷⁰ The

¹⁶⁶ See generally Leutert, *supra* note 165 at 16.

¹⁶⁷ Chang-Tai & Zheng Michael Song, *Grasp the Large, Let Go of the Small: The Transformation of the State Sector in China*, BROOKINGS INST.: BROOKINGS PAPERS ON ECON. ACTIVITY, Spring 2015, at 295; Li Ping, Thoughts on the Strategy of “Grasping the Big and Letting Go of the Small (1998).

¹⁶⁸ SEIs are the preferred industries for state support and considered crucial for development, both in China and globally. See Dongbei Xu & Jianmin Wang, *Strategic Emerging Industries in China: Literature Review and Research Prospect*, 5 AM. J. INDUS. & BUS. MGMT 486 (2015) (in SEIs, however, SOE’ capacity to innovate is inferior to private enterprises mainly because “SOE managers are usually unwilling to take on the risk of failure; they are much more willing to purchase new technologies than invest in R&D on their own.”). THE WORLD BANK, CHINA 230 246 (2013).

¹⁶⁹ SOEs are described as the “main forces” for the BRI because of the focus on infrastructure and energy. According to Xinhua (China’s state media outlet), 80 Central Enterprises with 3100 projects under development are, to date, involved in the BRI. Xu Zhenwei (许振威), *Guoqi Fa Li Tuijin “Yidai Yilu” Jianshe Hezuo* (国企发力推进“一带一路”建设合作) [State-Owned Enterprises Make Efforts to Promote “Belt and Road” Construction Cooperation], XINHUA SILK ROAD (新华丝路) [XINHUA SILK ROAD] (Sept. 21, 2018), <https://www.imsilkroad.com/news/p/112084.html>.

¹⁷⁰ Some scholars consider budget expenditures in China an ongoing problem. In fact, mostly at the local level, State-Owned Enterprises provide public goods and are the recipients of direct

pragmatic approach followed by China in carrying out the reform of its taxation system was aimed at enabling SOEs to, on one hand, reach independence from the government and, on the other, ease the financial distress of the 1990s. For these reasons, after-tax profit was retained by the SOEs.¹⁷¹ With SASAC's creation, the situation did not drastically change. However, what did change was the different orientation of government towards divided perceptions as a catalyzer for innovation. The Interim measures on equity and profit-sharing incentives for state-owned science and technology enterprises (国有科技型企业股权和 分红激励暂行办法) enabled, for the first time, a distribution of dividends and were jointly released by SASAC, the Ministry of Finance, and the Ministry of Science and Technology. The measure allows the distribution of dividends or equity to SOEs personnel to promote innovation. This signals an important direction of SASAC that, as a mediator of state interests and economic profit, seeks to push a more business-oriented perspective for its SOEs' management to stimulate technology breakthroughs. In any case, this is limited to specific cases as requested by the government.

B. Commitments on State Trading Enterprises and the Definition of Public Body from a Chinese Perspective

1. STEs

Amongst the commitments which China undertook in its Accession Protocol, the one on STEs and SOEs/SIEs are crucial. Riding the liberalization spirit behind the WTO, China committed to carry out liberalization plans affecting trade in goods and services and implemented several reforms of its political, legal and economic system with successful results.¹⁷² The liberalization plan¹⁷³ on some of the products have been welcomed in China as essential to

credit by the local government. Christine Wong, *Budget Reform in China*, 7 OECD J. BUDGETING 21 (2007) (noting that "central ministries spent CNY 28.2 billion in tax rebates of various forms to compensate state-owned enterprises (mostly in nine enterprise groups) for their quasi-fiscal expenditures in providing education, health care, and social security.").

¹⁷¹ SOE DIVIDENDS: HOW MUCH AND TO WHOM?, WORLD BANK 1, 2-3 (2005), <https://documents1.worldbank.org/curated/en/961421468243568454/pdf/566510WP0SOE1E10Box353729B01PUBLIC1.pdf>.

¹⁷² See Farah, *supra* note 146 (discussing relevant trade reforms).

