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Rethinking the (CP)TPP As A Model for Regulation of Chinese State-Owned Enterprises

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Abstract

This paper challenges the widespread view that the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) provides a suitable model for regulating China's state-owned enterprises (SOEs). It argues that compared to China's existing WTO obligations, particularly those specifically tailored to it, the CPTPP SOE chapter does not provide more rigorous or workable rules but rather has narrower application and more carve-outs. More recent US/EU free trade agreements (FTAs) are largely based on the CPTPP SOE chapter. While these FTAs also seek to address some deficiencies in the CPTPP SOE chapter and gradually expand the rules on subsidies and SOEs, the expanded rules are balanced by the inclusion of extensive exceptions. This balanced approach may be used to facilitate multilateral negotiations of SOE rules but if it is adopted, WTO Members will need to be prepared to negotiate with China on replacing the potentially very broad and rigid China-specific WTO rules with more balanced new rules that apply to all Members. And the consequence of doing so would be softer rather than stronger disciplines on Chinese SOEs.

I. INTRODUCTION

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership[1] (CPTPP) is widely regarded as a landmark achievement in the development of international rules on state-owned enterprises (SOEs). Despite critics of some outstanding issues in CPTPP's SOE chapter (i.e. Chapter 17), most commentators believe that this chapter has advanced SOE rules in significant and innovative ways.[2] In a recent detailed study of China and the World Trade Organization (WTO), Mavroidis and Sapir advocate the use of the CPTPP as a model for the reform of

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1 For the full legal text of the CPTPP, see Australian Government, Department of Foreign Affairs and Trade, 'CPTPP Text and Associated Documents', available at: www.dfat.gov.au/trade/agreements/in-force/cptpp/official-documents/Pages/official-documents.

2 See generally eg. Gary Clyde Hufbauer and Cathleen Cimino-Isaacs, 'How Will TPP and TTIP Change the WTO System?', (2015)18(3) *Journal of International Economic Law* 679; Julien Sylvestre Fleury and Jean-Michel Marcoux, 'The US Shaping of State-Owned Enterprise Disciplines in the Trans-Pacific Partnership', (2016)19(2) *Journal of International Economic Law* 445; Sean Miner, 'Commitments on State-Owned Enterprises' in Jeffrey Schott and Cathleen Cimino-Isaacs (eds) *Assessing The Trans-Pacific Partnership: Volume 2: Innovations in Trading Rules* (Peterson Institute for International Economics, 2016) 91-100; Ines Willemyns, 'Disciplines on State-Owned Enterprises in International Economic Law: Are We Moving in the Right Direction?' (2016)19(3) *Journal of International Economic Law* 657; Minwoo Kim, 'Regulating the Visible Hands: Development of Rules on State-Owned Enterprises in Trade Agreements', (2017)58(1) *Harvard International Law Journal* 225; Jaemin Lee, 'Trade Agreements' New Frontier – Regulation of State-Owned Enterprises and Outstanding Systemic Challenges' (2019)14(1) *Asian Journal of WTO & International Health Law and Policy* 33; Mitsuo Matsushita and C.L. Lim, 'Taming Leviathan as Merchant: Lingering Questions about the Practical Application of Trans-Pacific Partnership's State-Owned Enterprises Rules', (2020)19(3) *World Trade Review* 402.

multilateral disciplines on Chinese SOEs because the CPTPP rules "would cover a great deal of ground in addressing the concerns expressed by China's trading partners."[3]

The United States (US) was the key architect of the SOE chapter when it led the negotiations of the Trans-Pacific Partnership (TPP) – the predecessor of the CPTPP. Despite the US's withdrawal from the TPP in January 2017, the other 11 states carried on the cooperation and brought the CPTPP into force in December 2018.[4] The SOE chapter remains unchanged under the CPTPP. There is no doubt that China's state capitalism has been a longstanding concern of its trading partners particularly the US and the European Union (EU) and that the (CP)TPP rules were designed with China as a major target.[5] While China is not a CPTPP party, the US sought to shape the international norms and standards that can be applied to Chinese SOEs in the future.[6]

China's current round of SOE reforms, which commenced in 2013, has led to a remarkable resurrection of state capitalism[7] and thus intensified the existing concerns of its trading partners. Since 2018, these concerns and some proposed solutions have been reiterated in a series of US-EU-Japan joint statements. To tackle "non market-oriented policies and practices … that create unfair competitive conditions … and undermine the proper functioning of international trade", they call for the strengthening of the WTO rules on SOEs and industrial subsidies (amongst other objectives and proposals).[8] More recently, in a joint announcement released on 24 March 2021, the US and the EU reinforced their shared commitments to dealing with "the full range of (China-)related challenges and opportunities."[9] A fundamental challenge, as unequivocally envisaged in their respective current trade policy agendas, arises from China's "state-capitalist

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3 See Petros C. Mavroidis and Andre Sapir, *China and the WTO: Why Multilateralism Still Matters* (Princeton University Press, 2021) 182-186.

4 For an excellent discussion of the US's withdrawal from the TPP, see Meredith Kolsky Lewis, 'Winning Strategy or Own Goal? Reflections on the United States Exiting the Trans-Pacific Partnership' in Bahri, Zhou and Boklan (eds) *Rethinking, Repackaging and Rescuing World Trade Law in the Post-Pandemic Era* (Oxford and Portland, Oregon: Hart Publishing, 2021) Chapter 15.

5 See Raj Bhala, 'TPP, American National Security and Chinese SOEs', (2017)16(4) *World Trade Review* 655, 661. Daniel C.K. Chow, 'How the United States Uses the Trans-Pacific Partnership to Contain China in International Trade', (2016)17(2) *Chicago Journal of International Law* 370, 398-99.

6 See eg. above n 2, Fleury and Marcoux, 'The US Shaping of State-Owned Enterprise Disciplines in the Trans-Pacific Partnership', at 448-49.

7 See generally Nicholas Lardy, *The State Strikes Back: The End of Economic Reform in China?* (Peterson Institute for International Economics, 2019); Weihuan Zhou, Henry Gao and Xue Bai, 'Building A Market Economy Through WTO-Inspired Reform of State-Owned Enterprises in China', (2019)68(4) *International & Comparative Law Quarterly* 977, 980-94 (a detailed review of China's SOE reforms between 2013 and 2018).

8 See Office of the United States Trade Representative, 'Joint Statement on Trilateral Meeting of the Trade Ministers of the United States, Japan, and the European Union' (31 May 2018), available at: https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/may/joint-statement-trilateral-meeting; Office of the United States Trade Representative, 'Joint Statement of the Trilateral Meeting of the Trade Ministers of the United States, European Union, and Japan' (23 May 2019), available at: https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/may/joint-statement-trilateral-meeting; European Commission, 'Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union' (14 January 2020), available at: https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158567.pdf.

9 See U.S. Department of State, 'Joint Statement by the Secretary of State of the United States of America and the EU High Representative for Foreign Affairs and Security Policy/Vice President of the European Commission' (24 March 2021), available at: www.state.gov/joint-statement-by-the-secretary-of-state-of-the-united-states-of-america-and-the-eu-high-representative-for-foreign-affairs-and-security-policy-vice-president-of-the-european-commission/.

model" and "unfair trade practices" that undermine a level playing field for US and EU businesses.[10]

While the CPTPP SOE rules were intended to target China, no studies have adequately examined whether these rules actually offer sufficient tools to tackle Chinese SOEs and the extent to which they extend beyond the existing WTO rules particularly those contemplated in China's WTO accession instruments.[11] This paper fills this gap by undertaking such a study. My central argument is that compared with the WTO rules particularly China's WTO-plus obligations, the CPTPP SOE chapter does not provide more rigorous or workable rules but has a narrower coverage and more carve-outs. Therefore, if the CPTPP were adopted as a model for multilateral negotiations, it would soften rather than tighten the existing disciplines that are already applicable to Chinese SOEs.

Drawing on a series of studies by the Organisation for Economic Co-operation and Development (OECD), Section II provides an overview of the challenges posed by SOEs and the essential policy responses necessary to address them. It then briefly reviews the US's approaches to regulating SOEs in major pre-CPTPP free trade agreements (FTAs) to provide some background for a detailed discussion of the CPTPP SOE chapter. Section III critically examines the efficacy of the CPTPP SOE chapter and compares it with China's WTO-plus obligations in the context of China's ongoing SOE reform so as to show its lack of development or deficiencies. Section IV considers the more recent development of SOE disciplines in some major post-CPTPP FTAs and shows that they are largely based on the CPTPP. While these FTAs also seek to address some deficiencies in the CPTPP SOE chapter and gradually expand the rules on subsidies and SOEs, they counterbalance the expanded rules by the inclusion of wide-ranging exceptions. Section V concludes this paper by reflecting on future WTO reform of SOE disciplines.

