From Effect to Behaviour
Regulating State-Owned Enterprises as Competitors in Trade Agreements
Su, Xueji

Published in:
Journal of World Trade

Published: 01/06/2023

Document Version:
Final Published version, also known as Publisher's PDF, Publisher's Final version or Version of Record

Publication record in CityU Scholars:
Go to record

Publication details:
https://kluwerlawonline.com/journalarticle/Journal+of+World+Trade/57.3/TRAD2023021
From Effect to Behaviour: Regulating State-Owned Enterprises as Competitors in Trade Agreements

Xueji Su*

In recent years, the attempt to curb state-owned enterprises (SOEs) has resulted in dedicated rules in trade agreements. This paper reveals significant paradigm shifts in cross-border SOE regulation by exploring the emerging SOE rules and contrasting them with SOE disciplines in World Trade Organization (WTO) agreements. First, the emerging SOE rules shift the emphasis from regulating trade measures to the competitive behaviour of SOEs. More importantly, the emerging SOE rules are characterized by excessive focus on behaviour analysis and a per se approach. Under a per se approach, a violation of the emerging SOE rules could be established regardless of whether the behaviour of an SOE caused a harmful trade or competition effect. Finally, in light of SOE reform in China, the article contends that the emerging SOE rules' behaviour analysis deviate cross-border SOE regulation from its primary goal of levelling the playing field.

Keywords: State-owned enterprise, CPTPP, subsidy, competition, WTO, commercial considerations, non-discrimination, competitive neutrality, regional trade agreement

1 INTRODUCTION

In the recent decade, cross-border activities of state-owned enterprises (SOEs) have been thrust into the limelight due to the mounting presence of state capitalism in the global marketplace, engaging in competition with private actors.1 Regulating SOEs’ competitive conduct in a transnational setting is no doubt a vexed issue.2 The difficulty lies in striking a balance between the sovereign right of governance and the negative spillovers of state intervention. On the one hand, the

---

* Postdoctoral Research Fellow, City University of Hong Kong, School of Law. Email: xuejisu@cityu.edu.hk. The article was presented at the 11th Annual Conference of the Society of International Economic Law's Postgraduate and Early Professionals Network (PEPA/SIEL). The author thanks Chin Leng Lim, Julien Chaisse, Alexandr Sveticinii, Geraldo Vidigal, and Shiling Xiao for their constructive comments on the earlier iterations of this article. All errors are my own.


© 2023 Kluwer Law International BV, The Netherlands
making and operating of SOEs is a matter of regulatory diversity and societal choices. On the other hand, as SOEs are often closely linked to and supported by states, their conduct, if left unbridled, can undermine fair competition, market access, and resource allocation.

In this context, the attempt to regulate SOEs’ competitive behaviour results in a variety of rules in preferential trade agreements (PTAs). A 2020 World Bank survey reveals that 78% of the deep trade agreements that include provisions on state enterprises address the anti-competitive behaviour of SOEs. However, for a long time, the rules utilized to this end varied substantially. It was only until the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) that the practice of regulating SOEs’ competitive conduct began to merge into a set of dedicated SOE rules. These emerging SOE rules are crafted with a view to curbing SOEs’ undue competitive edge and re-establishing a level playing field. On the substance, the rules primarily consist of four subsets of obligations: the non-discrimination, the commercial considerations, the non-commercial assistance (NCA), and the elevated transparency rules. The former two standards mandate states to ensure their SOEs do not discriminate in their sales and purchases (non-discrimination) and behave commercially (commercial considerations), while NCA rules, as a set of anti-subsidy rules specific to SOEs, control subsidies that are granted by or to SOEs.

Arguably, incorporating similar SOE rules into PTAs is a novel and critical phenomenon. It preludes a burgeoning trend in cross-border SOE regulation. Once the time is ripe, the emerging SOE rules could be couched as jus cogens or, at least, as a readily acceptable template and hence have profound implications for domestic regulation.