¹⁷³ The following goods subjected to state designated trading should have been liberalized within three years from China's accession: Steel, Acrylic, Wool, Plywood, Timber, Natural Rubber. *Protocol, supra* note 70, at annex 2b, *Products Subject to Designated Trading*. The current situation, however, is far from the intention of the WTO. The timber market could be taken as an example. While some efforts have been carried out in loosening state ownership over timber, trading, harvest, and transport are still heavily regulated and no foreign enterprises are currently involved. Further, timber in China is, for the most part, owned by State-owned Forest Enterprises

boost the private economy but such reforms did not effectively take place during the expected time period. Prompted by the U.S., the latest notification submitted by China to the Council on Trade in Goods noted that a list of products state trading on import and export has been abolished.¹⁷⁴ According to the Notification, in China, there are more than one hundred STEs currently operating. The largest number of STEs operate in cotton and silver, but the most relevant focus is on Crude and processed oil.

The full information on STEs required by both China's Accession Protocol and by the Understanding on the Interpretation of Article XVII is, at best, lacking, if not completely absent, in the latest notification.¹⁷⁵ The data provided in the notification highlights that China increased both national production and total import in almost every sector under state trading.

Although trading privileges in China have been called off, some sectors involved are still witnessing the presence of large state-owned enterprises and, as a result, are unduly favoring Chinese enterprises over foreign competitors.¹⁷⁶

China's protocol of accession to the WTO contains specific references regarding state trading enterprises. The products listed under Annex 2A remain subjected to state trade and "shall complete all necessary legislative procedures to implement [the obligations of the Protocol]."¹⁷⁷ This exclusive right to trade bestowed to STEs in Annex 2A and 2B products created some tension between China and its trade partners. The dispute, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*,¹⁷⁸ is at the center of this specific problem. The finding

(国有森林企业); State-owned Forest Farms (国有森林农场); and collective forests farms (集体森林农场). See generally XIUFANG SUN, LIQUN WANG & ZHENBIN GU, CHINA'S TIMBER MARKET: AN OVERVIEW, FOREST TRENDS (2005), https://www.forest-trends.org/wp-content/uploads/imported/china_timber_market_system_final-5-31-05-pdf.pdf.

¹⁷⁴ In the original documents the word "suspended" had been used instead of the word "abolished."

¹⁷⁵ Working Party on the Accession of China, *supra* note 72, at 76.

¹⁷⁶ The request for consultation submitted to the DSM by Mexico highlights the fact that the measures enacted by the Chinese government "indicates that *enterprises become eligible* for such payments for reasons including that they: Are *owned at least in part by the Chinese government*; operate in the apparel and textile industry; operate in an industry designated by China as "key," have been designated as a "key" enterprise, or make a "key" product, and upgrade technology; Engage in research related to issues identified in China's industrial planning documents; *export or otherwise "expand" into foreign markets.*" Request for Consultations by Mexico, *China—Measures Relating to the Production and Exportation of Apparel and Textile Products*, WTO Doc. WT/DS451/1, at 2 (Oct. 18, 2012) (emphasis added).

¹⁷⁷ Ministerial Declaration of 10 November 2001, *Accession of the People's Republic of China*, WTO Doc. WT/L/432, at 4 (2001) (emphasis added).

¹⁷⁸ Panel Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc. WT/DS363/R (adopted

of the AB is that China could legitimately use Article XX(a) of the GATT (protection of public morals) to restrict trade in goods and services, but the measures enacted were not the “least restrictive” alternative measure. The AB, on several occasions, followed a conservative approach in its interpretation. This could negatively undermine the effective and real implementation of the objective pursued by the WTO.