II. INTERNATIONAL REGULATION OF STATE-OWNED ENTERPRISES

The mounting challenges posed by SOEs to the world economy are widely documented. The OECD, in particular, has taken a range of initiatives to explore these challenges and the best regulatory approaches to address them.[12] The starting point is to treat SOEs as a global issue because many economies other than China, including CPTPP countries such as Vietnam, Mexico

[10] See United States Trade Representative, '2021 Trade Policy Agenda and 2020 Annual Report' (1 March 2021) at 4, available at: https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/march/biden-administration-releases-2021-presidents-trade-agenda-and-2020-annual-report; European Commission, 'Trade Policy Review – An Open, Sustainable and Assertive Trade Policy', COM(2021)66 Final (18 February 2021) at 2, 9-14, available at: https://ec.europa.eu/transparency/regdoc/rep/1/2021/EN/COM-2021-66-F1-EN-MAIN-PART-1.PDF.

[11] See *Protocol on the Accession of the People's Republic of China* (AP), WT/L/432 (23 November 2001); *Report of the Working Party on the Accession of China* (WPR), WT/ACC/CHN/49 (1 October 2001).

[12] See eg. Antonio Capobianco and Hans Christiansen, 'Competitive Neutrality and State-Owned Enterprises: Challenges and Policy Options', OECD Corporate Governance Working Papers No. 1 (Paris: OECD Publishing, 2011); OECD, 'Guidelines on Corporate Governance of State-Owned Enterprises' (Paris: OECD Publishing, 2015); OECD, 'State-Owned Enterprises as Global Competitors: A Challenge or an Opportunity?' (Paris: OECD Publishing, 2016); OECD, 'Measuring Distortions in International Markets: The Semiconductor Value Chain', OECD Trade Policy Papers No. 234 (Paris: OECD Publishing, 2019) [hereinafter OECD Semiconductor Report]; OECD, 'Measuring Distortions in International Markets: The Aluminum Value Chain', OECD Trade Policy Papers No. 218 (Paris: OECD Publishing, 2019) [hereinafter OECD Aluminum Report].

and Malaysia, maintain a significant state sector.[13] China stands out as a major concern because it is regarded as a unique economic model with an extremely complex and increasingly formidable state sector backed by ambitious and expansive industrial policies which have growing impacts on global commercial activities.[14]

Nevertheless, global activities of SOEs generate common problems. As observed by the OECD, the underlying problem arises from the non-commercial behaviour and conduct of SOEs driven by political or policy motives rather than commercial interests.[15] Such behaviour and conduct is typically enabled by state support including a wide spectrum of direct and indirect subsidies and preferential regulatory treatment and exemptions.[16] As SOEs increasingly compete with privately-owned enterprises (POEs) in home and foreign markets, their privileged position and anti-competitive practices lead to significant market distortions and undermine the interests of POEs particularly those of trading partners.

These problems entail two essential policy responses. Competitive neutrality, as the first response, seeks to constrain preferential treatment or the privileged position of SOEs so as to remove their competitive advantages and level the playing field vis-à-vis POEs.[17] This approach requires not only rules to deal with subsidies and other preferential treatment enjoyed by SOEs but also rigorous competition laws and enforcement more broadly.[18] The second response tackles the market-distortive behaviour and conduct of SOEs especially when engaged in commercial activities globally that cause (potential) harms to the interests of foreign competitors.[19] Moreover, the scope of these disciplines hinges on how SOEs are defined, and enforcement requires access to detailed information about SOEs, the support they receive from governments, etc. which in turn calls for rules on transparency and disclosure.[20] At the same time, however, the legitimate needs of governments to use SOEs for public policy objectives are also generally recognized.[21] This means that international disciplines on SOEs are necessarily subject to exceptions and exemptions so as to leave the policy space needed by governments. Taken together, these constitute the major elements of international regulation of SOEs as we have seen in recent trade agreements (some of which are discussed below).

This paper does not consider the competition rules in trade agreements but focuses on the other elements mentioned above which are also the main features of the CPTPP SOE chapter. It suffices to note that competition policies and enforcement, including competitive neutrality, vary considerably across jurisdictions, and harmonisation among different economic, political and

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13 See above n 12, OECD, 'State-Owned Enterprises as Global Competitors', at 21-26; above n 2, Miner, 'Commitments on State-Owned Enterprises', at 93.

14 See Mark Wu, 'The "China, Inc." Challenge to Global Trade Governance', (2016)57(2) *Harvard International Law Journal* 261, 264-84. Also see generally Alicia Garcia-Herrero and Gary Ng, 'China's State-Owned Enterprises and Competitive Neutrality', Bruegel Policy Contribution Issue 05/21 (February 2021); above n 12, OECD Semiconductor Report; OECD Aluminum Report.

15 See above n 12, OECD, 'State-Owned Enterprises as Global Competitors', at 27.

16 Ibid., at 28-30.

17 See generally above n 12, Capobianco and Christiansen, 'Competitive Neutrality and State-Owned Enterprises'; above n 14, Garcia-Herrero and Ng, 'China's State-Owned Enterprises and Competitive Neutrality'.

18 Ibid.

19 See above n 12, OECD, 'State-Owned Enterprises as Global Competitors', at 83-95.

20 Ibid., at 18-19; above n 12, OECD, 'Guidelines on Corporate Governance of State-Owned Enterprises', at 24-25.

21 See eg. above n 12, OECD, 'State-Owned Enterprises as Global Competitors', at 19; OECD, 'Guidelines on Corporate Governance of State-Owned Enterprises', at 12-13.

social systems can hardly be achieved in any near future.[22] In the case of China, its competition law and enforcement has largely failed to constrain the competitive advantages and anti-competitive practices of Chinese SOEs.[23] Therefore, while competitive neutrality is key to addressing the "SOE problems", it is also imperative to discipline the market-distortive behaviour and conduct of SOEs directly.

Prior to the CPTPP, most US FTAs were focused on tackling anti-competitive conduct and did not develop detailed rules on SOEs. For example, Chapter 16 of the US – Chile FTA[24] (2004) targets anti-competitive conduct of designated monopolies and state enterprises and prevents these enterprises from engaging in such conduct when exercising designated government functions (Article 16.4). The only specific obligation on state enterprises is non-discrimination in the sale of goods or services (Article 16.4.3). These rules were largely reproduced in some later FTAs such as Chapter 14 of the US – Australia FTA[25] (2005), Chapter 13 of the US – Peru FTA[26] (2009), Chapter 13 of the US – Colombia FTA[27] (2012), and Chapter 16 of the US – Korea FTA[28] (2012 and amended in 2019).

One notable exception is the US – Singapore FTA[29] (2004) which provided the most detailed SOE rules before the CPTPP. In addition to the non-discrimination obligation, Singapore commits to ensure that any government enterprise "acts solely in accordance with commercial considerations in its purchase or sale of goods or services" (Article 12.3.2(d)), and that the government does not "directly or indirectly, … influence or direct decisions of its government enterprises" (Article 12.3.2(e)). Singapore is also subject to more extensive transparency obligations. For example, it is required to publish an annual report to make available information on government ownership and voting rights of covered entities, annual revenue or total assets, and officials on the board of directors, and to provide such information on a non-covered entity when requested by the US (Article 12.3.2(g)).

Key concepts are also carefully defined in the US – Singapore FTA. "Government enterprises" covers any enterprise in which the Singaporean government has an "effective influence". Such influence exists where "the government and its government enterprises, alone or in combination" (a) "own more that (sic) 50 percent of the voting rights of an entity", or (b) "have the ability to exercise substantial influence over the composition of the board of directors or any other

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22 See generally Robert Anderson et al. 'Competition Policy, Trade and the Global Economy: Existing WTO Elements, Commitments in Regional Trade Agreements, Current Challenges and Issues for Reflection', WTO Staff Working Paper ERSD-2018-12 (31 October 2018).

23 See above n 14, Garcia-Herrero and Ng, 'China's State-Owned Enterprises and Competitive Neutrality', at 11-16; William Kovacic, 'Competition Policy and State-Owned Enterprises in China', (2017)16(4) *World Trade Review* 693, 706-11.

24 United States – Chile Free Trade Agreement, effective on 1 January 2004, full legal text available at: https://ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text.

25 United States – Australia Free Trade Agreement, effective on 1 January 2005, full legal text available at: https://ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text.

26 United States – Peru Free Trade Agreement, effective on 1 February 2009, full legal text available at: https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text.

27 United States – Colombia Free Trade Agreement, effective on 15 May 2012, full legal text available at: https://ustr.gov/trade-agreements/free-trade-agreements/colombia-tpa/final-text.

28 United States – Korea Free Trade Agreement, effective on 15 March 2012, amended on 1 January 2019, full legal text available at: https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text.