---

7 Ibid.
10 The first two requirements are present in all such agreements, while the last one remains scant. None of the EU’s standing PTAs contains SOE-specific NCA rule, and it is also rare in the PTA practice of the US. See Su, supra n. 6.
12 See a discussion in Jean-Michel Marcoux & Julien Sylvestre-Fleury, China’s Contestation of International Norms on State-Owned Enterprises and Government Procurement Through the Belt and Road Initiative, 30 Asia Pac. L. Rev. 325 (2022).
Given the importance of the subject, much ink has already been spilled on the emerging SOE rules. In general, scholarly debate centres on the effectiveness of the emerging SOE rules, specifically whether they are more effective than the SOE disciplines in the World Trade Organization (WTO) agreements in terms of levelling the playing field.\(^\text{11}\) An issue germane to this critical inquiry, among others, is whether the emerging SOE rules are really new, namely, to what extent they are different from the existing SOE-related disciplines in WTO agreements.\(^\text{12}\)

At first glance, the former bears considerable resemblance to the latter in terms of terminology and structure. The non-discrimination and commercial considerations requirements almost repeat the basic formula of Article XVII (State Trading Enterprises (STEs)) of the General Agreement on Tariffs and Trade (GATT), while the NCA rules are based on the Agreement on Subsidies and Countervailing Measures (SCM Agreement).\(^\text{13}\) Therefore, it has been submitted that the new SOE rules are not particularly original.\(^\text{14}\)

This article engages with the discussion on the novelty and efficacy of the emerging SOE rules by laying bare a critical paradigm shift. The article contends that the emerging SOE regulations differ from the previous GATT-WTO-based SOE standards because the former seek to control the competitive behaviour of SOEs. As the European Union proclaimed: ‘New international SOE rules should focus on the behaviour of SOEs in their commercial activities’.\(^\text{15}\) Most importantly, the emerging SOE rules are diverted from the GATT-WTO’s effect-based analysis towards the per se rules. Following the per se methodology, a violation of the emerging SOE rules can be established irrespective of whether an SOE’s behaviour causes trade injuries. This article, however, cautions against this formalist tendency on the grounds that the concept of a level playing field, which is a fundamental normative tenet for cross-border SOE regulation, is formulated and justified based on the harmful effects of SOE’s activities. Finally, in light of the SOE reform in China, the article explains why self-standing behaviour analysis would struggle to fully capture the issue of concern, and furthermore lead to over- and under- regulation.


\(^{12}\) Zhou, supra n. 9.

\(^{13}\) See a comprehensive analysis of the modifications in Kim, supra n. 11.

\(^{14}\) See for instance, Zhou, supra n. 9.

To flesh out the discussions with doctrinal details, the analysis uses the CPTPP as a benchmark. The article will concentrate on two of the principal SOE-related obligations provided in the CPTPP: commercial considerations rule and the NCA rule. The new trend of regulating SOEs’ competitive behaviour is best shown by these two obligations. Comparing the commercial considerations rule and the NCA rule to their original GATT-WTO templates, this article sets forth the paradigm shift in the regulation of SOE by trade agreements.

The article is structured as follows: section 2 pins down the (anti)competitive behaviour of SOEs and the (anti)competitive issues that are unique to SOEs. The section emphasizes that competition concerns over SOEs arise from their unfair competitive advantages. Section 3 discusses whether and how the (anti)competitive conduct of SOEs is regulated under the auspices of the WTO agreements. The section concludes that the GATT-WTO-based SOE rules necessitate an effect analysis, where a trade injury or a distortion of competitive conditions needs to be ascertained. Section 4 turns to the emerging SOE rules provided in the CPTPP. This section unveils the novel, behaviour-based analysis in the emerging SOE rules. Section 5 challenges the conceptual basis and rationality of behaviour-based approach to cross-border SOE regulation.

2 SOE AS COMPETITORS AND ADVERSE EFFECTS ON TRADE

As with private companies, SOEs can engage in commercial activities, and, in recent years, their participation in the world market has taken on a number of forms. 16

When SOEs and other business operators are in a competitive relationship, SOEs may distort competition by acting as rivals. There is little doubt that, like private operators, SOEs may be involved in anti-competitive practices which are usually prohibited by competition law. 17 But beyond that, because of their public ownership and prerogatives, SOEs might possess and deploy certain government-granted or rent-seeking competitive advantages that accrue less to private operators. 18 This matter frequently poses a challenge to the operation of modern competition law 19 or, worse, falls outside its purview. 20 As a result, SOEs’

