World Trade Review (2020), **19**, 402–423
doi:10.1017/S1474745619000168

ORIGINAL ARTICLE

Taming Leviathan as Merchant: Lingering Questions about the Practical Application of Trans-Pacific Partnership's State-Owned Enterprises Rules

Mitsuo Matsushita[1] and C. L. Lim[2*]

[1]University of Tokyo and [2]Chinese University of Hong Kong
*Corresponding author. Email: chin.leng.lim@post.harvard.edu.

(Received 18 July 2018; revised 4 February 2019; accepted 14 February 2019; first published online 19 August 2019)

Abstract
The suspended provisions of Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTTP will not substantially affect the Trans-Pacific Partnership (TPP) Chapter 17 on State-owned enterprises (SOEs). As a consequence, the original TPP scheme remains an important treaty model and poses complex questions notwithstanding a growing literature. This article discusses TPP but unlike current writings which focus on comparative treaty methods of SOE regulation, we focus on how TPP/CPTPP will actually operate, paying attention to how its framers have defined an SOE not least in how they have viewed complex crossholdings, excluded non-profits, and preserved a role for State monopolies. Our answers differ from some of the existing literature – particularly on complex cross-holdings. We also provide detailed illustrations of how TPP's non-discrimination, commercial basis, and non-commercial assistance rules might work and comment on the chances of a rule cascade triggered by TPP, particularly in the current state of heightened Sino-American rivalry and allegations of State control in China's economy.

1. Introduction

The Trans-Pacific Partnership (TPP) was the first signed regional treaty text with a dedicated chapter on State-owned enterprises (SOEs). The TPP Chapter 17 addresses the regulation of what Gattologists call 'State trading enterprises' (STEs).[1] The terminological difference is revealing, for while the GATT-WTO regime and countries like China look to State control of enterprises, the United States (US), which was a dominant force in TPP negotiations, looks to State direction through ownership.

In January 2017, the Trump Administration withdrew from TPP,[2] even if as of early 2018 that Administration had expressed some interest in re-entering and renegotiating TPP.[3] At the same time, following the APEC Leaders' Meeting in Vietnam in November 2017,[4] the other 11 of the original signatories to TPP signed the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) in March 2018.[5] CPTPP suspends a small number of TPP provisions. Its ratification requirements differ from that of TPP so as to enable ratification of

[1]In the terminology of the framers of the General Agreement on Trade and Tariffs (GATT).
[2]See Executive Memorandum, 23 January 2017; Letter from Acting USTR to TPP Depository, 30 January 2017.
[3]S. Donnan and D. Sevastopulo (2018), 'Trump Opens Door to Rejoining TPP', *Financial Times*, 25 January 2018.
[4]Trans-Pacific Partnership Ministerial Statement, 11 November 2017, Singapore Ministry of Trade and Industry, www.mti.gov.sg (accessed 21 February 2018).
[5]For the legally verified text of the CPTPP, dated 21 February 2018, New Zealand Ministry of Foreign Affairs, www.mfat.govt.nz (accessed 21 February 2018).

© Mitsuo Matsushita and C. L. Lim 2019

https://doi.org/10.1017/S1474745619000168 Published online by Cambridge University Press

what in substance is TPP notwithstanding the non-participation of the US.[6] Article 30.5 of the TPP text had required, in the event that not all original 12 signatories had ratified the treaty, ratification by at least six of the 'original' TPP signatories accounting for at least 85% of their total combined GDP as at 2013. In effect, this meant that without the US that 'GDP requirement' will not be reached. It also meant that no new party, such as Korea or China, could simply have replaced the US without amendment of Article 30.5. The TPP-11 have been able to avoid the Article 30.5 requirements in bringing CPTPP into force.[7] With the sixth ratification by Australia, CPTPP entered into force on 30 December 2018.[8]

Aside from some further carveouts by Malaysia, CPTPP's regulation of SOEs will not differ from TPP Chapter 17.[9] As a consequence, the original TPP scheme contained in Chapter 17 remains an important model for the future treaty regulation of SOEs. That model poses a number of interesting questions. It has already received early, timely commentary.[10] In brief, it is a 'hybrid' model, demonstrating approaches derived from GATT Article XVII, GATT-WTO regulation of subsidies and countervailing measures, and competition law.

This article discusses TPP in light of competing methods of SOE regulation. We focus less on comparison with previous US efforts in past FTAs,[11] and more on how TPP's rules will work. An equally important question that arises concerns the attractiveness of the TPP model. There is a practical aspect to this for there is a widely repeated view that the SOE Chapter, while it has served as an immediate source of difficulty for Vietnam and Malaysia, and was certainly of great interest to Singapore in light of the tougher disciplines which had earlier been applied there under the US–Singapore FTA, is aimed at laying down Twenty-First Century rules for China.[12] We also focus on this aspect, as we believe it is a timely issue. Following the recent Section 301 report on China, the threat of a Sino-American Trade War loomed. That report had focussed on, among other things, the terms of joint ventures between US enterprises and China's SOEs which it suggests are heavily State directed, particularly in respect of the terms governing technology transfer.[13]

[6] For the list of suspended provisions, see Trans-Pacific Partnership Ministerial Statement, 11 November 2017, supra n. 4, and now the CPTPP legally verified text, dated 21 February 2018, supra n. 5.

[7] CPTPP's Article 3 states:

> 1.This Agreement shall enter into force 60 days after the date on which at least six or at least 50 per cent of the number of signatories to this Agreement, whichever is smaller, have notified the Depositary in writing of the completion of their applicable legal procedures.
> 2.For any signatory to this Agreement for which this Agreement has not entered into force under paragraph 1, this Agreement shall enter into force 60 days after the date on which that signatory has notified the Depositary in writing of the completion of its applicable legal procedures.

Article 1.3 of the CPTPP states further that in the event of inconsistency, such as with Article 30.5 of TPP, the CPTPP text prevails over the TPP text. Article 30.5 of TPP is not included in the CPTPP's list of suspended provisions in the TPP text, which Article 1 of the CPTPP incorporates by reference.

[8] A. Panda (2018), 'The CPTPP Trade Agreement Will Enter into Force on 30 December', *The Diplomat*, 1 November 2018.

[9] See Malaysia's carve-outs in the party-specific annexes (TPP, Annex IV) under Article 17.9, TPP. These are carve-outs to Article 17.4 (Non-discriminatory Treatment and Commercial Considerations) and Article 17.6 (Non-Commercial Assistance).

[10] See especially, J. S. Fleury and J.-M. Marcoux (2016), 'The US Shaping of State-Owned Enterprise Disciplines in the Trans-Pacific Partnership', 19 *Journal of International Economic Law* 445; M. Kim (2017), 'Regulating the Visible Hands: Development of Rules on State-Owned Enterprises in Trade Agreements', 58 *Harvard International Law Journal* 225; and the special symposium papers in volume 16.4 of the *World Trade Review*.

[11] See Fleury and Marcoux, supra n. 10, 450 *et seq*.; I. Willemyns (2016), 'Disciplines on State-Owned Enterprises in International Economic Law: Are We Moving in the Right Direction?', 19 *Journal of International Economic Law* 657, 667ff; Kim, supra n. 10, 240, 247.

[12] R. Bhala (2017), 'TPP, American National Security and Chinese SOEs', 16 *World Trade Review* 655.

[13] 'Findings of the Investigation into China's Acts, Policies, and Practices related to Technology Transfer, Intellectual Property, and Innovation under Section 301 of the Trade Act of 1974', USTR, 22 March 2018, 23–24 (hereafter, '2018

https://doi.org/10.1017/S1474745619000168 Published online by Cambridge University Press

For Beijing, however, its SOEs operate on their own and Washington's allegations are presumptuous and speculative.[14] The allegation is, in effect, of State direction, coordination, and/or outright control. However, concern is not limited to operations in China but also to Chinese SOE behaviour abroad.

It is not too great a stretch of the imagination that Beijing itself may yet enter into negotiations for more extensive SOE regulation in the future. Arguably, this could in time be important to China's 'Belt and Road Initiative' ('BRI' for short). Implementation of that policy now involves participation from the private sector (investors, financiers, manufacturers, construction companies) because Chinese SOEs have now slowly begun to embrace the techniques of non-recourse project financing.[15] The pattern thus far has witnessed Chinese policy bank lending with the construction contracts awarded to Chinese SOEs.[16] In any event, many Chinese participants will be SOEs should non-recourse financing grow, causing some element of apprehension on the part of foreign private enterprises. In our view, the gap between Washington and Beijing in designing future treaty rules is not as wide as may be supposed. There is already the long application of already tighter disciplines on Chinese SOEs compared to other GATT-WTO Members under the terms of China's WTO Accession Protocol.[17] The way in which TPP's framers have accounted for the demands of business for stricter regulation of SOEs has been discussed in the available literature.[18] In this article, we dwell instead on the gap between the Chinese and American positions,[19] while we seek to explain some of the key issues in these areas of difference.

2. Comparing the GATT, and TPP's Definition of an SOE

This section discusses the architecture of TPP's SOE Chapter and its definition of an 'SOE' in comparison with – *inter alia* – the GATT's definition of STEs. TPP's regulation of SOEs and designated monopolies adapts GATT-WTO regulation under GATT Article XVII, imposes extensive transparency obligations, and extends and adapts WTO subsidy regulation to SOEs operating in the services sector,[20] as well as to the protection of covered investments. TPP Chapter 17 thus cuts across sectors. A further complexity involves the way TPP interacts with domestic law where the treaty envisages the enforcement of TPP rights under the latter, including, but not limited to, domestic competition laws.

A key issue is that SOEs and designated monopolies, such as those involving import and export and marketing boards, distort trade. They might act in a discriminatory manner, impose a hidden tariff through their pricing policies, even enact quota-like barriers to market access.[21] In this regard, a country cannot be allowed to escape the application of non-discrimination

Section 301 Report on China'). This is not necessarily to be taken to suggest acceptance of the premise that imposing technology transfer requirements is theft.

[14]T. Miles (2018), 'US and China Clash over "Technology Transfer" in the WTO', *Reuters*, 28 May 2018.

[15]M. Arnold (2018), 'Western Banks Race to Win China's Belt and Road Initiative Deals', *Financial Times*, 26 February 2018.

[16]This is the case with Malaysia's East Coast Rail Link, the Multi-Product Pipeline, and the Trans-Sabah Gas Pipeline, see N. Bowie (2018), 'How Far Will Malaysia Push China', *Asia Times*, 25 July 2018.

