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Reforming WTO Rules on State-Owned Enterprises: SOEs and Financial Advantages

*Yingying Wu**

Abstract: State-owned enterprises (SOEs) are pervasive worldwide nowadays, particularly in the emerging countries. SOEs are currently more active in global markets than decades ago, engaging in cross-border trade and investment. Concerns, hence, have arisen, that there are negative effects on global markets associated with SOEs usually receiving various advantages, particularly, such as financial advantages. Meanwhile, SOEs often act as the givers of financial advantages. Current WTO rules are not sufficient to address the problem of SOEs as givers of financial advantages, and the problem of SOEs as recipients of financial advantages. This article tries to push the current WTO rules to their limits, and to find potential approaches to address those problems. The efforts, however, failed to some degree.

Hence, the article makes recommendations to improve them by three types of proposals, i.e., trade remedies proposals, trade rules proposals, and a competition rules proposal within the framework of the WTO. In the end, the author also engages with other academic articles on SOEs, and where they support the author's position or differ from it. Explanations are also given on how proposals made by the author are similar to or differ from what was proposed in the Trans-Pacific Partnership (TPP) and why the author's approach is better.

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TABLE OF CONTENTS

I. INTRODUCTION

State capitalism[1] is omnipresent in the global economy.[2] There are various forms of state capitalism, including state-owned enterprises, sovereign wealth funds and so on. This article's focus, however, is mainly government-controlled commercial enterprises (SOEs) that produce goods or services.[3] Looking at the data and information about SOEs' number, size, value, sector distribution and country distribution, it can be inferred that SOEs are pervasive globally, particularly in emerging countries.[4] Nowadays, the model of state capitalism has been embraced by many countries, such as China, Russia, Brazil and South Africa.[5] SOEs usually receive various advantages, which can be categorized into three types, i.e., financial advantages; monopolies and exclusive rights, such as production permits and quotas; and regulatory and other advantages, such as deregulation of SOEs in the fields of environment laws, domestic anti-trust laws, bankruptcy laws, etc. SOEs are expanding into global markets nowadays by trade and investment.[6] SOEs in emerging countries are more likely to engage in international trade than SOEs in countries that are members of the Organization for Economic Co-operation and Development (OECD) .[7]

Hence, political concerns in relation to SOEs arise frequently.[8] Nevertheless, the economic concerns relating to SOEs merit more attention, which is the focus of this article.[9] One type of economic concern is that giving advantages per se constitutes a concern, and the other is that the

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1 *See* Ian Bremmer, *State Capitalism Comes of Age: The End of the Free Market?,* 88 FOREIGN AFF. 3, 40 (2009) (There is an extensive literature that analyses state capitalism).

2 Przemyslaw Kowalski et al., *State-Owned Enterprises: Trade Effects and Policy Implications*, 9 (OECD Trade Policy Working Paper Grp., Paper No. 147, 2013).

3 *See* WORLD BANK, BUREAUCRATS IN BUSINESS: THE ECONOMICS AND POLITICS OF GOVERNMENT OWNERSHI 26 (Washington, DC: World Bank, 1995) (There might be some deviations across different definitions of SOEs).

4 *See* Grzegorz Kwiatkowski & Pawel Augustynowicz, *State-owned Enterprises in the Global Economy-Analysis Based on Fortune Global 500 List*, *in* MANAGING INTELLECTUAL CAPITAL AND INNOVATION FOR SUSTAINABLE AND INCLUSIVE SOCIETY, 27- 29 (2015).

5 Carsten Sprenger, *The Role of State Owned Enterprises in the Russian Economy*, (OECD Roundtable on Corporate Governance of SOEs. 2008), http://www.oecd.org/daf/ca/corporategovernanceprinciples/42576825.pdf.

6 Max Büge et al., *State-owned Enterprises in the Global Economy: Reason for Concern?,* VOX: CEPR'S POLICY PORTAL, (May 2, 2013), https://voxeu.org/article/state-owned-enterprises-global-economy-reason-concern.

7 Hejing Chen & John Whalley, *The State-owned Enterprises Issue in China's Prospective Trade Negotiations*, *the Centre for International Governance Innovation,* CIGI PAPERS NO. 48, 12 (Oct. 2014).

8 *See* Robert Loring Allen, *State Trading and Economic Warfare*, 24 L. AND CONTEMP. PROBS. 256, 259 (1959).

9 *Id.* at 261. For information about impacts of SOEs in trade, *see* Madanmohan Ghosh & John Whalley, *State-owned Enterprises, Shirking and Trade Liberalization* (NBER Working Paper Series, No. 7696. May 2000), http://www.nber.org/papers/w7696.

behavior of SOEs to the extent that they receive advantages constitutes a concern.[10] The first kind of economic concern relates to distortion of global markets, contamination of a level playing field and so on. The second economic concern relates to the SOEs' anti-competitive activities like avoiding restrictions on below-cost pricing, cross-subsidization, etc.[11] SOEs are more likely to engage in such anti-competitive behavior after they receive advantages.[12] The above concerns make sense due to basic differences between SOEs and private owned or controlled enterprises (POEs). In light of the relationship between SOEs and governments: i) SOEs can act as givers of advantages; ii) SOEs receive more advantages on more favored terms; iv) the behavior of SOEs after they receive advantages is different as opposed to POEs in that SOEs are more likely to pursue revenues, rather than profits, and have public objectives in addition to commercial objectives, while POEs are more likely to respond to market signals. As a consequence, SOEs pose challenges to current WTO rules with respect to financial advantages.

II. WEAKNESSES OF CURRENT WTO RULES ADDRESSING THE PROBLEM OF SOES RECEIVING FINANCIAL ADVANTAGES

Many financial advantages given to SOEs can be regulated by WTO rules, such as the Agreement on the Subsidies and Countervailing Measures (hereinafter as SCM Agreement). However, there are some specific issues concerning advantages given to SOEs that are not effectively covered by current WTO rules when they are applied in the context of SOEs. This is particularly true in the way in which the SCM Agreement defines certain terms relevant to determining the existence of a subsidy. These terms include the definitions of "a government or public body" "benefit" and "specific". The article will analyze the following issues, i.e., the problem of SOEs giving advantages to others (include both SOEs and POEs)[13]; the problem of SOEs in a downstream industry benefiting from SOEs in the upstream industry that receive advantages; and certain problems of SOEs as

[10] Sara Sultan Balbuena, *Concerns Related to the Internationalisation of State-Owned Enterprises: Perspective from Regulators, Government Owners and the Broader Business Community* 23-28, (OECD Corporate Governance Working Paper No.19, 2016).

[11] *See* Kenneth C. Baseman, *Open Entry Costs and Cross-Subsidization in Regulated Markets*, in GARY FROMM EDS., STUDIES IN PUBLIC REGULATION 329-70 (Cambridge MA: MIT Press, 1981); Timothy J. Brennan, *Cross-Subsidization and Cost Misallocation by Regulated Monopolies*, J. OF REG. ECON., 37 (March 1990).

[12] David E. M. Sappington & J. Gregory Sidak, *Anticompetitive Behavior by State-Owned Enterprises: Incentives and Capabilities*, in COMPETING WITH THE GOVERNMENT, ANTICOMPETITIVE BEHAVIOR AND PUBLIC ENTERPRISES, EDS., RICHARD R. GEDDES 7-14 (Hoover Institution Press, 2004).

[13] In fact, SOEs give more advantages to other SOEs than to POEs; nevertheless, the legal analysis is largely the same under the broader problem of SOEs as givers, in spite of some variations such as the "one entity approach (recipient approach)" as illustrated in the Section B.2 below.

receivers of financial advantages.

A. The Problem of SOEs Giving Advantages to Others

SOEs give financial advantages to others in terms of capital and inputs, such as raw materials, oil, gas, metals, minerals, electricity, water, better access to railways, etc. For a subsidy to exist for purposes of the SCM Agreement, there must be a financial contribution by a government or public body. However, there is no clear answer to the question of whether SOEs can be considered to be public bodies and therefore givers of subsidies by looking at legal texts of the SCM Agreement. Three interpretative approaches may be utilized to address the problem within current WTO rules. However, all encounter difficulties.

1. The "Private Body" (entrust/direct) Approach within the SCM Agreement

Article 1.1(a)(1)(iv) of the SCM Agreement provides that "a subsidy shall be deemed to exist if: (a)(1) there is a financial contribution by a government or any public body… i.e. where:…(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above". The "private body" approach within the SCM Agreement treats an SOE as a private body "entrusted or directed by a government" to provide a financial contribution. Hence, benefits given by SOEs to another entity can be challenged as subsidies under the SCM Agreement as long as two conditions are met, i) a link of "entrustment or direction" between the government and the SOE in question;[14] and ii) the SOE is deemed to be a private body.

The First Condition

The "private body" approach encounters difficulties in satisfying the first condition in three senses. First, in WTO jurisprudence, it is complicated to prove an "entrustment or direction" link between a government and an SOE.[15] The Panel in *Korea–Commercial Vessels* rejected the argument that "some degree of government ownership, by itself, constitutes proof of government entrustment or direction."[16] In essence, a certain degree of compulsion is needed. The mere facts that the government is the controller of an entity cannot automatically imply that "a

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[14] Ru Ding, *'Public Body' or Not: Chinese State-Owned Enterprise*, 48 (1) J. OF WORLD TRADE 167, 169 (2014).

[15] WTO Panel Report, *United States-Measures Treating Exports Restraints as Subsidies (US-Export Restraints), WT/DS194/R*, ¶¶ 8.29-8.31 (Jun. 29, 2001).