29 United States – Singapore Free Trade Agreement, effective on 1 January 2004, full legal text available at: https://ustr.gov/trade-agreements/free-trade-agreements/singapore-fta/final-text.

managing body of an entity, 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" (emphasis added). The underlined text addresses situations of *de facto* influence in the absence of a majority voting right or substantial influence on the composition of the board. Moreover, where the voting securities held by the government and/or government enterprises are between 20-50%, "there is a rebuttable presumption that effective influence exists" (Article 12.8(5)). "Covered entities" include government enterprises whose annual revenue and total assets are both greater than SGD 50 million and in which the Singaporean government "owns a special voting share with veto rights relating to" certain major corporate matters (Article 12.8(1)).[30] "Commercial considerations" means "normal business practices of privately-held enterprises in the relevant business or industry" (Article 12.8(8)).

Although the SOE rules in the US – Singapore FTA were not adopted in the other US FTAs before the CPTPP, they provided the basis for the development of the (CP)TPP SOE chapter which in turn influenced the SOE rules under post-CPTPP FTAs of the US and the EU, as will be discussed in Section IV.

III. CPTPP RULES ON STATE-OWNED ENTERPRISES

Consistent with the approaches to the regulation of SOEs outlined above, the CPTPP SOE chapter (i.e. Chapter 17) consists of five key elements: (1) definition of SOEs; (2) substantive obligations; (3) non-commercial assistance (NCA); (4) transparency; and (5) exceptions and non-conforming measures (NCMs). This section offers a critical analysis of the major rules under each element and shows why they are not more advanced or more effective than China's WTO-plus obligations at tackling Chinese SOEs.

A. Definition

Article 17.1 of the CPTPP defines SOEs as an entity "that is principally engaged in commercial activities" and in which the government:

(a) directly owns more than 50 percent of the share capital;

(b) controls, through ownership interests, the exercise of more than 50 per cent 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.

This definition is narrower than the one in the US – Singapore FTA in two important aspects: (1) it is limited to SOEs that principally undertake commercial activities; and (2) it does not explicitly cover entities over which the government has *de facto* "effective influence", for example, where the government is a minority shareholder without a majority voting power or influence over board composition but remains capable of influencing the management and operation of the entities.

[30] Excluded from the "covered entities" are Temasek Holdings (Pte) Ltd – Singapore's state-owned investment company – and government enterprises operating solely for the purpose of investing the government's reserves in foreign markets.

As regards the first limitation, "commercial activities" refer to the production and sale/supply of goods and services for profits (Article 17.1). Some have observed that this limitation was intended to exclude "regulatory agencies and other entities that merely grant licenses or permits".[31] However, this limitation tends to be far broader in that it excludes SOEs which operate "on a not-for-profit basis or on a cost-recovery basis" (Footnote 1 of Article 17.1). Where such an SOE also undertakes profit-making activities, it is still excluded from the coverage of the CPTPP as long as most of its activities[32] are not-for-profit.

Generally, this limitation fails to address market distortions caused by non-profit entities.[33] As far as China is concerned, it creates a wide loophole in dealing with Chinese SOEs. China's current SOE reform classifies state entities into three categories: (1) Public Welfare SOEs which exercise social functions and provide public goods and services, (2) Special Commercial SOEs which undertake projects or tasks designated by the state particularly in strategic industries and fields, and (3) General Commercial SOEs which are expected to operate as POEs.[34] The CPTPP definition is unlikely to capture Public Welfare SOEs and Special Commercial SOEs given their government functions. However, these SOEs and their activities have attracted considerable international concern particularly when they are used as an instrument to achieve China's industrial policies in strategic sectors. One notable example is the high-tech sector which has become increasingly prominent in China's national policies like the famous 'Made in China 2025'.[35] China's Fourteenth Five-Year Plan (2021-2025) places even more emphasis on technology and innovation to promote technological independence and global competitiveness.[36] SOEs are critical to the pursuit of the strategic goals in the high-tech sector, and future SOE reform will most likely lead to more state capital and influence in the sector.[37] However, the SOEs involved in the strategic pursuits would typically be categorized as Special Commercial SOEs or Public Welfare SOEs. And the lack of a clear definition and scope for the three types of SOEs provides the flexibility for the Chinese government to categorise an SOE as a not-for-profit entity exercising government functions. For example, to avoid the CPTPP rules, China may direct a state entity to undertake production and sale/supply of goods and services – such as SOEs in the major tech-related upstream industries (eg. steel, aluminum, raw materials and rare earths) and state banks – on a not-for-profit or cost-recovery basis so as to support the industrial policies and strategic goals. The

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31 See above n 2, Miner, 'Commitments on State-Owned Enterprises', at 92.

32 The term "principally" means "for the most part", "chiefly", "largely", "mostly", "predominantly". See Merriam-Webster Dictionary Online: www.merriam-webster.com/thesaurus/principally.

33 See above n 2, Matsushita and Lim, 'Taming Leviathan as Merchant', at 415-16.

34 See *Guiding Opinions of the Communist Party of China Central Committee and the State Council on Deepening the Reform of State-Owned Enterprises*, promulgated by Central Committee of the Communist Party of China and the State Council, Zhong Fa [2015] No. 22, effective on 24 August 2015 [hereinafter Guiding Opinions], Section 2; *Guiding Opinions on the Functional Definition and Classification of State-Owned Enterprises*, promulgated by the State-Owned Assets Supervision and Administration Commission of the State Council (SASAC), Ministry of Finance and National Development and Reform Commission, Guozifayanjiu [2015] No. 170, effective on 30 December 2015.

35 See Made in China 2025, issued by the State Council on 8 May 2015, effective on the same date.

36 See Outline of the 14th Five-Year Plan for the National Economic and Social Development and the 2035 Long Term Goals, adopted at the Fourth Session of the Thirteenth National People's Congress on 11 March 2021, available at: www.gov.cn/xinwen/2021-03/13/content_5592681.htm.

37 See eg. Notice on Accelerating Digital Transformation of State-Owned Enterprises, issued by SASAC on 21 September 2020, available at: www.sasac.gov.cn/n2588020/n2588072/n2591148/n2591150/c15517908/content.html.

activities of these SOEs, and many others of the kind, may not be captured by the CPTPP although they cause significant market distortions.[38]

With respect to the second limitation of the CPTPP SOE definition, attempts have been made, by way of treaty interpretation, to broaden the definition to cover entities in which the government has a *de facto* "effective influence". However, the lack of an explicit reference to such "effective influence" suggests that a compromise was made among the CPTPP governments to avoid a broader definition.[39]

Matsushita and Lim opined that subparagraph (b) of Article 17.1 "could have a very broad reach … to encompass indirect ownership interests" and "*de facto* control".[40] A major issue, as Matsushita and Lim also pointed out, concerns the difficulties of collecting evidence to show "*de facto* control of the exercise of over 50% of voting rights".[41] While it is possible to interpret subparagraph (b) in a broad manner, its scope is constrained by the requirement of "the exercise of 50% of voting rights". In reality, a government does not need to control a majority of voting rights to effectively influence the decision-making of state entities. For example, one major component of China's current SOE reform is the corporatization of state entities. While this reform is intended to improve corporate governance of Chinese SOEs, it mandates the creation of a Party Committee in all state entities, including the listed ones, to ensure the leadership role of the Party.[42] By June 2020, 1,036 SOEs had established a Party Committee typically through amending their articles of association.[43] With the Party playing a leadership role, one can hardly deny its considerable or even decisive influence on state entities. While this is strong evidence of "effective influence", it would be difficult to show that the Committee or any of its members control, directly or indirectly, a majority of voting rights in the entities.

Miner argues that subparagraph (c) "provides reasonable scope for encompassing enterprises … where the state owns no shares or has no equity voting rights but controls hiring of the top management … [and] firms that are highly dependent on regulatory approval or public funds and the government effectively selects the board."[44] Again, while this broad interpretation is plausible, it overlooks the implications of the reference to "the power to appoint a majority of members of the board of directors". Using the illustration above, the Party Committee can exert sufficient influence over the board of state entities without needing to have an explicit power to appoint a majority of the board. As a result of the corporatization reform, the State/Party no longer

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38 See eg. above n 12, OECD Semiconductor Report; OECD Aluminum Report.

39 See Ian F. Fergusson et al., 'The Trans-Pacific Partnership (TPP) Negotiations and Issues for Congress', Congressional Research Service (20 March 2015) 43-44; Ian F. Fergusson and Brock R. Williams, 'The Trans-Pacific Partnership (TPP): Key Provisions and Issues for Congress', Congressional Research Service (14 June 2016) 67.

40 See above n 2, Matsushita and Lim, 'Taming Leviathan as Merchant', at 413, 422.

41 Ibid., at 413.

42 See above n 34, Guiding Opinions, Sections 3 & 7; *Guiding Opinions of the General Office of the State Council on Further Improving the Corporate Governance Structure of State-owned Enterprises*, General Office of the State Council, Guo Ban Fa [2017] No. 36, 24 April 2017.

