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WTO RULES ON STATE-OWNED ENTERPRISES REVISITED: BALANCING FAIR COMPETITION AND INSTITUTIONAL DIVERSITY

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This paper examines World Trade Organization (WTO) rules on state-owned enterprises (SOEs) and their role in balancing fair competition with institutional diversity. Recent reform efforts, particularly in agreements like the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), advocate for competitive neutrality as a means to discipline SOEs. However, this paper argues that the WTO's ownership-neutral approach—based on non-discrimination, market access, and subsidy rules—provides a more effective and flexible framework for regulating SOEs while respecting institutional diversity. It contends that competitive neutrality disciplines, which impose antitrust and stricter subsidy rules on SOEs, risk constraining state-led economic strategies and disregarding the diverse market structures of WTO members. To support this argument, the paper examines how the WTO accommodates varied economic models while addressing trade distortions through interface mechanisms.

A key aspect of the analysis is the regulation of SOEs under WTO subsidy rules, particularly the definition of "public body". The paper defends the Appellate Body's 'governmental authority test' as a balanced approach that accounts for different state-market relationships. However, to improve and ensure consistent application of the government authority test, the paper proposes refining it by introducing a non-exhaustive list of indicators to assess governmental authority. Additionally, the paper examines how WTO rules address monopoly rights and regulatory advantages granted to SOEs, arguing that the WTO's existing non-discrimination and market access disciplines already provide effective tools to prevent competition distortions. The analysis further considers China's WTO-plus obligations, demonstrating that these

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commitments offer additional flexibility to regulate Chinese SOEs without the need for competitive neutrality-based reforms.

The paper concludes that rather than pursuing competitive neutrality reforms that could undermine institutional diversity, the WTO should focus on strengthening its existing interface mechanisms. Targeted improvements—such as refining subsidy disciplines and clarifying non-discrimination norms—can enhance the WTO's ability to manage SOE-related trade distortions while preserving policy space for diverse economic models.

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I. INTRODUCTION

With the fall of the Berlin Wall, Francis Fukuyama declared that liberal democracy and free-market capitalism were the ideological endpoints of history.[1] However, developments over the last three decades seem to suggest otherwise. As market capitalism travelled to the former 'second' and 'third' worlds, it adapted itself to accommodate local values and preferences. What emerged as a consequence were new and heterodox market forms embedded in diverse institutional orders from around the world.

The literature on comparative capitalism demonstrates the institutionally diverse nature of the global economy. Notably, Hall & Soskice's classic work on Varieties of Capitalism (VoC) highlights the bifurcation of western market economies into liberal and coordinated market types.[2] Extending the VoC framework to state-capitalism, Nölke *et al.* describe how the centralised bureaucracies of the 1960s have gradually transitioned to the State-Permeated Market Economies (SME) of today, where the state works in close cooperation and competition with the private sector.[3]

These variegated forms of capitalism have integrated into the global economy under conditions of economic globalisation. The resulting intra-capitalist institutional diversity is a source of strength and dynamism for the global economy.[4] It establishes new patterns of comparative advantage that result in international specialisation.[5] At the same time, institutional diversity also breeds competitive tensions. The institutional choices of a state may be perceived as unfairly advantaging its domestic

[1] FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN xi-xii (1992).
[2] VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE 1-2 (Peter Hall & David Soskice eds., 2001) [hereinafter Hall & Soskice].
[3] NÖLKE ET AL., STATE-PERMEATED CAPITALISM IN LARGE EMERGING ECONOMIES 4-6 (2021).
[4] DANI RODRIK, THE GLOBALIZATION PARADOX: DEMOCRACY AND THE FUTURE OF THE WORLD ECONOMY 233 (2011) [hereinafter Rodrik].
[5] Hall & Soskice, *supra* note 2.

firms in global trade.[6] This is particularly true of state capitalism in China, where the state's support for domestic Chinese firms is seen as undermining fair competition.[7]

In essence, therefore, the principle of fair competition is in tension with the preservation of institutional diversity. Fair competition broadly refers to ensuring a level playing field between economic actors by preventing distortive practices, regardless of the ownership or origin of the firm. Institutional diversity, on the other hand, refers to the legitimate coexistence of different national models of economic governance, including varying roles of the state in markets. These are shaped by distinct historical, political, and developmental contexts. While fair competition is a foundational value of the international trade regime, institutional diversity is also among its central strengths.[8] Consequently, a core challenge for the global trading system is to hold the two objectives in balance. That is, to accommodate institutional diversity to such an extent that it does not impinge upon conditions of fair competition. According to Rodrik, such a balance would enable states to pursue their values and developmental objectives within their preferred social arrangements, without affecting the well-being of others.[9]

Against this normative framework, this article will examine the balance between fair competition and institutional diversity in the context of the WTO rules on SOEs (used interchangeably with 'state enterprises'). The Organisation for Economic Cooperation and Development (OECD) defines SOEs as "any corporate entity recognised by national law as an enterprise and in which the central [or federal] level of government exercises ownership and control".[10] SOEs are ubiquitous in both the developed and developing parts of the world.[11] However, while SOEs in the OECD countries are being increasingly privatised, they exercise significant influence in emerging economies.[12]

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[6] JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 218 (1989) [hereinafter Jackson].

[7] IAN BREMMER, THE END OF THE FREE MARKET: WHO WINS THE WAR BETWEEN STATES AND CORPORATIONS? 67-71 (2010); Mark Wu, *The "China, Inc." Challenge to Global Trade Governance*, 57(2) HARV. INT'L. L. J. 261, 261 (2016) [hereinafter M. Wu].

[8] Petros C. Mavroidis & Andre Sapir, *China and the WTO: Towards a Better Fit* (Bruegel Working Paper No. 2019/06, 2019) [hereinafter Mavroidis & Sapir].

[9] Rodrik, *supra* note 4.

[10] Organisation for Economic Co-operation and Development, *OECD Guidelines on Corporate Governance of State-Owned Enterprises* 14 (2015) [hereinafter Guidelines on Corporate Governance].

[11] Organisation for Economic Co-operation and Development, *The Size and Sectoral Distribution of State-Owned Enterprises* 10 (2017) [hereinafter Size and Sectoral Distribution]; *See further* Przemyslaw Kowalski & Kateryna Perepechay, *International Trade and Investment by State Enterprises* 24 (OECD Trade Policy Paper No 184, 2015) [hereinafter Przemyslaw].

[12] Size and Sectoral Distribution, *supra* note 11, at 10-12.

SOEs are an important instrument of industrial and social policy. The prominent reasons for establishing and maintaining SOEs include: (i) savings mobilisation; (ii) employment generation; (iii) correction of market failure; (iv) pursuit of social and equity goals like income redistribution; (v) development of capabilities and technical know-how; and (vi) the commanding heights rationale, where the state controls strategic industries that cannot be left in private hands.[13] The economic recovery of states, in the wake of COVID-19, further affirms the importance of SOEs today.[14]

Given their role in the economy, SOEs receive several advantages from their governments. These include financial and regulatory advantages as well as monopoly rights and exclusive privileges.[15] The grant of advantages to SOEs has resulted in concerns of market distortion.[16] Since the above advantages only extend to SOEs and not private-owned enterprises (POEs), they are seen as disrupting the level-playing field.[17] Moreover, with increasing globalisation, the distortion of competition by SOEs has extended from national to global markets.[18] This, coupled with the scale of competitive advantages given to state enterprises in China,[19] has put SOEs at the very heart of the current trade frictions.

Given the above context, WTO rules on SOEs are confronted with a tension between fair competition and the institutional prerogative of states to establish and maintain SOEs. To be clear, the institutional choices of states concerning SOEs relate not just to their establishment but also to overall governance. The latter includes, for example, the corporate governance of SOEs, application of antitrust

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[13] Malcolm Gillis, *The Role of State Enterprises in Economic Development*, 47 SOC. RES. 248, 258-65 (1980); Ha-Joon Chang, *State-Owned Enterprise Reform,* NAT'L. DEV. STRATEGIES - POL'Y. NOTES 8-14 (2007).

[14] 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*, 23 J. INT'L. ECON. L. 371, 386 (2020).

[15] YINGYING WU, REFORMING WTO RULES ON STATE-OWNED ENTERPRISES: IN THE CONTEXT OF SOES RECEIVING VARIOUS ADVANTAGES 16, 17-19 (2019) [hereinafter Y. Wu].

[16] Ines Willemyns, *Disciplines on State-Owned Enterprises in International Economic Law: Are We Moving in the Right Direction?*, 19(3) J. OF INT'L. ECON. L. 657, 661-62 (2016) [hereinafter Willemyns].

[17] Y. Wu, *supra* note 15, at 134-137.

[18] *Id.* at 36; Willemyns, *supra* note 16, at 657-58.

[19] *See* Organization for Economic Co-operation and Development, *Broadening the Ownership of State-Owned Enterprises: A Comparison of Governance Practices* 52 (2016) (in China, the second-largest economy, SOE assets are approximately 67% of the market value of all domestic listed enterprises); *see also*, M. Wu, *supra* note 7.

norms, and other domestic regulations on SOEs. Notably, these choices vary widely across different institutional orders.[20] The current WTO rules reflect the principle of 'ownership-neutrality', which means that the legal obligations under WTO agreements apply equally to enterprises regardless of their ownership status, whether public or private.[21] In other words, WTO rules do not treat SOEs as a distinct category of actors but rather subject them to the same disciplines (such as those on non-discrimination, market access, and subsidies) as private firms. This approach focuses on the effects of trade-distorting measures rather than the identity or ownership of the entity involved. By doing so, the WTO preserves the foregoing institutional choices of states. Meanwhile, trade distortion resulting from governmental advantages to SOEs is managed by the WTO through the norms of non-discrimination, market access, and subsidies, which act as an 'interface mechanism'. These are a set of legal disciplines that mediate between diverse domestic economic systems and the multilateral trade regime by preventing national institutional choices from generating harmful trade spillovers.[22]

That said, there is growing concern that the WTO's ownership-neutral rules do not adequately address the structural advantages enjoyed by SOEs, particularly those in China. These SOEs often benefit from preferential financing, regulatory support, and non-commercial mandates, raising fears of unfair competition and market distortions.[23] Consequently, SOE rules under bilateral and preferential trade agreements (PTAs) — which are predicated on the concept of competitive neutrality — have emerged as the template for reforming WTO rules on SOEs.[24] Unlike ownership neutrality, the principle of 'competitive-neutrality' holds that SOEs should not benefit from any unfair advantages merely due to their public ownership. It seeks to neutralise the effects of government-granted privileges such as subsidies, preferential financing, regulatory exemptions, and monopoly rights that are unavailable to private firms. Under this approach, SOEs are treated as a special category requiring stricter disciplines to ensure they do not distort competition, particularly when they operate in commercial markets alongside private competitors. A case in point is the SOE chapter under the CPTPP.[25] In addition, several reform

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[20] Hall & Soskice, *supra* note 2.

[21] Leonardo Borlini, *When the Leviathan Goes to the Market: A Critical Evaluation of the Rules Governing State-Owned Enterprises in Trade Agreements*, 33 LEIDEN J. INT'L. L. 313, 315-16 (2020) [hereinafter Borlini].

[22] *See* Jackson, *supra* note 6, at 248 (John H. Jackson theorised the notion of 'interface mechanism' as legal instances that resolve competitive tensions arising from the co-existence of different institutional orders).

[23] *See generally* Mavroidis & Sapir, *supra* note 8.

[24] *See* Jackson, *supra* note 6.

[25] *See generally* Mitsuo Matsushita, *State-Owned Enterprises in The TPP Agreement*, *in* PARADIGM SHIFT IN INTERNATIONAL ECONOMIC LAW RULE-MAKING 187 (Chang-fa Lo et al. eds.,

proposals also premised on competitive neutrality have been advanced by WTO Members[26] and scholars.[27]

Against this background, the research question guiding the article is: How can WTO rules governing SOEs balance fair competition and institutional diversity? The article principally argues that the current WTO approach to SOE regulation which is based on ownership-neutrality coupled with the norms of non-discrimination, market access, and subsidies, is more effective in balancing fair competition and institutional diversity than the competitive-neutrality based disciplines under PTAs and reform proposals. As for the specific challenges stemming from Chinese SOEs, the article demonstrates how the WTO-plus obligations under China's Accession Protocol (CAP) provide sufficient room to regulate the complex web of state enterprises in China. Hence, the article proposes modest reforms to strengthen the WTO's existing interface mechanisms governing SOEs, rather than negotiating new SOE disciplines based on competitive neutrality.

Pursuant to this argument, the structure of the article proceeds as follows. Part II establishes the normative framework for balancing fair competition and institutional diversity by examining whether the preservation of institutional diversity is consistent with the liberal foundations of the WTO. It then situates the regulation of SOEs within this framework and critiques proposals premised on competitive neutrality. Parts III and IV substantiate the article's core claim by assessing how the WTO's existing ownership-neutral rules, incorporated in the disciplines of non-discrimination, market access, and subsidies, address distortions caused by governmental advantages to SOEs. These parts propose modest reforms to enhance the WTO's regulatory effectiveness while safeguarding institutional diversity. They also demonstrate that the WTO's approach strikes a more effective balance between institutional diversity and fair competition than the competitive-neutrality based rules under the CPTPP and that China's WTO-plus obligations under its accession protocol offer additional tools for disciplining Chinese SOEs. Part V concludes the article.

As regards scope, the article focuses on the distortion of competition by the grant of governmental advantages to SOEs. Thus, transparency-related issues *vis-à-vis* SOEs, while an important concern, fall outside the purview of this article.

2017) (on the CPTPP being the model for reforming WTO rules concerning SOEs) [hereinafter Matsushita & Lim]; M. Wu, *supra* note 7.

[26] Press Release, Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union (Jan. 14, 2020) [hereinafter Trilateral Initiative].

[27] *See generally* PETROS C. MAVROIDIS & ANDRE SAPIR, CHINA AND THE WTO: WHY MULTILATERALISM STILL MATTERS (2021) [hereinafter Peter & Andre]; Mavroidis & Sapir, *supra* note 8; Y. Wu, *supra* note 15.

II. COMPETING APPROACHES TO SOE REGULATION: OWNERSHIP-NEUTRALITY VERSUS COMPETITIVE NEUTRALITY

Since the centrepiece of this article is to weigh the WTO rules on SOEs against the balance between fair competition and institutional pluralism, this part starts by enquiring whether the preservation of institutional pluralism is consistent with the normative foundations of the GATT/WTO system. Responding in the affirmative, the part frames the debate on SOE regulation at the WTO as the contest between two approaches: ownership-neutrality and competitive neutrality. The part makes a case for the ownership-neutrality approach and outlines the roadmap for the remainder of the article.

A. Institutional Diversity and the WTO: Setting the Agenda for Reform

To justify the proposed normative framework of the article, the burden on this sub-part is to establish that the preservation of institutional diversity is consistent with the values of the WTO regime and its predecessor, the GATT.