[16] WTO Panel Report, *Korea-Measures Affecting Trade in Commercial Vessels (Korea-Commercial Vessels), WT/DS273/R*, ¶ 7.406 (Mar.7, 2005) [hereinafter Korea Commercial Vessels Panel].

government gives responsibility to," "a government exercises its authority over" or "threat or inducement." Consequently, neither do those facts imply the existence of the link of "entrustment or direction by a government." Second, although the link of "entrustment or direction by a government", to some degree, has been relaxed in *US-Countervailing Duty Investigation on DRAMs,* the typical non-transparent relationship between the government and SOEs makes it hard to get evidence of a specific "entrustment and direction" in a particular case.

Third, even if the use of circumstantial evidence is permitted, the conclusion is uncertain. On one extreme, there is exclusively private conduct, and on the other extreme, there is exclusively governmental conduct.[17] Somewhere in the middle, there is a mixture such as a situation might be found where an SOE engages in behavior deviating from that of ordinary market players, such as providing goods or services at lower than market prices or on terms unfavorable to itself. It is hard to categorize the above situation as exclusively private conduct. One approach adopted by the Japanese investigating authority (JIA) in *Japan–DRAM (Korea)* may shed light on the situation. In that case, the factors of "non-commercial reasonableness" and "the government's capacity to influence" are regarded as relevant circumstantial evidence to establish government intervention by the investigating authority, and the Panel and Appellate Body (AB) didn't reject it.[18] The Appellate Body agreed that, at least in principle, *government pressure* on private creditors to restructure their obligations could amount to "directing" a private body to engage in a "direct transfer of funds" and thus amount to a subsidy.[19] In cases of SOEs giving advantages, the factor of "non-commercial reasonableness" and pressure from the government may be found, as well as other circumstantial evidence as opposed to a case involving POEs. For example, state ownership and the dynamics among the government, the ruling Party and SOEs, are all relevant circumstantial evidence. However, some of these relevant factors have been recognized by WTO cases while others have not and the significance of each factor is not clear.

The Second Condition

Moreover, the phrase "entrusts or directs a *private* body to carry out" in Article 1.1(a)(1)(iv), clearly requires that the entity that is directed or entrusted by a government is a private body. However, it can be disputed whether an SOE is "a private body" in the sense of Article 1.1(a)(1)(iv).[20]

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17 *See* AB Report, *US — Countervailing Duty Investigation on DRAMs, WT/DS296/AB,* ¶ 107 (2005(.

18 AB Report, *Japan-DRAMs (Korea), WT/DS336/AB/R,* ¶¶ 117, 119 and 138 (2007).

19 *Id*. ¶ 123.

20 Julien Chaisse & Tsai-yu Lin (eds.), *International Economic Law and Governance: Essay in* HONOUR OF MITSUO MATSUSHITA 243 (2016).

From a standpoint of pure logic, a spectrum can be observed from on the one extreme, a private body without any state-owned shares, and on the other extreme, a government. This spectrum is based on the statement by the AB in *US–Anti-Dumping and Countervailing Duties (China)* that "the term 'private body' describes something that is *not* 'a government or any public body.'"[21] The definition of the word *"private"* includes "of a service, business, etc., provided or owned by *an individual rather than the state or a public body."*[22] An inference can be made logically that SOEs are somewhere in the middle between the two extremes, or at least SOEs are not private bodies.

In summary, the "private body" approach is not sufficient to address the problem of SOEs giving advantages to others, given that the standard for satisfying the "entrust/direct" requirement is strict, and state ownership or state control of an entity cannot automatically imply the existence of "entrustment/direction", even if relevant circumstantial evidence is taken into consideration. In addition, it is hard to argue that SOEs are private bodies.

2. The "Public Body" Approach within the SCM Agreement

Subsidies granted by SOEs may be subject to the SCM Agreement if it can be demonstrated that the SOE at issue is a "public body", and thereby subject to the same rules that restrain a government from granting subsidies. The WTO legal texts don't mention explicitly that SOEs giving advantages to others can be covered by the SCM Agreement, and neither do they mention whether SOEs can be the givers of subsidies, nor do they give a definition of the phrase "a public body".[23] Some authors have examined the meaning of the term "public body" from the perspectives of the texts, the context and the purpose and the negotiating history of the SCM Agreement, and found that object and purpose of the SCM Agreement do not help a lot in interpreting the term "public body", and the negotiating history is too ambiguous to rely upon.[24] Four legal standards have been presented or debated so far in WTO jurisprudence in the determination of what constitutes a public body.[25]

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[21] AB Report, *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, US – Anti-Dumping and Countervailing Duties (China)*, WT/DS379/AB/R, ¶ 291 (2011). [hereinafter Anti-Dumping and Countervailing Duties Appellate Body Report].

[22] AB Report, *US – Anti-Dumping and Countervailing Duties (China)*, WT/DS379/AB/R, ¶¶ 291-92 (2011).

[23] *See* Agreement on Subsidies and Countervailing Measures.

[24] *Id*.

[25] These four standards have been discussed in the following cases: Korea Commercial Vessels Panel Report, *supra* note 16; Panel Report, *US—Anti-Dumping and Countervailing Duties (China)*, WTO Doc. WT/DS379/R (adopted Oct. 22, 2010) [hereinafter Anti-Dumping and Countervailing Duties Panel Report]; Anti-Dumping and Countervailing

First, the "government organ/agency" standard, which views a public body as functionally equivalent to a government organ or agency, which would mean that SOEs are not public bodies, was rejected by panels and the AB.[26] Second, the "majority ownership" standard, which views a public body as an entity that is majority government owned, and hence SOEs are public bodies, was rejected by the AB.[27] Third, the "government control" standard, adopted by two panels, which views SOEs as public bodies since they are controlled by the government, was rejected by the AB.[28] Finally, the "vested governmental authority" standard, which was adopted by the AB, views a public body as an entity that possesses, exercises, or is vested with governmental authority. The last two standards of "government control" and "vested governmental authority" generated much heated debate and controversy. However, both standards are limited in their ability to address the problem of SOEs giving subsidies to others SOEs as analyzed below.

The "Government Control" Standard

Although this standard was rejected by the AB, many commentaries and people support this standard. Hence, it is worth being discussed here. It can be summarized that under the "government control" standard, evidence of "majority government ownership" *alone* is *sufficient* to satisfy the "government control" standard, and hence, to establish the entity in question is a public body, *unless it can be proved otherwise* by the entity and the government concerned that the control is absent.[29] Nevertheless, the Panel that adopted the "government control" standard also considered other factors, such as the existence of meaningful control and the nature of the entity. In *Korea Commercial Vessels*, the Panel found that the entity in question was a public body *primarily* based on the evidence that it was 100

Duties Appellate Body Report, *supra* note 21. Recently cases reaffirm: Panel Report, *United States—Countervailing Duty Measures on Certain Products from China*, WTO Doc. WT/DS437/R (adopted July 14, 2014) [hereinafter US—Countervailing Measures (China) Panel Report]; Appellate Body Report, *United States—Countervailing Duty Measures on Certain Products from China*, WTO Doc. WT/DS437/AB/R (adopted Dec. 18, 2014) [hereinafter US—Countervailing Measures (China) AB Report]; Panel Report, *United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WTO Doc. WT/DS436/R (adopted July 14, 2014) [hereinafter US—Carbon Steel (India) Panel Report]; AB Report, *United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB (adopted Dec. 8, 2014) [hereinafter US—Carbon Steel (India) AB Report].

[26] *See* Anti-Dumping and Countervailing Duties Appellate Body Report, *supra* note 21, ¶ 321; Anti-Dumping and Countervailing Duties Panel Report, *supra* note 25, ¶¶ 8.55, 8.59.

[27] *See* Anti-Dumping and Countervailing Duties Appellate Body Report, *supra* note 21, ¶ 277.

[28] Korea Commercial Vessels Panel Report *supra* note 16, ¶ 7.50; Anti-Dumping and Countervailing Duties Panel Report, *supra* note 25, ¶ 8.73.

[29] Anti-Dumping and Countervailing Duties Panel Report, *supra* note 25, ¶¶ 8.134-136.

percent owned by the government or other public bodies.[30] Nevertheless, the Panel also stated that the operations of the entity were conducted by presidents who were appointed and dismissed by the government, and mentioned that the government enjoyed extensive control over the parameters within which the entity in question (KEXIM) must operate. The Panel found that KEXIM would follow whatever the government directed or asked it to do.[31] Also, the Panel considered that the "public" nature of KEXIM is further confirmed by KEXIM's own perception of itself.[32]

Therefore, the author views that the Panel in this case also considered the factor of "meaningful control." However, the factor of meaningful control was regarded as unnecessary, and the factor of "formal (i.e., majority voting) control" alone is decisive and sufficient to find the existence of a public body.[33] In addition, the panel took the view that whether "an entity [was] operating on a commercial basis" was not relevant for deciding whether the entity was a public body. Rather, whether it "operated on a commercial basis" was relevant for the "benefit" analysis in the subsidization analysis of the SCM Agreement.[34] It also considered the "pursuance of public policy objectives" as an unnecessary factor in finding a public body.[35]

The "Vested Governmental Authority" Standard

The "vested governmental authority" standard takes the view that the relevant factors to establish vested governmental authority include ownership, control, meaningful control, appointments of managers in high positions, and policy mandates, all of which need to be examined.[36] One factor is not sufficient and determinative.[37] In *U.S.–China AC/CVD*, the AB viewed the factor of "meaningful control" as relevant evidence for exercising governmental functions, by stating that "where the evidence shows that the formal indicia of government control are manifold, and there

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30 Korea Commercial Vessels Panel Report *supra* note 16, ¶ 7.172;

31 Korea Commercial Vessels Panel Report *supra* note 16, ¶¶ 7.50-56.

32 Korea Commercial Vessels Panel Report *supra* note 16, ¶ 7.50.

33 As to the distinction between "formal control" and "meaningful control," the former can be evidenced by majority ownership or majority voting, while the latter means that the daily operation of the entity and decision-making of the entity is not independent. For instance, under "formal control," the managers of the entity enjoy large discretion in terms of making decisions regarding daily operation of the entity, without much interference from the majority owner. The managers or CEO are more likely to be independent and behave like professional managers, although their appointments are largely influenced by the majority owner. Under "meaningful control," the shareholders (majority owners) have extensive control over the mangers' decision making in daily operation of the entity.