[17]J. Ya Qin (2004), 'WTO Regulation of Subsidies to State-Owned Enterprises – A Critical Appraisal of the China Accession Protocol', 7 *Journal of International Economic Law* 863.

[18]See the special symposium papers in volume 16.4 of the *World Trade Review*.

[19]Cf. P. I. Levy (2017), 'The Treatment of Chinese SOEs in China's WTO Protocol of Accession', 16 *World Trade Review* 635; Bhala, 'TPP, American National Security', supra n. 12.

[20]This is not to say that the GATS has no notion of monopoly suppliers and exclusive service suppliers and does not in fact regulate them for MFN and specific commitments violations. See GATS Article VIII; M. Matsushita *et al.* (2016), *World Trade Organization*, 3rd edn (Oxford: Oxford University Press), 577–578; Willemyns, supra n. 11, 664, 667 (observing that the activities of sensitive monopoly or exclusive service suppliers are in any case likely to be carved out under a WTO Member's GATS NT/MA commitments).

[21]Matsushita, supra n. 20, 244.

https://doi.org/10.1017/S1474745619000168 Published online by Cambridge University Press

obligations by having an SOE behave as its *alter ego*.[22] The basic aims of regulation, however designed, are to secure regulatory impartiality/neutrality and competitive neutrality.[23] Although SOEs are often associated with non-market economies (NMEs), they also feature in market economies where their activities are potentially just as trade distortive. Indeed, a key twenty-first century feature is the emergence of hybrid capitalism.[24] No longer are STEs and SOEs the inefficient and obsolete Soviet-style behemoths of the past. In any event, the GATT never confined the application of GATT Article XVII to NMEs.

While the GATT accepts the existence of STEs regardless of the distinction between market economies and NMEs, it also subjects them to GATT disciplines.[25] GATT Article XVII (1) addresses discrimination by STEs, such as the obligation to accord most favoured nation (MFN) treatment and national treatment (NT); (2) requires purchases and sales relating to exports and imports to be performed solely on a commercial basis; and (3) seeks to ensure competition for such trading activity.[26] TPP merely presents the latest example of how the US has been approaching the issue of SOE regulation in a changed world where the importance of the services sector in the past several decades, and of cross-border investment activity, now has to be factored in. Thus, TPP cuts across the traditional sectoral approach.[27] Nonetheless, TPP's approach is new in this regard,[28] and to that extent demonstrates a rethinking of SOE regulation which has already been used as a model for the negotiations in the Trans-Atlantic Trade and Investment Partnership between the US and the European Union (EU).[29]

Unsurprisingly, TPP refines the application of disciplines on subsidies (non-commercial assistance) to SOEs. Previously, US FTAs typically included references to SOEs in their competition chapters,[30] but, as we shall see, TPP adopts a different approach. Finally, today's SOEs demonstrate what Musacchio and Lazzarini call 'Leviathan as a minority shareholder'. SOEs are not necessarily majority-owned but they can be State-controlled nonetheless,[31] and TPP seeks to address this. Fundamentally, then, TPP as with the GATT seeks to achieve a more level playing field – regulatory and competitive neutrality – for both state-owned and non-state-owned enterprises. The TPP negotiators were faced with definitional issues. Provided the SOE operates for profit and is of a certain size, TPP Article 17.1 employs three tests – namely, where the Government owns *more than* 50% of the shares of the SOE, has control through ownership interests of the exercise of more than 50% voting rights, or has the power to appoint the majority of

[22]Kim, supra n. 10, 238 citing the WTO Appellate Body in *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain* (*Canada–Wheat Exports and Grain Imports*), WT/DS276/AB/R, 30 August 2005, para. 85 for the Appellate Body's view that, otherwise, a Member would be able to circumvent its non-discrimination obligations by acting through an STE.

[23]TPP Article 17.3 addresses the issue of delegated authority, stating that each Party shall ensure that the exercise of such delegated governmental authority is not inconsistent with the (TPP) Party's own obligations under TPP – i.e. including the obligation to accord most favoured and national treatment.

[24]A. Musacchio and S. G. Lazzarini (2012), 'Leviathan in Business: Varieties of State Capitalism and their Implications for Economic Performance', Harvard Business School Working Paper, No. 12-108, June 2012.

[25]Matsushita, supra n. 20, 244; Kim, supra n. 10, 244–247; P. Mavroidis and T. Cottier (1999), 'State Trading in the Twenty-First Century: An Overview', in T. Cottier *et al.* (eds.), *State Trading in the Twenty-First Century*, Vol. 1 (Ann Arbor, MI: University Michigan Press), 3.

[26]Matsushita, supra n. 20, 245; see GATT Article XVII.1 (a) and (b).

[27]Chapter 16 of TPP deals with competition policy generally and some part of Chapter 17 is relevant to competition policy matters (such as predatory practices). Although those two chapters cover different subject matters, the existence and activities of SOEs are an important concern for competition policy and the reader should be aware of this.

[28]USTR, 'Trans-Pacific Partnership: Likely Impact on the US Economy and Specific Industry Sectors', May 2016, 454 *et seq.*

[29]Willemyns, supra n. 11, 675; J. Kelsey, 'The US-proposed Annex on State-owned Enterprises for TISA, dated 6 October 2015', uniglobalunion.org.

[30]These are, according to a USTR report, the US–Singapore FTA's Chapter 12; US–Australia FTA's Chapter 14; US–Peru FTA's Chapter 13; US–Chile FTA's Chapter 16, US–Columbia FTA's Chapter 13 and the US–Korea FTA's Chapter 16. See USTR, 'Trans-Pacific Partnership', supra n. 28, 454. See further, Fleury and Marcoux, supra n. 10, 451.

[31]Musacchio and Lazzarini, supra n. 24, 14.

https://doi.org/10.1017/S1474745619000168 Published online by Cambridge University Press

the board members. This resembles closely the definition of an SOE first seen in the US–Singapore FTA (USSFTA).[32] There are, however, immediate contrasts with the GATT-WTO regime. The TPP formula adds precision to GATT Article XVII that defines STEs ('State trading enterprises' in GATT parlance) as entities that benefit from exclusive or special privileges – a capacious definition which intentionally draws SOEs, State-designated monopolies, and marketing boards into the fold.[33] While the GATT speaks of 'State trading enterprises' as a broad collective term, TPP speaks instead of 'SOEs and designated monopolies'. TPP's definition recalls the *US–AD & CVD (China)* case, where China argued that, for the purposes of offering a subsidy, a 'public body' as defined by the SCM Agreement does not include a body which is merely majority-owned by the Chinese Government, as the US had argued. In that case, the Chinese argument prevailed. What TPP does is to reverse the WTO Appellate Body and reinstate the US definition under which attribution of conduct could depend upon ownership alone.[34] The American view has been explained and sought to be justified on the ground that such a bright-line definition (the '50%' rule, above) will be easier and less costly to administer.[35] As this paper will show, it is not because of the problems associated with Leviathan as a minority shareholder and complex cross-holding structures, although, unlike what has been argued elsewhere, we believe the TPP definition does capture such complex cross-holdings.

A second noteworthy feature is that TPP only regulates for-profit institutions; requiring that SOEs governed by TPP 'must be' those 'principally engaged in commercial activities'.[36] While not a definitional aspect, it should also be observed that TPP applies only to SOEs with a threshold value of 200 million SDRs in annual revenue, calculated on the basis of the past three consecutive fiscal years. Put simply, to apply TPP's rules[37] – the SOE must be of a certain size.[38] This will in particular exempt smaller SOEs.[39] Various flexibilities exist too for safeguarding:

(a) prudential regulation and bank bailouts,[40] and other temporary measures in times of national or global economic emergency;[41]
(b) sovereign wealth funds (SWFs) in respect of TPP's non-discrimination/commercial basis rule, though not for harm through non-commercial assistance provided by an SWF;[42]
(c) pension funds,[43] and
(d) SOEs with governmental functions and public service obligations.[44]

Export credit agencies (i.e. the role of SOEs in trade financing) and investment agencies are also exempted.[45] Furthermore, Chapter 17 does not apply to government procurement,[46] although, as will be discussed below, harmful subsidization could nonetheless be addressed through the rule that state-owned procuring entities engaged primarily in profit-making activities (such as

[32]USSFTA, Article 12.8.5 and Article 12.8.6(b); Fleury and Marcoux, supra n. 10, 452.
[33]Matsushita *et al.*, supra n. 20, 244. See the GATT's Article XVII, and Ad Article XVII.
[34]WTO Appellate Body Report, *US – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (*US–AD & CVD (China)*), WT/DS379/AB/R, 25 March 2011, para. 290; reversing the Panel report in *US–AD & CVD (China)*, WT/DS379/R, 23 July 2010, on which see para. 8.94.
[35]Kim, supra n. 10, 232 *et seq*.
[36]Article 17.1, TPP (definition of SOEs).
[37]For which, see the discussion in the next section, below.
[38]Article 17.13.5, and Annex 17-A, TPP.
[39]See too Fleury and Marcoux, supra n. 10, 461.
[40]Article17.2.2–Article 17.2.4, TPP.
[41]Article 17.13, TPP.
[42]Article 17.2.5, TPP.
[43]Article 17.2.6, TPP.
[44]Article 17.2.8 and Article 17.2.10, TPP.
[45]Article 17.13.2, TPP.
[46]Article 17.2.7, TPP.

https://doi.org/10.1017/S1474745619000168 Published online by Cambridge University Press

national oil companies, for example) are required not to discriminate and to act solely in accordance with commercial considerations. Finally, investor–state dispute settlement is precluded, and other specific non-conforming measures, including at the sub-central level, are tolerated.[47]

3. Substantive Disciplines

Substantively, TPP's principal disciplines:

(1) require SOEs and designated monopolies to act solely in accordance with commercial considerations and in a non-discriminatory manner (the 'basic GATT disciplines on competitive neutrality');
(2) preclude 'non-commercial assistance' through direct transfers of funds or the provision of goods or services other than general infrastructure specifically to an SOE that causes adverse effects to another TPP Party or harm to its industry (the 'NCA rule'). This rule excludes such cases where there exists however a public mandate to provide a non-discriminatory public service;
(3) require greater transparency (the 'transparency rule').