43 See SASAC, 'Improving the System for State-Owned Enterprises with Chinese Characteristics', 20 November 2020, available at: www.sasac.gov.cn/n2588025/n4423279/n4517386/n16018252/c16018578/content.html. For an example of proposed amendments of articles of association, see Proposed Amendments to Articles of Association and Notice of EGM, Datang International Power Generation Co., Ltd, 29 June 2017, available at: www.hkexnews.hk/listedco/listconews/SEHK/2017/0630/LTN201706301016.pdf.

44 See above n 2, Miner, 'Commitments on State-Owned Enterprises', at 92-3.

maintains a majority position in the board of most central SOEs.[45] While the presence of a Party Committee may be used to establish a *prima facie* case of *de facto* influence, it would be difficult to adduce evidence to show that the State/Party has the power to appoint a majority of the board.

The main point of comparison under China's WTO-plus obligations is paragraph 46 of the Report of the Working Party on the Accession of China (WPR) which provides:

> The representative of China further confirmed that China would ensure that all state-owned and state-invested enterprises would make purchases and sales based solely on commercial considerations, e.g. price, quality, marketability and availability, and that the enterprises of other WTO Members would have an adequate opportunity to compete for sales to and purchases from these enterprises on non-discriminatory terms and conditions. In addition, the Government of China would not influence, directly or indirectly, commercial decisions on the part of state-owned or state-invested enterprises, including on the quantity, value or country of origin of any goods purchased or sold, except in a manner consistent with the WTO Agreement. (emphasis added)

The first sentence requires that "*all* [Chinese] SOEs and state-invested enterprises [("SIEs")] … make purchases and sales based solely on commercial considerations" and on a non-discriminatory basis. This coverage of entities is potentially much broader than the CPTPP definition of SOEs precisely in the two aspects discussed above. Specifically, the first sentence can be read broadly to cover state entities in which the Chinese government holds, directly or indirectly, a majority or minority interest regardless of whether their activities are for profit or not. More importantly, it can be argued that this obligation is not even conditional upon the State/Party having an "effective influence" on the entities. Instead, there seems to be an assumption that such an influence exists as long as the SOEs or SIEs concerned fail to fulfill the substantive obligations. This argument is supported by the fact that only the second sentence makes an explicit reference to direct or indirect influence of the Chinese government on SOEs and SIEs. Therefore, the obligations relating to "commercial considerations" and "non-discrimination", which are also the major obligations under the CPTPP, apply to all SOEs and SIEs regardless of whether the Chinese government has a majority ownership, controls a majority voting rights or otherwise has an effective influence. This broader coverage of state entities necessarily extends the substantive obligations under paragraph 46 and the other relevant China-specific rules (discussed below) beyond the equivalent CPTPP rules.

B. Substantive Obligations: Non-Discrimination and Commercial Considerations

Article 17.4.1 of the CPTPP sets out two substantive obligations requiring governments to ensure an SOE, when engaging in commercial activities and in its purchase or sale of a good or service, (1) acts in accordance with "commercial considerations", and (2) accords both national treatment (NT) and most-favoured nation (MFN) treatment to a good or service supplied by an enterprise of another Party. This provision addresses the limitations of GATT Article XVII:1, which targets state trading enterprises (STEs), by clarifying that the non-discrimination requirement includes both MFN and NT and the "commercial considerations" requirement is independent from and

[45] See above n 43, SASAC.

additional to non-discrimination.[46] However, compared to China's WTO-plus obligations, this provision does not create more rigid or workable rules.

Consider the "commercial considerations" requirement first. This term is defined under Article 17.1 as follows:

> price, quality, availability, marketability, transportation, and other terms and conditions of purchase or sale, or other factors that would normally be taken into account in the commercial decisions of a privately owned enterprise in the relevant business industry.

Compared to the US – Singapore FTA, this definition merely adds an illustrative list of factors that POEs may consider in commercial transactions. However, these factors already exist under GATT Article XVII:1(b) and paragraph 46 of the WPR. Although neither GATT Article XVII:1(b) nor paragraph 46 of the WPR refer to "the commercial decisions of POEs in the relevant business industry", the inclusion of this expression in the CPTPP does not further clarify the relevant standard of "commercial considerations" or the factors to be considered which are at the heart of this obligation.[47] In this respect, the WTO tribunals, in *Canada – Wheat*, have provided more guidance. The panel opined that the "commercial considerations" rule requires STEs to make purchase or sale decisions based on "terms which are economically advantageous for themselves and/or their owners, members, beneficiaries, etc." as opposed to "such considerations as the nationality of potential buyers or sellers, the policies pursued by their governments, or the national (economic or political) interest".[48] On appeal, the Appellate Body endorsed the panel's interpretation and observed that whether such decisions are "commercial" needs to be determined in the relevant market(s) and on a case-by-case basis.[49] While more guidance will need to and can be developed by case law, it is evident that the CPTPP rule on "commercial considerations" does not go beyond paragraph 46 of the WPR. Nor does it provide further guidance for the application of this rule compared to the existing WTO jurisprudence.

Turning to the non-discrimination requirement, the CPTPP does set out more specific rules to clarify that (1) both MFN and NT are required in an SOE's purchase or sale of goods or services, and (2) this requirement also applies to the purchase/sale of goods or services from/to a foreign-invested enterprises ("FIEs") in the territory of the host country.[50] While paragraph 46 of the WPR does not offer such level of detail, its intended scope is clearly as broad as the CPTPP rule. Specifically, China's obligations under paragraph 46 were designed to address WTO Members' concerns set out in paragraph 44 of the WPR which states:

> In light of the role that state-owned and state-invested enterprises played in China's economy, some 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

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46 For a detailed discussion of the laws and jurisprudence under Article XVII, see above n 7, Zhou et al., 'Building A Market Economy Through WTO-Inspired Reform of State-Owned Enterprises in China', at 997-1001. Also see above n 2, Matsushita and Lim, 'Taming Leviathan as Merchant', at 408.

47 Panel Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/R, adopted 27 September 2004, paras. 6.92-95.

48 Ibid., paras. 6.87-88.

49 Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004, para. 140.

50 This obligation applies to "covered investment" which, as defined under Article 1.3 of the CPTPP, means "with respect to a Party, an investment in its territory of an investor of another Party in existence as of the date of entry into force of this Agreement for those Parties or established, acquired, or expanded thereafter."

> 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. (emphasis added)

In response, China made the following statement in paragraph 45:

> The representative of China emphasized the evolving nature of China's economy and the significant role of FIEs and the private sector in the economy. Given the increasing need and desirability of competing with private enterprises in the market, decisions by state-owned and state-invested enterprises had to be based on commercial considerations as provided in the WTO Agreement. (emphasis added)

While paragraphs 44 and 45 do not create additional commitments,[51] they provide important context for interpreting the commitments under paragraph 46. They show that the "commercial considerations" and non-discrimination rules under paragraph 46 were drafted based on a clear understanding that the rules shall cover the purchase/sale of both goods and services by SOEs and SIEs including from or to FIEs. Accordingly, there is a (con)textual basis to support an interpretation of paragraph 46 at least as broadly as the equivalent CPTPP substantive obligations on SOEs.

In addition, it should be noted that Section 9.1 of China's WTO Accession Protocol (AP) imposes an obligation on the Chinese government to ensure "prices for traded goods and services in every sector to be determined by market forces". This obligation is even broader than the "commercial obligations" and non-discrimination requirements and has the potential to capture all governmental measures that affect all prices in all sectors.[52] That is, it extends beyond tackling the behaviour and conduct of SOEs and prohibits all forms of government intervention in the market that affect prices directly or indirectly. Such a broad obligation does not exist in the CPTPP.

C. Non-Commercial Assistance

Article 17.6.1 of the CPTPP prohibits the provision of NCA by any Party, directly or indirectly, to its SOEs if such assistance causes "adverse effects to the interests of another Party". This rule also applies to the provision of NCA by an SOE to another SOE (Article 17.6.2).

Similar to the definition and scope of "financial contributions" under Article 1 of the Agreement on Subsidies and Countervailing Measures (ASCM), NCA covers (i) "direct transfers of funds or potential direct transfers of funds or liabilities" such as grants, debt forgiveness, and preferential loans, guarantees and equity investment, and (ii) the supply of goods or services on terms more favourable than those commercially available (Article 17.1). Furthermore, the scope of NCA is limited to "assistance to a state-owned enterprise by virtue of that state-owned enterprise's government ownership or control" which in turn refers to assistance the access to which is limited to, or predominantly or disproportionately used by, SOEs. This limitation effectively creates a requirement of specificity similar to Article 2 of the ASCM. Indeed, it simplifies the specificity requirement by using "ownership" as a major criterion for assessment. However, this approach is

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51 See above n 11, WPR, paragraph 342.