34 Korea Commercial Vessels Panel Report *supra* note 16, ¶¶ 7.45-7.50.

35 *Id.* ¶7.50.

36 Anti-Dumping and Countervailing Duties Appellate Body Report, *supra* note 21, ¶¶ 349-350, 355.

37 US—Carbon Steel (India) AB Report, *supra* note 25, ¶¶ 4.20, 5.37.

is also evidence that such control has been exercised in a meaningful way, then such evidence may permit an inference that the entity concerned is exercising governmental authority."[38] It might be inferred from this AB's statement that evidence of formal control plus meaningful control may satisfy the standard of vested authority. However, the case of *US–Carbon Steel (India)* clarifies "meaningful control" and its relative weight. It held that "meaningful control" is relevant, but not decisive or exclusive. The substantive standard should be distinct from the evidentiary standard.[39] The AB thinks it is wrong to construe the term "public body" to mean any entity that is "meaningfully controlled" by a government.[40] In other words, the factor of "meaningful control" only has evidential weight, rather than the weight of serving as the substantive standard.

Limitations in the Context of Chinese SOEs

There are limitations in using these two standards to address the problem of SOEs giving financial advantages to others. First, the consequences of the "government control" standard may give rise to the concern of legal fragmentation at the international level if SOEs are deemed to be public bodies under WTO rules while in the international business community, it is widely accepted that the behaviors of SOEs, who are doing merely commercial activities, or who are merely commercial entities, cannot be attributed to the state. In the international investment area, private entities can bring investment claims against the host state under bilateral investment treaties or free trade agreements, while the state is not allowed to bring such claims. In practice, SOEs usually have the standing to bring such investment claims. To that end, SOEs are not deemed to be governments, and the behavior of SOEs---bringing an investment claim---is not attributed to their government. Second, the consequences of the "government control" standard may give rise to the concern of legal fragmentation at the WTO level. It creates different treatments of SOEs within the WTO, i.e., treating SOEs as public bodies in the context of subsidies while treating SOEs as non-public bodies in the context of non-subsidies.

In contrast, the "vested governmental authority" standard creates uncertainty. The answer remains unclear as to the question of whether SOEs can be deemed to be public bodies, in that the answer is dependent on the evidence found in every case. Only in one case has the AB held that state-owned banks (SOBs) are deemed to be public bodies, while the AB in the same case decided that other SOEs are not public bodies within the

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[38] Anti-Dumping and Countervailing Duties Appellate Body Report, *supra* note 21, ¶ 318.

[39] US—Carbon Steel (India) AB Report, *supra* note 25, ¶ 4.37.

[40] *Id.*

SCM Agreement.[41] The AB in *US–Carbon Steel (India)* held that the National Mineral Development Corporation is not a public body within the SCM Agreement.[42] Furthermore, it seems that the AB doesn't attach different weights to different factors, except for stating that all relevant factors shall be examined conjunctively. It provides little guidance for practice. For instance, the AB in *US–China AD/CVD* relied heavily on the "meaningful control" factor in finding SOBs as public bodies within the SCM Agreement,[43] while the AB in *US–Carbon Steel (India)* clarified that the "meaningful control" factor, which is similar to other relevant factors, shall not be assigned a decisive weight.[44] However, in the latest case of *US-Countervailing Measures (China)*, the Panel seemed to follow the earlier case, noting that the "meaningful control" factor was weighted significantly by the AB in *US–China AD/CVD*.[45] It might be better to clarify, at least, the weight assigned to each factor.

Moreover, the AB explained that among other relevant factors to be considered are the legal order,[46] ". . . economic environment prevailing in the country, the scope and content of government policies relating to the sector in question, etc."[47] However, the literature and WTO jurisprudence to date have not analyzed in detail the specific factors considered by each standard, or the extent to which they overlap with one another.[48] The elements mentioned above are not assigned significant weights except for "relevance." Most cases are brought by a WTO member complaining about the countervailing measures imposed on products exported by their SOEs to an importing country. Hence, panels evaluate whether the investigating authority in the importing country has conducted a thorough examination through all relevant factors in determination of whether the SOE in question constitutes a public body. In that sense, it remains to be seen whether panels in future cases will state that factors like economic environment prevailing

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[41] Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, ¶¶ 347, 356, WTO Doc. WT/DS379/AB/R (adopted Mar. 11, 2011).

[42] US—Carbon Steel (India) AB Report, *supra* note 25, ¶¶ 4.1-4.55.

[43] Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, *supra* note 37, ¶ 318.

[44] US—Carbon Steel (India) AB Report, *supra* note 25, ¶ 4.37.

[45] US Countervailing Measures (China) Panel Report, *supra* note 25, ¶ 7.74.

[46] US—Carbon Steel (India) AB Report, *supra* note 25, ¶ 4.54; US—Carbon Steel (India) Panel Report, *supra* note 25, ¶ 7.66, in which the public body issue was not appealed since the panel applied the "vested governmental authority" standard.

[47] US—Carbon Steel (India) AB Report, *supra* note 25, ¶ 4.29.

[48] For more debate about whether SOEs are "public bodies" within the SCM Agreement, *see* Ding, *supra* note 14; Mark Wu, *The "China, Inc." Challenge to Global Trade Governance*, 57 HARV. INT'L L.J. 261 (2016). For critics of AB's standard from the perspectives of interpretative method and legal implications, *see* Michel Cartland, Gerard Depayre & Jan Woznowski, *Is Something Going Wrong in the WTO Dispute Settlement?* 46 J. WORLD TRADE 979 (2012).

in the country, the scope and content of government policies relating to the sector in question, should be examined, or whether panels will further give different weights respectively to each factor.

In the context of Chinese SOEs, many factors seem to be relevant: the factor of which industry the SOE is in; the factor of whether there are related governmental policies to encourage and support the industry concerned; the factor of market structure of the industry and the market power enjoyed by the SOE, particularly whether the SOEs benefit from monopoly and exclusive rights; the factor of the extent to which various advantages are granted to the industry, etc. These factors should play significant roles in the determination of whether a Chinese SOE is a public body or not, since these factors are typical in the context of Chinese SOEs.

Taking the factors of the industry an SOE is in and whether the SOE has been granted monopolies as an example, except for SOBs which have already been found to be public bodies, SOEs in strategic industries, such as coal, airline and aviation, telecommunication, petroleum and petrochemical, shipping and manufacturing of ships, and electricity, are more likely to satisfy both the "government control" standard and "vested governmental authority" standard. In contrast, SOEs in pillar industries such as steel, non-ferrous metal, automotive and auto parts, machinery and equipment, information technology, are less likely to satisfy the "vested governmental authority" standard, although the "vested governmental authority" standard may be satisfied in industries with SOE blocs, such as in the steel, non-ferrous metals, and automotive industries. One major difference in the above two sets of industries lies in the fact whether SOEs have monopolies or exclusive rights in the industry they are in respectively, and whether the competition is limited in favor of SOEs to the detriment of POEs in terms of entry, importation, exportation, distribution, and so on. For instance, in cases of *China–US AD/CVD* and *China–US AD*,[49] the products under investigation were petrochemicals, rubber, steel, tires, pipe and tube, woven sacks, thermal paper, kitchen appliance, lawn groomers, print graphics, etc., produced by SOEs who are in different industries, with different market power and different degrees of government support.[50] These factors should warrant significant considerations and different treatment as to the question whether the SOE in question constitutes a public body, but current WTO case law does not distinguish them.

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[49] Panel Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China,* WTO Doc. WT/DS379/R (adopted Oct. 22, 2010); US Countervailing Measures (China) AB Report, *supra* note 25.

[50] *See* Yu Xiangming (于祥明), *Yige Hafo Anli De Zaisikao: Zhongguo Shuini Chanye Fazhan (一个哈佛案例的再思考：中国水泥产业发展)*, SHANGHAI SEC. NEWSPAPER, Nov. 7, 2012, http://finance.sina.com.cn/stock/hyyj/20121107/025313597055.shtml.

3. The Approach of Regulating the Behavior of SOEs

The above two approaches of "private body" and "public body" are in the context of subsidies within the SCM Agreement. This section discusses the approach of regulating the behaviors of SOEs in the context of WTO rules generally, and protocols made by Members in particular. Giving advantages to others by SOEs can be categorized as one behavior the SOEs conduct. Such conduct may give rise to the level of discriminatory behavior or decision-making by the SOEs based on non-commercial considerations. Hence, the approach of regulating the behaviors of SOEs can address the problem of SOEs giving advantages to others, particularly providing goods or services at lower prices or on favorable terms. Paragraph b of Article 3 of China's Accession Protocol can be resorted to since it provides that the prices and availability of goods and services provided by public or *state enterprises*, in areas including transportation, energy, basic telecommunications, other utilities and factors of production, should be in conformance with the non-discrimination principle.[51] A claim under this provision needs to be based on differentiated pricing practices.