The issue of state trading has been, so far, at least marginal, if not nonexistent, in contracting parties’ disputes. Little jurisprudence, even in the pre-WTO period, and the lack of certainty and definition on Article XVII of the GATT pushed WTO members to use Article III (National Treatment) and Article XI (prohibition on import or export quotas) instead of Article XVII as a legal basis instead.¹⁷⁹ The limitation of the discipline to trade in goods and the exclusion of “imports of products for immediate or ultimate consumption in governmental use and not otherwise for resale or use in the production of goods for sale”¹⁸⁰ are in the same way hindering the “complete” operation of Article XVII.¹⁸¹

China’s obligations under its protocol of accession to the WTO call for full transparency and cooperation over the operation and pricing mechanisms of STEs.¹⁸² However, Article XVII 4(d), which grants Contracting Parties a right not to disclose confidential information if this information would impede law enforcement, is contrary to the public interest, and would prejudice the commercial interest of enterprises. This broadly worded right of confidentiality has been recently at the center of a quarrel regarding state trading between the U.S. and China. China has used the confidentiality rights of Article XVII to justify withholding the missing information from the U.S.¹⁸³

Jan. 19, 2010). See also Paolo Davide Farah, *Trade and Progress: The Case of China*, 30 COLUM. J. ASIAN L. 51, 110–11 (2016).

¹⁷⁹ WTO: LAW, *supra* note 5; Macrory, *supra* note 4, at 148–50.

¹⁸⁰ General Agreement on Tariffs and Trade, art. XVII (2), Oct. 30, 1947, 55 U.N.T.S. 194.

¹⁸¹ WTO: LAW, *supra* note 5, at 148–50.

¹⁸² Working Party on the Accession of China, *supra* note 72, at 76.

¹⁸³ China replied five out of thirteen times to the questions posed by the US with the following answer: “Since statistics of individual enterprises are their internal information and are considered as business secrets, related details are not available.” Working Party on State Trading Enters., *Replies to Questions Posed by the United States Regarding the Notification of China*, WTO Doc. G/STR/Q1/CHN/8 (Mar. 16, 2017). This approach seems contrary to the same scope of the obligations of China’s Accession Protocol.

2. Public Body

Under the dispute, *United States—Countervailing Duty Measures on Certain Products from China* (“United States—Countervailing Duty”),¹⁸⁴ it is clear that China’s intention is to define the term “public body” in a manner consistent with its national legislation and with the “socialist market economy.” In fact, China tried to narrow down the scope of application of article 1.1(a)(1) of the SCM to government agencies. By referring to the Spanish term “organismo publico,” China attempted to exclude entities that did not perform functions of a “governmental” character such as the regulation, restriction, control, and supervision of private citizens.¹⁸⁵ As a consequence, the term is limited to entities that exercise authority over citizens. SOEs in China would have been excluded from the scope of application of the Article because they act in a commercial and not public sphere. This is further confirmed by the fact that, in China, no differences exist between “public entity” and “government” and for the principle of effectiveness in international public law interpretation, there is no other possible way to avoid the redundancy within the term.¹⁸⁶

The Chinese translation of the term public body (公共机构) and its use shed a light on the peculiar characteristic of China. First, the Hanyu Xiandai Dictionary defines the term public (公共) as “something belonging to the society or that can have public use.”¹⁸⁷ SOEs, on the other hand, are the property of the state and their executives exercise only the “right of operation” on public ownership.¹⁸⁸ Second, although the English definition of the term is based *per relationem* with the concept of a private body, the Chinese use of the term is closely bound to institutional power, namely the possibility for the public body to perform a legislative function by governmental delegation. Third, designation as a “public body” usually is directly provided by the Chinese government to clearly show the need for the body to be subject to additional obligations.

¹⁸⁴ Panel Report, *United States—Countervailing Duty Measures on Certain Products from China*, WTO Doc. WT/DS437/R (adopted Jan. 16, 2015).

¹⁸⁵ Panel Report, *United States—Countervailing Duty Measures on Certain Products from China*, WTO Doc. WT/DS437/R/Add.1, at F-4 (adopted Jan. 16, 2015).

¹⁸⁶ Panel Report, *United States—Countervailing Duty Measures on Certain Products from China*, WTO Doc. WT/DS437/R, at 105–06 (adopted Jan. 16, 2015).