52 Only a short list of goods and services, envisaged in Annex 4 of the AP, is exempted from this obligation. For a more detailed analysis of the obligations under paragraph 46 of the WPR and Section 9.1 of the AP, see above n 7, Zhou et al., 'Building A Market Economy Through WTO-Inspired Reform of State-Owned Enterprises in China', at 1011-14.

not unprecedented and can be found in Section 10.2 of China's WTO Accession Protocol which was designed to reduce the burden for governments to tackle subsidies granted to Chinese SOEs.[53] Finally, the requirement of "adverse effect" is also based on Articles 5 and 6 of the ASCM, although it remains debatable as to whether Article 17.7 of the CPTPP provides more guidance for the assessment of "adverse effects".[54] Accordingly, despite the lack of reference to the ASCM, the NCA section largely incorporates the existing WTO rules on actionable subsidies including the specificity rule tailored to China.

However, the CPTPP rules on NCA are more limited than the WTO rules in at least two aspects. One relates to CPTPP's limited coverage of SOEs which, as discussed above, would exclude some major Chinese SOEs from the NCA rules. The other concerns the limited focus of the NCA rules on subsidies provided to SOEs only. While this focus is aimed at removing the preferential treatment and competitive advantages that SOEs receive beyond those enjoyed by POEs (i.e. competitive neutrality),[55] it leaves NCA provided to POEs unregulated. However, subsidization of POEs in the strategic sector tends to be a major source of market distortions under China's current SOE reform. Specifically, the mixed ownership reform, which seeks to promote ownership diversification in SOEs,[56] is also leading to growing investment of state capital in POEs especially in the strategic sectors.[57] In 2020, central SOEs alone invested in over 6000 POEs through more than RMB 400 billion of equity infusion.[58] In the high-tech sector, for example, China's massive government investment funds have injected billions of dollars by way of equity infusion.[59] To the extent that the equity infusion is made on preferential terms and conditions for policy or other non-commercial reasons, it constitutes a "financial contribution" under the ASCM but is not

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53 Section 10.2 creates an assumption of specificity of "subsidies provided to SOEs" if the SOEs "are the predominant recipients of such subsidies or … receive disproportionately large amounts of such subsidies." For more discussions of this China-specific rule, see Julia Ya Qin, 'WTO Regulation of Subsidies to State-Owned Enterprises (SOEs) – A Critical Appraisal of the China Accession Protocol', (2004)7(4) *Journal of International Economic Law* 863, 890-91.

54 See above n 2, Willemyns, 'Disciplines on State-Owned Enterprises in International Economic Law', at 671 (noting the CPTPP elaborates on the concept of adverse effects); Miner, 'Commitments on State-Owned Enterprises', at 94 (observing that while the CPTPP lays out very specific instances in which adverse effects may occur, these conditions are more narrow than those under the ASCM); Matsushita and Lim, 'Taming Leviathan as Merchant', at 409 (observing that the CPTPP sets a relatively high threshold for showing adverse effects similar to the definition of "serious prejudice" under the ASCM).

55 See above n 39, Fergusson et al., 'The Trans-Pacific Partnership (TPP) Negotiations and Issues for Congress', at 44; Fergusson and Williams, 'The Trans-Pacific Partnership (TPP)', at 68.

56 See above n 34, Guiding Opinions, Section 5; *Opinions of the State Council on the Development of Mixed Ownership Economy by State-Owned Enterprises*, promulgated by the State Council, Guo Fa [2015] No. 54, effective 23 September 2015.

57 See PWC, 'A Review of China SOE Reform 2019 – Reform and Development of Central SOEs', SOE Reform Blog (March 2020), available at: www.pwccn.com/zh/blog/state-owned-enterprise-soe/reform-development-central-enterprises.html; PWC, 'A Review of China SOE Reform 2020 – Reform and Development of Central SOEs', SOE Reform Blog (March 2021), available at: www.pwccn.com/zh/blog/state-owned-enterprise-soe/reform-and-development-of-central-enterprises-mar2021.html.

58 See Deloitte, 'White Paper on the New Stage of Mixed Ownership Reform', (March 2021), available at: www2.deloitte.com/content/dam/Deloitte/cn/Documents/ser-soe-br/deloitte-cn-soe-white-paper-on-the-new-stage-of-mixed-reform-zh-210322.pdf.

59 See eg. Ministry of Industry and Information Technology, 'The Establishment of the National Integrated Circuit Investment Fund' (14 October 2014); SASAC, 'The Establishment of the Advanced Manufacturing Industry Investment Fund' (12 June 2016); Sina Finance, 'The Analysis of China's National Integrated Circuit Investment Fund First Tranche's Investment' (13 Mar. 2019), available at: https://finance.sina.com.cn/stock/hyyj/2019-03-13/doc-ihsxncvh2157328.shtml; Sarah Dai, 'China Completes Second Round of US$29 Billion Big Fund Aimed at Investing in Domestic Chip Industry', SCMP (26 Jul. 2019), available at: www.scmp.com/tech/science-research/article/3020172/china-said-complete-second-round-us29-billion-fund-will.

covered by the CPTPP NCA rules because the recipients are POEs. Here, it is worth noting that the "commercial considerations" and non-discrimination rules under the CPTPP do not apply to "the purchase or sale of shares, stocks or other forms of equity by a state-owned enterprise as a means of its equity participation in another enterprise" (footnote 13 of Chapter 17). Thus, subsidies of this kind, when granted to POEs, would fall outside of the CPTPP SOE chapter.

The CPTPP's major breakthrough is the application of the NCA section to subsidies adversely affecting trade in services which are subject to further negotiations under the WTO's General Agreement on Trade in Services (GATS).[60] Currently, this section only applies to the supply of services via mode 1 (cross-border supply) and mode 3 (commercial presence)[61] and excludes the provision of services within the territory of the subsidizing party (Article 17.6.4).[62] This exclusion means that the NCA rules do not protect the competitive condition of foreign services suppliers/firms vis-à-vis SOEs in the home market.

Overall, other than the discipline on services subsidies, the CPTPP does not develop the existing WTO rules in any substantive manner. Due to the limited coverage of the NCA rules, the WTO rules remain the only source of discipline that may be applied to tackle some major trade-distorting subsidies granted to or by Chinese SOEs.[63]

D. Transparency

Article 17.10 of the CPTPP sets out an extensive list of transparency obligations mandating each Party to provide, *inter alia*,

> (1) "to the other Parties or otherwise make publicly available on an official website a list of its state-owned enterprises" and to "update the list annually"; and upon request of another Party,
>
> (2) a range of information on SOEs including the equity interest, special shares or voting rights of the government or its SOEs in the entities, the government position of any government official on the board, the entities' annual revenue and total assets over the past three years, exemptions and immunities that the Party's law grants to the entities; and
>
> (3) information regarding any policy or programme that provides for NCA including the form, the names of the providers, the legal basis and underlying policy objective, the amount and related budget, the duration and statistical data for assessment of the effects of the NCA.

Before CPTPP, most FTAs that have transparency rules on SOEs do not cover such a wide range of information.[64] In this respect, the CPTPP does advance international SOE rules in a positive direction by creating a mechanism for governments to collect evidence necessary to monitor and

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60 See Article XV of the GATS. Also see above n 2, Willemyns, 'Disciplines on State-Owned Enterprises in International Economic Law', at 671; Matsushita and Lim, 'Taming Leviathan as Merchant', at 409. It is also worth noting that only a small number of FTAs before the CPTPP regulate subsidies in services. See L. Rubini, 'Subsidies' in Aaditya Mattoo et al. (eds) *Handbook of Deep Trade Agreements* (The World Bank, 2020) 427-461 at 450.

61 See above n 1, CPTPP, Articles 17.6.1 (b)&(c) and Articles 17.6.2 (b)&(c).

62 Annex 17-C(b) of the CPTPP sets out a mandate for the parties to review this exclusion within five years.

63 For a detailed discussion of the application of the existing WTO rules on industrial subsidies to major Chinese subsidies in the high-tech sector, see generally Weihuan Zhou and Meng Fang, 'Subsidizing Technology Competition: China's Evolving Practices and International Trade Regulation in the Post-Pandemic Era', forthcoming (2021)30(3) *Washington International Law Journal*, an accepted copy is available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3737272.

64 See L. Rubini and T. Wang, 'State-Owned Enterprises' in Aaditya Mattoo et al. (eds) *Handbook of Deep Trade Agreements* (The World Bank, 2020) 464-503 at 496-98.

constrain the market-distorting behaviour and practices of state entities as well as the NCA they receive.