However, the specific commitment is only applicable to China. Besides, the non-discriminatory obligation only works in domestic markets. Moreover, this particular rule only works in one segment of the domestic market where FOEs are present. In other words, it only works in a situation where SOEs give advantages to others who are in competition with FOEs (foreign individuals and enterprises and foreign-funded enterprises) that produce goods or services in China. In practice, there are few FOEs in the Chinese domestic market in the abovementioned segments. It doesn't work in situations where SOEs give advantages to other SOEs who are in competition with imported goods, or where SOEs give advantages to other SOEs who export goods or services to importing markets. What's worse, WTO rules currently do not regulate the behavior of SOEs in general, let alone the obligation of commercial considerations for SOEs, except for those SOEs with exclusive trading rights.

4. Conclusion of Section A

In summary, the problem of SOEs giving advantages to other SOEs is not sufficiently addressed by the current WTO rules in that the "private body" approach within the SCM Agreement faces difficulty in proving the link of entrustment or direction between the government and the SOE in a particular case, and in proving that SOEs are private bodies. The "public body" approach also fails in that the legal standards and evidential factors for the question of what constitutes a public body have limitations in WTO jurisprudence. Particularly in the context of Chinese SOEs, insufficient attention is given to the factors of which industry the SOE is in and of

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[51] WTO, Protocol on the Accession of the People's Republic of China, WT/L/432, 23 Nov. 2001, art. 3.

whether the SOE has been granted monopolies or exclusive rights, and other factors that are typical in the context of Chinese SOEs. The behavior approach also failed in the sense that the specific commitment made by China only applies partially to the situation where SOEs give advantages to other SOEs. The WTO rules, in general, do not regulate the behavior of SOEs directly.

B. The Problem of Upstream Subsidies in the Context of Chinese SOEs

Input subsidies and upstream subsidies refer to subsidies granted to an input purchased by the downstream industry, which is in competition with imports or which exports to foreign markets.[52] There are four situations of concern to my analysis, i.e., situation 1 is where SOEs dominate both the upstream and the downstream industries; situation 2 where POEs dominate the upstream industry and SOEs dominate the downstream industry; situation 3 where SOEs dominate the upstream industry and POEs dominate the downstream industry; and situation 4 where POEs dominate both the upstream and the downstream industries. Typically, when most literature discusses whether upstream subsidies can be deemed to be subsidies for the downstream industry and analyzes the difficulties encountered under the SCM Agreement, it is done in the context of situation 4.

Situations 1, 2, and 3 are worthy of attention. They arise when SOEs are either the major player in the upstream industry or the downstream industry or both. Particularly in situation 1, for instance, in the context of Chinese SOEs, the coal industry is the upstream industry in relation to the steel industry, in which SOEs are the major players in China.[53] Actually, the steel industry receives advantages of three types: i) SOEs in the coal industry receive advantages from having better access to railways *for transporting coal used for generating electricity*, and the steel industry gets better deals from the electricity companies for purchasing electricity in large quantities directly rather than purchasing on-grid electricity; ii) SOEs in the coal industry receive advantages from having better access to railways for transporting coal used for producing steel; and iii) the coal industry also gets compensation specifically for supporting the steel industry by providing coal at lower prices. Examples can be found in Pinding Shan Tian AN Coal Ltd. (an SOE).[54] This situation is also typical

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52 GARY CLYDE HUFBAUER & JOANNA SHELTON-ERB, SUBSIDIES IN INTERNATIONAL TRADE (The MIT Press, 1984).

53 Organisation for Economic Co-operation and Development, State Enterprises in the Steel Sector, Directorate For Science, Technology and Innovation Steel Committee, DSTI/SC(2017)10/FINAL, Dec. 20, 2018, ¶¶ 14-9. http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/SC(2017)10/FINAL&docLanguage=En

54 The example of Pingding Shang Tian An Coal Ltd receiving compensation for providing lower prices of coal can be found in its annual financial reports (Shanghai Stock Exchange) from 2008-2014, which can be found at http://english.sse.com.cn/listed/company/cannouncements/index.shtml?COMPANY_CODE=601666

in industries of chemicals, petrochemicals, and aluminum. Four approaches may be put forward to address this situation through current rules. Nonetheless, all of them encounter difficulties in the context of Chinese SOEs.

1. The Subject Approach

The subject approach treats the upstream SOEs as public bodies, who are givers of subsidies through the provision of goods or services. This approach can apply to situation 1 and 3. However, the difficulty of the approach has been discussed in the section above.

2. The Recipient Approach

The recipient approach is to treat the upstream SOEs and downstream SOEs as related entities as if they were part of one group of related companies. In such a case, both the upstream and downstream SOEs are viewed as direct recipients of the subsidies. The Panel in *US-Softwood Lumber III* concluded that where there is "*complete identity* between the tenure holder/logger and the lumber producer, no pass-through analysis is required."[55] In *United States–Softwood Lumber IV*, it was held that if two industries operate at arm's length, a "benefit pass-through" analysis is needed.[56] It can be inferred that if the two producers do not operate at arm's length or if there is complete identity between the two producers, a "benefit pass-through" analysis is not necessary since these two producers can be deemed to be one. In that sense, the producers of the processed products are also direct recipients of subsidies.

The same logic can be applied to the case of SOEs to examine whether SOEs in the upstream industry and downstream industry are related or not. It can be argued that the state is the major shareholder or controller of the two SOEs, and hence, SOEs in the upstream industry and downstream industry can be treated as related entities or their transactions can be viewed as not at arm's length in this regard. Furthermore, from the perspective of accountancy, there might be one financial report for the whole corporate group. This argument works well especially in a situation where the parent SOE is subsidized for its products, which are inputs for subsidiary SOEs, who produce the processed products. For instance, in natural resources industries, vertical integration is common in China. The SOE in the exploration sector is usually a sibling of an SOE in the processing sector. To that end, the upstream subsidies can be deemed to be subsidies for the downstream industry. Subsidization of inputs, produced by the upstream SOEs, can be deemed to be subsidization of the final product, produced by

55 Panel Report, *United States — Sections 7.72, 7.74 of the Softwood Lumber III*, WTC Doc. WT/DS236/R (adopted Sept. 27, 2002).

56 Appellate Body Report, *United States –Softwood Lumber IV*, ¶¶ 152-66, WTC Doc. WT/DS257/AB/R (adopted Jan. 19, 2004).

the downstream SOEs.

However, opposing arguments exist that the key test for whether two entities are related or not lies in whether the transaction in question is conducted at arm's length. It is not reasonable to treat all sibling SOEs as one entity ignoring the nature of transactions in practice. In addition, from a business viewpoint, it may be difficult to demonstrate that SOEs in the upstream industry and SOEs in the downstream industry are in one group, particularly if they operate in different industries, produce different products, keep separate accounts and so on.

3. The Approach of "Benefits Pass-Through"

The analysis of "benefits pass-through" examines "whether subsidization of the upstream industry results in the provision of inputs by the upstream industry at a cheaper price than the price prevailing on world markets."[57] In the context of SOEs in the similar situation of subsidized inputs, the "benefits pass-through" analysis is needed to prove that there are benefits flowing from the upstream industry to the downstream industry, evidenced by, for instance, low pricing of goods or services provided by the upstream SOEs to the downstream SOEs. If the upstream subsidies (provided to coal industry) led to prices of coal lower than the normal market prices in China than world prices, a potential subsidy might exist with respect to the downstream industry such as the steel industry.

Taking the steel industry as an example, first, SOEs in the coal industry receive advantages from railways (all are SOEs) in having better access to railways for transporting their coal designated for generating electricity, and prices of coal sold to electricity companies (almost all are SOEs) are lower than the prices when coal is sold to other sectors. The steel companies usually approach electricity companies for lower priced electricity. Second, SOEs in the coal industry also receive advantages from railways (SOEs) in having better access to railways for transporting their coal designated for producing steel. Third, in some cases, the coal industry receives subsidies specifying that it is compensation for providing coal at lower prices to the steel industry.[58] Hence, the government imposes conditions on the subsidized industry (the majority of which are SOEs) and requires them to sell at lower prices to the downstream industry (the majority of which are SOEs). The consequence is that the steel industry benefits from lower cost coal, electricity and transportation.

As a practical matter, it be may difficult to show that benefits flow

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[57] Panel Report, *United States — Section 7.71 of the Softwood Lumber III*, WTC Doc. WT/DS236/R (adopted Sept. 27, 2002); WILLIAM R. CLINE (ED.), TRADE POLICY IN THE 1980s 352-3 (MIT Press, 1st ed. 1983).

[58] Usually the title of subsidies granted in this regard specifically state that the subsidies are for compensating the coal industry for their encouraging and supporting the steel industry.

from the upstream sector to the downstream sector through lower pricing. Due to the transparency problem, it is hard to find whether there are explicit governmental policies by different levels of authorities. In addition, it is difficult to prove that inputs are provided at cheaper prices than the prices prevailing on world markets or prices under market conditions.