¹⁸⁷ Lu Shuxiang, *The Contemporary Chinese Dictionary* (Xiandai Hanyu Cidian) (Commercial Press 2004).

¹⁸⁸ CHEN, *supra* note 130, at 92–94.

IV. STATE'S INTERFERENCE IN THE MARKET IN TIMES OF CRISIS: THE CASE OF COVID-19

The COVID-19 pandemic highlights a novel approach to the relationship between the state and the market. The first response to the pandemic, in the difficult first period (January–May 2020), was an overall break with the traditional free-market, laissez-faire approach in exchange for a more pronounced State intervention in the economy. On one hand, the State restricted the market by doubt on one of the most basic tenants of the global economy—market openness—and, on the other, taking over private companies. The WTO, in this context, has not only been marginalized but also disregarded as a possible avenue for the resolution of trade disputes. In this section, we first review the role of the WTO in export restrictions and, second, the increase of public ownership based on the Chinese model of SOEs over key strategic enterprises and assets. Such escape from trade obligations has been possible both due to the lack of a clear regulatory framework on the topic and a changing relationship between the state and the market.

A. *WTO and Covid-19*

The World Trade Organization (WTO) answered against COVID-19 by establishing national inquiry points and by attempting to increase transparency.¹⁸⁹ The first communication of the organization specifically dealing with COVID-19, dated March 11, 2020, addressed the negative impact of COVID-19, specifically on trade in services, especially as a result of lockdown measures put in place in China in January of that year.¹⁹⁰ Since the very beginning of the pandemic, WTO members started applying trade restrictive measures. The first communication notifying the WTO of a restrictive measure was from the Russian Federation. The measures, enacted on February 3, 2020, covered a temporary restriction based on the *Agreement on the Application of Sanitary and Phytosanitary Measures* to the import of exotic and decorative animals from China.¹⁹¹ In total, the WTO has been notified of 217 measures taken in relation to the COVID-19 pandemic. Of this amount, most restrictions fall under technical barriers to trade (79), sanitary and phytosanitary (58), and

¹⁸⁹ *COVID-19 and World Trade*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/covid19_e/covid19_e.htm (last visited Oct. 14, 2022).

¹⁹⁰ *Services Trade Growth Weakens as COVID-19 Crisis Hits Global Economy*, WORLD TRADE ORG. (Mar. 11, 2020), https://www.wto.org/english/news_e/news20_e/wtoi_11mar20_e.htm.

¹⁹¹ This measure specifically restricted, temporarily, the “import of exotic and decorative animals, including insects, arthropods, amphibians, reptiles and other, live fish and hydrobionts from China.” Notification from the Russian Federation, *Notification of Emergency Measures*, WTO Doc. G/SPS/N/RUS/178 (Feb. 3, 2020).

quantitative restrictions (37). Interestingly, Brazil provided the most restriction notices to the WTO (27), and during the first months (March and April 2020) enacted 17 measures to both reduce the export of personal protective equipment and facilitate the import of goods for treatment.

The goods most affected by temporary export restrictive measures could be categorized as follows: a) *prevention*: goods used to prevent the spread of COVID-19 including face masks, gloves, hand sanitizers, thermometers, and test kits; b) *treatment*: goods used to diminish symptoms of COVID-19 including supplies and other medical equipment, ventilators, and medicines; c) *cure*: medications potentially used for treating COVID-19 based on preliminary and often contradictory data such as hydroxychloroquine, pneumococcal vaccines, and anti-malaria drugs; d) *food*: mostly implemented in developing and least developed countries basic foodstuffs such as crop and rice; e) *treatment and prevention*: when measures have been applied on both types and f) *others*: a residual category with goods ranging from cigarettes and tobacco products via diesel to ferrous scrap.¹⁹² It is clear that the most affected goods from export restrictive measures are those goods under the categories of prevention, treatment, and foodstuff. Export restrictions took place at the global and regional levels even in highly integrated markets such as those of the EU.¹⁹³ The export bans put in place in both Germany and France at the outset of the pandemic clarified that, in a case of crisis and critical shortages, national interests prevail not only between distant trade partners but also in highly integrated markets. Neither the WTO nor the EU in this case was able to find an amicable solution or secure the smooth flow of trade in goods and services. This is also due to the lack of a clear and curtailed regulatory framework on State intervention in the market. Due to political reasons and the naïve approach of the WTO on the matter, the State and its apparatus tend to escape trade regulations. This apparent paradox is explained by the prevalence of the political realm over the juridical arm in times of crisis and distrust in the functioning of global governance institutions or, as in the case of China, when the core values at the heart of the system are not shared between the members.

