

# Trade Policy

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State Owned or State Linked Companies in Trade Agreements

# European Union and Vietnam FTA

(g) "state-owned enterprise" means an enterprise, including any subsidiary, in which a Party, directly or indirectly:

- (i) owns more than 50 per cent of the enterprise's subscribed capital or controls more than 50 per cent of the votes attached to the shares issued by the enterprise;

- (ii) can appoint more than half of the members of the enterprise's board of directors or an equivalent body;  
or

- (iii) can exercise control over the strategic decisions of the enterprise.

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- For the purposes of this Chapter:
- (a) "commercial activities" means activities the end result of which is the production of a good or supply of a service, which will be sold in the relevant market in quantities and at prices determined by the enterprise, and are undertaken with an orientation towards profit-making;<sup>1</sup>
- (b) "commercial considerations" means price, quality, availability, marketability, transportation and other terms and conditions of purchase or sale, or other factors that would normally be taken into account in the commercial decisions of an enterprise operating according to market economy principles in the relevant business or industry;

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- (c) "designate" means to establish or authorise a monopoly, or to expand the scope of a monopoly to cover an additional good or service;
- (d) "designated monopoly" means an entity, including a group of entities or a government agency, and any subsidiary thereof, that in a relevant market in the territory of a Party is designated as the sole supplier or purchaser of a good or service, but does not include an entity that has been granted an exclusive intellectual property right solely by reason of such grant;
- (e) "enterprise granted special rights or privileges" means any enterprise, including any subsidiary, public or private, that has been granted by a Party, in law or in fact, special rights or privileges;

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- (c) in their sale of a good or service:
  - (i) accord to an enterprise of the other Party treatment no less favourable than they accord to enterprises of the Party; and
  - (ii) accord to an enterprise of investors of the other Party in the Party's territory treatment no less favourable than they accord to enterprises of investors of the other Party in the relevant market in the Party's territory.

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- ARTICLE 11.5
- Regulatory Framework
- 1. The Parties shall endeavour to ensure that state-owned enterprises, enterprises granted special rights or privileges, and designated monopolies observe internationally recognized standards of corporate governance.
- 3. Each Party shall ensure the enforcement of laws and regulations in a consistent and non-discriminatory manner, including with regard to state-owned enterprises, enterprises granted special rights or privileges, and designated monopolies.

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- ARTICLE 11.6
- Transparency
- 1. A Party which has reasonable reason to believe that its interests under this Chapter are being adversely affected by the commercial activities of a state-owned enterprise, an enterprise granted special rights or privileges, or a designated monopoly of the other Party may request the other Party in writing to provide information about the operations of that enterprise or entity. The request shall indicate the enterprise or entity, the products or services and markets concerned, and include indications that the enterprise or entity is engaging in practices that hinder trade or investment between the Parties.



# CPTPP SOE Articles

- Article 17.4: Non-discriminatory Treatment and Commercial Considerations
- 1. Each Party shall ensure that each of its state-owned enterprises, when engaging in commercial activities:
  - (a) acts in accordance with commercial considerations in its purchase or sale of a good or service, except to fulfil any terms of its public service mandate that are not inconsistent with subparagraph (c)(ii);
  - (b) in its purchase of a good or service:
    - (i) accords to a good or service supplied by an enterprise of another Party treatment no less favourable than it accords to a like good or a like service supplied by enterprises of the Party, of any other Party or of any non-Party; and
    - (ii) accords to a good or service supplied by an enterprise that is a covered investment in the Party's territory treatment no less favourable than it accords to a like good or a like service supplied by enterprises in the relevant market in the Party's territory that are investments of investors of the Party, of any other Party or of any non-Party; and

# CPTPP SOE Articles

- 2. Each Party shall ensure that its state enterprises and state-owned enterprises do not cause adverse effects to the interests of another Party 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.

# CPTPP SOE Articles

- Article 17.7: Adverse Effects
- 1. For the purposes of Article 17.6.1 and Article 17.6.2 (Non-commercial Assistance), adverse effects arise if the effect of the non-commercial assistance is:
  - (a) that the production and sale of a good by a Party's state-owned enterprise that has received the non-commercial assistance displaces or impedes from the Party's market imports of a like good of another Party or sales of a like good produced by an enterprise that is a covered investment in the territory of the Party;
  - (b) that the production and sale of a good by a Party's state-owned enterprise that has received the non-commercial assistance displaces or impedes from:
    - (i) the market of another Party sales of a like good produced by an enterprise that is a covered investment in the territory of that other Party, or imports of a like good of any other Party; or
    - (ii) the market of a non-Party imports of a like good of another Party;