3.1 The Non-Discrimination Rule, and Commercial Basis Rule

First, Chapter 17 requires the SOEs and designated monopolies of a TPP party to act on a commercial basis, and not to discriminate, in their purchases and sales of goods and services against suppliers, buyers, and investors of other TPP parties.[48] Thus, the commercial basis and non-discrimination rules apply to SOE purchases in addition to SOE sales.[49] This responds to contemporary concerns about State dominance on the demand side.[50] It means that the commercial basis and non-discrimination rules apply to SOE procurement notwithstanding the fact that TPP Chapter 17 does not apply to 'government' procurement. TPP's requirements are akin to regulation under GATT Article XVII. However, TPP's non-discrimination and commercial basis requirements are formulated differently. Unlike GATT Article XVII as interpreted in *Canada–Wheat Exports and Grain Imports*, discussed further below, TPP's commercial basis rule is not simply about non-discrimination. TPP is also not confined to regulation of the goods trade. Rather, Chapter 17 cuts across sectors – its disciplines extend to services, and further extend to the protection of covered investments.[51] As for the non-discrimination rule itself, the standard of treatment is not simply most-favoured nation (MFN) treatment and national treatment (NT) but the more familiar US formula which accords the better of MFN treatment or NT.[52]

By extending the reach of the TPP rule to services and the investment sector, TPP's commercial basis requirement applies to sales and purchases of both goods and services.[53] Under TPP's non-discrimination rule, a 'covered investment' in the assisting Party's territory is accorded the better of MFN treatment or NT in respect of an SOE's sales and purchases of goods and

[47]Article 17.9. See Schedule to Annex IV, Annex 17-D relating to the sub-central level, and Annexes 17-E (Singapore) and 17-F (Malaysia). The Singapore and Malaysian annexes to Chapter 17 concern Singapore's Government Investment Corporation Private Limited and Temasek Holdings (Private) Limited, and Malaysia's Permodalan Nasional and Lembaga Tabung Haji, discussed further in this article below in Section 5 (cross-holdings).

[48]See Article 17.4, TPP.

[49]See Fleury and Marcoux, supra n. 10, 457–458 for fuller treatment of this extension of SOE disciplines in TPP, following the USSFTA.

[50]For this US concern in the 2018 Section 301 Report on China, see supra n. 13, 33 (discussing the significance of purchases by China's three largest airlines – AirChina, China Eastern, and China Southern).

[51]See for SOEs Article 17.4.1(a) ('purchase or sale of a good or service'), Article 17.4.1(b)(ii) ('accords to a good or service supplied by an enterprise that is a covered investment'), Article 17.4.1(c), including Article 17.4(1)(c)(ii); and likewise for designated monopolies Article 17.4.2(a), Article 17.4.2(b)(ii), and Article 17.4.2(c).

[52]See Article 17.4(1)(b)(i). See also Fleury and Marcoux, supra n. 10, 457.

[53]Article 17.4.1(a), TPP.

https://doi.org/10.1017/S1474745619000168 Published online by Cambridge University Press

services.[54] We might illustrate this based on the facts of the *Canada–Wheat Exports and Grain Imports* case. That GATT-WTO dispute concerned the Canadian Wheat Board's export regime and certain requirements imposed upon grain importation into Canada. There the Appellate Body ruled that paragraph (a) of GATT Article XVII lays down the primary rule (i.e. non-discrimination), and that sub-paragraph (b), requiring that an SOE – or 'STE' in GATT parlance – acts according to commercial considerations, is but an application of the non-discrimination rule. The significance of this lies in the fact, as the panel had found, that where an SOE has not acted according to commercial considerations, it would thereby have breached sub-paragraph (a) as well. On appeal, it was suggested that the panel had erred in not addressing an analysis of discrimination under paragraph (a) before proceeding to an analysis of paragraph (b), which states that:[55]

> The provisions of sub-paragraph (a) of this paragraph shall be understood to require that such enterprises shall, having due regard to the other provisions of this Agreement, make any such purchases or sales solely in accordance with commercial considerations.

The Appellate Body's ruling was that the panel had not erred and had analysed paragraph (a), even if not sequentially. In the case of TPP, the two concomitant requirements of non-discrimination and commercial basis under Article 17.4 operate cumulatively. TPP therefore reflects the US position in *Canada–Wheat Exports and Grain Imports*.

TPP's expansion of its scope of coverage to the services and investment sectors comes from its analogous rule to GATT Article XVII's paragraph (a).[56]

In this way, the scope of TPP extends beyond goods exportation and importation. More than that, when coupled with the definitional aspects of TPP – absent a carve-out by the relevant TPP member – TPP extends its reach to listed companies so long as the latter fulfills the 50% ownership-or-control rule discussed earlier. TPP goes beyond NAFTA[57] because, as Fleury and Marcoux also explain, it goes beyond the regulation of designated monopolies.[58] It has been suggested that the change from the GATT ought to be welcomed – despite potentially being overly rigid – since TPP's bright-line '50%' rule would be easier to enforce than the GATT/WTO method of analysing each case on its own facts in determining whether, in fact, the company is an *alter ego* of the government.[59] But, we shall argue below, this point risks over-simplification.

3.2 Non-Commercial Assistance (NCA) Rule

Secondly, in an extension of WTO subsidies regulation, TPP prohibits 'non-commercial assistance' to SOEs which harms another TPP party or its domestic industry.[60] As with the WTO, TPP uses a specificity test. This is notable because, as we shall see, a different approach might have been to treat SOE subsidization as specific *per se*. Thus, 'non-commercial assistance' ('NCA') is 'assistance to a state-owned enterprise by virtue of that state-owned enterprise's government ownership or control', where the phrase 'by virtue of that state-owned enterprise's government ownership or control' is further defined as the explicit limitation of access to such assistance to the Party's SOE, assistance which is predominantly or disproportionately used by the Party's SOE or which otherwise favours the Party's SOE.[61]

[54] Article 17.4.1(b) and Article 17.4.1(c), TPP.
[55] GATT, Article XVII, see also Ad Article XVII.
[56] Article 17.4.1 (a), (b)(ii), (c)(ii).
[57] Cf. NAFTA, Article 1502. Also Article 1503 which applies to state-trading enterprises at the sub-central level and imposes the obligation of non-discrimination upon these.
[58] Fleury and Marcoux, supra n. 10, 455, tracing this to the model embraced under the US–Singapore FTA.
[59] Kim, supra n. 10, 244, 236, 257.
[60] See Article 17.6, TPP.
[61] Article 17.1, TPP. Cf. WTO SCM Agreement, Article 2.

https://doi.org/10.1017/S1474745619000168 Published online by Cambridge University Press

The rule resembles the GATT's measures against actionable subsidies under the WTO SCM Agreement, which defines such subsidies as those which are specific within the meaning of SCM Article 2.[62] TPP's 'predominant or disproportionate assistance' test appears also to reflect the WTO SCM Agreement's test for *de facto* specificity. However, the SCM Agreement would require predominant or disproportionate use by certain enterprises. As Julia Qin has explained, the precise identification of such a class of enterprises is however problematic. The difficulty lies in establishing that alleged subsidization is specifically directed to a group of enterprises to which the SOE, it is alleged, belongs. How shall that group or class be defined?[63] In practice, as the *US–AD & CVD (China)* case has shown, one ends up instead quibbling about what the SCM Agreement means by a 'public body'. TPP avoids this problem by counting 'SOEs' as being of themselves a distinct class, rather in the way the Chinese WTO Accession Protocol does.

As with the SCM Agreement, TPP requires a showing of 'adverse effect' to the interests of another TPP Party or 'injury' to another party's domestic industry.[64] Using a harm test in trade law acts generally as a check on overbroad regulation.[65] There are therefore two limbs to TPP's harm test under the NCA rule:

(a) *'Adverse effects'*. This limb prohibits a Party from causing 'adverse effects to the interests of another Party',[66] and requires that Party to ensure that its SOEs do not do so.[67] The rule applies to 'non-commercial assistance' given to the production and sale of a good by an SOE, or to the supply of a service by an SOE under modes 1 (cross-border supply) and 3 (commercial presence).[68]
(b) *'Injury'*. In addition, a Party is prohibited from causing 'injury' to another Party's domestic industry through non-commercial assistance given to the production and sale of a good in the other Party's territory provided the domestic industry of the other Party produces a like good.[69]

Thus, the 'injury' limb (discussed further, below) does *not* apply to the services sector,[70] whereas the 'adverse' effects limb only covers assistance given to SOEs in respect of services supply outside the assisting Party's own territory.[71] Thus, the 'adverse effects' limb applies only to the international trade in services.

'Adverse effects' is also WTO SCM Agreement language.[72] It is defined in TPP in a manner similar to the SCM Agreement's definition of 'serious prejudice' caused by an actionable subsidy.[73] Thus, a relatively high threshold for showing adverse effects is adopted. Again, as with the non-discrimination and commercial basis rules, the NCA rule extends in a cross-cutting way to covered investments and significant price undercutting in the international supply of services. This, as other commentators have also observed, introduces subsidies regulation to the international trade in services and is innovative.[74] It applies where:

[62]See Article 1.2 and 2, WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement).

[63]Qin, supra n. 17, 889–890.

[64]Article 17.1–17.3, TPP. See further, Article 17.7 and 17.8.

[65]See further, N. E. Nedzel (2008), 'Antidumping and Cotton Subsidies: A Market-Based Defense of Unfair Trade Remedies', 28 *Northwestern Journal of International Law & Business*, 215.

[66]Article 17.6.1, TPP.

[67]Article 17.6.2, TPP.

[68]In the parlance of the General Agreement on Trade in Services (GATS).

[69]Article 17.6.3, TPP.

[70]Article 17.6.3, TPP.

[71]Article 17.6.4, TPP.

[72]Article 5, WTO SCM Agreement. See also GATT Article XVII(4)(c) (which speaks of a GATT Contracting Party's belief that its interests are adversely affected by SOE activity).

[73]Article 17.7, TPP, cf. SCM Agreement Article 6.3.