4. The Approach of Channeling Through "Income or Price Support"

The last approach is related to a specific situation where subsidies are granted to the upstream SOEs for the purpose of maintaining prices in the domestic market. This situation may involve "income or price support" within the meaning of Article 1.1(a)(2) of the SCM Agreement, which provides that "a subsidy shall be deemed to exist if there is any form of income or price support in the sense of Article XVI of the GATT 1994". Subsidies to the upstream SOEs can be viewed in totality as a scheme of income support, for instance, which leads to lower prices of coal/energy for the steel industry. However, while this GATT provision was incorporated into the SCM Agreement, it is mainly of historical interest, cases today are normally brought under the more detailed provisions of the SCM Agreement.[59]

5. Conclusion of Section B

As for the problem of SOEs in the downstream industry which benefit from transactions with subsidized SOEs in the upstream industry, the various approaches that are available within the current WTO rules are all inadequate. In respect of the subject approach, it may be easy to find some SOEs are public bodies while it is hard to conclude the same for other SOEs depending on the industry/sector they are in and the nature of the SOE. In respect of the recipient approach, it is hard to treat two separate SOEs in the upstream and downstream sectors as one group of related companies although some arguments can be made. In respect of the "benefits pass-through" approach, it is difficult to find evidence of lowering prices. The approach of "price or income support" is mainly of historical interest.

C. The Problem of Chinese SOEs as Receivers of Financial Advantages

1. SOEs Receive Financial Advantages Prior to Their Privatization

In a situation where a POE receive financial advantages and shareholders of the POE changed afterward, no controversy would arise whether financial advantages received previously would be affected by the change of shareholders. However, the analysis may be different if the change of shareholders is privatization. For instance, Chinese SOEs receive

[59] General Agreement on Tariffs and Trade 1994, Article XVI, 61 Stat. A-11, 55 U.N.T.S. 194.

financial advantages prior to privatizations. After privatization, some of these entities continue to engage in international markets. Problems arise if benefits from subsidies granted to SOEs prior to privatization continue to exist, and hence, the entity after privatization will have comparative advantages over its competitors.

The WTO rules in this regard are confusing. In the early cases of *US–Lead and Bismuth II* [60] and *US–Countervailing Measures on Certain EC Products*, it was held that a full privatization at arm's length and for fair market value of an SOE that received prior subsidies can give rise to a rebuttable presumption that the benefit conferred by prior subsidies is extinguished.[61] However, in *EC–Civil Aircraft*, which concerns partial privatization, the AB divided in three ways. i) One position is that the presumption of extinction only applies to full privatization, rather than partial privatizations or private-to-private sales; ii) The second position views that the presumption rule also applies to partial privatization and private-to-private sales. Nevertheless, this position noted the issue of a transfer of control to the new owners; iii) The third position is that in a sale of shares, regardless whether there is a transfer of control or not, the value of assets of the company, to which the shares attach, does not change at all, including the benefit of any subsidy granted, which continues to benefit the recipient.[62]

Hence, as for the privatizations with a transfer of control, the uncertainty continues in respect of whether benefits of the subsidies would be extinguished under the three positions. To that end, the legal problem remains that in cases of partial privatization of Chinese SOEs when there is a transfer of control, it is not clear whether subsidies received prior to privatization can still be subject to the SCM Agreement given that it is not clear based on current jurisprudence whether the legal element of "benefit" as required under the SCM Agreement can be established or not.

2. The Element of "Benchmark Prices"

In order to find whether there is a subsidy, a benchmark is needed to examine whether benefits are given to recipients that are otherwise not

[60] Appellate Body Report, *United States —of the Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* (*US – Lead and Bismuth II)*, WTC Doc. WT/DS138/AB/R (adopted May 10, 2000), ¶ 68.

[61] Appellate Body Report, *United States — Countervailing Measures Concerning Certain Products from the European Communities (US – Countervailing Measures on Certain EC Products)*, ¶117, WTC Doc. WT/DS212/AB/R (adopted Dec. 9, 2002); Panel Report, *European Communities — Section 7.248 of the Measures Affecting Trade in Large Civil Aircraft (EC and Certain Member States — Large Civil Aircraft)*, WTC Doc. WT/DS316/R (adopted June 30, 2010).

[62] *US-Countervailing Measures on Certain EC Products, supra* note 61, ¶¶ 730-2.

available under market conditions.[63] In cases of SOEs receiving advantages, the market in which SOEs operate may be distorted, particularly where SOEs are monopolists or dominate the market. How is the factor, for instance, that the state dominates the sector through SOEs, relevant in finding that Chinese prices, in general, do not "permit a proper comparison"?[64]

The current standard for using an alternative benefit benchmark is relatively strict. Article 15(b) of China's Accession Protocol, which does not have an expiration date, allows choosing a different benchmark if market economy conditions are not prevailing or the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks.[65] However, the burden of proof is on the importing country to explain the choice of a different benchmark. First, the standard focuses on the outcome, i.e., whether the proposed benchmark is market-determined, rather than a function of the source of the price.[66] Second, it was held in *US Countervailing Measures (China)* that there is no per se rule that the fact the government is the predominant supplier proves price distortion.[67] "Evidence relating to government ownership of SOEs and its respective market shares does not, in and of itself, provide a sufficient basis for concluding that in-country prices are distorted."[68] Finally, factors relating to the structure of relevant market, whether the market is dominated by the state, SOEs' respective market shares, whether systematic subsidies are associated with the market, etc., are only deemed to be *relevant factors*, rather than decisive factors, in finding whether the government influences the pricing conduct of SOEs.[69]

In sum, in cases of SOEs receiving advantages, although the market in which SOEs operate may be distorted, particularly where SOEs are monopolists or dominate the market, it is usually difficult to find the existence of benefits, which is a legal element of establishing the existence of subsidies subject to the SCM Agreement. Although current rules allow choosing a different benchmark in identifying benefits subject to certain conditions, the mere status of SOEs' dominance in one industry cannot automatically imply the price distortion which warrants an alternative benchmark.

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63 Art. 1.1(b) and 14 of the SCM Agreement.

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

65 WTO, Protocol on the Accession of the People's Republic of China, WT/L/432, 23 Nov. 2001, art. 15 (b) and (d).

66 US—Carbon Steel (India) Panel Report, *supra* note 25, ¶ 4.154.

67 US Countervailing Measures (China) AB Report, *supra* note 25, ¶ 4.51.

68 *Id*. ¶ 4.62.

69 *Id*. ¶ 4.62.

3. The Element of "Specificity"

The above problems primarily cast challenges to whether the measure in question constitutes a subsidy. In addition, the SCM Agreement requires that an actionable subsidy must be specific.[70] In the context of China, however, it is hard to prove "specificity" either as "industry specificity" or "enterprise specificity."

First, various SOEs that dominate in many industries receive financial advantages. In practice, policies adopted by the Chinese government usually identify strategic industries and pillar industries and provide guidelines to favor these industries, in which SOEs dominate. However, due to the non-transparency, details of how this favoritism is implemented may be difficult to find, such as through granting specific financial advantages. Thus, policies and guidelines that specify certain industries as favored industries cannot be used per se to establish "industry specificity" in making subsidies subject to the SCM Agreement. Second, the recipients of advantages are largely SOEs even if the conditions for receiving advantages are neutral in their face. China's commitments in its accession to the WTO include a special rule of specificity in relation to SOEs,[71] i.e., subsidies provided to SOEs will be viewed as specific if SOEs are the predominant recipients of such subsidies or if SOEs receive disproportionately large amounts of such subsidies. However, there have been no WTO cases resorting to this special rule so far. The reason might be evidentiary difficulties in finding information showing that SOEs are predominant recipients of the subsidies at issue or that SOEs receive disproportionately large amounts of such subsidies. The "specificity" rule focuses on the outcome of a subsidy, rather than the status of the recipients in markets. Thus, it is hard to prove "enterprise specificity."

In sum, it is difficult to satisfy the legal elements of "specificity" in cases of Chinese SOEs receiving advantages, given that information in this regard is scarce in terms of finding either "industry specific" or "enterprise specific."

D. Summary of Section II

In summary, this section examined the deficiencies of current WTO rules in regulating financial advantages in the context of SOEs. First, the problem of SOEs giving advantages to others is not sufficiently addressed by the current WTO rules neither through the "private body" approach, the "public body" approach, nor the behavior rules within the WTO. Second, as for the problem of SOEs in the downstream industry which benefit from transactions with subsidized SOEs in the upstream industry, various approaches are all inadequate. Third, in respect of SOEs as recipients of

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[70] Article 2 of the SCM Agreement.

[71] WTO, Protocol on the Accession of People's Republic of China, WT/L/432, 23 Nov. 2001, para.10.2 of Part I.

financial advantages, the privatizations of SOEs with a transfer of control may raise uncertainty with respect to whether subsidies received prior to privatization can still be subject to the SCM Agreement. Also, in cases of SOEs receiving advantages, it is usually difficult to find the existence of benefits, which is one legal element in establishing the existence of a subsidy if the benchmark is the market where SOEs dominate, since current WTO jurisdiction holds that the mere status of SOEs' dominance in one industry or market cannot automatically imply price distortion which warrants an alternative benchmark. Finally, it is difficult to satisfy the legal element of "specificity" in cases of SOEs receiving advantages due to the transparency issue.

III. PROPOSALS TO THE WTO RULES TO ADDRESS THE PROBLEMS

The author makes proposals to address the deficiencies in WTO rules regarding SOEs giving financial advantages to others and SOEs receiving advantages. The proposals are divided into three groups, (i) proposals relating to improving WTO trade remedies; (ii) proposals relating to improving WTO trade rules generally; and (iii) proposals for adding competition rules to the WTO Agreement. A combination will be introduced in order to solve all problems.