---

16 Du, supra n. 1.
17 Although competition law can also fail its undertakings. See William Kovacic, Competition Policy and State-Owned Enterprises in China, 16 World Trade Rev. 693 (2017).
18 But there are no such competitive advantages that SOEs enjoy but POEs do not. It is always a matter of degree.
20 Traditionally, antitrust standards were designed to apply to profit maximizing firms and were not specifically aimed at preventing subsidies and artificially low prices – except where these are manifestly motivated by predatory strategies. Antonio Capobianco & Hans Christiansen, Competitive Neutrality
competitive advantages and their effect on competition have become a source of agitation, particularly in a cross-border context.\textsuperscript{21}

SOEs’ competitive advantages typically include monopoly/exclusive rights, direct subsidies, concessionary financing, debt guarantees, preferential treatment in the application of regulation, captive equity, and information advantages.\textsuperscript{22} Further, the absence of a requirement from their major shareholder, the states, for SOEs to recover costs or achieve a commercially sustainable rate of return, as well as their immunity from bankruptcy, may shelter SOEs from financial pressures. At the same time, non-public market participants may also preferentially treat SOEs for a variety of commercial reasons.\textsuperscript{23} From an economic standpoint, these competitive advantages enable SOEs’ soft budget constraints, lower financing costs (including direct budgetary subsidies and off-budget sources of support), and, ultimately, a better endowed competitive position.

Here, a caveat crucial for our discussion must be borne in mind. SOEs’ competitive advantages do not always amount to genuine harm to competitors and reduction of competition.\textsuperscript{24} In reference to subsidies, one of the common competitive advantages of SOEs, Diamond harboured that, for an advantage to distort competition, ‘it must lead the firm either to increase the quantity of goods offered or to decrease the price it charges in [foreign] market[s],’\textsuperscript{25} and ‘a payment will only have such a detrimental impact if it either decreases the marginal cost of the foreign producer or increases its marginal revenue.’\textsuperscript{26} That is to say, if an advantage merely improves the financial position of the recipient but does not alter its pattern of conduct, it need not be viewed as distorting. Further to Diamond’s proposition, Rubini put forward a succinct two-step assessment to prove that a subsidy genuinely distorts competition: first, whether the advantages bear on the economic position of the recipient, and in particular its production decisions. Secondly, this effect should cause harm to competing producers.\textsuperscript{27} In trade law parlance, harm to competing producers is deemed to occur when trade flows concerning a product or service are prevented, impeded, or diverted as a result.

\textsuperscript{21} As regards the adverse effects in relation to SOEs’ cross-border activities, see the OECD, supra n. 2.


\textsuperscript{23} For instance, financial institutions would feel more secured to grant loans to SOEs for a lower risk in lending to an entity close to the government. \textit{See ibid.}


\textsuperscript{26} \textit{Ibid.}

\textsuperscript{27} Luca Rubini, \textit{The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective} 383 (OUP 2009).
of trade obstacles.\(^{28}\) In order to ascertain the existence of injury or an adverse trade
effect, regard must be had to a number of variables, such as market shares, capacity
utilization, profit, sales prices, direct employment, and investments. It is also
necessary to conduct a causation analysis, which includes a non-attribution apprai-
sal, between the contested trade interest and the alleged trade impediment.\(^{29}\)

Depending on whether a rule necessitates such a harmful effect assessment, it
could be classified as either *per se* or effect-based rules. A *per se* approach is one that
views certain behaviours as naked restraint of trade; hence, there is no need for a
further inquiry into their actual or potential effects.

3 COMPETITION CONDUCT OF SOES UNDER GATT/WTO RULES

This part recounts whether and how the competitive conduct and advantages of
SOEs is regulated at the WTO. It zeroes in on the WTO rules that the emerging
SOE disciplines are modelled upon: section 3.1 covers GATT Article XVII.
Section 3.2 turns to WTO anti-subsidy rules. This part makes the demonstration
that GATT-WTO-based SOE regulations are not centred on the competitive
behaviour of SOEs, but rather on effects, be they trade-harming or competition-
altering.