China's accession instruments have also included extensive transparency obligations. For example, China undertakes to publish all "laws, regulations and other measures pertaining to or affecting trade in goods, services, TRIPS … before such measures are implemented or enforced"[65] and to "establish or designate an enquiry point" to provide all such information "upon request of any individual, enterprise or WTO Member".[66] These obligations were designed to address WTO Members' concerns about "the difficulty in finding and obtaining copies of regulations and other measures undertaken by various ministries as well as those taken by provincial and other local authorities" and "to ensure that information from all government bodies at all levels could be assembled in one place and made readily available."[67] These obligations extend significantly beyond the general WTO transparency rules[68] and can be applied to subsidies or NCA, although it would be hard to construe the reference to "laws, regulations and other measures" in a way that requires the disclosure of the same detailed information of SOEs as contemplated under the CPTPP. However, as will be discussed in sub-section E, sub-central SOEs may be exempted from the CPTPP's transparency obligations.[69] In this regard, China's WTO-plus obligations have a wider coverage.

More importantly, despite the positive development of transparency rules in the CPTPP, the efficacy of the rules hinges on implementation. Here, the same challenges, faced by the WTO in coaxing Members into fulfilling their transparency commitments, may well arise. As widely noted, the WTO's Trade Policy Review Mechanism (TPRM) and notification mechanisms have been ineffective in inducing China (as well as other Members) to provide information on SOEs and subsidies.[70] While China has taken a range of actions to implement its WTO-plus transparency obligations, there are notable deficiencies such as the lack of publication of sub-central governmental measures, insufficient responses by certain enquiry points and a general lack of implementation by local governments.[71] The CPTPP does not seem to have a more effective mechanism to address these implementation challenges.[72]

Notably, Annex 17-B of the CPTPP sets out a detailed process to facilitate information-gathering for the resolution of disputes including empowering a CPTPP panel to "draw adverse inferences from instances of non-cooperation by a disputing Party" (paragraph 9). However, one may argue

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65 See above n 11, AP, Section 2(C).1.

66 Ibid., Section 2(C).3.

67 See above n 11, WPR, Paragraph 324.

68 See Julia Ya Qin, '"WTO-Plus" Obligations and Their Implications for the World Trade Organization Legal System', (2003)37(3) *Journal of World Trade* 483, 491-95. For a more detailed analysis of China's transparency obligations and implementation, see Henry Gao, 'The WTO's Transparency Obligations and China', (2017)12(2) *Journal of Comparative Law* 329, 329-40.

69 See above n 1, CPTPP, Annex 17-D.

70 See generally Petros Mavroidis and Robert Wolfe, 'From Sunshine to a Common Agent: The Evolving Understanding of Transparency in the WTO', (2015)21(2) *Brown Journal of World Affairs* 118; Robert Wolfe, 'Sunshine over Shanghai: Can the WTO Illuminate the Murky World of Chinese SOEs?', (2017)16(4) *World Trade Review* 713. China's latest trade policy review in 2018 provided very few information on SOEs despite the request for information by other members. See WTO Trade Policy Review Body, *Trade Policy Review Report by China*, WTO Doc. WT/TRP/G/375 (June 6, 2018); WTO Trade Policy Review Body, *Trade Policy Review Report by the Secretariat*, WTO Doc. WT/TRP/S/375 (June 6, 2018).

71 See above n 68, Gao, 'The WTO's Transparency Obligations and China', at 340-55.

72 See above n 70, Wolfe, 'Can the WTO Illuminate the Murky World of Chinese SOEs?', at 725.

that a similar process also exists under Article 13.1 of WTO's *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU). This provision gives a WTO panel "ample and extensive discretionary authority" to seek necessary information from disputing parties[73] and requires the parties to provide the requested information promptly and fully. When one party is unable to obtain relevant information, it may ask the panel to request the information from the other party. In such circumstances, the panel will do so to ensure "the proceedings are fairly conducted" and the requesting party is "afforded … a fair opportunity to produce evidence necessary to make out its *prima facie* case."[74] This is especially the case where the information concerned is "in the exclusive possession of the other party" and the requesting party has tried but failed to obtain the information through reasonable means.[75] Thus, the DSU also provides a process to facilitate information-gathering. Moreover, it is possible to interpret Article 13.1 as providing scope for the panel to draw an adverse inference if requested information is not provided. Therefore, the CPTPP rules are not necessarily more advanced or effective in inducing implementation of transparency obligations.

In addition, the narrow definition of SOEs under the CPTPP is likely to create uncertainties about the scope of the transparency obligations (i.e. what entities and NCA should be notified), thereby further reducing the efficacy of the rules.[76] In short, while the CPTPP should be praised for setting new and higher standards of transparency, it does not resolve the longstanding problem of enforcement – the most challenging issue under the WTO's transparency regime.

E. Exceptions and Non-Conforming Measures

The key compromise to the "strengthened" disciplines on SOEs in the CPTPP is the inclusion of wide-ranging carve-outs.[77] Indeed, most pre-CPTPP FTAs that have SOE rules also provide exceptions particularly for public services and strategic sectors.[78] However, the exceptions in the CPTPP are so extensive as to further reduce the rigour of the obligations discussed above.[79] The main exempted entities/activities include sovereign wealth funds, central banks and financial regulatory bodies exercising regulatory or supervisory authority, independent pension funds, government procurement, the supply of goods or services by SOEs in the exercise of government functions, the supply of financial services pursuant to a government mandate, and smaller SOEs whose annual revenue from commercial activities in any of the past three years was below 200

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73 Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R (adopted 20 Aug. 1999), para. 192.

74 Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R (adopted 23 Mar. 2012), paras. 1143-45.

75 Panel Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R (adopted 29 Jun. 2020), para. 1.82.

76 The WTO's transparency mechanisms have been plagued by similar issues for years. See above n 70, Wolfe, 'Sunshine over Shanghai', at 720-24.

77 See above n 2, Willemyns, 'Disciplines on State-Owned Enterprises in International Economic Law', at 673; Fleury and Marcoux, 'The US Shaping of State-Owned Enterprise Disciplines in the Trans-Pacific Partnership', at 453-55.

78 See above n 64, Rubini and Wang, 'State-Owned Enterprises', at 495-96.

79 See Kirk Haywood, 'The Treatment of State Enterprises in the WTO & Plurilateral Trade Agreements', The Commonwealth Secretariat Emerging Issues Briefing Note (3) (March 2016) 1, 8 (observing that the extensive exclusions, "when combined with questions around the overall trade distorting impact of SOEs, raises questions as to the commercial rationale for this Chapter").

million Special Drawing Rights (approximately US$287 million).[80] Furthermore, as flagged above, sub-central SOEs are generally not subject to the substantive obligations, the NCA rules and the transparency requirement under Article 17.10.1, that is, the obligation to publish a list of SOEs. Vietnam, Malaysia and Mexico, who have the largest state sectors among CPTPP members, are exempted from the transparency requirements entirely for their sub-central SOEs.[81] In addition, CPTPP members are allowed to maintain a negative list of NCMs reserving the right for select SOEs to undertake the scheduled activities which are not subject to the disciplines on "commercial considerations", non-discrimination and NCA (Article 17.9.1 and Annex IV). These exceptions reflect the interests and needs of all CPTPP members, not merely those with a more significant state sector. Notably, while actively advocating more rigorous SOE disciplines, the US was also keen to ensure the CPTPP leaves sufficient room for SOEs to exercise public functions (particularly financial institutions) and excludes sub-central SOEs from the substantive obligations.[82]

Instead of discussing all the exceptions, I consider the implications of the exemption of sub-central SOEs and NCMs. Under its current SOE reform, China has been consolidating the state sector through restructuring and reorganization to create world-class multinational companies.[83] By May 2021, the consolidation has reduced the number of central SOEs to 97, a list of which is published on the website of the State-Owned Assets Supervision and Administration Commission (SASAC).[84] This list satisfies the requirement under Article 17.10.1 of the CPTPP as no existing CPTPP members are required to publish a list of sub-central SOEs. In reality, however, sub-central SOEs continue to flourish in China, reaching a total of 242,000 by the end of 2018.[85] Moreover, while the central SOEs are generally larger and stronger players domestically and globally, local SOEs are actively involved in a much wider range of industries and operations of commercial significance and have become increasingly important actors.[86] In 2020, the revenue of local SOEs accounted for almost half (i.e. 44.2%) of the total annual revenue of all Chinese SOEs,[87] and the

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80 See above n 1, CPTPP, Article 17.2, Article 17.13 and Annex 17-A. International Monetary Fund, SDR Valuation, 16 May 2021, available at: www.imf.org/external/np/fin/data/rms_sdrv.aspx.

81 See above n 1, CPTPP, Article 17.9 and Annex 17-D; above n 2, Miner, 'Commitments on State-Owned Enterprises', at 93, 96-97.

82 See above n 2, Fleury and Marcoux, "The US Shaping of State-Owned Enterprise Disciplines in the Trans-Pacific Partnership", at 460-61; Miner, 'Commitments on State-Owned Enterprises', at 96; Willemyns, 'Disciplines on State-Owned Enterprises in International Economic Law', at 674-75.