A. Trade Remedies Proposals

1. Proposals to Solve the Problem of SOEs as Givers

The trade remedies proposals are focused on changes to the SCM Agreement in order to ensure that financial advantages received by or granted to SOEs are adequately controlled. The author would not propose to substantively change the definition of "entrust/direct" to mean that "state control can automatically imply the existence of entrustment or direction" since there may be situations of facial control where controllers do not interfere with the daily operation of the entity. Instead, the author proposes to change the interpretation of the SCM Agreement, referring to as "the public body presumption proposal." It proposes that entities under the meaningful control of the government with monopolistic or dominant market power can be presumptively deemed to be public bodies unless evidence to the contrary is put forth by the responding party with regard to the entity in question. The presumption of "public body" status of SOEs based on control and market status, places the burden of proof on the Member who has the SOE to demonstrate either that "meaningful control" is not present in a sense that the government is not in actual control of daily operations, and that the decision-making of the SOE is independent, or that the SOE in question do not enjoy monopolistic or dominant market power out of favor from governments. If these can be proved, the presumption is rebutted.

Possibility of Realizing the Proposal

The proposal has the potential to be realized in practice. First, the AB states that its view on "public body" comes from the analysis of text, context, object or purpose, and that its interpretation merely "coincides" with "the essence of Article 5 of the ILCDAs," which provides that "[t]he conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance."[72] It might be interpreted that SOEs that have been granted monopolies or exclusive rights are entities empowered by the state to exercise elements of the governmental authority given that most monopolies or exclusive rights are granted out of public interest, or at least governments so allege.

Second, the factor "meaningful control" does not go too far away from the latest jurisprudence and would not raise too much controversy. The AB in *US-Carbon Steel (India)* clarified that the "meaningful control" factor shall not be assigned a decisive weight compared to other relevant factors.[73] In the latest case of *US-Countervailing Measures (China)*, the Panel seemed to view that the "meaningful control" factor was weighted significantly by the AB in *US-China AD/CVD*.[74] The Panel did not question the U.S.' interpretation that "public body" can mean an entity that is controlled by a government such that the government can use the resources of that entity as its own, citing the concept of "meaningful control" relied upon by the Appellate Body in *US-China AC/CVD*. The Panel in *US-Countervailing Measures (China)* found that the U.S. investigative authority did not apply their alleged "meaningful control" standard in the investigated case at hand even assuming that the alleged standard is the right interpretation of the term "public body." To that end, it can be inferred that the Panel did not follow the AB explicitly to denounce the interpretation that "meaningful control" is a decisive factor in interpreting the term "public body," which the AB has clearly denounced in *US-Carbon Steel (India)*. The panel's attitude towards the significance of the factor "meaningful control" in the interpretation of the term "public body" seems different from that of the AB. Although the AB's view is more authoritative, the contradiction between the AB and panels may open the

[72] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/CN.4/L.602/Rev.1 (Jul. 26, 2001), art. 8; Michel Cartland, Gerard Depayre & Jan Woznowskl, *Is Something Going Wrong in the WTO Dispute Settlement?*, 46 J. WORLD TRADE 979, 996-1001 (2012), 997.

[73] US—Carbon Steel (India) Panel Report, *supra* note 25, ¶ 4.37.

[74] US Countervailing Measures (China) Panel Report, *supra* note 25, ¶ 7.74.

door for my proposal in the future.

Third, the factor relating to "market status" would not go much away from the AB's interpretation. The AB mentioned that relevant factors may play different roles in different cases, such as the factor of market power and the industry in which the entity is. The AB explained that "whether the conduct of an entity is that of a public body must in each case be determined on its own merits, with due regard to the core characteristics and functions of the relevant entity, its relationship with the government, and the legal and economic environment prevailing in the country in which the investigated entity operates[75] . . . Evidence regarding the scope and content of government policies relating to the sector in which the investigated entity operates may inform the question of whether the conduct of an entity is that of a public body."[76] Hence, the factor of whether the SOE enjoys monopolistic/dominant market positions out of receiving various advantages from the government could be a relevant factor.

Problems Solved by this Proposal

The proposal can solve the problem of SOEs giving financial advantages to others, and the problem of upstream subsidies in the situation of SOEs from a legal viewpoint. One major reason that these two problems may escape the discipline of the SCM Agreement lies in that SOEs that are givers of advantages cannot fit into the categories of "governments" or "public body" captured by the SCM Agreement, and hence, it cannot be established that there is a subsidy given by a government or public body. By treating SOEs who are under the government's meaningful control and are given monopolies or exclusive rights or dominant positions as public bodies within the meaning of the SCM Agreement, the proposal expands the reach of SCM Agreement to many cases where SOEs give advantages to others, and where SOEs receive upstream subsidies and give advantages to downstream industries. The proposal makes it possible to establish there is a subsidy in these two situations and makes them subject to the discipline of SCM Agreement by focusing on the nature of SOEs as givers of advantages as a subject matter.

The proposal can solve the two problems largely from a practical viewpoint. First, the emphasis on the factor of whether the SOE enjoys monopolistic or dominant market positions out of receiving various advantages from governments has economic grounds. If SOEs are in dominant positions in a specific industry or market, with no or little competition from POEs, these SOEs could provide goods or services lower than the world prices. If SOEs were not in dominant positions in a specific industry, their provision of goods or service at prices lower than the world prices would not affect the market too much since POEs can compete with

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75 US — Carbon Steel (India) AB Report, *supra* note 25, ¶ 4.29.
76 *Id*.

them in the market. To that end, whether SOEs have monopolies or exclusive rights in the industry can be the standard for the typology of SOEs. For instance, SOEs in energy producing sectors may provide energy at prices below market rates to SOEs in other sectors. This proposal directly responds to the problem of productive inputs provided by SOEs to other SOEs.

Second, the presumption of SOEs under meaningful control of the government and with monopolistic or dominant market power as public bodies, fits into the reality of China and can well handle the problems at issue. For instance, Chinese SOEs in strategic industries, such as coal, airline and aviation, telecommunication, petroleum and petrochemical, shipping and manufacturing of ships, and electricity, enjoy monopolies or dominant market power due to statutory grants or governmental measures limiting competition in the favor of these SOEs. The Chinese Government usually maintains state ownership in absolute control of strategic industries with the purpose of "protecting public interest, national interest, and security interest". It fits into the "public body" discussion insofar the stress is all on the public interest. The proposal takes into consideration that it is difficult to gather evidence regarding SOEs due to their non-transparency. The proposal is more likely to motivate China to move toward a direction that could produce evidence about Chinse SOEs not being meaningfully controlled by the government or reducing the predominant status of SOEs in strategic industries particularly. Hence, China may have the motive to reduce or eliminate the actual control over daily operation and management of SOEs, and the decision-making of SOEs may become independent and be commercially based, on the one hand, and to increase competition in strategic or pillar industries, on the other hand.

2. Proposals to Solve the Problem of SOEs as Receivers

Privatization

In cases of SOEs that had received financial advantages being partial privatized afterwards with a transfer of control to private entities, it remains unclear whether subsidies received prior to privatization can still be subject to the SCM Agreement. It is due to the fact that current jurisprudence is not clear whether the legal element of "benefit" as required under the SCM Agreement would be extinguished or not. The author proposes to treat the benefits obtained prior to privatization as not extinguished even if the privatization is at arm's length and for fair-market value, given that competitive advantages still remain.

Benchmark

In cases of SOEs receiving advantages, although the market in which SOEs operate may be distorted, particularly where SOEs are monopolists or dominate the market, it is usually difficult to find the existence of benefits, which is a legal element of establishing the existence of subsidies subject to the SCM Agreement. Although current rules allow choosing a different benchmark, the mere status of SOEs' dominance in one industry cannot automatically imply there is price distortion which warrants an alternative benchmark.

The author proposes to have a presumptive rule regarding benchmarks, which can be applied in cases of SOEs receiving advantages where the SOEs are monopolists or dominant players.[77] In other words, it is refutably presumed that the fact that the government/SOEs is/are the predominant supplier(s) establishes that there is price distortion. For instance, selecting a different benchmark is allowed in the case of Chinese SOEs who are dominant in the industry in question. Instead of focusing on the consequences of SOEs receiving advantages, such as whether the price is market-determined, the proposal focuses on the market structure, whether it is dominated by the state or SOEs, whether there are systematic subsidies granted in association with the market, etc. Combining these factors together can be indicative of whether they lead inevitably to distortion of prices by making presumptive inference from status, without demonstrating the consequences in fact. This proposal's rationale is based in part on the underlying evidentiary problems given that information about all the factors listed above may not be available in China. Hence, all factors are relevant and the rebuttable presumption can be made based on several of these factors.

Specificity

One additional problem in disciplining SOEs receiving financial advantages lies in the difficulty in establishing the legal requirement that an actionable subsidy must be specific.[78] Despite China's commitments in its accession to the WTO that subsidies provided to SOEs will be viewed as specific if SOEs are the predominant recipients of such subsidies or SOEs receive disproportionately large amounts of such subsidies,[79] it is hard to find evidence regarding the outcome of a subsidy in terms of recipients.

The author proposes, instead of focusing on the outcome of a subsidy, to focus on the market power of recipients (SOEs) in question, i.e., whether they are monopolistic or dominant in the industry, or enjoy exclusive rights to the exclusion of POEs, in finding the legal element of "specificity". This proposal comes with a rebuttable presumption rule that financial advantages granted to those SOEs are deemed to be specific unless evidence to the

77 JOHN H. JACKSON, RESTRUCTURING THE GATT SYSTEM 84-87 (1990).

78 The Agreement on Subsidies and Countervailing Measures, art. 2, 1869, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Apr. 15, 1869 U.N.T.S. 14

79 World Trade Organization, Accession of the People's Republic of China, Part I, ¶.10.2, December 11, 2001.

contrary can be proved. The proposal makes sense from economic and historical viewpoints. In the view of economists, the requirement of specificity cannot be explained by any economic rationale.[80] Specificity was not necessarily required by the 1979 Tokyo Round Subsidies Code.[81] Specificity is more of an administrative tool, and it embraces the "de facto" test.[82] It is due to an administrative contingency and judicial economy, as well as the balance between the imposition of CVDs and grants of subsidies, that specificity is required in the SCM Agreement. The specificity test is a flexible test. For instance, it is more about legal technicalities that specificity is deemed to exist for export subsidies. Such flexibility and legal technicalities can be applied in cases involving giving advantages to SOEs, who are monopolistic or dominant in the industry, or enjoy exclusive rights to the exclusion of POEs.