[74]Fleury and Marcoux, supra n. 10, 459–460 (describing it as a 'breakthrough'); Willemyns, supra n. 11, 671.

https://doi.org/10.1017/S1474745619000168 Published online by Cambridge University Press

(a) NCA displaces or impedes imports of a like good of another Party or sales of a like good by an enterprise which is a covered investment.[75]
(b) The same occurs in another Party's or non-Party's market.[76]
(c) There is significant price undercutting, price suppression, price depression, or lost sales in the goods sector. Again, the rule also protects the covered investments of investors of another Party, though only in the territory of the assisting Party.[77]
(d) There is displacement or an impediment or price suppression in the services sector, albeit limited – as we have seen – only to effects caused by services exports through modes 1 and 3,[78] as opposed to effects within the assisting Party's own domestic services market.[79]

As for the injury limb, injury is confined to injurious effects in the goods sector. 'Injury' is defined in a similar way to harm under GATT-WTO trade remedies law, not least under the WTO SCM Agreement's provisions on countervailing measures – i.e. by reference to material injury, the threat of material injury, or the material retardation of the establishment of an industry. In this regard, consideration shall be given to increases in volume of production and its effect on prices, including significant price undercutting, as well as effects on the like domestic industry based upon an evaluation of all relevant economic factors and indices.[80] As for causation, all relevant evidence shall be taken into account.[81] The language of TPP's provision on the existence of a threat of material injury also resembles that of the WTO SCM Agreement.[82]

To illustrate, imagine an auto company which is more than 50% government-owned – Company A of Party A. Company A acquires a controlling stake in another auto company, Company B, operating in the territory of Party B, and in the territory of a third-party. Company A purchases wholly built-up vehicles and auto parts only from Company B and supplies an exclusive service to Company B, say the supply of auto-servicing in the territories of Party A, Party B and a third party at highly discounted rates. Company A would be defined as an SOE under TPP's 50% rule. Its purchases would be discriminatory under TPP – where TPP has fully de-linked the non-discrimination and commercial basis rules under GATT Article XVII – even if Party A could establish that Companies A and B are operating on a commercial basis. Party A now risks a claim of discrimination. Company A's supply of a service within the territory of Party A would be exempted from the NCA rule;[83] however, its purchases of cars and parts into the territory of Party A, and in Party B, and the third-party would not be, just as its supply of auto-servicing in the territories of Party B and in the third-party would also not be exempted from the NCA rule.

3.3 Transparency

In addition, Chapter 17 contains transparency disciplines (e.g. concerning the extent and nature of government ownership and control).[84] These are GATT-plus transparency disciplines,[85] and we will go on to discuss a key point about these obligations in the section immediately below.

[75]Article 17.7.1(a), TPP.
[76]Article 17.7.1(b), TPP.
[77]Article 17.7.1(c), TPP.
[78]Willemyns, supra n. 11, 671.
[79]Article 17.7.1(d) and Article 17.7.1(e), TPP.
[80]Article 17.8, TPP, cf. GATT Article VI and SCM Agreement, arts. 15.3 and 15.4.
[81]Article 17.8.4, TPP, cf. SCM Agreement Article 15.5.
[82]Article 17.8.5; cf. the language in the SCM Agreement, Article 15.7 and Article 15.8.
[83]Article 17.6(4); see also Fleury and Marcoux's remarks, supra 10, 460.
[84]Article 17.10, TPP.
[85]See Kim, supra n. 10, 250.

https://doi.org/10.1017/S1474745619000168 Published online by Cambridge University Press

4. Lingering Questions

4.1 The Sino-US Definitional Divide

In this section, we show how TPP's approach to the definition of an 'SOE' emphasizes form over function. Recall the WTO Appellate Body's view that government ownership of an enterprise does not automatically equate with 'control' of that enterprise. In the WTO *US–AD & CVD (China)* case, China challenged trade remedy action by the US against a range of Chinese products. The US argued that an SOE is a 'public body' for the purposes of the WTO SCM Agreement which defines a financial contribution as that made by a government or a public body. Article 1(1)(a)(i) of the SCM Agreement states that a subsidy exists if 'there is a financial contribution by a government or any public body within the territory of a Member'. The US argued that Chinese SOEs qualify as 'public bodies' under the WTO SCM Agreement because they are 'controlled' by the Central Government by virtue of the latter's majority ownership of those SOEs. China argued that an SOE is not a 'public body' under the WTO SCM Agreement if it is not specifically entrusted with governmental functions.[86] The WTO panel agreed with the US.[87] According to the panel's view, transactions entered into by SOEs can be scrutinized for unlawful subsidization. If that recommendation had been adopted by the WTO Dispute Settlement Body, transactions by all government majority-owned Chinese SOEs would have fallen under scrutiny.[88] China however appealed, the Appellate Body reversed the panel's ruling and accepted China's argument instead that SOEs are not public bodies simply on the basis of majority shareholding.[89] Rather, a case-by-case approach will be required. What TPP does is to reverse the Appellate Body's ruling and commit TPP parties to the US' view in that case.

The Appellate Body's requirement that a public body is one which 'possesses, exercises or is vested with government authority' turns upon the facts. The test is to be applied on a State-by-State, case-by-case basis.[90] What will matter is a 'proper evaluation' of the entity's 'core features' as well as the nature of its relationship with the government.[91] It does not mean ownership as under the TPP becomes irrelevant in the WTO context, merely that it is hardly decisive however extensive that ownership may be.[92] This method of analysis is familiar. There is a similar international debate over the entitlement of State agencies to foreign State/sovereign immunity. Under the Anglo-Commonwealth common law doctrine (e.g. in Singapore, Malaysia, Australia, and New Zealand as TPP/CPTPP signatories), analogous questions arise under foreign State immunity laws. Sovereign ownership of a ship grants it immunity.[93] While that may serve for ships, what if an entity were a separate and independent legal person altogether under the law of that foreign sovereign? What if it was the Soviet Tass News Agency of old, or in another well-known case the grain trading department of the Spanish Government? In the latter case, not only was the entity a separate legal person, as was the Tass News Agency,[94] the transaction in question

[86]Cf. WTO SCM Agreement, Article 1 where a subsidy is defined as 'a financial contribution by a government or any public body within the territory of a Member'.

[87]Panel Report, *US–AD & CVD (China))*, paras. 8.79, 8.94.

[88]See further, J. Wang (2016), 'State Capitalism and Sovereign Wealth Funds: Finding a "Soft" Location in International Economic Law', in C. L. Lim (ed.), *Alternative Visions of the International Law on Foreign Investment: Essays in Honour of Muthucumaraswamy Sornarajah* (Cambridge: Cambridge University Press), 405, 412–414. On the test of majority control, see R. Ding (2014), '"Public Body" or Not? Chinese State-Owned Enterprises', 48 *Journal of World Trade* 167, 173–174, also cited by Wang, at 413.

[89]Appellate Body Report, *US–AD & CVD (China))*, paras. 290, 317, 322.

[90]Panel Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (*Korea–Beef*), WT/DS161/R, 31 July 2000, para. 766; Kim, supra n. 10, 237.

[91]Appellate Body Report, *US–AD & CVD (China)*, para. 290.

[92]Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India* (*US–Carbon Steel (India)*), WT/DS436/AB/R, 8 December 2014, 4.17–4.30, 4.52; Kim, supra n. 10, 239.

[93]The rule in *The Parlement Belge* (1879) 4P.D.129.

[94]*Krajina* v. *Tass Agency* [1940] 2 All E.R. 274.

https://doi.org/10.1017/S1474745619000168 Published online by Cambridge University Press

was also purely commercial.[95] The English Court of Appeal had held – with Lord Justice Singleton famously dissenting – that the grain trading department's separate legal personality did not matter. After all, evidence by the Spanish ambassador and a Spanish law expert had shown that the entity was still a part of the Spanish State.[96] The idea that what matters is what the law of that foreign sovereign State actually says gained ascendancy as a result.[97] Returning to our present discussion, the fact that the SOE may be a separate legal person under its forum law is not necessarily the end but only the beginning of the inquiry. For the WTO Appellate Body in *US–AD & CVD (China)*, it is the possession, exercise, or vesting of governmental authority that counts.[98]

TPP, however, resembles the American position under section 1603 of the 1976 US Foreign Sovereign Immunities Act; namely, that an 'agency or instrumentality' of a foreign State includes a company or corporation (i.e. a separate legal person) which has the majority of its shares owned by a foreign State or its political subdivisions.[99] The definition is capacious. It goes beyond entities which merely engage 'in a public activity on behalf of a foreign government'.[100] The Anglo-Commonwealth rule, which will be familiar to lawyers in Malaysia, Singapore, Brunei, Australia, and New Zealand, is as we have seen quite different – a separate entity is not immune under State immunity laws (i.e. it is not considered to be a part of the foreign State) unless 'the proceedings relate to anything done by it in the exercise of a sovereign authority', and 'the circumstances are such that a State … would have been immune'.[101] In other words, if a separate entity, which is distinct from the government and is capable of suing or being sued in its own name, were to be considered a part of the government, then it must be vested with governmental authority. This rule has shown great subtlety, such as to treat State direction itself as not being dispositive – which it cannot be where an entity displays mixed characteristics, doing some things governmentally and other things commercially. The court asks – where a particular transaction is called into question and the entity demonstrates a mixture of governmental and commercial characteristics – if the act is traceable to a sovereign or governmental interest, taking into account the surrounding context. TPP appears to reject that kind of case-by-case, flexible method. Rather, its definition of government 'control' is formulaic in a manner that reflects the US Foreign Sovereign Immunity Act's definition of an 'instrumentality of a foreign State'.[102] While TPP excludes non-profit enterprises, it does not mean that for-profit SOEs cannot, in fact, undertake governmental functions. Absent TPP's explicit carving out of entities exercising public functions, of which there are many, TPP's rule may still apply but for 'any service supplied in the exercise of governmental authority', which is also exempted from Chapter 17's scope.[103] Beyond that, TPP looks to the nature of an entity as defined by its ownership and regular control.

[95]These cases are discussed briefly, for example, in C. L. Lim (2012), 'Beijing's 'Congo' Interpretation, Commercial Implications', 128 *Law Quarterly Review* 6, 7.

[96]*Baccus Srl* v. *Servicio Nacional del Trigo* [1957] 1 Q.B. 438.

[97]The issue is discussed more amply in D.W. Greig (1976), *International Law* (London: Butterworths), 235–237, which, although apparently dated, provides a still remarkably useful analysis of these issues. Lord Denning had considered the existence of a separate legal personality to be persuasive; *Mellenger* v. *New Brunswick Development Corp* [1971]2AllE.R.593; *Trendtex Trading Corp* v. *Central Bank of Nigeria* [1977] Q.B.529.

[98]Appellate Body Report, *US–AD & CVD (China))*, para. 290.