B. Nationalization and Public Ownership

During the first phase of the pandemic, protectionism, nationalization, and reshoring rose to prominence as the main solutions envisaged to counteract the pandemic. Such trends are not limited at the short term but are opening a rise to the state interference into the market—in particular, the health sector and air

¹⁹² See generally *COVID-19 Temporary Trade Measures*, INT'L TRADE CTR., (Aug. 21, 2022) <https://www.macmap.org/covid19>.

¹⁹³ *European Commission Warns Member States on Mask Export Ban*, FIN. TIMES, <https://www.ft.com/content/1bbdfbd0-5fbc-11ea-b0ab-339c2307bcd4> (last visited Oct. 17, 2022).

transport—that will be realistically reflected in the medium run. As an example, raising consensus on nationalization is present in several European Union (EU) members’ political declarations ranging from Germany to Italy. The nationalization of Alitalia, the Italian flag carrier, under the first government decree to counteract the pandemic is, in this sense, emblematic. Article 79, *Urgent measures for air transport*, of the Decree, approved on March 17, 2022, states:

1. For the purposes of this article, the COVID-19 epidemic is formally recognized as a natural disaster and event exceptional 2. In view of the damage suffered by the entire sector aviation due to the outbreak of the COVID-19 epidemic 3. In consideration of the situation determined on the activities of Alitalia - Società Aerea Italiana S.p.A. and Alitalia Cityliner S.p.A. both under extraordinary administration since the COVID-19 epidemic, the incorporation of a new company wholly controlled by the Ministry of Economy and Finance or controlled by a company with a majority public shareholding even indirectly is authorized.¹⁹⁴

The approach of the Italian government exemplifies the existing loopholes in both the WTO and the State Aid regulation within the EU framework. First, by recognizing the epidemic (upgraded soon after to a pandemic by the World Health Organization) as a case of *force majeure*, the government is able to shield its behavior from existing limitations within the State aid framework. The second part of the clause defines imprecise damage to the industry to further support the nationalization of the Italian airline company. The damage should not be quantified in the context of *force majeure* and would have been difficult to do so, especially because flights were still circulating at the time of enactment of the law decree. Paragraph C calls for a nationalization of the previous company with the establishment of a new company. The recourse to nationalization as a consequence of the economic damages brought by COVID-19 is not limited solely to Italy. Throughout the region, several full or partial acquisitions of equity stakes took place as an answer to the pandemic. These include private healthcare in Spain, the Lufthansa airline in Germany, TAP for Portugal, and the UK Railway industry. These strategic sectors, which were associated with natural monopolies previously in the public realm, are now connected with the commercial arm of the State, which, although premature at this time, may provide interesting results.

The fear of public ownership over private actors has been gradually substituted in the public discourse of political leaders after the pandemic. Bruno Le Maire, in 2020, stated, “I will not hesitate to use any means at my disposal to

¹⁹⁴ Decreto-Legge 17 marzo 2020, n.18, G.U. Mar. 17, 2020, n.70 (It.).

protect large French enterprises. This can be through capital injections or stake purchases. I can even use the term nationali[z]ation if necessary.”¹⁹⁵ Such a shift in the priorities over the role of the State in the market is interesting because it signals a change in both the short and the long run. Key and strategic industries, as well as the guarantee of a degree of national sovereignty over the economy, are now informing much of the debate at the EU level over many products (e.g., lithium batteries). Nationalization is increasingly discussed as a viable strategy for overcoming times of crisis, whether it is COVID-19 or similar to the recent Russian invasion of Ukraine. In this second aspect, energy production and the dependence on gas from Russia are increasingly becoming a matter of concern for EU policymakers attempting to ‘re-shore’ energy production within their national borders, even if it means going against their climate change commitments.