3.1 GATT ARTICLE XVII

The principal rules governing STEs are provided in GATT Article XVII. Article
XVII consists of three-layered obligations targeting different actors.\(^{30}\) As regards
STEs, Article XVII comprises, among others, two substantive doctrines: non-
discrimination (subparagraph (a) of Article XVII: 1) and commercial considerations
(subparagraph (b) of Article XVII: 1). The non-discrimination obligation requires
that an STE ‘shall, in its purchases or sales involving either imports or exports, act
in a manner consistent with the general principles of non-discriminatory
treatment’.\(^{31}\) The term commercial considerations specifies that STE must act
’solely in accordance with commercial considerations in its purchase or sale of
good or service’, based on the ‘price, quality, availability, marketability, transporta-
tion and other conditions’ of the transactions.\(^{32}\) As a quintessential

---

\(^{28}\) Przemysław Kowalski et al., *State-Owned Enterprises: Trade Effects and Policy Implications*, OECD Trade
Policy Papers, No. 147 (2013).


\(^{30}\) Andrea Mastromatteo, *WTO and SOEs: Article XVII and Related Provisions of the GATT 1994*, 16
World Trade Rev. 601 (2017).

\(^{31}\) Article XVII(1)(a) of the GATT.

\(^{32}\) Article XVII(1)(b) of the GATT.
anti-circumvention rule, Article XVII aims to prevent states from evading agreed-upon obligations, in particular non-discrimination rules, by using STEs as cover.  

And because Article XVII was created to prevent circumvention, in Canada-Wheat, the Appellate Body (AB) confirmed that, chief to this discipline is the obligation of non-discrimination.

Non-discrimination standards in WTO law are concerned with competition conditions. As noted, in the cases relating to non-discrimination standards, ‘the competition-based approach became the dominant and eventually the exclusive one in the WTO era’. The competition assessment derives from the term ‘equality of competitive opportunities’ – amplified by the WTO’s adjudicating bodies with regard to most-favoured nation treatment and national treatment – which speaks of a competition-distorting effect of domestic measures, rules, and regulations. It is therefore a rather entrenched proposition that the non-discrimination standards entail the element of ‘effect’, namely, the modification of competitive conditions.

Nevertheless, the non-discrimination requirement does not adjust private business restraints. Accordingly, GATT Article XVII is not intended to regulate the anti-competitive behaviour of STEs, but their purchases and sales decisions. In the previous cases involving state trading, the STEs concerned almost always appeared as business counterparts rather than competitors to the afflicted private traders. Thus, as much as the non-discrimination standards attach great

---

33 Mastromatteo, supra n. 30.
38 A question that has arisen regarding the interpretation of this provision is whether non-discriminatory treatment prescribed in Art. XVII includes national treatment or it merely contains most-favoured nation treatment. This question is left in limbo in WTO jurisprudence. See for instance, Mastromatteo, supra n. 30.
39 Appellate Body Report, EC-Seal Products (2014), supra n. 37, para. 5.82.
41 Mastromatteo, supra n. 30, at 602. See also Art. XVII: 3 of the GATT.
42 Canada – Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies, adopted 18 Feb. 1992, BISD 39S/27, 80–82, paras 5.17–5.22; On recent cases see e.g.,
importance to distortion of competition arising from STEs’ trade measures, it does not cover their unfair competitive conduct.

As regards the doctrine of commercial considerations, whether or not it governs the competitive conduct and advantages of SOEs was a contentious issue. In Canada-Wheat, the US argued that the second clause of subparagraph (b) of Article XVII: 1, which asks STEs to ‘afford the enterprises of other Members adequate opportunity … to compete for participation in such purchases or sales’, should read as requiring adequate opportunities for enterprises competing with the STE. This argument, however, did not find favour with the AB, who considered that the term ‘such purchases or sales’ is linked to subparagraph (a), which addresses purchases and sales by the STE, not by competing enterprises. The AB held that, ‘[t]hus, the requisite adequate opportunity is to be a purchaser or seller counterpart to the STE, not to be a competitor to the STE’. All in all, the AB considered that Article XVII:1 does not amount to a competition-law-type of obligation as had been suggested by the US. Accordingly, ‘Subparagraph (b) does not give panels a mandate to engage in a broader inquiry into whether, in the abstract, STEs are acting “commercially”’. However, because the commercial considerations requirement is subject to the non-discrimination requirement under the WTO’s STE rules, it likewise requires the presence of a distortive effect on competition. Put it differently, subparagraph (b) can only be deemed breached when subparagraph (a) is violated; for a violation of subparagraph (a) to occur, as explained, the element of ‘effect’ should exist.