[99]Section 1603(b)(2). See *Karaho Bodas Co. LLC* v. *Perusahaan Pertambangan Minyak dan Gas Bumi Negara*, 313 F 3d 70, 75–76 (2d Cir. 2002) cert. denied, 123 S Ct 2256.

[100]*Patrickson* v. *Dole Food Co.*, 251 F 3d 795, 807–808 (9th Cir. 2001); *Mendenhall* v. *Saudi Aramco*, 991 F Supp 856 (SD Tex 1998); see further A. Dickinson, R. Lindsay, and J. P. Loonam (2004), *State Immunity: Selected Materials and Commentary* (Oxford: Oxford University Press), para. 3.018.

[101]United Kingdom State Immunity Act 1978, section 14(2). See further, Dickinson *et al.*, supra n. 100, para. 4.101.

[102]USFSIA, Section 1603.

[103]See Article 17.2.10, TPP.

https://doi.org/10.1017/S1474745619000168 Published online by Cambridge University Press

What if several companies are controlled by the government through the holding of stocks or voting rights? Should they be considered a single economic entity and an SOE?[104] Or is TPP's '50% rule' potentially open to evasion through inter-locking and indirect ownership structures? Likewise, if the government is a minority shareholder, say with only 15% of the outstanding stock of a company, but the other shareholders are dispersed with none holding more than 5% of the stock, then unless they form a coalition the government could still exercise effective control.

4.2 Cross-Holdings, 'Control' of the 'Exercise' of Voting Rights, and Board Control

In short, how might TPP address related parties, and where Leviathan acts as a minority shareholder? We hold that TPP addresses the issue by defining an SOE, not only in terms of formal share ownership but also by reference to '*de facto* control'. It is by so doing that TPP seeks to address the various indirect ways in which the State might act as a minority shareholder.

Article 17.1, as we have seen, includes in paragraph (b) the 'control and exercise' of more than 50% voting power, and, alternatively. in paragraph (c) a power of appointment in respect of the majority of the board or equivalent management body. Thus, even where a government owns only 50% or fewer shares, it could have 'more than 50% voting power' or a 'power of appointment in respect of the majority of the board or the equivalent' under a special share such as a 'golden share'.[105] What about the case where, in the absence of a golden share, where the company's stock is widely dispersed, the Government holds a block of, say, only 20% of ordinary shares?[106] It has been argued, elsewhere, that a chief benefit of TPP's '50%' rule is that it will be easier to administer when compared to the GATT–WTO rule. However, this is not necessarily so. Structures of ownership and control in respect of SOEs are potentially very complex, and we still lack adequate analytical frameworks to understand them.[107] Arguably, the TPP also captures *de facto* control of the exercise of voting rights under Article 17.1(b),[108] thereby requiring inquiry into inter-locking and indirect ownership structures, as well as other forms of indirect 'control' such as through building shareholder coalitions, including coalitions between government and other quasi-State actors such as pension funds.[109] Whether '*de facto* control' exists is often not apparent even in the case of seemingly obvious examples of SOEs.[110] Thus, TPP's bright-line 50% rule is either too crude if it were only to count formal ownership, voting rights, or golden shares, or it remains vague and open-ended where the rule also captures *de facto* control.

At the same time, TPP is under-inclusive where the company's stocks are widely dispersed but the government can exert effective control through a minority shareholding falling below the exercise of 'more than 50% voting power'. Where the other stockholders are private individuals holding no more than 5% for the purpose of receiving dividends, while the government holds

[104]For a comparison, see treatment of transactions that were closely connected as a single concentration under Recital 20 of the EU Merger Regulation in Case M.7850 – EDF/CGN/NNB Group of Companies.

[105]Golden shares are commonly found in post-privatization scenarios, see Musacchio and Lazzarini, supra n. 24, 14. See also (e.g.) J. Adolff (2002), 'Turn of the Tide? The "Golden Share" Judgements of the European Court of Justice and the Liberalization of the European Capital Markets', 8 *German Law Journal* 3.

[106]Kim, supra n. 10, 244 cites an *Inside US Trade* report of an aide to the House Ways and Means Committee pointing this out as an unforgiveable loophole.

[107]A. Musacchio and S. G. Lazzarini (2015), 'Chinese Exceptionalism or New Varieties of State Capitalism?', in B. L. Liebman and C. J. Milhaupt (eds.), *Regulating the Visible Hand* (Oxford: Oxford University Press), 403, 404.

[108]While one who posseses voting rights can choose whether or not to exercise them, adding the word 'control' to the word 'rights' would seem superfluous unless it were intended to include *de facto* 'control' of the exercise of such voting rights within the scope of the rule.

[109]See A. Musacchio and S. G. Lazzarini (2014), *Reinventing State Capitalism* (Cambridge, MA: Harvard University Press), 227 *et seq* for the example of State pension funds; also Musacchio and Lazzarini, supra n. 107, 403, 422.

[110]See the example of Ping An Insurance in C. J. Milhaupt and W. Zheng (2015), 'Reforming China's State-Owned Enterprises', in Liebman and Milhaupt, supra n. 107, 175, 179.

https://doi.org/10.1017/S1474745619000168 Published online by Cambridge University Press

15%, the private stockholders are unlikely to have much incentive to form a coalition. In short, the TPP's definition of an SOE needs still further work. However, TPP's transparency obligations facilitate the administration of the 50% rule and improved understanding of the structures of State capitalism. Difficulties with lengthy investigations of inter-locking corporate structures – including complicated pyramids[111] – and the fact that sovereign wealth funds may choose to invest in private companies, which are relatively intransparent, rather than in public companies[112] ought, at least in principle, to be ameliorated by the requirement imposed on TPP parties to disclose relevant information. Aside from listing SOEs,[113] and supplying information on the legal regulation of SOEs and of non-commercial assistance provided,[114] TPP parties are required also to disclose information relating to their cumulative shareholdings, including shares held by SOEs and designated monopolies, special or golden shares, government officials serving on boards and – for the purpose of the SOE size threshold requirement – annual revenues and total assets.[115] It does not mean – nor should it – that TPP parties are compelled to disclose confidential or sensitive information, but if they do not an adverse inference rule will apply.[116]

Thus, TPP seeks – or so we argue – to address the various indirect ways in which Leviathan acts as a minority shareholder, be it as minority stakeholder in the nurturing of a post-privatization (or post-disinvestment) State champion, debt-for-equity swap participant or pyramid holding company.[117] TPP does not apply the non-discrimination and commercial basis rules to the actual acquisition of such minority, or indeed to majority, stakes.[118] Two illustrations may help. Both involve pyramid state-owned holding companies. Such companies:[119]

> operate as portfolio managers for the government. For instance, in emerging markets examples of this range from *Khazanah Nasional Berhad* in Malaysia to SASAC in China. Malaysia is an extreme case in terms of consolidating the management of state equity under the umbrella of one big holding company. In 2010, Khazanah Nasional Berhad owned stock in 52 companies, out of which it held minority positions in about 26 of them, in sectors ranging from financials, transportation, and utilities.[120]

First illustration. Consider, firstly, Malaysia's carveouts to TPP's (and CPTPP's) Chapter 17 disciplines. To what extent will these shield SOEs that are State or SOE minority owned? Malaysia has carved out, under Annex IV, certain SOE purchases of goods and services from local enterprises, albeit capped in some (but not all) cases at 40% of the SOEs' annual budget.[121] Similarly, it reserves the right to provide NCA to certain Malaysian development banks and financial institutions – i.e. where these offer preferential financing to businesses under Malaysia's racial affirmative action programme. The carveouts operate through the positive listing of the SOEs in question in Annex IV to the TPP Agreement. In this way, the SOEs are exempted from the non-

[111] See Musacchio and Lazzarini, supra n. 107, 403, esp. 422 *et seq*; also Li-Wen Lin and C. J. Milhaupt (2013), 'We are the (National) Champions: Understanding the Mechanisms of State Capitalism in China', 65 *Stanford Law Review* 697 for an analysis of the 'networked hierarchy' of Chinese State capitalism where a top–down governance structure within State-owned corporate groups combines with links to other SOEs.

[112] S. A. Johan *et al.* (2013), 'Determinants of Sovereign Wealth Fund Investment in Private Equity vs. Public Equity', 44 *Journal of International Business Studies* 155.

[113] Article 17.10.1.

[114] Article 17.10.3(e), 17.10.4, 17.10.5.

[115] Article 17.10.3(a)–(d). See Kim, supra n. 10, 250–251.

[116] Annex 17-B, para. 9, discussed in Kim, supra n. 10, 251.

[117] Musacchio and Lazzarini, supra n. 24, 14–15.

[118] See Footnote 13 in Chapter 17, TPP.

[119] Musacchio and Lazzarini, supra n. 24, 15.

[120] This is likely to change in Khazanah's case; 'Khazanah Clearly Straying from its Original Purpose, says PM', *New Straits Times*, 6 July 2018.

[121] Annexes to the Agreement – Annex IV, Schedule of Malaysia.

https://doi.org/10.1017/S1474745619000168 Published online by Cambridge University Press

discrimination, commercial basis, NCA, and other disciplines. But what happens if an entity which is minority owned is – unlike the holding company itself – unlisted in the carveout? In such a case, the rule on *de facto* control through (even minority) cross-holdings will apply, excepting cases where the entity is merely the beneficiary of what otherwise would be the discriminatory acts of the holding company or is only a recipient of the latter's bounty. TPP disciplines would still apply, *mutatis mutandis*, to the unlisted SOE and to its indirect minority holdings – however indirect, presumably – as long as the *de facto* 'share or board control' rule is satisfied. The fact that the Malaysian and other similar carveouts list a whole range of SOEs is perhaps proof of the veracity of this point.[122] Thus, one can fall below the 50% share ownership threshold and still be captured by TPP disciplines as long as the conditions for *de facto* control under Article 17.1(a) and 17.1(b) are satisfied.[123] This, it would appear, is the significance of also having Chapter 17's chapter-specific annexes, as opposed to the 'whole agreement' Annex IV carveouts referred to above. In the chapter-specific annexes, Singapore, for example, states that the non-discrimination, commercial basis, and NCA rules 'shall not apply with respect to a state-owned enterprise owned or controlled by a sovereign wealth fund of Singapore'.[124] Malaysia uses the same formula ('owned or controlled') in carving out ownership and control by *Permodalan Nasional Berhad* (the 'Malaysian State Fund') in its chapter-specific annex.[125] *Permodalan Nasional* has stakes in some of Malaysia's largest publicly listed companies. What, presumably, these chapter-specific carveouts seek is the immunization of indirect holdings that are traceable to these State/sovereign wealth funds.