National governments are rediscovering themselves as economic actors; as traders in the case of their procurement of personal protective equipment (PPE) and medical supplies; and as owners in the case of key national industries. While the pandemic is proceeding steadfastly, such reversals in the relationship between the state and the market have shifted greatly since China’s accession to the WTO. The rise of industrial policy in the global economy, both the policy promoting green objectives¹⁹⁶ and the policy attempting to maintain job employment, are not new but COVID-19 nonetheless is facilitating a return of the State to the direction and control of the market.

Whether in the case of China or other States in their answers to the pandemic, those States’ actions escape the regulation of the WTO and little possibilities exist for an intergovernmental organization to force compliance of the behavior of the state.

V. CONCLUSION

The aim of the present research was to examine and understand how International Economic Law addresses public ownership and public intervention in the market. More specifically, the research assessed whether the WTO legal framework is a suitable venue, either directly with its Agreements or through its jurisprudence, to regulate SOEs. This study has identified three possible available options under the WTO to cover such issues with SOEs: State Trading Enterprises (GATT Article XVII), public body (SCM Agreement Article I), and the term State-Owned and Invested Enterprises under the Protocol of Accession

¹⁹⁵ *Fearing Coronavirus Recession, France Weighs Nationalisation*, EURACTIV (Mar. 17, 2020), <https://www.euractiv.com/section/economic-governance/news/fearing-coronavirus-recession-france-weighs-nationalisation/>.

¹⁹⁶ Mark Wu & James Salzman, *The Next Generation of Trade and Environment Conflicts: The Rise of Green Industrial Policy*, 108 NW. UNIV. L. REV. 401 (2014).

of non-market economies. The WTO has proven to be a successful tool for pushing some non-market economies to follow market principles but has failed to do so with other countries. The evidence from this study suggests that new challenges posed by SOEs, from countries where the state plays a major role in “guiding” the national economy, accompanied by the overall distrust of globalization and rising protectionism measures are lowering the WTO’s capacity to adapt to these changing dynamics. Instead of an extensive interpretation guided by the aim of the organization (i.e., the maintenance of the multilateral system in trade relations), the over-reliance on textual interpretation and the conservative approach followed by the DSM makes it difficult, if not impossible, to find an internal solution for regulating SOEs. This study has found that generally, and because of the impossibility of finding an internal solution, WTO members are increasingly referring to bilateralism and regionalism to regulate SOEs’ behavior. Specific sets of rules, a definition of the SOEs covered, and additional obligations on SOEs are part of these FTAs aimed at guaranteeing a leveled playing field. Although this approach could be a viable solution, the inclusion of specific provisions on SOEs under China-negotiated FTAs is highly unlikely. The “peculiarity” of the Chinese legal framework and the role of SASAC in the management and supervision of central SOEs are worsening the situation. The CPC is, if not the main, at least the most tangible problem for effective reform of the state sector and, generally, for the implementation of the rule of law in the country. To the best of the authors’ knowledge, no attempts have been made in China to separate SOEs from the CPC, and instead, the regulations, circulars, and policy recommendations seem to go in the opposite direction strengthening the party influence over SOEs. Because of the pandemic, the “guiding” role of the State of the market that we analyzed in the case of China is on the rise globally. Industrial policy, bending the market towards social goals, and the need to respond to national constituencies in times of crisis will be the real challenges for furthering the integration of the global economy and the continued development of global governance principles in the next decade. However, we argue that in light of the global challenges, this “social function” of public ownership could enable a more just transition, where the balance between economic development, social values, and a healthy and clean environment will be struck, but only if transparency and equity are fulfilled.