Notably, the GATT/WTO system is normatively based on a liberal understanding of the law and economy. Development scholars have long criticised the system's liberal foundations for restricting the policy space of developing countries.[28] Santos, on the other hand, offers a somewhat different perspective. He argues that WTO rules contain *de facto* and *de jure* flexibilities that developing countries could use to justify heterodox industrial policies.[29] Trubek describes this inherent flexibility as the truce of 'embedded neoliberalism' underlying the WTO.[30] That is, a 'truce' between "a radical liberalization campaign and strong resistance in the name of state-led growth and sovereignty."[31]

The WTO's approach to institutional diversity reflects the embedded neoliberalism compromise. While principally a promoter of free markets, the WTO accommodates

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[28] *See, e.g.*, DANI RODRIK, ONE ECONOMICS, MANY RECIPES: GLOBALIZATION, INSTITUTIONS, AND ECONOMIC GROWTH 213-36 (2008); HA-JOON CHANG, BAD SAMARITANS: THE MYTH OF FREE TRADE AND THE SECRET HISTORY OF CAPITALISM 65-83 (2007); JOSEPH E. STIGLITZ, MAKING GLOBALIZATION WORK 61-102 (2007).

[29] Alvaro Santos, *Carving Out Policy Autonomy for Developing Countries in the World Trade Organisation: The Experience of Brazil and Mexico*, 52(3) VIRGINIA J. INT'L. L. 551, 575-576 (2012).

[30] Sonia E. Rolland & David M. Trubek, *Embedded Neoliberalism and Its Discontents: The Uncertain Future of Trade and Investment Law*, *in* WORLD TRADE AND INVESTMENT LAW REIMAGINED: A PROGRESSIVE AGENDA FOR AN INCLUSIVE GLOBALIZATION 87-96 (Alvaro Santos et al. eds., 2019) [hereinafter Rolland & David].

[31] *Id.* at 88.

the institutional preferences of its members. In other words, despite its neoliberal thrust, the system leaves room for different models of state-market relations to coexist.

Lang offers a fitting account of institutional diversity in the GATT/WTO regime.[32] According to him, the GATT system embraced institutional pluralism by opening its doors to different economic systems, including centrally planned economies. However, as Mavroidis and Sapir note, this changed with the creation of the WTO, which sought to resolve competitive tensions between different economic orders through institutional convergence around liberal market principles.[33] A telling instantiation of this, they emphasise, is the accession protocols of former socialist states that required extensive market-based reforms as a 'ticket of admission' to the WTO.[34]

The WTO's neoliberal leaning notwithstanding, Lang argues that the system accommodates a diverse range of market forms. For starters, one may look to the *inter se* variation between Western market economies like the United States, Germany, France, post-war Britain, and Scandinavian countries. Even mixed economies like Brazil and India, and the state-led economy of Japan, never fully transitioned to liberal market capitalism. This goes to show the institutionally diverse nature of the WTO membership.[35] The resultant frictions between different institutional orders, Lang explains, are managed by the WTO through interface mechanisms like trade remedies that serve as a buffer between different economic orders.[36]

Seen in this light, the GATT/WTO rules embody a compromise between the objective of institutional convergence around free markets and the preservation of institutional diversity.[37] What is notable, however, is that the degree of compromise between institutional convergence and diversity has been in a state of flux. In the past, when trade frictions between different economic systems came to a head, the compromise shifted considerably toward institutional convergence around Western market capitalism. For example, trade disruptions caused by state capitalism in East

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[32] Andrew Lang, *Heterodox Markets and 'Market Distortions' in the Global Trading System*, 22 J. INT'L. ECON. L. 677, 682-87 (2019) [hereinafter Lang].
[33] Merit E. Janow & Petros C. Mavroidis, *Free Markets, State Involvement, and the WTO: Chinese State-Owned Enterprises in the Ring*, WORLD TRADE REV. 571, 572 (2017) [hereinafter Janow and Mavroidis].
[34] *Id.*
[35] Lang, *supra* note 32, at 677, 684-685.
[36] *See* Jackson, *supra* note 6, at 218.
[37] Lang, *supra* note 32, at 686-687.

Asia resulted in stricter WTO disciplines on state intervention in the economy.[38] Today, we are at a similar juncture, where the perceived threat of state capitalism from China has resulted in renewed contestation over the boundary between institutional convergence and diversity.[39] And it seems likely that the ensuing reform would further constrain the legitimate range of institutional diversity under the WTO.

Lang cautions against such an outcome, arguing that the current phase of reform should keep the WTO open to diverse market forms and, more importantly, leave room for legitimate institutional experimentation.[40] Two arguments can be offered in support of Lang's position. First, the capacity to innovate institutionally has contributed to the strength and dynamism of the global economy and must, therefore, be safeguarded. [41] The second justification concerns the importance of accommodating the institutional preferences of emerging states with a view to preserving multilateralism. This argument flows from Trubek's work on new developmentalism, which highlights emerging economies' ongoing experimentation with new forms of public-private collaboration.[42] Respecting such institutional choices has become increasingly crucial for the survival of multilateralism, given the growing influence of emerging powers in global trade.[43]

Shaffer makes a similar point when advocating for a 'Rebalancing within a Multilateral Framework' approach. He crucially notes:

> Because there is no one form of economic governance that promotes development, much less one that universally applies across national contexts, multilateral rules must be sensitive to different economic, social, and political choices. At the same time, each country's policies should be subject to external scrutiny for their transnational implications, and other countries must be

[38] *See* Lang, *supra* note 32 (to address the trade disruptions caused by East Asian state capitalism, the GATT disciplines on industrial subsidies, intellectual property rights, and government procurement were oriented toward liberal market principles).
[39] *Id.* at 83-84.
[40] *Id.* at 85.
[41] Lang, *supra* note 32, at 680.
[42] David M. Trubek, *The Political Economy of the Rule of Law: The Challenge of the New Developmental State*, 1(1) HAGUE J. ON RULE L. 28-32 (2009).
[43] Sonia E. Rolland & David M. Trubek, *Emerging Economies and the Future of the Global Trade and Investment Regime*, *in* EMERGING POWERS IN THE INTERNATIONAL ECONOMIC ORDER, 197 (2019).

> permitted to protect themselves from the externalities of that country's policies.[44]

In summary, the emergent WTO reform should not discourage new forms of state-market relations, in line with the embedded neoliberalism truce underlying the system. With this as its normative frame, the article evaluates whether and, if so, to what extent the existing WTO rules regulating SOEs balance fair competition and institutional diversity.

B. SOE Regulation at the WTO: Revisiting the Contestation between Ownership-Neutrality and Competitive Neutrality

This sub-part traces the history of SOE regulation under the GATT/WTO and the factors prompting a turn to competitive neutrality as the basis for reform. In line with the previous sub-part, it makes a case for an institutionally sensitive approach to SOE reform at the WTO.

1. SOE Regulation Under the GATT/WTO and the Turn to Competitive Neutrality

In the spirit of institutional pluralism, the original GATT rules did not interfere with the domestic property regimes of its members.[45] Put differently, the GATT rules were ownership-neutral and applied equally to POEs and SOEs.[46] The resultant trade friction was managed by the interface mechanism comprising the general non-discrimination and market access norms (Articles I, II, III and XI, GATT) and specific obligations on state trading enterprises or designated monopolies (Article XVII, GATT).[47]

By the time the WTO came into being, liberal ideas on the law and economy were ascendant, and the focus of the system shifted toward institutional convergence around free market values.[48] However, rather than amending the ownership-neutral WTO rules, the membership preferred to deal with the SOE issue on an ad hoc basis – that is, by negotiating accession protocols with non-market economies (NMEs), with express disciplines on SOEs.[49]

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[44] Gregory Shaffer, *Governing the Interface of US-China Trade Relations*, 4-5 (Legal Stud. Rsch. Paper Series No. 2021-19, Sch. L., Univ. Cal. 2021).
[45] Janow and Mavroidis, *supra* note 33, at 571.
[46] For more details, *see* Borlini, *supra* note 21.
[47] *See infra* Part IV.A. for a detailed discussion on state trading enterprises and designated monopolies.
[48] Peter & Andre, *supra* note 27, at 6.
[49] Janow and Mavroidis, *supra* note 33, at 575.

A notable example is the CAP, which contains detailed NME disciplines to regulate the Chinese economy, including several SOE-specific rules. Interestingly, when the CAP was being negotiated, there was widespread optimism that within fifteen years China would transition to a market economy.[50] Accordingly, the negotiators settled for the CAP's more flexible anti-dumping regime, under Section 15(a), to expire in 2016. Over the years, while China did indeed transition to a market economy, it never quite converged with the Western model of market capitalism. Consequently, the unfamiliar Chinese economic model came to be regarded as a threat to the global economy.[51] This perceived threat has only exacerbated since the expiry of Section 15(a) in 2016, resulting in increasing pressure to strengthen WTO disciplines on NME practices, including the conduct of SOEs.

The call to amend WTO rules in relation to SOEs stems from their ownership-neutral character. It is argued that the current rules subject both SOEs and POEs to the same set of disciplines on non-discrimination, market access, and trade remedies, among others. As a result, they do not account for the inherent competitive advantages enjoyed by SOEs in the form of financial, regulatory, and monopoly privileges from the government. This arguably disrupts the level playing field between SOEs and POEs, resulting in the distortion of competition.[52]

Recent efforts by WTO members to reform existing WTO rules on NMEs include the trilateral statement by the US, EU, and Japan on industrial subsidies and forced technology transfer (Trilateral Initiative)[53] and the joint statement by the US, Brazil, and Japan on 'the importance of market orientated conditions to the world trading system'.[54] The EU, particularly, seeks to expand the mandate of the Trilateral Initiative to include stricter disciplines on SOEs.[55] Further, and importantly, it seeks to ground the Trilateral Initiative in the concept of 'competitive neutrality'.[56]

Notably, this is not the first time that competitive neutrality has been invoked in the context of international trade law. Previously, it formed the rationale behind SOE

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[50] *Id.* at 576.
[51] Lang, *supra* note 32, at 679.
[52] Willemyns, *supra* note 16, at 663-664.
[53] Trilateral Initiative, *supra* note 26.
[54] World Trade Organization, General Council: Importance of Market-Oriented Conditions to the World Trading System, Statement from Brazil, Japan and the United States, WTO Doc. No. WT/GC/W/803/Rev.1 (adopted on Dec. 16-18, 2020).
[55] *See* Annex to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Technical Committee of the Regions, Trade Policy Review – An Open and Assertive Trade Policy, COM(2021) 66 Final, 9-10 (Feb. 18, 2021).
[56] *Id.*

rules under PTAs (like the CPTPP) and the CAP.[57] It also underpins a range of recent reform proposals on SOE disciplines under the WTO.[58] The concept has its origins in the OECD literature on corporate governance of SOEs,[59] after which it migrated to the fields of international trade and competition law.[60] The idea underlying competitive neutrality is that business entities should not be advantaged (or disadvantaged) based solely on their ownership.[61] In other words, it seeks to create a level playing field between state-owned and private businesses.[62]

In sum, there are two competing approaches to SOE regulation at the WTO. First, the WTO's current ownership-neutrality approach, complemented by the interface mechanism comprising the non-discrimination, market access and subsidy norms, as well as China-specific obligations under the CAP. Second, the competitive neutrality approach, which seeks to level the playing field between enterprises with different ownership structures.

2. Governmental Advantages to SOEs: Is Competitive Neutrality the Solution?

The preceding discussion leads to an important question: What are the specific governmental advantages to SOEs that disrupt the level playing field in relation to POEs, and whether WTO reform, premised on competitive neutrality, is an adequate response to this problem.

Fundamentally, we may distinguish three types of competition-distorting governmental advantages to SOEs.[63] To begin with, financial advantages in the form of subsidies to SOEs and subsidies granted by SOEs to other SOEs. Second, monopoly rights and exclusive privileges to SOEs in the form of, *inter alia*, production or exploitation permits, production quotas, distribution rights, and export rights or import rights. And finally, regulatory and other advantages in the form of price controls and non-enforcement of domestic competition laws, taxation laws, bankruptcy laws, environmental laws, anti-bribery laws, etc., in favour of SOEs.

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[57] Borlini, *supra* note 21, at 318-320, 323-326.
[58] *See*, *e.g.*, Y. Wu, *supra* note 15, at 306; Willemyns, *supra* note 16, at 681ff.
[59] Guidelines on Corporate Governance, *supra* note 10.
[60] *See*, *e.g.*, Antonio Capobianco & Hans Christiansen, *Competitive Neutrality and State-Owned Enterprises: Challenges and Policy Options* (OECD Corp. Gov. Working Papers, 2011) [hereinafter Capobianco & Christiansen]; Kowalski et al., *State-Owned Enterprises: Trade Effects and Policy Implication* (OECD Trade Pol'y. Paper, 2013) [hereinafter Kowalski et al.].
[61] Capobianco & Christiansen, *supra* note 60, at 3.
[62] Guidelines on Corporate Governance, *supra* note 10, at 7.
[63] *See generally* Willemyns, *supra* note 16, at 661-662; Y. Wu, *supra* note 15, at 122.

Those in favour of competitive-neutrality based SOE disciplines argue that providing advantages to SOEs, while excluding POEs, distorts the level playing field. They further argue that WTO rules fail to address this concern due to their ownership-neutral character. Accordingly, they make a case for reforming WTO disciplines in relation to SOEs and basing the reform on the concept of competitive neutrality.[64]

This leads to the next critical question: What interface mechanisms does the competitive-neutrality approach to SOE regulation propose? Principally, the proponents of the competitive-neutrality approach recognise the sovereign right of states to establish SOEs and therefore do not call for their privatisation *per se*. Instead, they focus on the distortion of competition by SOEs in situations where SOEs compete with POEs.[65] Accordingly, the proponents of the competitive-neutrality approach advance the following interface mechanisms to govern SOEs. First, in order to discipline the subsidisation by SOEs of other SOEs, the competitive neutrality approach endorses a control-based definition of SOEs as opposed to the current authority-based criterion.[66] Second, to address the distortion of competition produced by monopoly and exclusive rights and regulatory advantages to SOEs, the competitive neutrality approach seeks to: (i) introduce anti-trust policies at the WTO exclusively for SOEs; and (ii) decouple the requirement of STEs acting on commercial considerations from the non-discrimination obligation.[67]

An ensuing question is whether the interface mechanisms proposed by the competitive-neutrality approach accommodate the legitimate institutional choices of states and leave room for institutional experimentation in relation to SOEs. Responding negatively, the article offers the following reasons why the interface mechanisms proposed by the competitive neutrality approach do not balance fair competition and institutional diversity.