Second illustration. To take China's SASAC as a second illustration, let us assume that the TPP or the CPTPP regime one day applies to China. The following scenario which appears in the latest US Section 301 report on China would be captured by TPP's rule against regulatory bias. One allegation in that report is that China's SASAC – the State-owned Assets Supervision and Administration Commission of the State Council – ultimately controls the Chongqing Changan Automobile Company which is listed on the Shenzhen Stock Exchange. The allegation is that Changan abjures grantback clauses in the technology licensing agreements attending its joint ventures (JVs), thus acquiring improvements upon the foreign-owned technology of its JV partner. The prohibition of grantback clauses is not uncommon in the regulation of technology licensing contracts.[126] However, the allegation is that China manages market access to its foreign investment market by restricting market access once companies like Chongqing Changan have acquired a sufficient competitive edge technologically.[127] Absent a suitably designed carveout of the kind discussed above, China would in such a hypothetical example violate the rule against regulatory partiality.

4.3 Non-Regulation of Non-Profits and Tolerance of Designated Monopolies: Comparisons with Competition Regulation

We now turn to a noticeable 'gap' in TPP. This lies in TPP's non-regulation of non-profit enterprises – i.e. the non-regulation of what are sometimes called 'altruistic' enterprises. We have seen

[122] Perhaps, although one can also imagine the retort that our entire argument is wrong, that the extensive listing of SOEs was done *ex abundante cautela*.

[123] *Contra* Kim, supra n. 10, 244, citing differences with the US–Singapore FTA, 257. The rule in Article 12.8.5(b) of the US–Singapore FTA (USSFTA) is, on our view, still capable of being subsumed under TPP/CPTPP Article 17(1)(b) and (c), even if the design of the USSFTA rule is different. Art.12.8.5(b) of the USSFTA states that: '[W]here the government and its government enterprises, alone or in combination, own 50% or less, but more than 20%, of the voting securities of the entity and own the largest block of voting rights of such entity, there is [a] rebuttable presumption that effective influence exists.'

[124] Annex 17-E.

[125] Annex 17-F.

[126] Cf. the EU's Technology Transfer Block Exemption Regulations (the 'TTBR'), Commission Regulation (EC) No. 316/2014 on the Application of Article 101(3) of the Treaty to Categories of Technology Transfer Agreements, 2014 O.J. (L93) 17.

[127] 2018 Section 301 Report on China, supra n. 13, 30.

https://doi.org/10.1017/S1474745619000168 Published online by Cambridge University Press

that TPP only covers profit-making/business entities. This risks ignoring the impact which non-profit entities can have on the market, as well as their ability to abuse a dominant position. A second TPP feature is that designated monopolies are allowed to operate within certain markets provided any adverse effects are ring-fenced from other markets.

The TPP framers' decision to depart from a competition law model may explain much. But that at best explains the outcome, not the underlying reason to preclude harmful non-profits. TPP Chapter 17's purpose is to impose effective control over SOE activities and to avoid adverse effects on other Parties or material injury to their domestic industries. However, a non-profit entity which is government-controlled may as easily engage in similarly harmful acts. For example, a non-profit cooperative, a substantial portion of whose shares are owned by a government, can engage in dumping or predatory practices aided by governmental NCA. This is as harmful as when engaged in by profit-seeking enterprises owned by the government. But if the mischief sought to be addressed by the rule were to determine its scope, it would have been better for Chapter 17 to apply to any 'enterprise' or 'undertaking'. That is commonly the 'functional' approach used in competition law when defining an 'undertaking' or 'person or combination of persons' and although it would include profit-seeking enterprises it is not limited thereto.[128] All business transactions causing an important impact in the market will be included. There is, after all, little difference between the discriminatory and anticompetitive activities of profit seeking entities and non-profits insofar as their respective market effects are concerned.

To illustrate, here is an example from Japanese competition law which, as we have said, is not untypical of competition regulation. The example involves the Japanese Supreme Court's decision in the *Slaughter House Case* in which the issue was whether (a) the Municipality of Tokyo could be regarded as an enterprise and thus was qualified as a subject of competition law and (b) its below-cost offering of meat slaughtering services could be regarded as a predatory practice.[129] The municipality owned and operated a slaughter house for processing large-sized animals (cows, oxen, horses, etc.) and meat production. It offered slaughtering services at an extremely low price as the operation was not intended to be profit-seeking. Rather the aim was to provide meat for Tokyo residents at low prices – i.e. to provide food for a public purpose. In fact, the municipality ran the slaughter house at a large deficit. The loss incurred was compensated by a subsidy from the municipality, which made up about 80% of the total running cost of the business. Its competitor (one of several private companies offering slaughtering services in the Tokyo metropolitan area) complained that this operation amounted to predatory pricing which harmed the Tokyo Slaughter House's competitors. A heavy business loss was incurred as a result of the below-cost offering of slaughtering services by the municipality. The Tokyo District Court held that the operation of the slaughterhouse by the municipality amounted to predatory pricing and that the municipality should be held accountable for damage to its competitors. It granted the plaintiff recovery in damages. The Tokyo High Court and the Supreme Court reversed that decision on the ground that the plaintiff's damage was caused largely by factors other than the low pricing of slaughtering services by the municipality. For example, if one takes as the relevant market the whole eastern part of Japan rather than just the Tokyo Municipality Area, there were many other slaughter houses operating at lower prices than that offered by the plaintiff, and it was competition from these other providers which had harmed the plaintiff's business. The Tokyo High Court and the Supreme Court came to the conclusion that a sufficient causal link had therefore not been established. Although relief was denied, what is noteworthy is that the Supreme Court recognized that the activities of the Tokyo Municipality, a non-profit-seeking body, could still be regarded as those of an 'enterprise' or 'undertaking'

[128] See for the US position Thomas J. Philipson and Richard A. Posner, 'Antitrust in the Not-For-Profit Sector', NBER Working Paper 12132, March 2006, 3. For EU law, see *Van Landewyck* v. *Commission* [1980] ECR 3125, para. 88.

[129] *Shibaura Slaughter House* v. *Municipality of Tokyo*, S. Ct. Decision of Dec. 14, 1989, Minshu (S. Ct. Civil Cases Reporter), Vol. 43, No. 12, p. 2078 *et seq.*

https://doi.org/10.1017/S1474745619000168 Published online by Cambridge University Press

and were therefore subject to competition law disciplines. Had causation been proven, the Municipality would have been held liable.

There is a second notable feature in TPP's SOE disciplines when compared with competition regulation, Namely, that TPP allows designated monopolies to operate so long as any adverse effects are ring-fenced – i.e. so long as their actions do not adversely affect other markets. Recall that GATT Article XVII prohibits discrimination by STEs under sub-paragraph (a), and requires under sub-paragraph (b) that purchases and sales relating to exports and imports take place on a commercial basis, thereby allowing competition. However, according to the Appellate Body in *Canada–Wheat Exports and Grain Imports*, paragraph (b) does not require STEs – operating commercially – to compete for sales. It only prohibits STE discriminatory practices when making an item *available* for sale.[130] Thus, SOEs, designated monopolies and marketing boards are allowed to operate (i.e. as monopolies) so long as they do not operate in a discriminatory way. In this way, they still operate on a 'commercial basis'. Put differently, most favoured nation (MFN) treatment and national treatment (NT) standards apply, but there is no 'market access-type' obligation under GATT Article XVII. It may be for similar reasons that TPP eschews requiring SOEs to be pro-competitive rather than merely seeking to limit the scope or redress the impact of certain harmful effects. It is an admission that SOEs cannot wholly be subjected to competition.

In contrast, Article 17.4.2(d) of TPP states, that:

> 2. Each Party shall ensure that each of its designated monopolies:
>
> …
>
> (d) does not use its monopoly position to engage in, either directly or indirectly, including through its dealings with its parent, subsidiaries or other entities the Party or the designated monopoly owns, anticompetitive practices in a non-monopolised market in its territory that negatively affect trade or investment between the Parties.

The footnote to that provision, Footnote 14, states that 'For greater certainty, a Party may comply with the requirements of this subparagraph through the enforcement or implementation of its generally applicable national competition laws and regulations, its economic regulatory laws and regulations, or other appropriate measures.'[131]

To understand this, observe that a conceptual issue would have arisen once TPP adopted a cross-cutting approach and extended SOE disciplines to the services sector. Unlike regulation under GATT Article XVII, in the services sphere a national treatment restriction amounts to a market access restriction. Thus, had the GATT approach been extended straightforwardly to services trade regulation, the national treatment discipline would have secured market access by curtailing designated monopolies. TPP adopts however a compromise position of leaving such monopolies intact – regulating them through an anti-discrimination rule in the monopolized market while concomitantly regulating their potentially harmful effects in 'non-monopolized markets.

To illustrate, consider the case relating to the Nippon Telephone and Telegraph Company, Eastern Japan (NTT) as an example of the situation envisaged in Article 17.4.2 (d). This was a Japanese Supreme Court decision. The case arose out of a claim that the NTT, which held a predominant share in telephone networking services, had engaged in predatory pricing in its connection charges.[132] NTT was originally a part of the Government (specifically, the Ministry of Telecommunications and Posts). It was however privatized and converted to a private company

[130]WTO Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, WT.DS276/AB/R, 30 August 2004, para. 100, 161; Matsushita *et al.*, *supra n. 20*, 245–246.

[131]As Willemyns has pointed out, we should not forget the independent application of TPP(/CPTPP) Chapter 16, which requires Parties to 'endeavor to apply its national competition laws to all commercial activities in its territory' (Article 16.1.2); Willemyns, supra n. 11, 671.