All in all, instead of viewing STEs as competitors, Article XVII regards and regulates STEs as latent buyers, sellers, and partners; it obliges STEs to purchase from and sell to foreign enterprises non-discriminatorily and commercially, rather than how they should compete in the global marketplace. Moreover, GATT Article XVII as a whole represents effect-based discipline.

---

Panel Report, Canada – Measures Governing the Sale of Wine (DS537); India – Certain Taxes and Other Measures on Imported Wines and Spirits (DS380). Note that not only SOE but also POE serve as state monopoly. See Panel Report, Canada – Certain Measures Concerning Periodicals, WT/DS31/R and Corr. 1, adopted 30 Jul. 1997, para. 5.35.


45 Appellate Body Report, Canada-Wheat (2004), supra n. 34, para. 145.

46 Ibid.

3.2 Competition in the SCM Agreement

Another crucial issue that the AB clarified in Canada-Wheat was that Article XVII does not concern the competitive advantage of STEs. In this way, the AB's opinion echoes a statement in the London Report, which provides: 'The view was generally held that a country receiving a loan would be free to take this loan into account as a "commercial consideration" when purchasing its requirements abroad. The position of countries making such "tied loans" was another question'. This 'another question' nonetheless falls within the remit of the SCM Agreement.

The SCM Agreement focuses on the competitive advantages and their detrimental effects rather than the behaviour of subsidy-recipients. As Rubini succinctly pointed out, 'the analysis of the goals of subsidy control is inextricably linked to their effects'. Under the SCM Agreement, subsidies are classified into three groups – prohibited, actionable, and non-actionable. Subsidies contingent on some requirements relating to export or import are generally prohibited; domestic subsidies are actionable when they meet certain standards and pose a trade menace. Prohibited subsidies focus on trade-related conditions for receiving the subsidy, while actionable subsidies focus on trade injury or adverse effects. Hence, at the heart of the WTO anti-subsidy law are trade interests. On this score, the distinction between prohibited and actionable subsidies is that the former presupposes distortion of trade, whereas the latter requires thorough investigation to establish such distortion. Hence, the regulation of actionable subsidies under the SCM Agreement clearly features effect-based analysis, while prohibited subsidy approximates to per se norm. In practice, the former's effect-based assessment attends to trade injury and adverse effect and entails defining the market(s), finding 'like products', and causation test.

---

48 As will be further explained in s. 4.1.
49 London Report, at 17, para. 1(a)(v).
50 Rubini, supra n. 27.
51 Ibid.
4 A NOVEL COMPETITION ELEMENT IN EMERGING SOE RULES

As mentioned in the last part, under both STE and SCM rules, harm to trade interests or competitive conditions is an essential element, which should be either assumed or proven to ascertain a violation. This approach is nonetheless cast aside in the emerging SOE rules, which are steered toward a behaviour-based approach. Following this novel formalist approach, a violation of the rules can be established irrespective of whether an SOE’s behaviour has periled trade or competition. In this part, two principal disciplines in the CPTPP’s SOE rules are set out. Section 3.1 and section 3.2 scrutinize the requirement of commercial considerations and the NCA rules respectively.

4.1 COMMERCIAL CONSIDERATIONS REQUIREMENT

The commercial considerations requirement essentially enjoins SOEs to behave commercially. Therefore, an imperative question with regard to this requirement is how to define the term ‘commercial’. Article 17.1 of the CPTPP prescribes the following indices for determining what is a commercial decision:

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

These elements are non-exhaustive, elusive and highly fact-dependent. Apart from them, no additional standard is provided for discerning the (anti)competitive conduct of SOEs or determining anti-competitive results. In the end, the term ‘commercial’, in its obscurity, has given rise to two strands of reading in WTO jurisprudence. Since it remains uncertain which interpretation will prevail, the following assessment will consider both.