First, by endorsing the control-based definition of SOEs, the competitive-neutrality approach does not uphold the institutional preferences of states regarding the corporate governance of SOEs. As Musacchio and Lazzarini highlight, state ownership/control over commercial firms may take the form of full, majority or minority ownership.[68] Building on their work, Ding crucially demonstrates that despite governmental ownership/control, SOEs may nonetheless use the market as

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[64] *See generally id.*; Peter & Andre, *supra* note 27.
[65] Willemyns, *supra* note 16.
[66] *See infra* Part III.A(1).
[67] *See infra* Part IV.A(2).
[68] Aldo Musacchio & Sergio G. Lazzarini, *Leviathan in Business: Varieties of State Capitalism and Their Implications for Economic Performance* (Harv. Bus. Sch., 2012).

the central coordinating institution for different types of business activities.[69] Thus, a presumption that governmental ownership/control by itself determines the governmental nature of all SOE activities disregards the private character of SOE decision-making.

Second, the competitive neutrality approach seeks to apply anti-trust norms to SOEs. As the VoC literature highlights, the antitrust regimes of countries diverge significantly between liberal market economies (LMEs), coordinated market economies (CMEs) and SMEs. In line with the central premise of the VoC approach, the institutional convergence of states' antitrust regimes would deprive them of the comparative advantage stemming therefrom. Moreover, the extension of antitrust norms only to SOEs, without reciprocal obligations on POEs (absent a multilateral antitrust framework at the WTO), is the very antithesis of competitive-neutrality. By contrast, the WTO's current ownership-neutrality approach, coupled with the interface mechanism comprising the non-discrimination and market access norms, allows countries to pursue their preferred institutional arrangements so long as they do not affect the conditions of competition in relation to trade in goods and services.

For the foregoing reasons, as elaborated in the following parts, the article argues that the competitive neutrality approach does not offer an institutionally sensitive path for reforming WTO disciplines governing SOEs. Arguing along similar lines, Borlini notes:

> [W]hat strikes the observer regarding 'competitive neutrality' is that the repeated (and somewhat uncritical) practice of recounting the development of new trade rules on SOEs through such an abstract idea seems eventually to determine its own normative stakes and securing it as the normative foundation of the emerging trade disciplines of SOEs.[70]

3. Towards Strengthening the WTO's Current Ownership-Neutrality Approach

The central premise of the article is that — by contrast to the competitive neutrality approach — the current ownership-neutrality approach of the WTO reflects the embedded neoliberalism compromise and achieves the normative balance between fair competition and institutional diversity more effectively. In the following parts, the paper demonstrates how the current WTO disciplines on non-discrimination, market access, and subsidies, while in need of modest reform, nevertheless serve as

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[69] Ru Ding, *Interface 2.0 in Rules on State-Owned Enterprises: A Comparative Institutional Approach*, 23(3) J. INT'L. ECON. L. 637 (2020) [hereinafter Ding].
[70] Borlini, *supra* note 21, at 321.

an adequate interface mechanism to address the competition distortion produced by governmental advantages to SOEs. Further, the paper substantiates how the China-specific obligations under the CAP allow adequate flexibility to discipline Chinese SOEs. Accordingly, it argues against the negotiation of competitive neutrality-based disciplines on SOEs at the WTO.

To further this premise, the following parts proceed as follows. The paper starts by describing how the current WTO rules regulate competition distortion produced by governmental advantages to SOEs. Pursuant to this, Part III focuses on financial advantages and Part IV on monopoly and exclusive rights and regulatory advantages. Further, this paper proposes specific reforms to the interface norms of non-discrimination and subsidies in order to effectively balance fair competition and institutional diversity. Next, the paper highlights how the current WTO disciplines, coupled with China's WTO-plus obligations under the CAP, adequately address concerns stemming from Chinese SOEs. Finally, it compares the current WTO disciplines with the competitive neutrality-based SOE disciplines under the CPTPP to demonstrate how the latter forecloses the room for institutional diversity and experimentation.

III. FINANCIAL ADVANTAGES

A foremost concern regarding SOEs relates to financial advantages. Broadly, it pertains to: (i) subsidisation of SOEs by the government; and (ii) grant of financial advantages by SOEs to other SOEs. The Agreement on Subsidies and Countervailing Measures (SCM Agreement) − the relevant interface mechanism in this context − is deemed wanting in its regulation of the above issue, particularly the subsidisation by SOEs of other SOEs. To be specific, it is argued that financial contributions by SOEs often fall outside the definition of 'subsidy' under the SCM Agreement. Consequently, the provision of financial advantages by SOEs to other SOEs is not adequately disciplined under the current framework, posing a threat to competitive neutrality.[71]

This part analyses the above issue in the following steps. First, it critically evaluates whether the current SCM disciplines balance fair competition and institutional diversity in the context of subsidisation by and of SOEs and proposes reforms to make the existing rules more effective. Next, it evaluates whether the current SCM disciplines coupled with CAP obligations adequately address concerns arising from subsidisation by and of Chinese SOEs. Finally, it compares the current SCM disciplines with the competitive neutrality-based SOE disciplines under the CPTPP.

A. SCM Disciplines and Proposals for Reform

[71] Capobianco & Christiansen, *supra* note 60, at 5.

In brief, a subsidy under the SCM Agreement has the following elements: (i) financial contribution by the government or public body;[72] and (ii) conferment of benefit(s) to the domestic industry of the subsidising state.[73] Concerns have been raised and reforms proposed from a competitive neutrality perspective regarding each of these two elements. The remainder of this part discusses these issues in turn.

1. "Public Body" Determination

The scope of the term "public body" in relation to SOEs has been one of the most intensely contested issues of WTO reform. It is argued that the current approach to defining "public body" is underinclusive, causing several instances of subsidisation by SOEs of other SOEs to escape the scrutiny of the SCM Agreement.[74] Accordingly, a core agenda of the Trilateral Initiative is to redefine "public body" to capture a wider range of SOEs under Article 1.1(a)(1), SCM Agreement.[75] In what follows, the article analyses the "public body" issue against the normative benchmark of balancing fair competition and institutional diversity.

a. Conceptual Approaches to Interpreting the Expression "Public Body"

As a background, Ding usefully summarises three approaches to substantively defining "public body".[76] The first approach − advocated by the US − is the governmental control approach. The substantive standard here is governmental control over an entity. The evidentiary standard could range from governmental links to an entity (low threshold) to governmental ownership, all the way up to meaningful control (high threshold). The second approach − supported by China − is the governmental function approach, which looks at whether the concerned entity performs functions of a governmental character. A significant shortcoming of this approach is that it sets a very high evidentiary standard, requiring statutory delegation of authority to perform a governmental function.[77] This results in many

[72] The Agreement on Subsidies and Countervailing Measures art. 1.1(a)(1) Jan. 1, 1995, 1869 U.N.T.S. 14 [hereinafter SCM Agreement].
[73] *Id.* art. 1.1(b).
[74] Chad Brown & Hillman Jennifer, *WTO'ing a Resolution to the China Subsidy Problem, Peterson Institute for International Economics*, 16 (Working Paper No 19-17, 2019) [hereinafter Brown and Hillman].
[75] Trilateral Initiative, *supra* note 26.
[76] Ru Ding, The "Public Body" Issue in the WTO: Proposing a Comparative Institutional Approach to International Issues on State-Owned Enterprises (Apr. 11, 2018) (S.J.D. dissertation, Georgetown University) (Georgetown University Repository) [hereinafter Public Body Issue].
[77] *Id.* at 176-178.

SOEs escaping scrutiny under the SCM Agreement. The third approach, adopted by the Appellate Body (AB), is the test of governmental authority, upon which the remainder of this part shall focus.

b. Overview of the Governmental Authority Approach

The governmental authority approach was laid down in United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China [hereinafter AB Report, *US — AD & CVD (China)*].[78] The AB famously held that "[a] public body within the meaning of Article 1.1(a)(1) of the SCM Agreement must be an entity that possesses, exercises or is vested with governmental authority".[79] It went on to suggest three ways to evidence governmental authority: (i) express delegation of authority in a legal instrument; (ii) *de facto* authority to perform governmental functions; and (iii) meaningful governmental control over the concerned entity.[80] Thus, we see that the governmental authority approach incorporates elements of both governmental control and governmental function. While the former two sources of evidence correspond to the governmental function approach, the latter relates to the governmental control test.

Given the institutional diversity among SOEs in different economic systems, the AB refrained from prescribing a fixed evidentiary standard, noting that "the exact contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case".[81] In fact, the AB made clear that neither the absence of express statutory delegation nor the presence of meaningful control could, by itself, deny or affirm, respectively, an entity's "public body" character.[82] Instead, it endorsed a holistic, case-by-case evaluation of "the core characteristics and functions of the relevant entity, its relationship with the government [in the narrow sense], and the legal and economic environment prevailing in the country in which the investigated entity operates".[83] In sum, the AB's approach reflects an appreciation of the diverse institutional contexts underlying SOEs across different economic orders.

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[78] Appellate Body Report, *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WTO Doc. WT/DS379/AB/R (adopted Mar. 25, 2011) [hereinafter AB Report, *US — AD & CVD (China)*].
[79] *Id.* at 317.
[80] *Id.*
[81] *Id.* at 318.
[82] *Id.*
[83] Appellate Body Report, *United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WTO Doc. WT/DS436/AB/R (adopted on Dec. 19, 2014) ¶ 4.43 [hereinafter AB Report, *US — Carbon Steel (India)*].

The legal reasoning provided by the AB for the governmental authority approach is summarised as follows. To begin with, the AB noted that the chapeau to Article 1.1(a)(1) uses the phrase 'government' twice: first in the narrow sense and then in the collective sense, with the latter alluding to both government and public body. On this basis, the AB concluded that there were core commonalities between the government and public body, *viz.*, performance of governmental functions or the authority to perform such functions.[84] The AB contextually supported this reasoning by relying on Article 1.1(a)(1)(iv). It noted that under Article 1.1(a)(iv), a public body, being a co-constituent of government in the collective sense, may entrust or direct a private body to carry out one or more of the type of functions illustrated in (i) to (iii). The AB, thus, deduced that in order to entrust or direct a private body, a public body "must itself possess such authority or ability to compel or command" and that such authority should be inherently governmental in nature.[85] Finally, the AB cited the ruling in *US – Anti-Dumping and Countervailing Duties (China)*, which relied on the rules on attribution of conduct to a State under Article 5 of the Articles on State Responsibility for Internationally Wrongful Acts (ARSIWA) to reaffirm its interpretation of "public body" as "an entity that possesses, exercises or is vested with governmental authority" as against one that is merely owned and controlled by the government.[86]

c. Problems with the Governmental Authority Approach

Scholars and practitioners have questioned the legal basis of the governmental authority approach and the impracticalities involved in its implementation.[87] Even the advocates of balanced SOE disciplines, like Pauwelyn and Howse, have questioned the AB's reliance on ARSIWA, arguing that the SCM Agreement constitutes *lex specialis* in relation to subsidy rules.[88] In the words of Pauwelyn, "SCM Article 1 sets out primary rules on what is a subsidy – ILC Articles 4-8 elaborate on secondary rules in respect attribution of wrongful conduct".[89]

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[84] *Id.* at 4.19-4.24.
[85] *Id.*
[86] *Id.* at 4.19-4.20.
[87] *See*, *e.g.*, M. Cartland, *Is Something Wrong in the WTO Dispute Settlement?*, 46(5) J. WORLD TRADE 979 (2012) [hereinafter Cartland]; Peter & Andre, *supra* note 27; Brown & Hillman, *supra* note 74.
[88] *See* Joost Pauwelyn, *Treaty Interpretation or Activism? Comment on the AB Report on United States-ADs and CVDs on Certain Products from China*, 12 WORLD TRADE REV. 235 (2013) [hereinafter Pauwelyn]; Robert Howse, *Official Business: International Trade Law and the Resurgence (or Resilience) of the State as an Economic Actor,* UNIV. PA. J. INT'L. L., 21, 34 (2021) [hereinafter Howse].
[89] Pauwelyn, *supra* note 88, at 236.

Another significant critique of the governmental authority approach relates to its subjectivity and perceived ambiguity. Notably, the AB refrained from defining the exact content and scope of the terms 'governmental authority', 'governmental function', and 'meaningful control'. Rather, it deferred to the ordinary classification of governmental functions within the member in question and other WTO Members, generally. Yielding to the subjective determination of the country under investigation or the country conducting the investigation – it is argued – could result in differing understandings of governmental function directed towards self-serving goals. Furthermore, the governmental authority test requires a case-by-case analysis of the concerned state and entity, which arguably places a heavy burden on IAs.[90]

It is also argued that a stringent definition of "public body" makes it difficult for IAs to discipline the conduct of SOEs as pass-through vehicles for subsidies to downstream industries.[91]

d. Governmental Authority Approach versus Meaningful Control Test

As an alternative to the governmental authority approach, scholars like Pauwelyn,[92] and Howse,[93] among others, have endorsed the meaningful control test as the basis for "public body". According to this approach, the government's formal control over an entity combined with other evidence of control, like the power to appoint the Board of Directors (BoD) or senior management, would lead to a rebuttable presumption of an entity's public body character. The principal argument in favour of the meaningful control approach is its perceived objectivity and practicality, insofar as it relieves IAs from the demanding obligation of a case-by-case analysis of the relevant entity's core features and its links to the government.

The article is principally opposed to the proposed adoption of meaningful control as the sole evidential factor in determining an entity's "public body" character. There are, indeed, problems with the governmental authority approach that need fixing. But the meaningful control test, as an alternative, is a blunt instrument of reform that does not account for the institutional choices of states. In what follows, this sub-part will elaborate on the shortcomings of the meaningful control test, both from a legal and policy standpoint.

To begin with, it is important to recall the AB's position in *US — Carbon Steel (India)*. The AB clarified that meaningful control is an evidentiary and not a substantive

[90] *See*, *e.g.*, Cartland, *supra* note 87, at 1013.
[91] Y. Wu, *supra* note 15, at 189-191.
[92] Pauwelyn, *supra* note 88, at 237.
[93] Howse, *supra* note 88, at 40-43.

standard. Thus, meaningful control, by itself, is not dispositive of an entity's "public body" character. Rather, it has to be evaluated in conjunction with other evidential factors relevant to the substantive test of governmental authority.[94] Seen in this light, the proposal to treat meaningful control as the sole evidential factor in a "public body" analysis essentially corresponds to the substantive standard of governmental control and not governmental authority.