Such a proposal can partially contribute to the solution of the problem of granting financial advantages to industries which are dominated by SOEs. To find evidence of market status is easier than finding out precisely who receives subsidies and how much they receive.

B. Trade Rules Proposals

The author proposes to expand the coverage of GATT Article XVII to all SOEs with all kinds of monopolies and exclusive rights, and hence the obligation of making decisions solely based on commercial considerations in GATT Article XVII:1(b) can be applied to all SOEs with different kinds of monopolies or exclusive rights. Furthermore, Article XVII:1(b) should be revised to make it independent from Article XVII:1(a). To that end, SOEs with different kinds of monopolies or exclusive rights would be obligated not to give financial advantages to other SOEs. This proposal can solve the problem of SOEs giving financial advantages to other entities. Requiring those SOEs with different kinds of monopolies or exclusive rights to make decisions solely based on commercial considerations would largely preclude them from giving financial advantages to other entities. However, this proposal can't solve the problem of SOEs receiving financial advantages.

C. Competition Rules Proposal

The author proposes to prohibit SOEs from giving financial advantages to others, particularly SOEs, to the extent that such behavior affects or distorts competition. The proposal has competition rules

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80 *See* Merit E. Janow & Robert W. Staiger, *US–Export Restraints: United States–Measures Treating Export Restraints as Subsidies*, 2 WORLD TRADE REV. 201 (2003).

81 GENERAL AGREEMENT ON TARIFFS AND TRADE, THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS: REPORT BY THE DIRECTOR-GENERAL OF GATT 181 (1979).

82 JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS (2nd ed. 1997).

elements, and hence, is called a competition rules proposal. More specifically, the author would add to the WTO a provision such as Article 17.6 of the Trans-Pacific Partnership Agreement, which provides:

> Each Party shall ensure that its state enterprises and state-owned enterprises do not cause adverse effects to the interests of another Party [nor distort or threaten competition] through the use of non-commercial assistance that the state enterprise or state-owned enterprise provides to any of its state-owned enterprises with respect to:
>
> (a) the production and sale of a good by the state-owned enterprise;
>
> (b) the supply of a service by the state-owned enterprise from the territory of the Party into the territory of another Party; or
>
> (c) the supply of a service in the territory of another Party through an enterprise that is a covered investment in the territory of that other Party or any other Party.[83]

The bracketed language is not in the TPP provision, but it would be useful to add such bracketed language as wording "nor distort or threaten competition." The bracketed language was inspired by the EU rules in that they regulate state aid within the competition rules framework to the extent that state aid threatens the goal of "a single market" pursued by European countries in the process of integration.[84] It regulates state aid that distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods.[85] The phrase "distort or threaten competition" in the bracket is not exactly the same as "cause adverse effects to another state's interests". The phrase "distort or threaten competition" adds something new. There might be a situation where the welfare of the subsidizing country decreases while the other countries' welfare may not decrease. This situation, while not covered by the phrase "cause adverse effects to another state's interests," can be captured by the phrase "distort or threaten competition". This proposal can solve the problem of SOEs giving financial advantages to others since it captures all SOEs in areas of trade of goods or services domestic and overseas. However, this proposal can't solve the problem of SOEs receiving financial advantages.

D. Combination of Proposals

From examining the proposals above, problems identified can be

[83] The Trans-Pacific Partnership Agreement, art. 17.6(2), Feb. 4, 2016.

[84] George Bermann, Roger Goebel, William Davey and Eleanor Fox, Cases and Materials on European Union Law 1043-33 (3rd ed. 2010).

[85] Consolidated Version of the Treaty of the Functioning of the European Union, art. 107.1, May 9, 2008, 2008 O.J. (C 115) [hereinafter TFEU].

largely solved through three ways. One is through the trade remedies proposals alone, i.e., proposals regarding a public body to solve the problem of SOEs giving financial advantages, and proposals regarding privatization, benchmark, and specificity to solve the problem of SOEs giving financial advantages. The second way is through the combination of the trade remedies proposals, i.e., proposals regarding privatization, benchmark and specificity to solve the problem of SOEs receiving financial advantages, and the trade rules proposals to solve the problem of SOE giving financial advantages. The third way is through the combination of the trade remedies proposals, i.e., proposals regarding privatization, benchmark and specificity to solve the problem of SOEs receiving financial advantages, and the competition rules proposal to solve the problem of giving financial advantages.

E. This Article's Contribution Compared to Other Approaches

This Article's contribution to current academic literature and legal practice is explained as follows. This article exams the financial advantages in the context of SOEs from two dimensions, i.e., one is that SOEs give financial advantages, and the other is that SOEs receive financial advantages. The proposal suggested in this article is also made within this framework as identified in the above section.

1. PTAs

In respect of the comparison with SOE rules and development in preferential trade agreements, the Trans-Pacific Partnership (TPP) in particular, proposals made here, although have some similarities with the TPP, differ from what was proposed in the TPP to some extent. In the TPP negotiations, there were proposals from its members about disciplines on SOEs receiving various advantages.[86] Ultimately, the TPP was concluded with a chapter on SOEs.[87] This chapter has provisions regarding non-commercial assistance to SOEs or given by SOEs; obligations imposed on SOEs' behavior, such as non-discriminatory treatment and the requirement to act in light of commercial considerations; transparency of SOEs; designated monopolies, particularly state monopolies; and various exceptions and long transitional periods. These rules were drafted with an eye on Chinese SOEs although China was not a party to the TPP

[86] The U.S.'s proposals and position can be found in *State-Owned Enterprises and Competition Policy*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-chapter-chapter-negotiating-7; For a general discussion about SOEs in the context of TPP Agreement Negotiations, *see* Tsuyoshi Kawase, *Trans-Pacific Partnership Negotiations and Rulemaking to Regulate Stat-Owned Enterprises*, VOXEU.ORG (Jul. 19, 2014), http://voxeu.org/article/trans-pacific-partnership-negotiations-and-rulemaking-regulate-state-owned-enterprises.

[87] The Trans-Pacific Partnership Agreement, art. 17, Feb. 4, 2016.

negotiations.[88] The United States also wants to incorporate detailed SOEs rules in future FTAs as well. For instance, the United States announced its intent to renegotiate the NAFTA, and listed objectives for this renegotiation.[89] Among many things, one objective in the list concerns state-owned and controlled enterprises, including the definition of SOEs, ensuring the behavior of SOEs accords with non-discriminatory treatment and with the requirement to make decisions based on commercial considerations, ensuring additional subsidy disciplines on SOEs, transparency requirements, overcoming evidentiary problems associated with litigation on SOEs, etc.[90]

"Vietnam has become the EU's second biggest trading partner in the Association of Southeast Asian Nations after Singapore and ahead of Malaysia."[91] EU and Vietnam announced that they have agreed on the final text for the EU-Vietnam Free Trade Agreement (FTA) on June 2018, which is to be signed in 2018.[92] There is a Chapter called "State Owned Enterprises, Enterprises Granted Speical Rights, or Privileges and Monopolies" in the draft of the EU-Vietnam FTA. It basically requires SOEs to behave according to non-discrimination principle and based on commercial considerations. The subsidies rules are embedded in the Chapter of "Competition Policy", which provides the exception of "public policy objective" for providing subsidies. However, it doesn't have provisions specifically regarding SOEs giving or receiving non-commercial advantages. The wording of the subsidies rules and SOE rules in the EU-Vietnam FTA is similar to that in the TPP except for the fact that the EU-Vietnam FTA has more exceptions.[93]

Negotiations for a Free Trade Agreement between the EU and Malaysia were launched in 2010 and pub on hold after seven rounds in 2012 at the request of Malaysia. A stocktaking exercise took place in 2016-17 to assess the prospect to presume negotiations. In the aftermath of the

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88 Keith Bradsher, *International Business: Trans-Pacific Partnership's Potential Impact Weighed in Asia and U.S.*, N.Y. TIMES, Jul. 8, 2015 http://www.nytimes.com/2015/07/09/business/international/trans-pacific-partnerships-potential-impact-weighed-in-asia-and-us.html?_r=0 ; Tuong Lai, *What Vietnam Must Now Do*, N.Y. TIMES (The Opinion Pages), translated by Nguyen Trung Truc from the Vietnamese, Apr. 6, 2015. http://www.nytimes.com/2015/04/07/opinion/what-vietnam-must-now-do.html.

89 *See USTR: Trump Administration Announces Intent to Renegotiate the North American Free Trade Agreement*, USTR.Gov., https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/may/ustr-trump-administration-announces.

90 *See Summary of Objective for the NAFTA Renegotiation*, Jul. 17, 2017, USTR.GOV, https://ustr.gov/sites/default/files/files/Press/Releases/NAFTAObjectives.pdf; Although Article 1503 of NAFTA touches on SOEs, it leaves much to the hand of the WTO rules. The TPP Agreement may divert some attention from the WTO to elsewhere.