4.1[a] Contextual Interpretation

Based on a contextual reading, Article 17.1 seems to hint at a due diligence obligation. The rule suggests that SOEs should consider – in their commercial decisions – the terms and factors that a benchmark company would normally give attention to. Insofar as an SOE complies with this due diligence requirement, the outcomes of its decision making – whether they jeopardize trade or not – is extraneous.

---

55 Borlini, supra n. 9.
56 Article 17.1 of the CPTPP.
57 With regard to such a benchmark company, the benchmark company must be private in the (CP)TPP but in the EU-China CAI it could be non-private.
An illustration of this interpretation could be found in the panel and the AB’s reasoning in *Canada-Wheat*. The panel held that the concept of commercial considerations requires STEs to make purchasing or selling decisions based on ‘terms which are economically advantageous for themselves and/or their owners, members, beneficiaries, etc.’ as opposed to ‘national (economic or political) interest’. Further, commerciality of a decision should be judged on a case-by-case basis, taking the relevant market(s) into account. In addition, the AB pointed out that the phrase does not ‘require STEs to refrain from using the privileges and advantages that they enjoy because such use might “disadvantage” private enterprises. STEs, like private enterprises, are entitled to exploit the advantages they may enjoy to their economic benefit.’

In line with this interpretation, the term ‘commercial’ here alludes to considerations regarding the aggregated costs, risks, and expected remuneration of a decision, which should be commensurate with a commercial rate of return. It requires SOEs to be independent from the states and able to take decisions autonomously in response to market signals. However, this line of reading does not dismiss SOE’s competitive advantages. In this context, the term ‘commercial’ essentially instructs SOEs to act like privately-owned enterprises (POEs). Nevertheless, in practice, POEs do engage in anti-competitive behaviours – such as predatory pricing and collusion – which are commercial in nature. As a result, requiring SOEs to behave commercially de facto allows SOEs to engage in anti-competitive behaviour that would otherwise be punishable under competition law.

If this line of reasoning is followed, the commercial considerations rule will not be able to address the competitive advantage or anti-competitive behaviour of SOEs. This repercussion has already been noted, prompting some scholars to advocate against separating commercial considerations from national treatment.

---

60 *Ibid.*, para. 149.
61 According to the application of competitive neutrality requirements in Australia, some critical considerations affecting the pricing model are: the presence of sound processes for setting cost estimates and pricing; the presence of appropriate sensitivity testing around the assumptions that underpin the business case; whether the company has adopted a pricing model in a bid to achieve the government’s objective. See for instance, Australian Government Competitive Neutrality Complaints Office (2011) NBN Co, Investigation No. 14.
62 Borlini, *supra* n. 9.
63 See for instance, Howse, *supra* n. 39.
4.1[b]  The ‘US Approach’

In effect, by delving into the US’ argument in the *Canada-Wheat* case, a different reading might surface. On appeal, the US argued that the panel erred in considering commercial considerations as merely indicating ‘non-political’ requirement. The US held that:

> where an export STE has been granted special and exclusive privileges which permit it to operate without the normal market constraints faced by a commercial actor, that STE could make use of its privileges to gain market share in particular markets, but such behaviour would not be commercial.  

Further, the US raised the significant argument that ‘[STEs] must also act within the limits of their cost constraints, which are established by the market’. In elaborating this point, the US used the example of ‘an STE that may be able to use its special privileges to gain market share through long-run price undercutting’. The US perceived that, ‘[f]or such an STE to act as a commercial actor, it would have to sell at prices that, at a minimum, would equal the replacement value of a good’.

Upon closer inspection, unlike the first strand of interpretation, the US logic presumes the unfairness of the competitive advantage of SOEs and, based on this premise, suggests neutralizing the competitive advantage by reining in SOEs’ commercial strategies. By mandating SOEs to sell at prices equal to the replacement value of a good, the US approach attempts to prevent SOEs from transforming their competitive advantages into production activities and market prices. Whether a decision is commercial or not therefore boils down to a clear-cut inquiry: whether an SOE sells at prices below the replacement value of a good. Along this line, SOEs should be banned from practicing certain commercial strategies that would otherwise be permissible for private companies. Note that here the gauge is not whether the price is being set below cost, as in the case of Australian domestic competitive neutrality rules. In a transnational setting, as SOEs are often seen in a non-market economy (NME), analyses based on market logic could be inadequate. For instance, the cost for an SOE to produce and sell a product might already be distorted due to the functioning of the market. This

---

66 Ibid.
might be a concern of the US in advancing this ‘replacement value of a good’ test in place of ‘below the cost’ test. However, because the US has not elaborated on its strategy, operational details are wanting: for example, whether competitive advantages must flow from public ownership, and whether pricing strategy should be determined with reference to the outcome of overall business activities or to specific products or services. At any rate, in reality, pricing a product below its replacement value does not necessarily lead to harm to competitors, least of all to economic efficiency or consumer welfare.