Based on the above line of reasoning, let us consider the legal arguments against the governmental control approach. In its support for the said test, the US in *US — AD & CVD (China)* had relied on the ordinary meaning approach to argue that an entity which is not by definition a private body is *ipso facto* a "public body". The dictionary meaning of the term 'private', the US noted, includes "a service, business, etc.: provided or owned by an individual rather than the state or a public body".[95] The Panel upheld the US position, noting that an entity controlled by the government through state ownership automatically qualifies as a "public body".[96] In addition, Howse advances two other justifications for treating state ownership/control as a sufficient basis for a finding of "public body". First, relying on Article 4, ARSIWA, he argues that a public body is an organ of the state, and its acts are attributable to the state, regardless of whether the concerned entity exercises legislative, executive, judicial, or any other function (emphasis added).[97] Second, relying on the GATT acquis, for example, the Canada liquor board cases,[98] he notes that panels have attributed the discriminatory conduct of certain entities to the state based on "the ability of government to control or direct the enterprise and its general dependency on governmental action".[99]

The fallacy of the above approach is its reductive view of the complex modern-day SOEs, where state ownership/control alone is not dispositive of governmental involvement in the activities of the said entity. The AB affirmed this view in *US —*

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[94] AB Report, *US — Carbon Steel (India)*, *supra* note 83 at 4.37.

[95] Panel Report, *United States — Definitive Anti-Dumping and Countervailing Duties on certain Products from China*, WTO Doc. WT/DS379/R ¶ 8.19 (adopted on Mar. 25, 2011) [hereinafter Panel Report, *US — AD & CVD (China)*].

[96] *Id.* at 8.142.

[97] Howse, *supra* note 88, at 35-36.

[98] *See*, *e.g.*, Report of the Panel, *Canada — Import*, *Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies*, Doc. No. L/6304-35S/37 (Mar. 22, 1988) [hereinafter GATT Panel Report, *Canada — Provincial Liquor Boards (EEC)*]; Report of the Panel, *Canada — Import*, *Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, Doc. No. DS17/R – 39S/27 (Feb. 18, 1992) [hereinafter GATT Panel Report, *Canada — Import*, *Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*]; *see infra* Part IV.A(4)(a)(i) (for an elaborate discussion on the GATT/WTO acquis on attribution under the GATT).

[99] Howse, *supra* note 88, at 17-18.

Countervailing Duty Investigation on DRAMS,[100] noting that the "actions of state-owned corporate entities are *prima facie* private (emphasis added), and thus presumptively not attributable to a Member under Article 1.1 of the SCM Agreement".[101] A brilliant study by Ding provides empirical evidence to support this position. She extends the VoC framework to analyse the institutional sphere of corporate governance of Chinese SOEs. Her study reveals that Chinese SOEs, "similar to firms in other types of market economies, resort to different coordinating institutions in different types of business decisions".[102] A summary of her key findings is below.[103]

Table 1: Overview of the Institutional Context Underlying Corporate Governance of Chinese SOEs

TYPE OF BUSINESS DECISION	TYPE OF COORDINATING INSTITUTION		
MAJOR BUSINESS DECISIONS	WHOLLY STATE-OWNED ENTERPRISE/ COMPANY WITH CONTROLLING STATE-SHARE THAT ARE CONSIDERED IMPORTANT	OTHER WHOLLY STATE-OWNED ENTERPRISE	OTHER COMPANIES WITH CONTROLLING STATE-SHARE OR NON-CONTROLLING STATE SHARE
	Certain decisions are taken by the government and others by the State-Owned Assets Supervision and Administration Commission (SASAC).	• Central coordinating role: SASAC • Other decisions: BoD	• Decisions taken in shareholder meetings; • SASAC, being one of the shareholders, can influence decision-making.

[100] Appellate Body Report, *United States — Countervailing Duty Investigation on Dynamic Random-Access Memory Semiconductors (DRAMS) from Korea*, WTO Doc. WT/DS296/AB/R ¶ 112 (adopted on Jun. 27, 2005).
[101] Panel Report, *US — AD & CVD (China)*, *supra* note 78 at 8.4.
[102] Ding, *supra* note 69.
[103] Public Body Issue, *supra* note 76, at 650, Table 3.

	Further bifurcation in the SASAC's decision-making: • Socially important strategies and national-level initiatives: Governmental coordination, • Firm-specific strategies: Market coordination; insider control of BoD.		
NON-MAJOR BUSINESS DECISIONS	**COMPETITIVE INDUSTRIES**	**STATE-DESIGNATED OR NATURAL MONOPOLY INDUSTRIES**	
	Market coordination: • Insider control of BoD, • Formal institutions, including the law and regulations, restrain governmental interference.	Mix of governmental and market coordination: • Government sets the prices with the facilitation of market mechanisms.	

Ding's research highlights that Chinese SOEs, despite governmental control, may rely on either the market or government as the central coordinating institution for different types of business and non-business decisions. Thus, the presumption of governmental involvement in an entity's decision-making, based solely on governmental control (whether meaningful or not), is unjustified. Reflecting this logic, the AB in *US — Carbon Steel (India)*, for example, did not identify India's National Mineral Development Corporation (NMDC) as a "public body", despite the Government of India's near-total shareholding and involvement in the NMDC's BoD. The AB noted:

> [NMDC] is a Mini RATNA Category 1 Company, which gives it, enhanced autonomy with regard to investment decisions and personnel matters… It enjoys freedom in its day-to-day operations. Except for certain personnel related matters and investment decisions over specified limits it takes its own decisions with the approval of its Board. All commercial matters are dealt with by the company on its own.[104]

[104] AB Report, *US — Carbon Steel (India)*, *supra* note 83, at 4.40.

Further, in response to Howse's argument regarding the broad scope of attribution under the GATT acquis, it is worth noting that acts of SOEs that do not meet the threshold of the governmental authority test could nonetheless be attributed to the state under the test of entrustment or direction of a private body under Article 1.1(a)(1)(iv), SCM Agreement.

A related critique of the meaningful control test is that it does not hold up to the object and purpose of the SCM Agreement: "to strengthen and improve GATT disciplines relating to the use of both subsidies and countervailing measures".[105] Because of its profound focus on anti-circumvention of subsidy rules, it gives too much discretion to IAs to impose countervailing duties − which they may abuse for protectionist ends − thus defeating the balance envisaged by the agreement.

Let us also consider Pauwelyn's proposal to treat meaningful control as a proxy of governmental authority/function (and not governmental control, as discussed above) − "unless rebutted by the government in question". Justifying this approach, he notes that it is the government "who will, in most cases, be the only party in possession of the relevant evidence anyhow".[106] The problem with this argument is that it gives IAs a free hand to impose countervailing duties − based on meaningful control alone − and places a higher burden of proof on the subsidising state to rebut this presumption through other evidential factors. Consequently, the respondent has the burden to justify its possibly legitimate institutional choices. This will have a chilling effect on the autonomy of WTO members to use diverse institutional contexts for the corporate governance and management of their SOEs, moving the WTO towards institutional convergence around these choices.

Another common argument in favour of the meaningful control test is that the "public body" examination is only the first step in a subsidy analysis and that the subsequent tests of 'benefit' and 'specificity' would eventually eliminate legitimate forms of subsidisation from being condemned under the SCM Agreement. As Pauwelyn puts it:

> After all, at this stage ('financial contribution by a government or any public body'), the question is only about who gives the financial contribution, what is the nature of the body or entity providing the loan or goods, not why the loan or goods are provided (e.g. for this

[105] Appellate Body Report, *United States — Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada*, WT/DS257/AB/R (adopted on Jan. 19, 2004) ¶ 64 [hereinafter AB Report, *US — Softwood Lumber IV*].
[106] Pauwelyn, *supra* note 88, at 237.

> or that governmental or other purpose). The question of *what* is done or *why*, comes up only later, under 'benefit'.[107]

To better appreciate this argument, it is essential to consider the conceptual policy framework of the SCM Agreement. The subsidies agreement principally seeks to discipline governmental conduct and not purely private-driven activity.[108] Towards this end, the first element of the subsidy definition – that is, financial contribution by: (i) a government or public body;[109] or (ii) a private body under the entrustment or direction of the government – ensures that only activities wholly or partially influenced by governmental policy considerations are disciplined under the agreement.[110] The second element of the subsidy definition – that is, conferment of benefit through financial contribution – ensures that the governmental activity in question is consistent with the prevailing market standard.[111] Thus, in principle, purely private-driven activity that does not conform to the market standard is not condemned under the SCM Agreement.

According to Pauwelyn, the question of "'what' is done or 'why'" comes up later under the 'benefit' test and is not relevant under the "public body" analysis. This view is not entirely correct. Fundamentally, the 'benefit' test is a macro-level analysis of the market in general, while the "public body" test is a micro-level analysis of the particular activity in question. Thus, under the 'benefit-benchmark test', the evidence of "*what* is done or *why*" is relevant to examine if the in-country prices reflect the market standard. On the other hand, the "public body" test determines if the activity in question is government- or private-driven.[112] As discussed above, it is relevant to consider the "*what* is done or *why*" type questions under the public body assessment since governmental ownership/control, by itself, is not dispositive of an activity's governmental character. Thus, given the different objectives of the 'benefit' and "public body" tests, one cannot substitute for the other. The consequence of Pauwelyn's approach would be that purely private-driven activities of government-controlled SOEs − that are not market-orientated − would be penalised under the SCM Agreement, going against its conceptual foundations.

Finally, it is argued that owing to a rigorous "public body" analysis, the subsidisation by SOEs as pass-through vehicles for inputs to downstream industries escapes

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[107] *Id.*

[108] SCM Agreement, *supra* note 72, art. 1.1(a)(1).

[109] *Id.* art. 1.1(a)(1)(iv).

[110] *See generally* PETER VAN DEN BOSSCHE & WERNER ZDOUC, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES, AND MATERIALS, 700 (4th ed., 2017) [hereinafter Bossche & Zdouc] (this is in contrast to the WTO's Anti-Dumping Agreement which regulates the actions of private actors).

[111] SCM Agreement, *supra* note 72, art. 1.1(b) & art. 14.

[112] Public Body Issue, *supra* note 76, at 92.

scrutiny under the SCM Agreement.[113] Here, it is essential to note that the pass-through analysis is a discrete test under the SCM Agreement, not to be conflated with the "public body" analysis simply for the sake of convenience or arguably even protectionism. The pass-through test applies in situations where SOEs, which are 'private entities', inadvertently pass government subsidies received by them to downstream producers. Thus, it is fundamentally different from a situation where SOEs, as public bodies, purposefully provide subsidies to downstream producers.[114] Consequently, a watered-down definition of "public body" cannot substitute for the pass-through analysis. Rather, in the interest of legal certainty, express rules governing the pass-through test need to be negotiated – an issue beyond the scope of this article.

In light of the above arguments, it is concluded that the meaningful control approach does not capture the diverse institutional contexts underpinning SOEs and is, thus, unsuitable for "public body" analysis under the SCM Agreement.

a. Towards a Workable Governmental Authority Approach

Having established the shortcomings of the meaningful control approach, this sub-part will shift focus on how to make the governmental authority approach more workable. Two of the prime issues with the governmental authority approach are its lack of clarity on: (i) the content and scope of the terms 'governmental authority' and 'governmental function'; and (ii) the level of analysis − whether state-level, industry-level, entity-level, or transaction-level − with the latter being considered as highly onerous for IAs.

Regarding the scope of the term 'governmental authority', Prusa and Vermulst consider the five-factor test applied by the US Department of Commerce (USDOC) in *US — Countervailing Duty Investigations on DRAMS* as an acceptable evidentiary standard for the 'governmental authority' test.[115] The said test includes: (i) governmental ownership; (ii) the government's presence on the BoD; (iii) governmental control; (iv) the pursuit of governmental policies or interests; and (v) the statutory creation of the concerned entity. Regarding the scope and content of indicator (iv), concerning governmental function, and indicator (v), concerning governmental control, a way out is to either amend the SCM Agreement[116] or for

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[113] Y. Wu, *supra* note 15, at 189.

[114] Public Body Issue, *supra* note 76, at 97.

[115] Edwin Vermulst & T. J. Prusa, *United States-Definitive Anti-Dumping and Countervailing Duties on Certain Products from China: Passing the Buck on Pass-Through*, 12(2) WORLD TRADE REV. 227, 300 (2013).

[116] Marrakesh Agreement Establishing the World Trade Organization, art. X, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement].

the Ministerial Conference (MC) or General Council (GC) to issue an authoritative interpretation[117] providing a non-exhaustive list of governmental functions and indicators of meaningful control that correspond to the "public body" analysis.

Indicators of 'governmental function' might include:

i. provision of public goods or services traditionally performed by the state (e.g., utilities, public health, or defence);
ii. mandated support for national policy objectives such as industrial upgrading or regional development;
iii. statutory obligations to operate under non-commercial considerations, such as affordability mandates or employment guarantees; and
iv. implementation of fiscal or redistributive policies on behalf of the government.

Likewise, meaningful control could be evidenced through:

i. the government's power to appoint or remove senior executives or board members;
ii. formal review or approval of major strategic or commercial decisions; and
iii. government veto powers embedded in the entity's corporate governance framework.

Admittedly, giving precise substantive content to these terms is counterintuitive to the objective of preserving institutional diversity. However, a non-exhaustive/illustrative list of indicators could go a long way in ameliorating concerns regarding the subjectivity of the "public body" analysis. A similar approach can be seen under the SCM Agreement and Anti-Dumping Agreement with respect to the establishment of injury, where IAs have to consider a non-exhaustive list of factors to establish the impact of the subsidised or dumped imports on the domestic industry.[118] Importantly, no single indicator should be treated as dispositive. Consistent with the approach under Article 3 of the Anti-Dumping Agreement, the assessment must be holistic and contextual. IAs must evaluate the cumulative weight of multiple indicators and consider the broader legal and economic environment in which the entity operates. This ensures a balanced and fact-sensitive determination that avoids both formalism and overreach.

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[117] *Id.* art. IX:2.

[118] *See* SCM Agreement, *supra* note 72, art. 15; Agreement on Implementation of art. VI of the General Agreement on Tariffs and Trade, Apr. 15, 1994, 1856 U.N.T.S. 120 art. 3 [hereinafter Anti-Dumping Agreement].

The next question is, what should be the level of analysis to examine the 'governmental function' of an SOE? The USDOC adopted a country-level examination, by way of which it classified "maintaining and upholding the socialist market economy" as a governmental function.[119] This approach is highly problematic, as it does not account for the institutional context underlying the entity, much less the specific activity in question. Going by the logic of country-level analysis, all SOEs in a socialist market economy would automatically qualify as 'public bodies' – which is clearly an inaccurate conclusion. On the other hand, China's transaction-by-transaction analysis is also problematic in that it places a heavy (and costly) burden on IAs, who also confront transparency-related issues in the country under investigation.

As a solution, in *US — CVD (China) (Article 21.5)*, the AB adopted a midway position of an entity-level analysis, focusing on the entity engaging in the conduct, "its core characteristics, and its relationship with government."[120] Notably, the AB's position reflects a workable compromise between the US position of a country-level analysis, which narrows the scope for institutional diversity, and China's position of a transaction-level analysis, which places a heavy burden on IAs.