[132]*NTT* v. *JFTC*, 17 December 2014, Hanrei Taimuzu (Court Cases Reporter), No. 1339, 55 *et. seq.*

https://doi.org/10.1017/S1474745619000168 Published online by Cambridge University Press

with the central government and local governments owning 35.26% of its stock. NTT owned most of the local telephone networks in the country and held a predominant position. Competing companies had their own facilities for local telephone networks but were required to lease and obtain connections to NTT's telephone network in order to operate and sell telephone services to urban consumers. Thus, telephone networks owned by NTT were 'an essential facility' necessary to any company intending to enter city telephone markets. NTT was obligated to grant connections to local telephone networks to competing companies under Japan's Telecommunications Law. However, NTT and competing telephone companies were also competitors in the telephone retail market. However, NTT had set its connection charges to be collected from competing companies at a level higher than what NTT itself charged telephone users/consumers in the cities. As a result, companies could not possibly compete. What NTT charged consumers was lower than the connection charge which NTT's competitors had to pay to NTT. NTT's practice was held to amount to predatory pricing by the Japan Fair Trade Commission (JFTC) and that decision was upheld by the Japanese Supreme Court. The NTT case illustrates how a company with a market dominant position in one market (the market for connection and access to local telephone networks) leverages its position to squeeze out competitors in another market (the consumer market for telephone services). It explains TPP's rule which, while allowing 'designated monopolies' to continue to operate, seeks to curb the effects of their activities in 'non-monopolized' markets.

4.4 Interaction with Domestic Law and the Applicable Law Problem

TPP piggy-backs on domestic law and domestic courts. Here too lie unresolved questions.

TPP envisages that States Parties shall grant civil jurisdiction to their own courts to render judgments on the behaviour of other TPP Parties' SOEs. Article 17.5.1 states, that:

> Each Party shall provide its courts with jurisdiction over civil claims against an enterprise owned or controlled through ownership interests by a foreign government based on a commercial activity carried on in its territory. This shall not be construed to require a Party to provide jurisdiction over such claims if it does not provide jurisdiction over similar claims against enterprises that are not owned or controlled through ownership interests by a foreign government.

The savings clause in the second sentence only serves to emphasize that SOEs are broadly speaking precluded from claiming foreign sovereign or State immunity. The concept is clear but the rule is too trim and raises questions about whether preclusion of immunity goes beyond the usual rules for the application of a restrictive immunity doctrine. Consider the case where an SOE can show that a particular foreign sovereign activity against which civil suit is brought would ordinarily have enjoyed immunity. Such cases may be covered by some other exclusion in TPP, such as the exemption of central banks, but this may not always be so. If a specific transaction is called into question, the normal application of foreign sovereign or State immunity rules may consider the critical act to be sovereign and not commercial in nature under a restrictive immunity doctrine, but TPP only exempts the supply of a service in the exercise of governmental authority.[133] Such situations are probably covered by Article 17.5.1, above. However, similar problems will arise if a domestic law doctrine of Act of State exists. At least according to the Anglo-American and Anglo-Commonwealth common law view, an Act of State does not prevent jurisdiction but merely counsels against the court's exercise of jurisdiction in cases where otherwise a foreign sovereign's actions within its own territory may be called into question by the forum court.[134]

[133] Article 17.2.10, TPP.

[134] For the US case-law, see *Underhill* v. *Hernandez* (1893) 65 Fed. 577; *Oetjen* v. *Central Leather Co.* (1918) 246 US 297, 304; *Banco Nacional de Cuba* v. *Sabbatino* (1964) 376 US 398. For the English and Anglo-Commonwealth doctrine, see Lord

https://doi.org/10.1017/S1474745619000168 Published online by Cambridge University Press

Secondly, what is the applicable law since Chapter 17 itself applies but does so only to TPP Parties? Imagine a common law action brought for restraint of trade in a TPP/CPTPP country where the defendant is a foreign SOE. How will the double-actionability rule in tort conflicts be addressed? This rule generally requires an alleged tort to be a tort under both the law of the forum and of the place of the tort. While a specific action of a foreign SOE may be a tort when committed abroad, it is unlikely to amount to a tort in its home State. Or imagine an instruction by Government A to an ordinary (non-State-owned) commercial bank in State A to finance a particular transaction. Say that transaction amounts to NCA causing harm to other financial institutions in State B, which as with State A is party to TPP/CPTPP. Imagine that TPP/CPTPP is incorporated into the domestic law of State B and rights arising under the treaty are made subject to civil action. Assume a civil claim can now be brought in State B against the bank in State A for violation of the NCA rule. The bank could argue that it enjoys foreign State immunity. Imagine that under the law of State B, immunity would ordinarily apply to that transaction, yet is it not TPP's intention to lift the immunity of foreign SOEs in such civil claims? The correct view, we would suggest, is that the matter should be resolved according to the State immunity rules in State B.

Piggy-backing on municipal law raises potentially far-reaching complexities. They have to do with the interaction of international treaty and domestic laws. The area of greatest difficulty is where municipal norms overlap with TPP regulation. This is where situations of conflict will arise. An even more interesting question arises when we consider allowing domestic civil claims against the State Party to TPP, which is obliged to incorporate TPP disciplines into its domestic law. TPP as we have seen requires administrative impartiality in regulating both SOEs and non-SOEs. The non-discrimination rule is applied not simply to a party's SOE but to the domestic regulation of SOEs. A simple example would be where a national competition authority is challenged for not being evenhanded.[135] A more direct example would be where an SOE's activities are supported by discriminatory State regulation. Thus, to take a contemporary allegation, Washington accuses China not only of discriminatory purchases through its three largest state-owned airlines, but because aircraft purchases in China require State approval, the Chinese Government acts, allegedly, in a discriminatory fashion.[136] Will these kinds of claims become common in TPP States? The answer is that Article 17.5.1 merely states that 'Each Party shall provide its courts with jurisdiction over civil claims' directed 'against an enterprise'. Article 17.5.1 does not appear to require the creation of public law rights. An inter-State and, where applicable, investor–State action under TPP (or CPTPP) might be brought instead.[137] This brings us to the issue of investors' rights under TPP Chapter 17.

Wilberforce's judgment in *Buttes Gas and Oil Co* v. *Hammer (No. 3)* [1982] AC 888, 930. The Anglo-Commonwealth doctrine is derived from US case-law which itself is derived from English law (see *Blad* v. *Bamfield* (1674) 3 Swan. 604, 607; *Duke of Brunswick* v. *King of Hanover* (1844) 6 Beav. 1; (1848) 2 H.L.Cas. 1; both cited by Lord Wilberforce, 932). For the English and Anglo-Commonwealth position, see also Lord Justice Rix's judgment in *Yukos Capital S.A.R.L.* v. *OJSC Rosneft Oil Company* [2012] EWCA Civ. 855. For further reference, see (e.g.) J. Crawford (2012), *Brownlie's Principles of Public International Law*, 8th edn (Oxford: Oxford University Press), 72–87 for an overview; and for the Anglo-Commonwealth view, C. McLachlan, *Foreign Relations Law* (Cambridge: Cambridge University Press, 2014), 523–545. For non-justiciability from a comparative perspective, see also Crawford, pp. 103–110, although in England Mr. Justice Hamblen in the court below in *Yukos* once observed that the Act of State doctrine appears to have no equivalent in civil law; see Lord Justice Rix in *Yukos*, at [40].

[135] Article 17.5.2, TPP. Fleury and Marcoux, supra n. 10, 458–459.

[136] 2018 Section 301 Report on China, supra n. 13, 33.

[137] For further discussion, see also Willemyns, supra n. 11, 678 (Article 17.5 does not contain an exclusive jurisdiction clause).

https://doi.org/10.1017/S1474745619000168 Published online by Cambridge University Press

4.5 Covered Investments and the Asymmetrical Treatment of Domestic and Foreign-Invested SOEs

TPP adds to the range of foreign investors' rights without going so far as to permit redress through investor–State arbitration. Rather, it would allow such rights to be vindicated through domestic and inter-State dispute settlement. Thus, Chapter 17 secures certain rights for SOEs when operating investments abroad. This effect may be a little surprising, but TPP/CPTPP accord for both purchases and sales of goods and services the better of MFN treatment or NT to a 'covered investment' in the assisting Party's territory.[138] A covered investment is also protected under TPP's/CPTPP's NCA rule. Here, a covered investment in the assisting Party's market is protected against market displacement or impediment of its like product.[139] It is protected against price undercutting, price suppression, price depression, or lost sales in the goods sector.[140] Thus, while SOEs face increased regulation at home, when they are investors abroad their investments will enjoy expanded rights in another TPP Party's market.

This can also be appreciated in light of the current debate in investment law circles about SOEs and sovereign wealth funds (SWFs).[141] There is an interesting issue about whether SWFs should be treated as if they were like private investors under investment treaties.[142] It is sometimes suggested that SWFs cannot be granted all the rights of a private investor.[143] Others counter that there is no reason in principle to distinguish between different investors simply on account of ownership structure. In this regard, TPP Chapter 17 draws no distinction, at least within the framework of Chapter 17, to the covered investments of sovereign-owned and private investors.

TPP's and CPTPP's Chapter 17 disciplines therefore appear to create additional investment rights. Unsurprisingly, TPP was designed to be pro-investment, addressing the new 'trade issue' of the inter-relationship between trade and investment in a way which demonstrates an early ambition of its negotiators that the treaty should become a 'Twenty-First Century', 'cross-cutting' agreement. Thus, TPP applies to the behaviour of SOEs and designated monopolies which 'affect trade or investment between the Parties'. The key words are 'or investment', without distinction between the investments of SOEs (including SWFs) and of private investors.[144] The treaty's non-discrimination and commercial basis rules, and its NCA rule extend to protect covered investments beyond the usual investment protection standards – such as outlawing uncompensated expropriation, and the assurances of fair and equitable treatment and full protection and security. Chapter 17 therefore is also a blueprint for a new kind of investment protection against harm to investors and investments by host State SOEs and designated monopolies. However, it is arguably incomplete – having drawn the distinction between SOEs and purely private enterprises it arguably suffers from a lack of attention to the investment law debate about foreign investment through SOEs.

Care must be taken in understanding how TPP or CPTPP creates expanded investment rights. Chapter 17 rights are not susceptible to investor–State dispute settlement under Chapter 9 of TPP or CPTPP).[145] Strictly speaking Chapter 17's extension of SOE disciplines to the protection of a TPP/CPTPP Party's investors' covered investments protect only the legal rights of TPP/CPTPP

[138] Article 17.4.1(b) and Article 17.4.1(c), TPP.

[139] Article 17.7.1(a) and Article 17.7.1(b), TPP.

[140] Article 17.7.1(c), TPP.

[141] SWFs are SOEs for the purpose of TPP where the treaty's definitional requirements are met. Thus, an SWF is an SOE where it is more than 50% owned by a TPP party, or where a TPP party has more than 50% voting rights, or where a TPP party has the power to appoint the majority of the board members under Article 17.1. As such an SWF/SOE is subject to the disciplines which TPP applies to the SOEs of a forum State.