4.1[c] All Roads Lead to Rome: Behaviour Analysis and Per Se Approach

As set forth above, the US approach drives a wedge between the commercial considerations doctrine from its original meaning under the auspices of the GATT. Notably, the two interpretational approaches split on the following aspects when it comes to judging the nature of a decision: first, the US approach examines output of a decision making, whereas the original commercial considerations rule focuses on the input; second, only the US approach bars SOEs from using their competitive advantages. By way of example, consider an SOE that has decided to price one of its products below its replacement value or engage in other predatory pricing strategies. The first line of interpretation would ask how the SOE at stake has reached this decision and whether due regard is being given to the commercial factors that a like-minded private operator would consider. If so, the predatory pricing strategy would be deemed to be in compliance with the commercial considerations requirement. In contrast, the US interpretation would, on the sole ground of this pricing strategy and the competitive advantages, establish a violation of commercial considerations. In the TPP negotiations, the US was unequivocal about the second interpretation, stating that its objective is to oblige SOEs to ‘act in accordance with commercial considerations and compete fairly, without undue advantages from the governments that own them.’

OECD, supra n. 67. It is also worth noting that in Canada Dairy (II) case, in ascertaining whether Canada’s subsidy system was inconsistent with the WTO Agreements, the AB contended that if suppliers sold fresh milk to diary producers at a price below cost, a SCM-inconsistency claim could stand. See Appellate Body Report, Canada Measures Affecting the Importation of Milk and the Exportation of Dairy Products, WT/DS 103/AB/RW, and WT/DS 113/AB/RW (3 Dec. 2001).

These were questions raised in the application of Australian competitive neutrality policy. See in general, Deborah Healey, Competitive Neutrality: Addressing Government Advantage in Australian Markets, in State-Initiated Restraints of Competition 3 (Josef Drexel & Vicente Bagnoli eds, Edward Elgar 2015).

In antitrust law, for instance, pricing below costs standalone would not raise competition concern but that the existence of realistic expectations for recoupment that would result in prospective predation.

It is intriguing to note that in Canada-Wheat, not only Canada, but also China, Australia, and the European Communities disagreed with the US’ reasoning. As the AB remarked:

‘Essentially, they argue that accepting the United States’ view of Article XVII:1(b) would force STEs to refrain from using any of the special rights or privileges that they may enjoy and, thereby, put them at a competitive disadvantage as compared to private enterprises, which can and do exercise any and all market power they can muster’.73

In the end, since the commercial considerations rule now stands without sufficient guidance, it remains unclear how the term ‘commercial’ will be interpreted in the future. Furthermore, in operation, the two lines of interpretation are not necessarily exclusive. An adjudicator could examine ‘input’ and ‘output’ aspects simultaneously, if not cumulatively, in judging whether a behaviour is commercial in nature. But no matter which line of interpretation will gain standing, a sole commercial considerations requirement targets SOEs’ competitive behaviour and can only read as per se rather than effect-based control.

In this respect, the NCA rule that will be discussed below is slightly different. The tendency toward formalistic control is more hidden in the NCA rule since it incorporates detailed adverse effect criteria. Yet, by unpicking the strands of two crucial elements of the NCA rule – the modified specificity test and the standard of adverse effect – the next section argues that the emerging NCA rule also chips away at effect analysis.