The above discussion reflects some of the thinking around a more pragmatic version of the governmental authority test, which balances the difficulties incurred by IAs and the institutional choices of WTO members regarding the corporate governance of their SOEs. To conclude, it is fitting to recall Lang's prescient advice that the search for objective standards or a so-called bright-line approach would not accommodate institutional diversity.[121] Rather, a transactional, case-by-case approach, as adopted by the AB when endorsing the governmental authority test, is more sensitive to the institutional choices of states.

2. Benefit-Benchmark Analysis

The next step in a subsidy determination under the SCM Agreement is whether the financial contribution in question has conferred a benefit on the domestic industry of the subsiding state. This requires a comparison of the governmental activity at

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[119] Implementation of Determinations Under Section 129 of the Uruguay Round Agreements Act: Certain New Pneumatic Off-the-Road Tires; Circular Welded Carbon Quality Steel Pipe; Laminated Woven Sacks; and Light-Walled Rectangular Pipe and Tube From the People's Republic of China, 77 FR 52683 (Aug. 30, 2012) [hereinafter USDOC, Public Bodies Memorandum].

[120] Appellate Body Report, *United States — Countervailing Duty Measures on Certain Products from China Recourse to Article 21.5 of the DSU by China)*, WTO Doc. No. WT/DS437/RW ¶ 5.139 (adopted on Aug. 15, 2019).

[121] Lang, *supra* note 32, at 710.

hand with a market standard defined under Article 14, SCM Agreement. The default market benchmark under Article 14 is the domestic or in-country price of the investigated subsidy programme. However, when the in-country prices are distorted, IAs may rely on an alternate benchmark, which closely approximates the market conditions in the subsidising state.

A relevant question to consider in the context of SOEs is when would in-country market prices be considered distorted? Is the predominance of SOEs in the market a sufficient basis to conclude that in-country prices are designated by the government and, therefore, distorted? Or do other evidential factors also have to be taken into account when examining the distortion of in-country prices? And what consequence would each of these approaches have on the institutional autonomy of states?

In *US — Softwood Lumber IV*, the AB held that in-country prices could be rejected as the market benchmark if "the government's role in providing the financial contribution may be so predominant that it effectively determines the price at which private suppliers sell the same or similar goods".[122] The AB reasoned that in cases where SOEs are monopolists or dominate the market, the price could be designated by the government rather than the forces of demand and supply, rendering it inappropriate as a market benchmark. An instantiation of this approach is *US — AD&CVD (China)*, where the AB upheld the USDOC's rejection of in-country prices in China on the ground that SOEs, in general, comprised 96.1% of the relevant market. Wu, for example, supports this approach, arguing that "it is difficult to find the existence of benefits if the benchmark is the market where SOEs dominate".[123]

However, in *US — CVD (China)* and *US — Carbon Steel (India)*, the AB departed from this approach, holding that the government's position as the predominant supplier does not validate the presumption that in-country prices are distorted.[124] The AB emphasised that "whether a price may be relied upon for benchmarking purposes under Article 14(d) is not a function of its source but, rather, whether it is a market-determined price reflective of prevailing market conditions in the country of provision".[125] Evidence for the latter element includes:

> [T]he *structure* of the relevant market, including the type of entities operating in that market, their respective *market share*, as well as any *entry barriers*. It could also require assessing the *behaviour of the entities*

[122] AB Report, *US — Softwood Lumber IV*, *supra* note 105, at 93.
[123] AB Report, *US — AD & CVD (China)*, *supra* note 78, at 451.
[124] *Id.* at 4.53, citing AB Report, *US — Carbon Steel (India)*, *supra* note 83, at 4.157.
[125] AB Report, *US — Carbon Steel (India)*, *supra* note 83, at ¶ 4.154.

> operating in that market in order to determine whether the government itself, or acting through government-related entities, exerts market power so as to distort in-country prices.[126]

Thus, prescribing a case-by-case examination of price distortion, the AB clarified that IAs "cannot refuse to consider evidence relating to factors other than government market share."[127]

The article supports the latter approach. The mere predominance of SOEs in the market does not justify the presumption that in-country prices are government-designated and, thus, distorted. Such a presumption is what Lang describes as "kitchen-sink-ism", noting:

> [Kitchen-sink-ism] is the approach according to which, in order to characterize a market as distorted, one simply catalogues all the governmental actions that can plausibly be said to have an impact on prices and competitive in that market, relying on their sheer number and aggregated weight to make a determination that a market is relevantly distorted. It involves no explicit attempt to distinguish between 'distortions' and background 'institutional conditions', instead lumping them all together in a single category.[128]

Nölke *et al.*'s seminal work on SMEs, from a VoC perspective, highlights that a "particularly typical feature [of corporate governance in SMEs] is state control of major corporation in terms of public ownership and various forms of state involvement in business operation".[129] Figure 1 illustrates the predominance of SOEs in emerging economies.[130]

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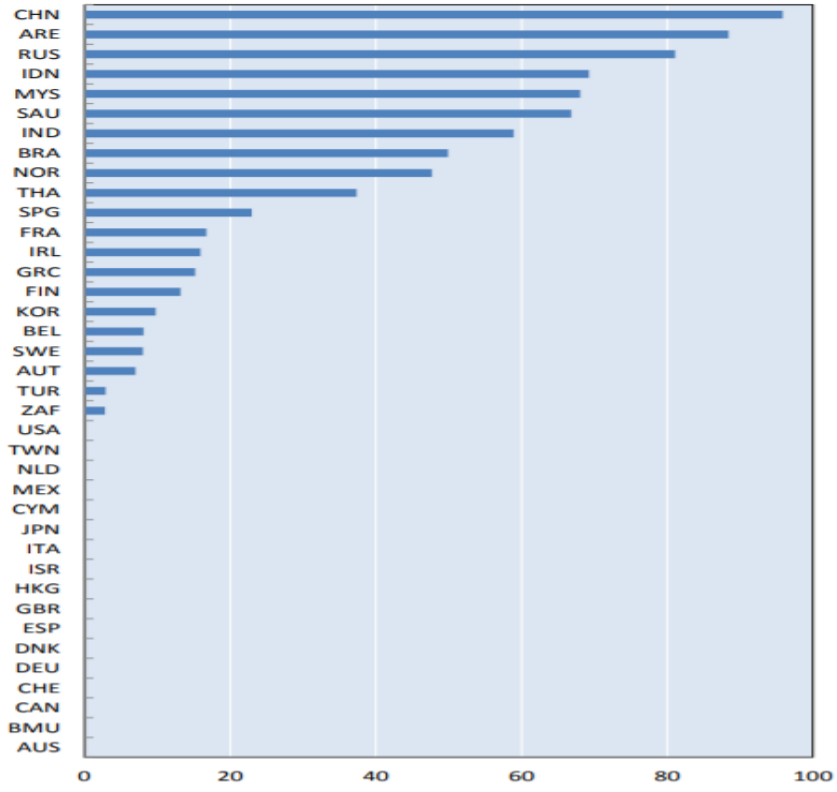
[126] AB Report, *US — AD & CVD (China)*, *supra* note 78 at 4.53, citing *AB Report, US — Carbon Steel (India)*, *supra* note 83, at 4.157.
[127] *Id.* at 4.59.
[128] Lang, *supra* note 32, at 701.
[129] Nölke et al., *Domestic Structures, Foreign Economic Policies and Global Economic Order: Implications from the Rise of Large Emerging Economies*, 21(3) EUR. J. INT'L. REL. 538 (2015).
[130] Kowalski et al., *supra* note 60, at 23 (notably, the study reveals, "[t]he ten countries with the highest [Country SOE Share] are China (95.9), the United Arab Emirates (88.4), Russia (81.1), Indonesia (69.2), Malaysia (68), Saudi Arabia (66.8), India (58.9), Brazil (49.9), Norway (47.7), and Thailand (37.3)").

Figure 1: Country SOE share for selected 38 economies[131]



The above study indicates that the predominance of SOEs in certain sectors is a background institutional feature of emerging economies. In line with Lang's argument, a presumption that the predominance of SOEs *ipso facto* amounts to market distortion is, indeed, an instance of 'kitchen-sink-ism', as it does not "attempt to distinguish between 'distortions' and background 'institutional conditions'".[132] By contrast, the AB's approach in *US — CVD (China)* and *US — Carbon Steel (India)* addresses this problem by proposing a case-by-case examination of price distortion, focusing on the characteristics of the relevant market. This is a welcome approach since it differentiates market distortion from the legitimate institutional choices of states.

In sum, having laid out and identified the gaps and proposed reforms to the current SCM disciplines governing SOEs, the following sub-part turns to the specific case of subsidisation by and of Chinese SOEs, regulated under the CAP.

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[131] Kowalski et al., *supra* note 60.
[132] Lang, *supra* note 32, at 701.

B. Chinese SOEs and the CAP

In *China — Rare Earths*, the AB held that the CAP is an 'integral part' of the WTO Agreement and, thus, a core constituent of the "single package of WTO rights and obligations".[133] Qin further notes that the CAP provides the context to interpret the SCM provisions applicable to China.[134]

Given the CAP's curious silence on the interpretive approach to the term "public body", the AB adopted the governmental authority approach in relation to Chinese SOEs and state-owned commercial banks.[135] Crucially, however, Wu's seminal article on China's state capitalism identified the authority-based approach as a significant obstacle in applying SCM disciplines to Chinese SOEs.[136] By contrast, Zhou *et al.* demonstrate that "the 'authority-based' approach leaves ample room for IAs to find a Chinese SOE or SIE [State-Invested Enterprise] to be a "public body", especially under China's current SOE reform".[137] They substantiate their position as follows. First, Chinese laws mandate implementation or consideration of governmental policies by SOEs – a case in point being Public Welfare SOEs and Special Commercial SOEs.[138] Second, meaningful control of the Chinese government over SOE activities may be inferred from "limitations on private equity, the mandates on activities, the criteria for performance evaluation, the involvement of SASAC and the [Communist Party of China] in management and decision-making, etc."[139] In line with Zhou *et al.*, the article holds that given China's ongoing SOE reform, it is possible to capture Chinese SOEs under the authority-based interpretation of "public body".

When it comes to determining the benefit benchmark, the CAP allows more flexibility to IAs than Article 14, SCM Agreement. Under Section 15(b), CAP, IAs can reject in-country Chinese prices and resort to an alternate methodology for identifying the benefit-benchmark when there are 'special difficulties' in applying the

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[133] Appellate Body Report, *China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum,* WTO Doc. No. WT/DS431/AB/R ¶ 5.72 (adopted on Aug. 29, 2014) .
[134] Julia Ya Qin, *Mind the Gap: Navigating between the WTO Agreement and its Accession Protocols, in* ASSESSING THE WORLD TRADE ORGANIZATION: FIT FOR PURPOSE? 258 (Manfred Elig et al., eds, 2016).
[135] AB Report, *US — AD & CVD (China)*, *supra* note 78, at 317.
[136] M. Wu, *supra* note 7, at 310.
[137] Zhou et al., *Building a Market Economy through WTO-Inspired Reform of State-Owned Enterprises in China*, 68(4) INT'L. COMPAR. L. Q., 977, 1018 (2019) [hereinafter Zhou et al.].
[138] *Id.* at 999.
[139] *Id.* at 1019.

general rules of Article 14.[140] Notably, the scope of 'special difficulties' is undefined, providing ample discretion to IAs to determine the existence of such circumstances.[141] For instance, IAs may resort to an alternate benchmark when Chinese SOEs dominate the market or when there is a lack of information from China regarding benefit determination. Moreover, unlike the NME methodology in anti-dumping actions, Section 15(b) does not have a built-in expiration date.

The CAP also provides legal certainty in another aspect of subsidy determination: the specificity analysis. Under the SCM Agreement, actionable subsidies have to fulfil the specificity requirement, which is presumed in the case of prohibited subsidies. According to Article 2, SCM Agreement, for a subsidy to be specific, it must be limited to an enterprise or industry or a particular region. Further, subsidies to an enterprise or industry may be *de facto* specific.[142] That is, notwithstanding an appearance of non-specificity, they may, in fact, be considered specific based on the allocation and use of the subsidy in question. The factors to be considered for a finding of *de facto* specificity include, *inter alia*, predominant use by certain enterprises and the granting of disproportionately large amounts of subsidy to certain enterprises. The CAP adds legal certainty to the *de facto* specificity regime of the SCM Agreement in relation to Chinese SOEs. Section 10.2, CAP, provides that subsidies to Chinese SOEs would be regarded as 'specific' if they "are the predominant recipients of such subsidies or […] receive disproportionately large amounts of such subsidies".[143] Thus, the CAP expressly introduces the ownership-based criteria of specificity in relation to Chinese SOEs.

In sum, given China's ongoing SOE reform and built-in flexibilities under the CAP, IAs have sufficient scope to discipline Chinese SOEs through countervailing measures.

C. CPTPP and Non-Commercial Assistance

Chapter 17 of the CPTPP, which provides disciplines on SOEs and designated monopolies, is premised on the competitive neutrality approach. Notably, its framework on financial advantages to SOEs is broadly based on the SCM Agreement.[144] That said, in specific aspects of departure from WTO rules and case

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[140] Procedure on the Accession of the People's Republic of China, WTO Doc. WT/L/432, Section 15(b) (adopted on Nov. 23, 2001) [hereinafter China's Accession Protocol].
[141] Zhou et al., *supra* note 137, at 1015.
[142] SCM Agreement, *supra* note 72, at art. 2.1(c).
[143] China's Accession Protocol, *supra* note 140, at Section 10.2.
[144] Weihuan Zhou, *Rethinking the (CP)TPP As A Model for Regulation of Chinese State-Owned Enterprises*, 24(3) J. INT'L. ECON. L., 572 (2021) [hereinafter Zhou].

law − where the CPTPP provisions seek to promote competitive neutrality − they constrain the institutional choices of states.

Specifically, the CPTPP regulates non-commercial assistance (NCA) to SOEs under Article 17.6. The definition of NCA is similar to that of 'financial contributions' under Article 1, SCM Agreement. Its scope extends to NCAs provided by CPTPP parties to their SOEs and by an SOE to another SOE.[145]

Regarding the benefit-benchmark determination, in line with the SCM Agreement, Article 17.1, CPTPP, it requires a comparison with in-country market prices. Notably, there is no express flexibility in the nature of Section 15(b), CAP, to adopt alternate benchmarks in case of 'special difficulties'. As for the specificity analysis, like the CAP, the CPTPP also introduces the ownership-based criteria for specificity in cases where access to NCA is limited to, or predominantly or disproportionately used by SOEs.[146] However, as explained in the previous sub-part, this issue can be resolved through the *de facto* specificity regime under the SCM Agreement. Finally, the requirement of 'adverse effects' under Article 17.7, CPTPP, is also broadly based on Articles 5 and 6 of the SCM Agreement. Thus, the CPTPP framework on NCA broadly proceeds from the SCM Agreement.