[142] M. Sornarajah (2011), 'Sovereign Wealth Funds and the Existing Structure of the Regulation of Investments', 1 *Asian Journal of International Law* 267.

[143] See *Beijing Urban Construction Group Co. Ltd.* v. *Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction (31 May 2017).

[144] Article 17.2.

[145] Section B, Chapter 9.

https://doi.org/10.1017/S1474745619000168 Published online by Cambridge University Press

Parties *inter se*, and only inter-State dispute settlement applies to Chapter 17 disputes.[146] This will not, strictly, preclude a TPP/CPTPP-country investor seeking to argue that its rights under Chapter 9 are also violated, for example by relying (also) on a breach of a Chapter 17 right to establish the breach of fair and equitable treatment, or indirect expropriation. However, breach of a Chapter 17 right *per se* cannot amount to a Chapter 9 breach.[147] In such cases, resort to inter-State dispute settlement will have to be carefully considered against the difficulty of making an investor–State claim. A forum selection exercise will be involved.

5. Imagining Treaty-Based Chinese SOE Reform

The GATT-WTO regime regulates SOEs for fear that they act as the alter ego of the State – i.e. through imposing non-discrimination and commercial basis disciplines. TPP and CPTPP go further in tackling subsidization ('non-commercial assistance'/'NCA') (1) to an SOE, and (2) through an SOE which causes an adverse effect to the interests of another TPP party or injury to its domestic industry. TPP/CPTPP protect against SOE behaviour for covered investments of TPP/CPTPP parties in their purchases and sales of goods and services. There are also extensive transparency obligations. The truly notable difference is a distinctly American definition of an SOE by reference to majority ownership and control.

Imagine how TPP's approach, or something akin to it, might one day operate in respect of the People's Republic of China. Imagine Washington and Beijing negotiating SOE regulation between themselves as opposed to engaging in strategic rule rivalry.[148] Recall (i) the difficulty under the SCM Agreement of establishing that alleged subsidization is specifically directed to a group of enterprises to which the SOE, it is alleged, belongs. Under TPP, harmful NCA to or through an SOE is outlawed; put differently, harmful NCA to an SOE is automatically deemed to be – in WTO terms – 'specific'. Examples include cheap land, financing, or other support to or through an SOE.[149] This gets us around the problem of determining the class of subsidy recipients to which an SOE is alleged to belong. Secondly, (ii) whether or not subsidization occurs through an SOE is now defined by reference to TPP's 50% rule (i.e. of ownership or board control) not as under the GATT-WTO by virtue of the enterprise exercising governmental authority or fulfilling in some other way the WTO definition of a 'public body'. In both these respects – (i) and (ii) – TPP expands the reach of SOE regulation to a range of SOEs which otherwise may not be captured so easily under WTO disciplines.

So what if China were to implement TPP disciplines? The question is a practical one to the extent that TPP's framers anticipated potential Chinese entry. They would then have proceeded on the implicit understanding that TPP's disciplines, or some version of these disciplines, might one day be put on the table in potential negotiations with China.[150] One could go so far as to say that the imposition of SOE disciplines on Vietnam was but a dress rehearsal (although not for Vietnam or indeed Malaysia). However, we might be forgiven for thinking, at the same time, that the idea of China accepting such disciplines is – at least at present – far-fetched. Having said that, reform of the Chinese SOE sector has been long discussed in China, notwithstanding

[146]TPP/CPTPP, Article 28.3.1.

[147]Cf. TPP/CPTPP, Article 9.6.2 (FET and FPS do not require treatment in addition to or beyond that which is required by' customary international law); 9.6.3 ('breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article').

[148]In other words, acting in rivalry to shape the rules of the international trading system, see further, Fleury and Marcoux, supra n. 10, 449–450.

[149]This is not to say that figuring out the size of implicit subsidies will be straightforward. SOEs may issue bonds that are not priced using the fundamentals of the firm but according to the sovereign's balance sheet; Wagner *et al.* (2015), 'Implicit Bailouts and the Debt of Wholly State-Owned Enterprises', SSRN working paper. Policy bank loans contain large subsidies which are difficult to quantify; S. G. Lazzarini *et al.* (2015), 'What Do State-Owned Development Banks Do? Evidence from BNDES, 2002–09', 66 *World Development* 237.

[150]See (e.g.) Bhala, supra n. 12, 661.

https://doi.org/10.1017/S1474745619000168 Published online by Cambridge University Press

Washington's allegations that constant Chinese promises in this regard have not been kept.[151] So too has TPP membership been mulled inside the Great Wall.[152]

Crucially, China's Accession Protocol already imposes additional obligations going beyond the GATT-WTO regime – 'WTO-plus' obligations so-called. In doing so, the Accession Protocol treats the provision of subsidies to SOEs as being specific *per se*. This differs little if at all from TPP's direct regulation of SOE subsidization. However, TPP extends SOE subsidies regulation to their effects in the services and investment domains.[153] As for the 50% rule, we still do not know what it means to say that beyond the 50% ownership rule, Article 17.1 of TPP (the definition of 'state-owned enterprise') sweeps within its reach a commercial enterprises meeting TPP's size threshold which a Party '(b) controls, through ownership interests, the exercise of more than 50 per cent of the voting rights; or (c) holds the power to appoint a majority of members of the board of directors or any other equivalent management body'. Note that it is 'control' over the exercise of an excess of '50% voting rights'. We suggest that, against contrary views, this could have a very broad reach and should be read to encompass indirect ownership interests. Observe that in contrast paragraph (a) of the definition of 'state-owned enterprise' refers to such enterprises in which a Party 'directly' owns 'more than 50 per cent of the share capital'. The word 'directly' is absent in paragraphs (b) and (c). So here lies a sticking point. But as we have seen in the Malaysian and Singaporean examples above, key indirect holdings may still be protected through express carveouts.

Fifty percent is not a harsh threshold. It is doubtful that China's SASAC still holds more than 50% stakes in Chinese SOEs following a policy of disinvestment, which, over time, has reduced the government's stake.[154] The crucial issue lies in the other aspects of TPP's definition of an SOE. On cross-holdings, is Beijing likely to always maintain its position that it is entrustment with government functions which counts? This TPP already carves out. Thus, the key difficulty in overcoming the Sino-American difference does not lie in Beijing's definition of an SOE or in TPP's and CPTPP's 50% ownership rule. Rather, in our view, it lies in the very specific way that TPP's/CPTPP's SOE regime defines *de facto* control. It is *de facto* control which occupies the attention of the authors of the latest Section 301 report on China. So far as Beijing is concerned, it has done everything to fulfill its WTO obligations even if Washington considers those obligations themselves to be opaque, outdated, and inadequate. According to this latter view, China is simply 'gaming the system' and is 'exploiting' currently inadequate trade rules.[155] Here lies the true conceptual divide. One which hopefully will still occupy the future attention of Sino-American and other negotiators.

6. Conclusion

The tensions which now exist in respect of the future design of SOE treaty regulation are often portrayed as part of a philosophical contest, and indeed it may be that fundamental tenets and beliefs are involved – competitive neutrality, regulatory neutrality, allocative efficiency, even the ultimate fate of market capitalism.[156] Still, if we assume in the Chinese case, which may justifiably be considered one of the most significant, that there is no fundamental quarrel with SOE reform

[151] Ibid.

[152] 'China Mulls Over Joining the TPP', *China Radio International*, 27 March 2014.

[153] See GATS Article XV. Implicating a long-standing discussion about having a multilateral regime for services sector subsidies regulation.

[154] F. Gang and N. C. Hope (2014), 'The Role of State-Owned Enterprises in the Chinese Economy', in *US–China 2022: Economic Relations in the Next 10 Years* (HK: CUSEF), describing this process which began in the mid-1990s as a 'dramatic restructuring' of Chinese SOEs, 2, 5.

[155] See e.g. J. Mullen, 'How Did China End Up Posing as the Defender of Global Trade', CNN, 10 April 2018.

[156] See e.g. I. Bremmer (2010), *The End of the Free Market: Who Wins the War between States and Corporations?* (New York: Portfolio).

https://doi.org/10.1017/S1474745619000168 Published online by Cambridge University Press

but merely with its pace and precise form, the TPP scheme is at least a welcome experiment. Yet it is but an experiment, as we have tried to emphasize in this article by endeavouring to tease out some key questions about how TPP's SOE regime might actually operate. Hopefully, we will know in due course, now that CPTPP has come into force. There is even the suggestion of US re-entry into TPP. In the meantime, the issue of Chinese SOE reform remains alive following a now mature policy of creating Chinese joint stock corporations.[157] Current Sino-American tensions come too into play,[158] there is already the wholesale reform of Chinese investment laws,[159] not to mention the long-drawn-out negotiations for a Sino-American bilateral investment treaty.[160] Reform of SOE regulation under current trade treaty laws is related, running through all of these as if a common thread.

Acknowledgment. The support of the Shanghai 1000 Plan and SUIBE, Shanghai, as host institution is acknowledged with gratitude.

[157]M. Miller and F. Cheng (2017), 'China Says Framework for SOE Reform "Basically Complete"', *Reuters*, 28 September 2017; *contra* H. Sender (2017), 'China's State-Owned Business Reform a Step in the Wrong Direction', *Financial Times*, 26 September 2017.

[158]See the 2018 Section 301 Report on China, supra n. 13.

[159]See S. Chong and C. L. Lim (2015), 'The Convergence of China's Foreign and Domestic Investment Regimes and China's Investment Treaty Commitments', 32 *Journal of International Arbitration* 461. The new Chinese Foreign Investment Law regime has just been passed and will come into force in January 2020.

[160]J. Perlez (2015), 'Q. & A.: Henry Paulson on Dealing with China', *New York Times*, 24 April 2015; D. Lehr (2015), 'Why China–US Investment Treaty Matters', Paulson Institute, 13 February 2015; W. Chen (2017), 'China–US BIT Remains Possible, Say Experts', *China Daily*, 7 November 2017.

Cite this article: Matsushita M, Lim CL (2020). Taming Leviathan as Merchant: Lingering Questions about the Practical Application of Trans-Pacific Partnership's State-Owned Enterprises Rules. *World Trade Review* **19**, 402–423. https://doi.org/10.1017/S1474745619000168

https://doi.org/10.1017/S1474745619000168 Published online by Cambridge University Press