83 *Guiding Opinions on Promoting the Restructuring and Reorganization of Central State-Owned Enterprises State Council*, promulgated by the State Council, Guo Ban Fa [2016] No.56, effective 17 July 2016. Between January 2013 to 31 December 2020, 41 central SOEs were restructured through 22 horizontal or vertical mergers, which are published on SASAC's website: www.sasac.gov.cn/n2588035/n2641579/n2641660/index.html.

84 See SASAC, List of Central State-Owned Enterprises, 10 May 2021, available at: www.sasac.gov.cn/n4422011/n14158800/n14158998/c14159097/content.html.

85 This is the latest official data from China's National Bureau of Statistics. See National Bureau of Statistics, 'Incorporated Entities Enter into A Fast-Growing Stage', 11 January 2020, available at: www.stats.gov.cn/tjsj/sjjd/202001/t20200122_1724483.html#:~:text=%E5%9B%BD%E6%9C%89%E4%BC%81%E4%B8%9A%E7%BB%A7%E7%BB%AD%E5%8F%91%E6%8C%A5%E6%94%AF%E6%9F%B1,%E4%B8%87%E4%B8%AA%EF%BC%8C%E5%A2%9E%E9%95%BF10.9%25%E3%80%82.

86 See Wendy Leutert, 'State-Owned Enterprises in Contemporary China' in Luc Bernier el al. (eds) *The Routledge Handbook of State-Owned Enterprises* (London and New York: Routledge, 2020) 201-212 at 202-3; OECD, 'Report on China's Shipping Industry and Policies Affecting it', OECD Science, Technology and Industry Policy Papers No. 105 (April 2021) at 51, available at: www.oecd-ilibrary.org/science-and-technology/report-on-china-s-shipbuilding-industry-and-policies-affecting-it_bb222c73-en.

87 See SASAC, Financial Performance of All State-Owned Enterprises and State-Controlled Enterprises between January and December 2020, 27 January 2021, available at:

number of local SOEs on the Fortune Global 500 climbed up to 32 (compared to 48 central SOEs).[88] As central SOEs increasingly concentrate into strategic sectors, local SOEs' influence on commercial activities nationwide will continue to grow. Thus, the lack of disciplines on sub-central SOEs limits considerably the efficacy of the CPTPP in addressing market distortions that Chinese SOEs may generate. It apparently falls short of the existing WTO norms, particularly Section 2(A)1 of China's AP under which WTO rules including the China-specific ones "shall apply to the entire customs territory of China" and Section 2(A)2 under which China must apply and administer all central and local trade-related measures "in a uniform, impartial and reasonable manner."[89] These China-specific rules clearly apply to sub-central SOEs and related trade-distortive measures and practices.

The scope of NCMs varies among CPTPP members. For example, Singapore and Japan do not have a schedule for NCMs. Australia has only one NCM relating to the purchase of goods and services by indigenous persons and organizations.[90] In contrast, Mexico and Vietnam have the most extensive NCMs. Mexico's NCMs cover exemptions of certain entities in specific activities/sectors such as supply of electricity and gas, exploration and production of oil, financing of infrastructure, public services and other essential financial services for the banking sector and national and regional economic development more broadly.[91] Vietnam's NCMs are even broader encompassing all SOEs and designated monopolies in a range of activities such as any financing necessary to the restructuring of these entities, production, sale and purchase of public goods or any goods for economic stability, and the use of these entities to promote and facilitate the economic development of remote and certain other areas as well as small and medium-sized enterprises.[92] If the CPTPP were employed as a model for future negotiations of SOE rules, undoubtedly China would push very hard for an extensive list of NCMs that are not available under its WTO commitments so as to maintain the strategic role of SOEs for economic development, global competition and other policy goals.

Finally, the extensive exceptions under the CPTPP SOE chapter must be contrasted with the lack of exceptions for China's WTO obligations under paragraph 46 of the WPR and Section 9.1 of the AP. In *China – Publications and Audiovisual Products* and *China – Raw Materials*, the Appellate Body ruled that the use of GATT exceptions to justify a breach of China's commitments under its accession instruments must be based on certain textual support. In the former dispute, the textual support was found in the opening language of Section 5.1 of the AP, that is, "[w]ithout prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement".[93] In the latter, however, the AB found no such textual support and hence that China has no recourse to GATT Article XX to justify its violations of Section 11.3 of the AP.[94] Similar to Section 11.3, Paragraph

www.sasac.gov.cn/n16582853/n16582888/c17476557/content.html.

88 See SASAC, Understanding Chinese SOEs on the Fortune Global 500 in 2020, 11 August 2020, available at: www.sasac.gov.cn/n2588020/n2877938/n2879597/n2879599/c15347659/content.html.

89 For more discussions of these China-specific rules, see above n 68, Qin, "'WTO-Plus" Obligations', at 497-99.

90 See above n 1, CPTPP, Annex IV, Schedule of Australia.

91 Ibid., Schedule of Mexico.

92 Ibid., Schedule of Viet Nam.

93 Appellate Body Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products,* WT/DS363/AB/R (adopted 19 January 2010). paras. 216-233.

94 Appellate Body Report, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R (adopted Feb. 22, 2012) paras. 279–307. Section 11.3 states "China shall

46 of the WPR (particularly the underlined text above in relation to the "commercial considerations" and non-discrimination rules)[95] and Section 9.1 of the AP do not provide any textual support for China to resort to GATT/GATS exceptions.

In light of the above, it is reasonable to conclude that the CPTPP SOE chapter is not as broad or stringent as the existing WTO rules particularly those tailored to China due to the limited coverage of the major obligations and the wide-ranging exceptions.

IV. POST-CPTPP FREE TRADE AGREEMENTS

The US and the EU have been seeking to further develop SOE rules in their post-CPTPP FTAs. Some of the latest ones are reviewed below. These FTAs generally use the CPTPP SOE chapter as a model and attempt to address some of its deficiencies discussed above. However, none of these agreements have addressed all the deficiencies, and the EU FTAs have shown a tendency to counterbalance the expanded rules on subsidies and SOEs by creating more exceptions.

For example, the United States-Mexico-Canada Agreement[96] (USMCA) (2020) extends the definition of SOEs to cover situations of *de facto* control/influence and the NCA rules to cover subsidies granted to "certain enterprises" which include POEs (Article 22.1). However, the other deficiencies (e.g. the limitation to profit-making SOEs, the lack of development of the "commercial considerations" standard) and the various types of exceptions largely remain untouched. Moreover, the USMCA adds two types of "prohibited subsidies": (1) loans or loan guarantees provided to an uncreditworthy SOE and (2) NCA provided to an SOE who "is insolvent or on the brink of insolvency, without a credible restructuring plan" (Article 22.6).[97] This addition expands the scope of prohibited subsidies under the ASCM in light of the US-EU-Japan joint proposals for WTO reform.[98] Accordingly, these prohibited subsidies are also included in the EU's recent FTAs such as the EU – Japan FTA[99] (2019) and the EU – Vietnam FTA[100] (2020).[101] These EU FTAs, however, take a slightly different approach by having separate chapters for subsidies and SOEs. Apart from the addition of the prohibited subsidies, the subsidy chapters explicitly incorporate the ASCM, particularly the rules on actionable subsidies, while emphasizing the importance of subsidies for public policy objectives and hence setting out a range of exceptions

eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of this Protocol or applied in conformity with the provisions of Article VIII of the GATT 1994."

95 One may argue that only the second sentence of paragraph 46 has such textual support as this sentence, which reproduces the obligation under Section 6.1 of the AP, includes the language "except in accordance with the WTO Agreement".

96 United States-Mexico-Canada Agreement, effective on 1 July 2020, full legal text available at: https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between.

97 These subsidies are prohibited only when they are granted to SOEs "primarily engaged in the production or sale of goods other than electricity". By doing so, the USMCA essentially limits these subsidies to trade in goods.

98 See above n 8.

99 Agreement between the European Union and Japan for An Economic Partnership, effective on 1 February 2019, Article 12.7, full legal text available at: https://ec.europa.eu/trade/policy/in-focus/eu-japan-economic-partnership-agreement/.

100 Free Trade Agreement between the European Union and The Socialist Republic of Viet Nam, effective on 1 August 2020, Article 10.9, full legal text available at: https://ec.europa.eu/trade/policy/countries-and-regions/countries/vietnam/.