That said, the CPTPP departs from WTO rules and case law in two important aspects. First, Article 17.1, CPTPP, defines SOEs based on the governmental control approach, thus overruling the authority-based approach of the AB in *US — AD & CVD (China)*. The rationale being that an objective definition of "public body" would provide more flexibility to IAs to discipline the subsidisation by SOEs of other SOEs, thereby promoting competitive neutrality. However, as discussed in Part III.A(1), the control-based definition undermines the institutional choices of states concerning the corporate governance of SOEs. Moreover, the CPTPP definition of SOEs is underinclusive. The definition is based on majority state ownership or voting rights in an entity or the state's power to appoint the majority of the board. Consequently, it does not discipline state-influenced SOE activities in situations where the state has minority ownership/control over the concerned entity.[147]

Second, while subsidy disciplines under the General Agreement on Trade in Services (GATS) are subject to further negotiation, the CPTPP extends the NCA disciplines

[145] Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Dec. 30, 2018, arts. 17.6.1 and 17.6.2, 3337 U.N.T.S. 56101 [hereinafter CPTPP].
[146] *Id.* art. 17(1)(b).
[147] Zhou, *supra* note 144, at 6-9.

to trade in services by SOEs.[148] Although this is hailed as a major breakthrough of the CPTPP,[149] it is not without its share of criticism. Importantly, while the CPTPP regulates services subsidies provided to SOEs, there are no corresponding disciplines on services subsidies granted to POEs. Consequently, this approach is prejudiced against SOEs and ends up undermining competitive neutrality. Affirming this view, Howse notes that while the absence of disciplines on services subsidies is indeed a gap in WTO rules, the issue is "much broader than the question of state enterprises".[150]

In conclusion, using the CPTPP's competitive neutrality-based NCA provisions as the basis for WTO reform would go against the WTO's ownership-neutral character and constrain the institutional choices of states regarding SOEs.

D. Conclusions

In view of the foregoing analysis of financial advantages, Part III concludes that the ownership-neutrality approach provides a more balanced framework for disciplining SOE-related subsidies than the competitive neutrality approach. By focusing on the effects of financial contributions rather than the identity or ownership of the entity providing them, the SCM Agreement regulates trade distortions without mandating structural reforms to SOEs. This enables WTO Members to retain flexibility in using SOEs for legitimate public policy objectives, including developmental and redistributive functions. In contrast, the competitive neutrality approach, exemplified by the CPTPP, imposes structural requirements such as commercial orientation and constraints on non-commercial assistance on SOEs as a class. This prescriptive approach risks narrowing the policy space available to governments, particularly in developing economies, and may penalise the use of SOEs for social or strategic purposes.

In this regard, three main conclusions stem from Part III. First, compared to the authority-based definition, the control-based definition constrains the institutional choices of states concerning the corporate governance of SOEs. Second, the authority-based approach can be made more workable, for example, by: (i) adopting a non-exhaustive list of indicators of 'governmental authority', 'governmental function', and 'meaningful control'; and (ii) conducting an entity-level analysis, as recently confirmed by the AB. Third, as illustrated in Table 2 below, the NCA provisions under the CPTPP provide almost the same level of flexibility as the CAP, precluding the need to negotiate competitive-neutrality-based rules multilaterally in

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[148] General Agreement on Trade in Services, Jan. 1, 1995, art. XV 1869 U.N.T.S. 183 [hereinafter GATS].

[149] *See generally* Willemyns, *supra* note 16, at 671; Matsushita & Lim, *supra* note 25, at 409.

[150] Howse, *supra* note 88, at 60.

order to discipline Chinese SOEs. A notable exception to the preceding observation is the application of the authority-based definition of "public body" to Chinese SOEs. However, in line with the position of Zhou *et al.*, the article maintains that the ongoing reform of SOEs in China has made it possible to capture Chinese state enterprises under the governmental authority test.

Table 2: Comparative Overview of Key Provisions Governing Financial Advantages to SOEs

	SCM Agreement	**SCM Agreement read with CAP**	**CPTPP**
SOE/public body definition	Governmental authority test	Governmental authority test	Governmental control test
Benefit-benchmark determination	No departure from in-country market prices on the ground of 'special difficulties'	Allows departure from in-country market prices on the ground of 'special difficulties'	No departure from in-country market prices on the ground of 'special difficulties'
Specificity	*De facto* specificity	Ownership-based criteria of specificity	Ownership-based criteria of specificity
Scope of application	Goods	Goods	Goods and services

IV. MONOPOLY RIGHTS, EXCLUSIVE PRIVILEGES, AND REGULATORY ADVANTAGES

The next set of governmental advantages that may result in trade distortion include monopoly rights and exclusive privileges and regulatory advantages to SOEs (as elaborated in Part II.B(2)). In this context, the competitive neutrality approach seeks to introduce competition policy-based primary obligations on SOEs and decouple the requirement of acting on commercial considerations from the non-discrimination obligation. The remainder of this part establishes how the WTO's existing approach of ownership-neutrality – complemented by the interface mechanism comprising the non-discrimination and market access norms – is more effective in balancing fair competition and institutional diversity than the competitive neutrality approach.

To this end, this Part starts by evaluating the current WTO approach juxtaposed with the competitive neutrality approach. The paper makes a case against the imposition of antitrust obligations on SOEs and establish the merits of the current

interface norms of non-discrimination and market access in disciplining SOE conduct. Thereafter, it reviews the flexibilities under the CAP to discipline Chinese SOEs. Finally, the paper identifies key aspects in which the CPTPP's substantive obligations restrict the institutional choices of states concerning SOEs and designated monopolies.

A. Current WTO Approach versus the Competitive Neutrality Approach

This sub-part starts with an overview of the current GATT and GATS rules governing the grant of monopoly and exclusive rights and regulatory advantages to SOEs. Then, it evaluates the demerits of introducing antitrust norms in relation to SOEs at the WTO while making a case for SOE regulation through the norms of non-discrimination and market access. Finally, it reviews the grounds on which the current WTO rules are considered inadequate in disciplining the anti-competitive conduct of SOEs.

1. Overview of the Current WTO rules

a. Monopoly and Exclusive Rights

As noted previously, the GATT/WTO system proceeds from the principle of state sovereignty and is, therefore, neutral towards the institutional arrangements of states, including the ownership structure of enterprises. Accordingly, it recognises the right of members to establish or maintain state enterprises and trade monopolies and grant exclusive privileges.[151] The trade distortion resulting therefrom is managed by the WTO through the interface mechanism comprising the non-discrimination and market access rules. Thus, the WTO accommodates the institutional choices of states to the extent they provide equal competitive opportunities in relation to trade in goods and services.

Under the GATT, Article XVII recognises the right of members to establish or maintain state trading enterprises (STE) or grant monopoly rights and exclusive privileges in respect of importation and exportation. Notably, an STE is an entity under governmental control (through ownership, control, or licensing) with exclusive export or import rights, allowing the government to conduct and control foreign trade.[152] The above right is conditional upon STEs and trading monopolies

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[151] *See*, *e.g.*, Report of the Panel*, Republic of Korea — Restrictions on Imports of Beef*, Doc. No. L/6503-36S/268, ¶¶ 114-115 (Nov. 7, 1989) (in *Korea — Restrictions on Imports of Beef*, the GATT panel held that the mere existence of an import monopoly is not *ipso facto* a violation of the GATT).

[152] *See generally* Edmond A. Ianni, *State Trading: Its Nature and International Treatment*, 5(1) NORTHWESTERN J. INT'L. L. BUS., 46 (1983).

making their purchases and sales involving imports or exports in accordance with the non-discrimination principle (Article XVII:1(a)) and commercial considerations (Article XVII:1(b)). It is worth noting that non-discrimination claims in the context of state trading and trading monopolies have mostly been decided under the national treatment (NT) provision of Article III, GATT, as against the more specific Article XVII:1(a). In addition, members maintaining import monopolies have an obligation, under Article II:4, GATT, to ensure that their "tariff concessions are not violated through the use of import monopoly power".[153] Finally, Article XI, GATT, prevents members from imposing quantitative restrictions on imports and exports through STEs, or entities with monopoly or exclusive rights.

Under the GATS, there are no disciplines on monopolies or exclusive rights in service sectors without market access commitments. Meanwhile, in sectors with market access commitments, Article XVI:2(a), GATS, prohibits quantitative restrictions on the number of service suppliers in the form of numerical quotas, monopolies, or exclusive service suppliers. Consequently, members may grant monopolies and exclusive service rights to SOEs in so far as they do not violate members' market access commitments. Further, Article VIII:1 provides that monopoly and exclusive service suppliers[154] must act in a manner consistent with the most-favoured-nation treatment obligation and specific commitments regarding market access and NT. Importantly, Article VIII:2, GATS, also prohibits cross-subsidisation by monopoly and exclusive service suppliers, i.e., transfer of monopoly benefits to another service sector subject to specific commitments under GATS.

b. Regulatory Advantages

As the VoC literature highlights, the overall framework and enforcement of domestic regulations on antitrust, taxation, bankruptcy, the environment, labour, etc., is the institutional prerogative of states.[155] Current WTO rules do not harmonise members' domestic regulatory regimes and, therefore, do not prohibit the grant of regulatory advantages to SOEs. The resultant distortion of competition is tackled by the WTO through the non-discrimination and market access norms discussed below.

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[153] KYLE BAGWELL & ROBERT W. STAIGER, THE ECONOMICS OF THE WORLD TRADING SYSTEM 149 (2002).

[154] GATS, *supra* note 147, art. XXVIII(h) (defines "monopoly supplier of a service" as "any person, public or private, which in the relevant market of the territory of a member is authorised or established formally or in effect by that member as the sole supplier of that service").

[155] Hall & Soskice, *supra* note 2.

As for regulatory advantages to SOEs in relation to trade in goods, Article XI, GATT, prohibits members from favouring SOEs by imposing quantitative restrictions on imports or exports. Further, under Article III:4, GATT, members have an obligation not to discriminate against foreign products by granting regulatory advantages to domestic SOEs. Regarding trade in services, the grant of regulatory advantages to SOEs must be consistent with members' commitments on market access (Article XVI, GATS) and NT (Article XVII, GATS).

2. Competitive Neutrality and the Turn to Antitrust Norms *vis-à-vis* SOEs

A core agenda of several PTAs[156] and scholarly literature,[157] premised on competitive neutrality, is to introduce antitrust norms to regulate the conduct of SOEs after receiving monopoly and exclusive rights and regulatory advantages. The proponents of this approach offer three fundamental reasons to justify their position.[158] The first argument is that the domestic competition laws of many members exempt the anti-competitive behaviour of SOEs from their scope of application. Second, they argue that the non-discrimination and market access norms are fundamentally focused on trade distortion and address competition distortion by SOEs only incidentally. As a result, several anti-competitive practices of SOEs, like cross-subsidisation and abuse of dominant position, escape the scrutiny of the current WTO rules. Finally, they identify certain deficiencies in the scope of application of the existing interface mechanism, comprising the norms of non-discrimination and market access (elaborated in Section IV.A(3)). Thus, to ensure that governmental advantages to SOEs do not disadvantage domestic POEs, they make a case for introducing antitrust norms at the WTO to regulate the conduct of SOEs, thereby promoting competitive neutrality.

3. Arguments Against the Anti-trust Policy-Based Competitive Neutrality Approach

On the question of whether the WTO imposes antitrust obligations on STEs, the AB, in *Canada — Wheat Exports and Grain Imports*, underscored the critical distinction between "preventing certain types of discriminatory behaviour… and imposing comprehensive competition-law-type obligations".[159] A pertinent question that

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156 *See infra* Part IV.C.

157 *See, e.g.*, Peter & Andre, *supra* note 27, at 19 and 21; Y. Wu, *supra* note 15, at 292.

158 *See* Y. Wu, *supra* note 15, at 234-235, 264.

159 Appellate Body Report, *Canada — Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WTO Doc. No. WT/DS276/AB/R ¶ 145 (adopted on Sep. 27, 2004) [hereinafter AB Report, *Canada — Wheat Exports and Grain Imports*].

follows is which of these two approaches can better balance the ends of fair competition and institutional diversity?

The antitrust policy-based competitive neutrality approach, the paper argues, is comparatively less sensitive to the institutional choices of states. To elaborate, the domestic antitrust laws of countries vary vastly. From a VoC standpoint, the antitrust regime of a country is an essential part of its institutional settings and a determinant of potential comparative advantages. Thus, harmonising the antitrust laws of states would deprive them of the comparative advantage stemming therefrom. Pursuant to this argument, Table 2 highlights the institutional diversity in the antitrust regimes of states from a VoC perspective.[160]

Table 3: Institutional Comparison of States' Antitrust Regimes

LMEs	CMEs	SMEs
• Based on Chicago principles. • Self-regulation of markets, with minimal governmental intervention.	• Based on Ordoliberal principles. • Regulatory intervention to avoid monopolised and cartelised markets.	• Competition policy protects public enterprises from competition leading to the development of monopolies or oligopolies. • Lately, focused on creating competitive domestic companies.

A counter-argument to the above reasoning is that the domestic antitrust regime of states, particularly SMEs, is a significant source of competition distortion and must, therefore, be disciplined at the WTO by applying the basic elements of antitrust policy to SOEs. In this context, it is worth noting that since the Singapore Ministerial Conference in 1996, members, like the EU, have tried to initiate WTO negotiations on competition policy-based disciplines, potentially applicable to both SOEs and POEs.[161] However, due to developing countries' steadfast opposition, such attempts have resulted in a stalemate.

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[160] Andreas Kornelakis & Pauline Hublart, *Digital Markets, Competition Regimes and Models of Capitalism: A Comparative Institutional Analysis of European and US Responses to Google*, 26(3) COMPETITION AND CHANGE 1 (2021).

[161] World Trade Organization, Singapore Ministerial Declaration of 18 December 1996, ¶ 20, WTO Doc. No. WT/MIN(96)/DEC (1996); WORLD TRADE ORGANIZATION, REPORT OF

Now whether or not competition-law-type disciplines should be introduced at the WTO is an issue beyond the scope of this article. It suffices to note that such a move would constrain the institutional autonomy of states. However, what is relevant to our discussion is that the selective imposition of antitrust obligations on SOEs, without corresponding obligations on POEs, would undermine rather than promote competitive neutrality.[162] As Howse rightly observes,

> Targeting state enterprises seems arbitrary if not perverse in a world where the anti-competitive practices of privately held firms like Google and Amazon, and the consequences of their market power, are what preoccupy many policy analysts and economic justice activists.[163]

A related question is whether the WTO should oblige members to enforce their national competition laws on SOEs. Notably, the WTO's current interface mechanism governing SOEs comprises the norms of non-discrimination and market access. Now, whether this interface mechanism should extend to enforcing national competition laws on SOEs depends on which of these two approaches would balance fair competition and institutional diversity more effectively. In what follows, the paper argues that the norms of non-discrimination and market access do a much better job at attaining the above balance.