91 European Commission, *EU and Vietnam Finalize Trade and Investment Discussion*, 26 June 2018, http://trade.ec.europa.eu/doclib/press/index.cfm?id=1875

92 *Id.*

93 EU-Vietnam Trade and Investment Agreements, Annex 10-a.

general elections in Malaysia in May this year [2018], the new government has yet to take a position on the possible resumption of negotiations.[94]

It is expected that a FTA, if it is to be concluded, between EU and Malaysia, will be similar to the EU-Vietnam FTA. In addition, the negotiation of EU-Japan Economic Partnership Agreement (EPA) has been finalized in December 2017. Chapter 12 of EU-Japan EPA has subsidies rules, which refer to the SCM Agreement for the definition of "subsidies". It also has exceptions for public policy objective. Nevertheless, exceptions here are much fewer than that in the EU-Vietnam FTA. Provisions relating to SOEs are provided in Chapter 14 of the EU-Japan EPA.

The competition rules proposal suggested here were inspired by what was drafted in the TPP as well as other PTAs mentioned above to the extent that the author's proposals suggest WTO incorporating a provision such as Article 17.6 of the TPP, and hence prohibit SOEs from giving financial advantages. Nevertheless, the author suggested one more phrase of "distort or threaten competition" to be added given that it captures more situations and cases than the phrase of "cause adverse effects to another state's interests" as explained in the above section. Second, the TPP proposed directly prohibiting SOEs from receiving non-commercial assistance from SOEs, state enterprises and states in its Article 17.6. In contrast, the author's proposal to solve the problem of SOEs receiving financial advantages is through trade remedy rules, i.e., slight alteration of current trade remedy rules regarding benchmark and specificity in the context of SOEs. Third, to solve the problem of SOEs giving financial advantages, the author also proposes modification of current definition of "public body" to accomodate entities that are under the meaningful control of the government, and with monopolistic or dominant market power, as well as the trade rules proposals that SOEs with different kinds of monopolies or exclusive rights would be obligated not to give financial advantages to other SOEs due to the obligation of making decisions solely based on commercial considerations. The distinctive features of the author's proposals also lie in the fact that the author focus on SOEs with monopolies and exclusive rights, or SOEs with dominant market power, which are more of concern, rather than every tiny SOE.

The authors' proposals are better in a political sense that states with large presence of SOEs are reluctant to accept rules that directly prohibit SOEs from receiving financial advantages. Alternatively, slight alteration of current trade remedies rules could be potentially acceptable to these states. In addition, rules that capture every SOEs is not politically favored by states that have lots of SOEs. On the other hand, it is only those SOEs that have monopolies or exclusive rights, or dominant market power that would cause concern in need of being addressed. A small and tiny SOE is not a big

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94 European Commission, *Countries and Regions: Malaysia*, Aug. 1, 2018, http://ec.europa.eu/trade/policy/countries-and-regions/countries/malaysia/

concern since it won't negatively affect market which is competitive.

2. Other Proposals

In respect of engaging in discussion with other academic articles on SOEs, explanations will be given in terms of the difference from current literation, whether they support the author's position or differ from it, and if so, why the author's approach is better.

Regarding SOEs as recipients of financial advantages, the literature on SOEs recognized that the receipt of advantages by SOEs is a problem, but most legal analyses were about enterprises receiving advantages from governments in general, without a further distinction between receipts of advantages by SOEs and receipts of advantages by POEs.[95] They pointed out the severe nature of the problem and briefly outlined the relevant rules covering international trade, investment and competition.[96] But recommendations were merely general. For instance, the newest and latest literature,[97] relying on the TPP Agreement and FTAs signed by the U.S., put forth proposals of disciplining SOEs in general from a norm development perspective. Taking another example, other articles suggested special rules specifically tailored to SOEs with respect to five elements for the purpose of regulation. The five elements are i) a clear definition and scope of SOEs; ii) clear general obligations and rights; iii) specific disciplines on trade-distortive practices by SOEs and specific exceptions; iv) provisions to improve transparency; and v) rules regarding enforceability and dispute settlement.[98] In contrast, the author's analysis focuses on SOEs in particular in the context of financial advantages. The author makes proposals from two dimensions, one is to tackle the problem of SOEs giving financial advantages, and the other is to address the problem of SOE receiving advantages. For that purpose, this article analyses legal problems from the two perspectives above, by looking at the issue of SOEs as givers as well as upstream subsidies in the context of SOEs, and the issue of SOEs as receivers that poses extra challenges to the legal analyses of "benchmark" "specificity" and "privatization". The goals that are pursued by other articles and scholars are similar to the author, which is to discipline SOEs, particularly the uncompetitive advantage.

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[95] Aaron Cosbey & Petros C. Mavroidis. *A Turquoise Mess: Green Subsidies, Blue Industrial Policy And Renewable Energy: The Case For Redrafting The Subsidies Agreement Of The WTO*. 17 J. OF INTL. ECON. L. 11, 47 (2014).

[96] Michael M. Du, *China's State Capitalism and World Trade Law* 63 (2), International and Comparative Law Quarterly, 409, 448 (Jan. 11, 2014), http://ssrn.com/abstract=2377797.

[97] Julien Sylvestre Fleury & Jean-Michel Marcoux, *The US Shaping of State-Owned Enterprise Disciplines in the Trans-Pacific Partnership*, 19 J. OF INTL. ECON. L., 445, 465 (2016); Ines Willemyns, *Disciplines on State-Owned Enterprises in International Economic Law: Are We Moving in the Right Direction?*, 19(3) J. OF INTL. ECON. L. 657, 680 (2016).

[98] Willemyns, *supra* note 97.

Nevertheless, the author's proposals can achieve goals in a feasible way from a political perspective. It is in part due to the fact that the author's proposals are more indirect, rather than directly targeting SOEs in general. Countries with SOEs are more acceptable to those indirect proposals, such as proposals are framed in the specific context of subsidies.

In addition, the author's proposals draw much attention to the elements of "monopolistic or dominant market power". For instance, regarding "benchmark" in the context of subsidies, the author suggests a refutable presumption that the fact that the SOEs are the predominant suppliers establishes that there is price distortion, and hence it justifies an alternative benchmark. With respect to the element of "specificity" in the context of subsidies, the author suggests a rebuttable presumption rule that financial advantages granted to SOEs that are monopolistic or dominant in the industry or enjoy exclusive rights to the exclusion of POEs, are deemed to be specific unless evidence to the contrary can be proved. The possibility of realizing such proposals are also analyzed in the section above.

Regarding SOEs as givers of financial advantages, recent literature analyses whether SOEs are public bodies or not, the implications of different standards of "public bodies" for Chinese SOEs,[99] criticizes the method of interpretation by the AB at the WTO regarding the term "public body" and its flaws, and suggests preference for majority ownership criteria in finding a public body in the context of subsidies.[100] In contrast, after pushing the current WTO rules to their limit, and analyzing whether different approaches might be utilized within the WTO rules to solve the problem of SOEs giving advantages to others, the author suggests a novel definition of the phrase "public body" by focusing on combining elements of "under meaningful control of the government" and "monopolistic power, exclusive rights or dominant market power". The proposal has its potential to be realized in practice given that it is sort of in a middle position between the "government control" standard and the "government vested authority" standard that have been discussed in WTO jurisprudence so far. Second, the factor of "meaningful control" and the factor relating to "market status", such as "monopolies, exclusive rights or dominant market power" do not go too far away from the latest jurisprudence of panels and AB, and hence, much controversy won't be expected to arise.

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[99] Ru Ding, *Public Body' or Not: Chinese State-Owned Enterprise*, 48 (1) J. OF WORLD TRADE, 167 (2014); Dukgeun Ahn, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, 105 (4) AM. J. OF INTL. L. (2011); Tegan Brink, *What Is a 'Public Body' for the Purpose of Determining a Subsidy after the Appellate Body Ruling in US – AD/CVD?*, 6 GLOBAL TRADE AND CUSTOMS J., 313, 315, (2011).

[100] Michel Cartland, Gerard Depayre & Jan Woznowskl, *Is Something Going Wrong in the WTO Dispute Settlement*, 46 (5) J. OF WORLD TRADE, 979, 1016 (2012).

IV. CONCLUSION

SOEs receive more financial advantages and often act as givers of financial advantages, posing challenges to current WTO rules. After pushing current rules to its limits by different approaches, these challenging issues are not resolved yet.

The author recommends trade remedy proposals to treat as public bodies those SOEs who are under the government's meaningful control and are given monopolies or exclusive rights or dominant positions in a particular industry within the meaning of the SCM Agreement; recommends to treat the benefits obtained prior to privatization as not extinguished even if the privatization is at arm's length and for fair-market value; recommends that it is refutably presumed there is price distortion if a government/SOEs is/are the predominant supplier(s); recommends with a rebuttable presumption rule that financial advantages granted to those SOEs are deemed to be specific unless evidence to the contrary can be proved; recommends trade rules proposals to expand the coverage of GATT Article XVII to all SOEs with all kinds of monopolies and exclusive rights, and hence the obligation of making decisions solely based on commercial considerations in GATT Article XVII:1(b) can be applied to all SOEs with different kinds of monopolies or exclusive rights; recommends competition elements proposals to prohibit SOEs from giving financial advantages to others, particularly SOEs, to the extent that such behavior affect or distorts competition, by adding competition elements to current WTO rules. A combination of trade remedies proposals, trade rules proposals, and the competition rules proposal can solve the problems identified in this article. By comparison with current SOE rules and development in preferential trade agreement, such as TPP draft, the ongoing NAFTA negotiations as well as the United States' free trade agreements, and after encountering with current other academic articles, the author concludes that the legal analyses and proposals made in this article are distinctive and novel with large potential to be realized in terms of political willingness and legal techniques.