101 These two EU FTAs remove the limitation to trade in goods under the USMCA and expand the application of the prohibited subsidies to trade in services.

including GATT/GATS exceptions that are arguably not available under the ASCM[102] or China's accession instruments. Like the USMCA, the SOE chapters of the two EU agreements expand the definition of SOEs to cover *de facto* influence.[103] In addition, they remove the limitation to SOEs "principally" engaged in commercial activities so as to capture all commercial activities of SOEs, and extend the application of the substantive rules to sub-central SOEs.[104] However, the wider coverage of the SOE rules is accompanied by an expansion of exceptions. In particular, both FTAs confine the SOE rules to the parties' specific commitments under their schedules on trade in services and investment.[105] In addition, the EU – Vietnam FTA also allows Vietnam to maintain a list of NCMs (Article 11.2.8). The EU – Japan FTA incorporates the GATT/GATS general exceptions (Article 13.8).

This brief review of the recent US/EU FTAs shows that these agreements are largely based on the CPTPP SOE chapter. While they seek to gradually address the deficiencies and expand the coverage of the subsidy/SOE rules, they have either maintained the extensive exceptions (i.e. USMCA) or created additional ones (i.e. the EU FTAs). Overall, other than the inclusion of services subsidies and the additional types of prohibited subsidies, they do not extend beyond China's WTO-plus obligations. To the extent that they leave some deficiencies in the CPTPP SOE chapter unaddressed and maintain the extensive exceptions, they are not as rigorous as the existing WTO rules tailored to China.

Finally, it is worth reflecting on China's position on the international regulation of SOEs. In contrast with the position/approaches of the US and the EU, China has consistently resisted disciplines on SOEs in its FTAs so that no existing Chinese FTAs have included specific rules on SOEs. Although China seems to be increasingly amenable to international competition rules in recent FTAs such as the China – South Korea FTA[106] (2015), the China – Singapore FTA Upgrade[107] (2018) and the Regional Comprehensive Economic Partnership[108] (2020), these rules are primarily focused on ensuring the implementation and enforcement of competition policies and do not provide any rules that directly regulate the behaviour and conduct of SOEs. Consistent with China's approaches under FTAs, the US – China Phase One Deal[109] (2020) leaves industrial

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[102] See above n 99, EU – Japan FTA, Chapter 12; above n 100, EU – Vietnam FTA, Chapter 10.B. For views on why GATT exceptions may not be applicable to ASCM, see Steve Charnovitz, 'Green Subsidies and the WTO', World Bank Policy Research Working Paper 7060 (Oct. 2014), at 18, available at: https://openknowledge.worldbank.org/handle/10986/20500; Robert Howse, 'Making the WTO (Not So) Great Again: The Case Against Responding to the Trump Trade Agenda Through Reform of WTO Rules on Subsidies and State Enterprises', (2020)23(2) *Journal of International Economic Law* 371, 374.

[103] See above n 99, EU – Japan FTA, Article 13.1(h)(iv); above n 100, EU – Vietnam FTA, Article 11.1(g)(iii).

[104] See above n 99, EU – Japan FTA, Articles 13.2.1 & 13.2.2; above n 100, EU – Vietnam FTA, Articles 11.2.2 & 12.2.4.

[105] See above n 99, EU – Japan FTA, Article 13.2.8; above n 100, EU – Vietnam FTA, Article 11.4.4.

[106] China – Korea Free Trade Agreement, effective on 20 December 2015, full legal text available at: http://fta.mofcom.gov.cn/topic/enkorea.shtml.

[107] China – Singapore Free Trade Agreement, effective on 1 January 2009, amended on 16 October 2019, full legal text available at: www.enterprisesg.gov.sg/non-financial-assistance/for-singapore-companies/free-trade-agreements/ftas/singapore-ftas/csfta.

[108] Regional Comprehensive Economic Partnership, signed on 15 November 2020, full legal text available at: www.dfat.gov.au/trade/agreements/not-yet-in-force/rcep/rcep-text-and-associated-documents.

[109] Office of the United States Trade Representative, 'Economic And Trade Agreement Between The Government Of The United States Of America And The Government Of The People's Republic Of China', signed on 15 January 2020, available at: https://ustr.gov/countries-regions/china-mongolia-taiwan/peoples-republic-china/phase-one-trade-agreement/text. It remains controversial as to whether the Phase One Deal constitutes an FTA within the meaning of GATT Article XXIV, see Maria Manuela Moccero, 'Is the Phase One Deal the

subsidies and SOEs for future negotiations.[110] Notably, the EU – China Comprehensive Agreement on Investment[111] (CAI) – China's latest bilateral treaty – is the first treaty in which China has agreed to some rules on SOEs. However, these rules also largely reproduce the CPTPP's "commercial considerations" and non-discrimination requirements and the wider definition of SOEs to cover *de facto* influence as contemplated in the post-CPTPP FTAs.[112] Moreover, given the (limited) focus of this agreement on investment liberalization, these rules do not apply to trade in goods or services "other than through establishment of an enterprise and operation of a covered investment."[113] In addition, both parties maintain a long list of exceptions or NCMs based on the approaches adopted in the recent EU FTAs discussed above.[114] A detailed review of the CAI is beyond the scope of this paper,[115] and in any case the text of this agreement is subject to further modifications.[116] Nevertheless, the CAI signals China's growing openness to negotiations of international regulation of SOEs.

V. CONCLUSION

A recent World Bank study found that SOE rules in FTAs between China's trading partners (i.e. not involving China as a party) have the effect of enhancing the export performance of Chinese SOEs in these markets and so negatively impact on the FTA parties. This finding reinforces the need for "commonly agreed multilateral rules to regulate" SOEs.[117] This paper has argued that the CPTPP does not provide an ideal model for the development of multilateral rules if the goal is to strengthen disciplines over Chinese SOEs. The discussions of the CPTPP SOE chapter in this paper show clearly its lack of development or deficiencies when compared to China's WTO-plus obligations. If the CPTPP were used as a model, it would provide an opportunity for China to soften its existing obligations by seeking to, for example, limit the coverage of state entities and create a range of exceptions or NCMs that are not available to it under the current WTO rules.

Emergence of a 'New Generation' of Bilateral Trade Agreements that Challenge the WTO?' in Bahri, Zhou and Boklan (eds) *Rethinking, Repackaging and Rescuing World Trade Law in the Post-Pandemic Era* (Oxford and Portland, Oregon: Hart Publishing, 2021) Chapter 13.

110 See United State Trade Representative, '2020 Trade Policy Agenda and 2019 Annual Report', February 2020, at 4-6, available at: https://ustr.gov/sites/default/files/2020_Trade_Policy_Agenda_and_2019_Annual_Report.pdf; Simon Lester and Huan Zhu, 'The U.S.-China Phase One Trade Deal: On to Phase Two, or Time to Phase It Out?', Cato Institute (22 March 2021), available at: www.cato.org/blog/us-china-phase-one-deal-phase-two-or-time-phase-it-out.

111 See EU – China Comprehensive Agreement on Investment, Agreement in Principle, concluded on 30 December 2020, legal text available at: https://trade.ec.europa.eu/doclib/press/index.cfm?id=2237.

112 Ibid., Section II, Article 3bis.

113 Ibid., Section II, Article 3bis, paragraph 3 and footnote 8.

114 Ibid., China's Schedule of Commitments and Reservations; EU's Schedule of Commitments and Reservations.

115 For a timely discussion of this agreement and the strategic goals of the EU and China, see Henry Gao, 'The EU-China Comprehensive Agreement on Investment: Strategic Opportunity Meets Strategic Autonomy' (1 May 2021), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3843434.

116 As of this writing, the prospect of this agreement is uncertain as its ratification is suspended due to the current tensions between the two parties. See European Parliament, 'European Parliament Resolution of 20 May 2021 on Chinese Countersanctions on EU Entities and MEPs and MPs', P9_TA(2021)0255 (20 May 2021), available at: www.europarl.europa.eu/doceo/document/TA-9-2021-0255_EN.pdf.

117 Kevin Lefebvre et al., 'Containing Chinese State-Owned Enterprises? The Role of Deep Trade Agreements', World Bank Policy Research Working Paper 9637 (April 2021) 4-5, available at: https://openknowledge.worldbank.org/bitstream/handle/10986/35516/Containing-Chinese-State-Owned-Enterprises-The-Role-of-Deep-Trade-Agreements.pdf?sequence=1.

Having said the above, the CPTPP and the post-CPTPP US/EU FTAs offer a more incremental and balanced approach that may facilitate multilateral negotiations. Essentially, this is because they allow governments the flexibility to develop preferred exceptions to counterbalance gradually expanded or tightened rules. To adopt this approach, however, WTO Members will need to be prepared to negotiate with China on replacing the potentially very broad and rigid China-specific rules with more balanced new rules that are applicable to all Members. The consequence is that we will have softer rather than stronger disciplines on Chinese SOEs. At the same time, WTO Members should start using the existing China-specific rules, which are strikingly under-utilized to date, to challenge and constrain the behaviour and conduct of Chinese SOEs. This would reveal the potential of these rules and consequently reduce China's resistance to further development of international regulation on SOEs based on the CPTPP.