# CPTPP SOE Article 17.10 Transparency

- 3. On the written request of another Party, a Party shall promptly provide the following information concerning a state-owned enterprise or a government monopoly, provided that the request includes an explanation of how the activities of the entity may be affecting trade or investment between the Parties:
  - (a) the percentage of shares that the Party, its state-owned enterprises or designated monopolies cumulatively own, and the percentage of votes that they cumulatively hold, in the entity;
  - (b) a description of any special shares or special voting or other rights that the Party, its state-owned enterprises or designated monopolies hold, to the extent these rights are different than the rights attached to the general common shares of the entity;
  - (c) the government titles of any government official serving as an officer or member of the entity's board of directors;
  - (d) the entity's annual revenue and total assets over the most recent three year period for which information is available;
  - (e) any exemptions and immunities from which the entity benefits under the Party's law; and

State Owned or State Linked Companies in Trade

# What is the Problem With State Trading Enterprises?

We know that state-trading enterprises (STEs), which may or may not be SOEs, are subject to WTO rules, and why (Mastromatteo), though we know little about how well China complies with those rules. We know that SOEs are complex entities (Lin), that are deeply entwined in China, Inc., a complex web of overlapping networks and relationships, which is hard for outsiders to understand (Wu), making even the definition of SOE contestable.

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# What is a State Trading Enterprise?

The Appellate Body (DS379 and DS437) seems to think that, in the terms of the Agreement on Subsidies and Countervailing Measures (ASCM), we know a body exercising “governmental authority” by what it does, not by who owns it (Prusa and Vermulst, 2013, 199). The distinction may matter in the case of an SOE providing a subsidy, but does not help in assessing other ways in which SOEs might affect the commercial interests of foreign firms. Moreover, without more information on the universe of SOEs, and what they do, or even just their objectives, the distinction has little operational utility.



# What is a State Trading Enterprise?

Many analysts also believe that Chinese SOEs distort the terms of competition. We know that SOEs receive large state transfers, but we know less than we should about the rationale, or purposes to which the money is put (that is, the extent to which losses are being covered, on the one hand, or excess investment is encouraged for some public purpose, on the other). The concern with spillovers goes beyond the fact that SOEs do not confront a hard budget constraint, or perhaps have a monopoly position, because governments can attain similar outcomes through a variety of policy instruments, such as discriminatory entry regulation or implicit guarantees that limit the ability of private firms to contest the market. Subsidies can take many forms, from targeted taxation and access to credit through calibrated regulation, guided sourcing, golden shares, and policies that promote conglomerates

# What Benefits Does a State Trading Enterprise Receive?

Increasingly we also care about the spillovers from government influence when an SOE invests abroad. We want to know two things—whether that SOE brings unfair advantages to competition in foreign markets (for example if it has access to capital at home at below market rates that it uses to invest in the host market), and whether its decisions in host markets will be taken on nondiscriminatory commercial terms. The worry is that the policy objectives of a host government can be undermined by a foreign SOE acting in support of the policy objectives of its state owner.

# What Benefits Does a State Trading Enterprise Receive?

- The core worry about SOEs is that they are subsidized by their governments. Formally binding discipline on subsidies is notoriously difficult, but informal law, can help
- The purpose of transparency, an essential element of WTO institutional design, is to illuminate trade policy practices to the benefit of both governments and traders. Such transparency reduces the inherent information asymmetry when a government knows more about its domestic policies than do its trading partners.

# What Benefits Does a State Trading Enterprise Receive?

...western ideals of democratic governance are not shared by China. The government attempts to comply in a mechanical fashion with WTO publication requirements, including the translation into English of trade-related laws and regulations (WTO, 2016b, 69), and it is doing reasonably well in meeting its notification obligations. But transparency is far from being an embedded principle of governance

# Who Don't States Notify About Subsidies?

Why do Members not notify subsidies, in general? Four reasons can be advanced. The ***first*** is bureaucratic incapacity. ***Second***, Members might worry about providing adverse information for a potential legal dispute, perhaps about a measure they suspect might be illegal. By notifying, they provide information that a trading partner might not have and they admit that the measures might be actionable. ***Third***, Members' trade authorities find it easier to notify actions taken by themselves than data on subsidies offered by other ministries, or other levels of government, or by SOEs. The ***fourth*** reason, and perhaps most important, is ambiguity about what requires notification

# Trade, Competition, and the WTO

# Tackling Competition Infringement

...it is unlikely that governments in the affected country will be able to get the evidence needed to pursue infringers even if they have effective laws. The capacity of competition authorities to adequately assess all the factors in transnational mergers may well be limited even if there no problem of willingness

# Tackling Competition Infringement

*If existing regimes are inadequate, could the currently envisaged non-WTO cooperation arrangements provide a solution?* The United States has long favored bilateral agreements as a solution.....they acknowledge the need for more cooperation but stress that it must be voluntary



# Tackling Competition Infringement

The European Commission argues strongly that the adoption of common core principles, including non-discrimination and transparency, should not conflict with other development objectives. But the Commission also suggest that if countries do want to exclude sectors from competition rules or from national treatment provisions, they should be free to do so, subject only to the proviso that exclusions must be transparent and hence predictable for economic actors...