As interface mechanisms, the non-discrimination and market access norms allow members to freely determine their institutional arrangements to the extent they do not alter the conditions of competition in the market. Thus, states are free to grant monopolies and regulatory advantages to SOEs so long as they do not modify the competitive conditions in relation to trade in goods and services.

The next question is whether the non-discrimination and market access norms, due to their primary focus on trade distortion, fail to tackle the distortion of competition by SOEs effectively. The article responds negatively to this suggestion. As indicated above, the WTO case law on non-discrimination has embraced a competition-based approach to discrimination. In *Japan — Alcoholic Beverages II*, the AB stated that "Article III [NT obligation] obliges Members of the WTO to provide equality of

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THE WORKING GROUP ON THE INTERACTION BETWEEN TRADE AND COMPETITION POLICY TO THE GENERAL COUNCIL WTO Doc. No. WT/WGTCP/217 (Dec., 1998).

[162] *See* WORLD TRADE ORGANIZATION, *Negotiating Group on Basic Telecommunications, in* TELECOMMUNICATIONS SERVICES: REFERENCE PAPER (1996) (notably, specialised competition policy-based rules for the telecommunications sector already exist).

[163] Howse, *supra* note 88, at 59.

competitive conditions for imported products in relation to domestic products."[164] Several AB reports have since adopted 'equality of competitive opportunities' as the test of consistency for the NT and Most Favoured Nation (MFN) obligations.[165] Further, under the likeness analysis − based on the Working Party Report on Border Adjustment, 1970[166] − the AB has consistently examined the nature and extent of the competitive relationship between the concerned products.[167] In view of the above arguments, Howse rightly observes that "the notion of equality of competitive opportunities underpinning the non-discrimination norms of the GATT and related WTO agreements could be understood as one form of competitive neutrality".[168]

In line with the above reasoning, why should the WTO concern itself with the grant of favourable advantages to SOEs over domestic POEs, provided the said advantages do not modify the conditions of competition to the detriment of foreign producers or service suppliers? The WTO, being a trade body, should focus on the distortion of competition by SOEs only to the extent it distorts international trade. Extending the WTO's interface mechanism to enforcing general anti-trust policies or domestic competition laws on SOEs would − as Lang cautioned – constrict the range of legitimate market forms at the WTO,[169] thereby, narrowing the room for institutional diversity and experimentation. Thus, the AB rightly interpreted Article XVII, GATT, as not imposing "comprehensive competition-law-type obligations on STEs".[170]

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[164] Appellate Body Report, *Japan — Taxes on Alcoholic Beverages*, WTO Doc. No. WT/DS8/AB/R, ¶ 109 (adopted on Oct. 4, 1996) [hereinafter AB Report, *Japan — Alcoholic Beverages (II)*].

[165] *See* Appellate Body Report, *Korea — Taxes on Alcoholic Beverages*, WTO Doc. No. WT/DS75/AB/R, ¶ 120 (adopted on Feb. 17, 1999); Appellate Body Report, *Canada — Certain Measures Concerning Periodicals*, WTO Doc. No. WT/DS31/AB/R, ¶ 464 (adopted on Jul. 30, 1997); Appellate Body Report, *European Communities — Measures Affecting Asbestos and Products Containing Asbestos*, WTO Doc. No. WT/DS135/AB/R, ¶ 98 (adopted on Apr. 5, 2001), [hereinafter AB Report, *EC — Asbestos*] (for NT obligations); Appellate Body Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc. No. WT/DS400/AB/R, ¶ 5.82, 5.87 (adopted on Jun. 18, 2014) [hereinafter AB Report, *EC — Seal Products*] (for MFN).

[166] WORLD TRADE ORGANIZATION, REPORT OF THE WORKING PARTY ON BORDER TAX ADJUSTMENTS BISD 18S/97 (Dec. 2, 1970).

[167] *See*, *e.g.*, AB Report, *EC — Asbestos*, *supra* note 165, at 99. *See also* Appellate Body Report, *Philippines — Taxes on Distilled Spirits*, WTO Doc. No. WT/DS396/AB/R, ¶ 170 (adopted on Jan. 20, 2012) (the competitive relationship is evidenced through: (i) product characteristics; (ii) products' end-use; (iii) consumers' tastes and habits; and (iv) products' tariff classification).

[168] Howse, *supra* note 88, at 43.

[169] Lang, *supra* note 32, at 74.

[170] AB Report, *Canada — Wheat Exports and Grain Imports*, *supra* note 159, at 145.

4. Addressing Arguments Regarding the Inadequacy of the Current WTO Rules

a. Monopoly and Exclusive Rights

The proponents of the competitive neutrality approach have identified gaps in the current non-discrimination and market access provisions, illustrating their inadequacy in disciplining the anti-competitive behaviour of SOEs after receiving monopoly and exclusive rights. Let us review these issues, first under the GATT, followed by the GATS.

i Shortcomings in the GATT

This sub-part reviews the grounds on which Article XVII, GATT, has been found inadequate in regulating STEs and trading monopolies. To begin with, it is argued that Article XVII has been sparingly applied in WTO adjudication, thereby reflecting its ineffectiveness. Responding to this concern, Howse persuasively explains how the GATT/WTO panels have exercised judicial economy by addressing GATT violations by STEs and trading monopolies under Articles II:4, III:4, and XI, GATT, instead of resorting to Article XVII.[171] Through a review of the GATT/WTO case law, he illustrates how panels – by relying on the general principles of attribution and state responsibility – have found states responsible for the GATT-inconsistent conduct of state enterprises and monopolies. Thus, through the doctrine of attribution, panels have prevented states from circumventing their GATT obligations by acting through state enterprises.

For example, in *Canada — Provincial Liquor Boards (EEC)*, the GATT panel found Canada responsible, under Articles II:4, GATT, for the markup pricing practices of the provincial liquor monopolies.[172] The panel also found the restrictions on the points of sale and listing by the provincial boards to violate Articles III:4 and XI, GATT.[173] Soon after, the GATT panel, in *Canada — Provincial Liquor Boards (US)*, again found Canada in violation of Article III:4 for the discriminatory practices of the provincial liquor boards.[174] Other relevant decisions from the GATT era include

[171] Howse, *supra* note 88, at 19-28; *see also* Andrea Mastromatteo*, WTO and SOEs: Article XVII and Related Provisions of the GATT 1994,* 16(4) WORLD TRADE REV. 607, 609 (2017).
[172] GATT Panel Report, *Canada — Provincial Liquor Boards (EEC)*, *supra* note 98, at 4.19.
[173] *Id.* at 4.22.
[174] GATT Panel Report, *Canada — Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, *supra* note 98, at 5.31 & 5.38.

Canada — Administration of the Foreign Investment Review Act (FIRA)[175] and *Japan — Trade in Semi-Conductors*.[176] WTO panels have consistently followed this approach, readily attributing the conduct of state enterprises and monopolies to the state. Notable decisions include *Canada — Periodicals*,[177] *Japan — Film*,[178] and *Saudi Arabia — IPRs*.[179]

Thus, the GATT/WTO acquis highlights that the lack of reliance on Article XVII, GATT, stems not from its ineffectiveness but from the fact that panels have decided claims related to STEs and trading monopolies under the general GATT rules of Articles II:4, III:4 and XI, among others.

This brings us to the second shortcoming in the current GATT rules: the possible exclusion of NT from the non-discrimination obligation under Article XVII:1(a), GATT. Davey draws this conclusion from the drafting history of Article XVII.[180] Petersmann further notes that the interpretative note to Articles XI, XII, XIII, XIV and XVIII, GATT, states that the terms 'import restrictions' or 'export restrictions' include restrictions made effective by STEs. However, such an express reference is absent in Article III, GATT.[181] This position is buttressed by the decisions of the GATT panels in *Belgium Family Allowances* and *Canada — Administration of the Foreign Investment Review Act*, which seem to suggest that Article XVII:1(a) does not entail the NT obligation.[182] One may argue that if states could be held responsible for the conduct of STEs and trading monopolies under Article III, GATT, then it is inconsequential whether or not Article XVII, GATT, entails the NT obligation. While this author fully endorses Howse's view that the conduct of STEs and trading

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[175] Report of the Panel, *Canada — Administration of the Foreign Investment Review Act (FIRA)*, L/5504 (Feb. 7, 1984) Doc No. BISD 30S/140, ¶ 6.5 [hereinafter GATT Panel Report, *Canada — Administration of the Foreign Investment Review Act (FIRA)*].

[176] Report of the Panel, *Japan — Trade in Semi-Conductors*, Doc. No. L/6309-35S/116, ¶ 118 (May 4, 1988).

[177] Panel Report, *Canada — Certain Measures concerning Periodicals*, Doc. No. WT/DS31/R (adopted on Jul. 30, 1997).

[178] Panel Report, *Japan — Measures Affecting Consumer Photographic Film and Paper*, Doc. No. WT/DS44/R (adopted on Mar. 22, 1998).

[179] Panel Report, *Saudi Arabia — Measures Concerning the Protection of Intellectual Property Rights*, Doc. No. WT/DS567/R (adopted on Jun. 16, 2020).

[180] William J. Davey, *Article XVII GATT: An Overview*, *in* STATE TRADING IN THE TWENTY-FIRST CENTURY 26 (Thomas Cottier & Petros C. Mavroidis eds., 1998).

[181] Ernst-Ulrich Petersmann, *GATT Law on State Trading Enterprises: Critical Evaluation of Article XVII and Proposals for Reform*, *in* STATE TRADING IN THE TWENTY-FIRST CENTURY 71 (Thomas Cottier & Petros C. Mavroidis eds., 1998).

[182] Panel Report, *Belgian Family Allowances*, Doc. No. G/32 - 1S/59, 60 ¶ 4(Nov. 7, 1952); GATT Panel Report, *Canada — Administration of the Foreign Investment Review Act (FIRA)*, *supra* note 175, at 6.16.

monopolies should be readily attributable to states under Article III, GATT, there is merit in the argument that Article XVII should entail an independent NT obligation. This is because Article XVII imposes primary obligations upon STEs and trading monopolies, whereas Article III requires the attribution of conduct to the state. There may be instances where it is difficult to make such an attribution, for example, when STEs decide on their buying and selling practices in a non-transparent manner. Accordingly, the paper proposes that the MC/GC adopt an authoritative interpretation to the effect that Article XVII, GATT, entails the NT obligation.[183]

The third issue with Article XVII relates to the relationship between the 'commercial considerations' requirement (subparagraph b) and the non-discrimination obligation (subparagraph a). In *Canada — Wheat Exports and Grain Imports*, the panel interpreted the 'commercial considerations' rule as requiring STEs to make purchase and 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".[184] Simply put, the 'commercial considerations' rule requires STEs and trading monopolies to make their purchases and sales on the same basis as a private economic actor,[185] without governmental interference. In *Canada — Wheat Exports and Grain Imports*, the AB found that the obligation to act "solely in accordance with commercial considerations" does not impose "comprehensive competition-law-type obligations" on STEs and trading monopolies.[186] Instead, the AB found a dependant relationship between the 'commercial considerations' requirement and the non-discrimination obligation, holding that the determination of whether an STE has acted per commercial considerations must be "with respect to the market(s) in which the STE is alleged to be engaging in discriminatory conduct".[187] Contrary to the AB's position, the proponents of the competitive neutrality approach argue that the 'commercial considerations' requirement should be a standalone obligation on STEs.[188] It is worth noting that whether or not an entity acts on commercial considerations is an institutional choice relating to the sphere of corporate governance. As discussed in the previous sub-part, the scope for institutional

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[183] Marrakesh Agreement, *supra* note 116, art. IX:2.

[184] Panel Report, *Canada — Measures Relating to Exports of Wheat and Treatment of Imported Grain*, Doc. No. WT/DS276/R, ¶¶ 6.92-95 (adopted on Sep. 27, 2004).

[185] The relevant factors include price, quality, availability, marketability, transportation, and other conditions of purchase or sale.

[186] Appellate Body Report, *Canada — Wheat Exports and Grain Imports*, *supra* note 159, at 145; *see also* GATT Panel Report, *Canada — Administration of the Foreign Investment Review Act (FIRA)*, *supra* note 175, at 5.16.

[187] AB Report, *Canada — Wheat Exports and Grain Imports*, *supra* note 159, at 145.

[188] Y. Wu, *supra* note 15, at 223.

diversity would be sharply reduced if SOEs were never allowed to act on other than a commercial basis. Moreover, as a general matter, why should trade law be concerned with the non-commercial activities of STEs, apart from situations where such actions alter the conditions of competition to the detriment of foreign producers or service suppliers? Thus, the scope of Article XVII should not extend beyond a determination of whether the price differentiation in question "among foreign producers,[189] or between domestic and foreign producers would also be pursued by a private firm".[190]

Another prominent argument against Article XVII is that it only applies to trading monopolies and exclusive rights while excluding "SOEs with exclusive production and distribution rights, [and] SOEs with exclusive natural resources exploitation rights".[191] For reasons explained above, disciplines on SOEs should not go beyond the modification of competitive conditions in relation to trade. Thus, the grant of exclusive production and distribution rights and natural resources exploitation rights should only be disciplined to the extent it affects the competitive conditions for imports and exports under Articles I and III, GATT, and the market access obligations of Articles II and XI, GATT.

ii Shortcomings in the GATS

A good starting point for the discussion under the GATs is the decision in *China — Electronic Payment Services*, where the panel found a violation of both the NT and market access obligations.[192] The services monopoly granted to the SOE, China UnionPay, in relation to payment card transactions, was found to violate China's market access commitments under Article XVI:2(a), GATS.[193] Further, a number of privileges granted to China UnionPay, to the exclusion of foreign service suppliers, were found to be inconsistent with China's mode 1 and 3 NT obligations under Article XVII, GATS.[194] The proponents of the competitive neutrality approach argue that such a violation of the NT and market access obligations can only be found with respect to sectors where members have undertaken specific

[189] Note that paragraph 1 of the *Ad* Note to Article XVII, GATT, allows STEs to charge different sale prices for a product in different markets provided such differentiation is for commercial reasons to meet the conditions of supply and demand in export markets.
[190] *See generally* Bernard Hoekman & Joel P. Trachtman, *Canada–Wheat: Discrimination, Non-Commercial Considerations, and the Right to Regulate Through State Trading Enterprises*, 7(1) WORLD TRADE REV. 45, 52 (2008).
[191] Y. Wu, *supra* note 15, at 216.
[192] Panel Report, *China — Certain Measures Affecting Electronic Payment Services*, WTO Doc. No. WT/DS413/R (adopted on Aug. 31, 2012).
[193] *Id.* at 7.508-7.636.
[194] *Id.*

commitments, thereby narrowing the scope of application of the GATS.[195] In response to this contention, recall that given the sensitive nature of services, the GATS pursues a limited level of liberalisation in order to reserve more policy space for members. Accordingly, the scope of NT and market access rules under the GATS is limited to sectors where members have specifically committed themselves in their schedule of commitments.[196] Applying NT and market access rules on SOEs, without regard for members' sectoral commitments, contravenes the logic underlying the GATS framework and would have a chilling effect on members' preference to provide services through SOEs. Moreover, the fact that members have been generally reluctant to revise their services commitments is a broader issue and should not be pursued through disciplines selectively targeting SOEs.

b. Regulatory Advantages

The distortion of the level playing field due to the grant of regulatory advantages to SOEs over POEs is a prominent justification for imposing antitrust obligations on SOEs. However, as discussed previously, the overall framework and enforcement of domestic regulations is the institutional prerogative of states and a key determinant of comparative advantage. Thus, WTO disciplines on the grant of regulatory advantages should not extend beyond the non-discrimination and market access obligations, as discussed in Part IV.A(1)(b).

That said, the general non-discrimination and market access provisions under the GATT and GATS do not address the situation where SOEs, after receiving regulatory advantages, export goods or services to foreign markets. Notably, the SCM Agreement also does not cover the grant of regulatory advantages. To remedy such and other situations, Howse calls for extending "the concept of National Treatment to encompass conditions of competition among firms, not only goods and services".[197] However, he clarifies that such a move would reintroduce the thorny issue of negotiating an agreement on investment protection at the WTO, to which many developing countries are principally opposed. Thus, while an interesting proposal to strengthen the non-discrimination norms in relation to SOEs, the political willingness for such disciplines may not be forthcoming, at least in the near future.

B. China's Commitments under the CAP

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[195] Y. Wu, *supra* note 15, at 208, 210.
[196] Bossche & Zdouc, *supra* note 110, at 399-400, 517.
[197] Howse, *supra* note 88, at 52.

Having discussed the overall WTO framework governing the grant of monopolies and exclusive privileges and regulatory advantages to state enterprises, let us zoom in on the additional obligations undertaken by China under the CAP.

Three principal areas of flexibility under the CAP can be identified. To begin with, Section 5, CAP, provides that within three years of accession, all enterprises in China would have the right to trade in all goods, except those identified in Annex 2A, which would remain subject to state trading. Put differently, China agreed not to grant trading monopolies and exclusive rights, barring the list of goods in Annex 2A.

Second, Section 6.1, CAP, read with paragraph 46 of the Working Party Report (WPR),[198] provides for an independent relationship between the 'commercial considerations' requirement and the non-discrimination obligation. Moreover, unlike Article XVII, GATT, its scope is not limited to STEs and trading monopolies but extends to all Chinese SOEs and SIEs. Thus, the Chinese government is effectively prevented from intervening in the market through SOEs and SIEs.

The third flexibility under the CAP relates to price controls. Under Section 9.1, CAP, China has committed to eliminating price controls, except for goods and services listed in Annex 4, where China has committed to make best efforts to reduce and eliminate price controls. This obligation, again, is independent of the non-discrimination obligation.[199] Further, as Zhou notes, it is even broader than the preceding non-discrimination and 'commercial considerations' requirement, in that it applies to "all governmental measures that affect all prices in all sectors".[200] The obligation is subject to a few exceptions,[201] that do not include strategic Chinese sectors and is not subject to further modification.

Other than the CAP, a key flexibility under Article XVII, GATT, that could be used in relation to China is subparagraph 3, which calls for "negotiations on a reciprocal and mutually advantageous basis" to limit or reduce obstacles to trade posed by STEs. Pursuant to this provision, members affected by Chinese STEs may enter into bilateral or plurilateral agreements with China to work towards a "mutually advantageous" solution rather than negotiating new primary obligations on SOEs, applicable to all WTO members.[202] This approach is in line with Shaffer's proposal

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198 WORLD TRADE ORGANIZATION, *Report of the Working Party on the Accession of China*, (Nov. 10, 2001) [hereinafter WPR].

199 Zhou, et al., *supra* note 137, at 1013.

200 Zhou, *supra* note 144, at 11.

201 China's Accession Protocol *supra* note 140, at Annex 4.

202 *See*, *e.g.*, Chad Bown's proposal in HEARING ON US TOOLS TO ADDRESS CHINESE MARKET DISTORTIONS, UNITED STATES-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION, WASHINGTON DC (2018), 14

to focus on "policy space for defensive measures combined with bilateral and plurilateral negotiations over conflicts".[203]

In sum, the CAP imposes strict restrictions against non-commercial activities in China: By preventing the Chinese government from intervening in the market (Section 9.1, CAP) and more specifically, intervening through SOEs (Section 6.1, CAP, read with paragraph 6, WPR). However, the exact scope of application of these obligations remains untested at the WTO. Further, China has agreed to eliminate state trading in all goods barring Annex 2A (Section 5, CAP). Meanwhile, there is inherent flexibility under Article XVII:3, GATT, allowing states to bilaterally or plurilaterally negotiate a 'mutually advantageous' solution to Chinese STEs and designated monopolies.

C. CPTPP and the Competitive Neutrality Approach

The CPTPP forecloses the room for institutional diversity in two significant ways: first, by subjecting designated monopolies to national competition laws; and second, by establishing an independent relationship between the 'commercial considerations' requirement and the non-discrimination obligation. This sub-part starts by reviewing the above issues, followed by other key substantive CPTPP obligations on SOEs.

Recall that several PTAs, premised on competitive neutrality, impose antitrust obligations on SOEs and/or designated monopolies.[204] The CPTPP also requires designated monopolies (as opposed to SOEs in general) to refrain from "anti-competitive practices", *inter alia,* by subjecting them to national competition laws.[205] Furthermore, the CPTPP chapter on competition policy requires parties "to endeavour [emphasis added] to apply its national competition laws to *all* commercial activities in its territory".[206] As discussed in Part IV.A(3), this approach does not offer an institutionally sensitive path to WTO reform. WTO disciplines should focus on conduct that modifies the conditions of competition in relation to imports and exports, rather than enforcing the domestic competition laws on designated monopolies. What is also notable is that while the enforcement of domestic

<HTTPS://WWW.USCC.GOV/SITES/DEFAULT/FILES/TRANSCRIPTS/HEARING%20TRANSCRIPT%20-%20JUNE%208,%202018.PDF>.

[203] Shaffer, *supra* note 44, at 33.

[204] Free Trade Agreement, U.S.-Mex.-Can., July 1, 2020, art. 22.4(2)(d); Free Trade Agreement, E.U.-S.Kor, May 14, 2011, arts. 11.1, 11.2, and 11/4 OJ L 127/2011; Association Agreement, E.U.-Chile, Dec. 30, 2002, section 2 OJ L 352/2002; Free Trade Agreement, S.Kor-Chile, Apr. 1, 2004, art. 14.8.

[205] *See* CPTPP, *supra* note 145, at art. 17.4(2)(d).

[206] *Id.* art. 16.1.2.

competition laws is generally framed as a best endeavour obligation, it is a binding one in relation to designated monopolies.

Another way in which the CPTPP restricts the scope for institutional diversity is by providing an independent relationship between the non-discrimination obligation and the 'commercial considerations' requirement.[207] To avoid repetition, a detailed discussion on this issue can be found in Parts IV.A(3) and IV.A(4)(a)(i).

Coming to the non-discrimination obligation, the CPTPP clarifies that it accords both NT and MFN treatment to goods or services supplied by an enterprise of another Party.[208] As discussed previously, this is certainly an advance from the current Article XVII:1(a), GATT, which possibly excludes NT. Further, the scope of the non-discrimination obligation extends to: (i) SOE's purchase/sale of goods or services; and (ii) purchase/sale of goods or services from/to foreign-invested enterprises (FIE). Notably, while the CAP does not expressly extend the non-discrimination obligation to FIEs, Zhou *et al.* interpret paragraphs 44 and 45, WPR, as entailing such an obligation.[209]

Finally, Chapter 17, CPTPP, has no express provisions on regulatory discrimination. However, the CPTPP's investment chapter imposes the obligation to ensure NT (Article 9.6) and a minimum standard of treatment (Article 9.6) with respect to covered investments. Thus, the CPTPP prohibits regulatory discrimination between enterprises that are covered investments and SOEs of the host country. However, when it comes to the WTO, as discussed in Part IV.A(4)(b), extending NT to like enterprises encounters the vexed history of negotiating WTO disciplines on investment protection and is, thus, unlikely to find the support of developing countries.

All things considered, it is concluded that transposing CPTPP-based substantive SOE obligations to the WTO would significantly restrict the scope for institutional diversity and experimentation in relation to SOEs.

D. Conclusions

This part has argued that the WTO's ownership-neutrality approach offers a more balanced and institutionally sensitive framework for disciplining the grant of monopoly rights, exclusive privileges, and regulatory advantages to SOEs and STEs than the competitive neutrality model. Unlike the CPTPP-style approach, which prescribes structural obligations such as commercial orientation and competition law

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[207] *Id.* art. 17.4.
[208] *Id.* art. 17.4(1)-(c) and art. 17.4(2)(b)-(c).
[209] Zhou et al., *supra* note 137, at 10 and 11.

compliance, ownership-neutrality regulates outcomes through general principles of non-discrimination and market access, without mandating how states should organise their domestic economic institutions. This effects-based orientation allows Members, especially developing countries, to retain the flexibility to use SOEs for legitimate public policy objectives such as industrial upgrading, strategic resource management, and equitable service delivery so long as such measures do not distort the conditions of international competition.

Three core conclusions follow. First, the WTO's ownership-neutrality approach, coupled with the non-discrimination and market access norms, balances fair competition and institutional diversity more effectively than the competitive neutrality approach, which seeks to enforce antitrust norms on SOEs/STEs. This is because the selective application of anti-trust norms on SOEs, to the exclusion of POEs, would be the very antithesis of competitive neutrality. Furthermore, the WTO should discipline competition distortion only to the extent it modifies the competitive conditions in relation to foreign producers and service suppliers, rather than enforcing domestic competition norms across the board.

Second, decoupling the commercial considerations requirement from the non-discrimination obligation under Article XVII, GATT, would constrain the institutional choices of states concerning the corporate governance of STEs. At the same time, there is merit in the argument that NT should be an independent and primary obligation upon STEs under Article XVII, GATT, rather than relying solely on the attribution route under Article III, GATT, to improve the enforceability of disciplines on STEs, especially where state attribution is opaque or indirect.

Third, as illustrated in Table 3 below, the flexibilities under the CPTPP are comparable to the CAP, undercutting the argument that antitrust obligations need to be negotiated multilaterally to discipline Chinese SOEs. Moreover, the flexibility under Article XVII:3, GATT, could be used to negotiate bilateral or plurilateral agreements with China to discipline Chinese STEs.

Table 4: Comparison of Key Provisions Governing Monopoly and Exclusive rights, and Regulatory Advantages to SOEs/STE

	GATT/ GATS	GATT/GATS read with CAP	CPTPP
Regulation of anti-competitive behaviour	Non-discrimination and market access rules	• Elimination of state trading, except goods in Annex 2A • Non-discrimination and market access rules	• Enforcement of national competition laws on designated monopolies • Non-discrimination and market access rules
Relationship btw commercial considerations & ND rule	Dependant	Independent and additional	Independent and additional
Price controls	Not expressly regulated	Prohibited	Not expressly regulated
Scope of non-discrimination and market access rules	• Goods • Service sectors subject to NT and market access commitments	• Goods • Service sectors subject to NT and market access commitments[210]	All goods and services
Scope for future negotiation	Negotiations on a reciprocal and mutually advantageous basis	Not applicable	Not applicable

V. CONCLUSION

[210] *See* Ling-Ling He & Razeen Sappideen, *Reflections on China's WTO Accession Commitents and their Observance*, 4 J. WORLD TRADE 847, 857-858 (2009) (for an overview of the changes made by China to adjust to the GATS. After its accession to the WTO, China liberalised its market access in services, particularly by opening sectors like finance, telecommunications, and insurance to foreign investment).

In sum, the ownership-neutrality approach proves more effective in regulating monopoly rights, exclusive privileges, and regulatory advantages than the competitive neutrality model because it disciplines trade-distorting outcomes without prescribing a specific model of economic governance. This allows governments, especially in developing countries, to use SOEs as tools of industrial policy, public service delivery, or strategic resource management while still complying with WTO rules. In contrast, the competitive neutrality approach, as reflected in the CPTPP, seeks to impose antitrust obligations and commercial orientation requirements on SOEs and designated monopolies, irrespective of whether their conduct has actual cross-border trade effects. This shift from effects-based to structure-based disciplines risks narrowing the policy space available to states and undermines the institutional pluralism that WTO law seeks to protect.

This article has argued that WTO rules governing SOEs are best understood through the lens of balancing fair competition with institutional diversity. This is an approach grounded in ownership neutrality and operationalised through interface norms such as non-discrimination, market access, and subsidy disciplines.

Part II laid the normative and conceptual foundation for this argument. It demonstrated that the WTO system accommodates institutional pluralism and disciplines trade distortions through interface mechanisms rather than imposing rigid structural requirements on states. In this context, SOE regulation was framed as a contest between two competing approaches: the WTO's ownership-neutrality framework and the competitive neutrality approach. The study demonstrated that the existing WTO rules, while not perfect, provide sufficient flexibility to discipline SOEs while respecting institutional diversity. It further highlighted that the competitive neutrality approach, by enforcing antitrust obligations on SOEs, risks constraining states' autonomy and selectively targeting SOEs over private-owned enterprises (POEs), thereby undermining its own objective.

Part III examined financial advantages to SOEs under the SCM Agreement. It supported the AB's governmental authority test as a more suitable tool for identifying 'public bodies' than the control-based test endorsed in the CPTPP. The part proposed modest reforms, such as an illustrative list of indicators and an entity-level analysis, to enhance the clarity of the current test. It further demonstrated that China's WTO-plus obligations under the CAP already provide significant flexibility for disciplining Chinese SOEs, thereby weakening the case for CPTPP-style reform at the WTO.

Part IV analysed monopoly rights, exclusive privileges, and regulatory advantages. It concluded that the WTO's existing non-discrimination and market access provisions adequately regulate trade distortions arising from these forms of state support without requiring the imposition of antitrust norms. The part cautioned against decoupling the commercial considerations requirement from the non-discrimination

obligation under Article XVII of GATT, as doing so would constrain states' institutional autonomy. It also showed that while the CPTPP introduces more rigid disciplines, these come at the cost of narrowing legitimate policy space.

Taken together, the article concludes that reforming WTO rules on SOEs should not involve transposing the competitive neutrality framework into multilateral trade law. Instead, the WTO should pursue targeted improvements such as clarifying the "public body" test and strengthening interface norms that enhance its capacity to discipline trade distortions without undermining institutional diversity. This approach would allow the WTO to respond to contemporary concerns about SOEs, including those related to China, while preserving its foundational balance between trade liberalisation and domestic policy autonomy.