4.2 SOE AND ANTI-SUBSIDY REGIME

4.2[a] SOE-Focused Specificity Test

One of the most conspicuous changes NCA made to the SCM agreement was instituting a tailored-made specificity test for SOE.74 This design is in marked contrast to the ownership-neutral model of the SCM Agreement. In the SCM Agreement, the ‘specificity test’ aids in identifying subsidies that are not widely available and thus more distortive.75 The design of this mechanism is in congruence with other criteria provided in the SCM agreement. Since subsidies

---

73 Appellate Body Report, Canada-Wheat (2004), supra n. 34, para. 147.
74 Supra n. 56.
contingent on imports/exports are prohibited per se, no extra specificity test is required.\textsuperscript{76} Only when it comes to actionable subsidies is the specificity test applicable.\textsuperscript{77} In light of this test, if a subsidy is granted to a group of enterprises, it must be proved in a case-by-case manner that the subsidy-receiving enterprises have certain commonalities for the subsidies in question to be objectionable.\textsuperscript{78}

Under NCA in the CPTPP, as long as a subsidy is destined for a group of SOEs, it is specific.\textsuperscript{79} In this manner, the specificity test under the NCA rule draws upon the per se prohibition rule provided for export/import subsidies. In light of the economic justification for the specificity test, this legal construct implies that either subsidies granted to SOEs are more distorted than other forms of subsidies, or that it is irrelevant whether the subsidies concerned cause distortion or not.\textsuperscript{80} It is worth noting that such an SOE-relevant specificity test, which is also included in China’s WTO Accession Protocol, has previously elicited criticism.\textsuperscript{81} The modified specificity test foresees operational pitfalls for it in fact limits the scope of the NCA rule. In reality, SOEs could receive developmental and industrial subsidies that are not dedicated to them but likewise harm competitors. However, in view of the SOE-pertinent specificity test, if a subsidy is not exclusive to SOEs, it would not be actionable.

Indeed, the foregoing discussion about ‘specificity test’ cannot carry directly to the conclusion that ‘effect’ is no longer important in NCA rule, as the rule indeed demands the presence of adverse effects, to which we now turn.

4.2[b] Modifications of the Adverse Effects Criterion: Overreaching Contextual Support

Unlike the commercial considerations rule, the detrimental effect on competitors is a constitutive element of an NCA violation.\textsuperscript{82} The formulation of adverse effects criterion by and large assimilates the SCM rules for actionable subsidies.

Under the auspices of NCA rule, akin to the SCM Agreement, adverse effects would arise, inter alia, from market displacement or market impedance\textsuperscript{83} ensuing

\textsuperscript{76} Coppens, supra n. 52, at 101.
\textsuperscript{77} Ibid., at 102.
\textsuperscript{78} Panel Report, United States – Upland Cotton (2005), supra n. 52, para. 7.1142.
\textsuperscript{79} Supra n. 56. Besides, NCA also omits the ‘diversity test’ and altered the description of ‘subsidy program’ in Art. 2.1 (c) to merely ‘assistance’. See for the implications of these two changes in Benitah, supra n. 53, at 31–36.
\textsuperscript{81} Ibid.
\textsuperscript{82} Raj Bhala, Exposing the Forgotten TPP Chapter: Chapter 17 as a Model for Future International Trade Disciplines on SOEs, 14 Manch. J. Int’l Econ. 2 (2017).
from commercial activities (production/sale of goods/supply of service) of subsidy receiving SOEs.\textsuperscript{84} When it comes to demonstrating market displacement/impedance, two approaches are available, according to the panel in \textit{Indonesia–Autos}. In principle, the complainant is required to prove that the challenged subsidy has such an effect as to displace or impede like products in a market. However, there is an exception inscribed in Article 6.4, referring to a much lower threshold. The panel in \textit{Indonesia–Autos} read this exception as follows: ‘the complainants could make a prima facie case of displacement or impedance simply by demonstrating that the market share of a subsidized product has increased over an appropriately representative period’.\textsuperscript{85} Under the SCM Agreement, this exception is rarely used as it is subject to geographical and ‘clean hands’ constraints. The former provides that the exception only applies when the products are displaced/impeded ‘from a third country market’,\textsuperscript{86} while the latter mandates that the competing product itself should be non-subsidised.\textsuperscript{87}

The NCA rule revitalizes this contextual support by phasing out both limitations and making it generally applicable.\textsuperscript{88} Pursuant to Article 17.7(2) of CPTPP, the occurrence of the following phenomenon, among others, is sufficient to show market impedance/displacement: ‘(a) There is a significant increase in the market share of the good or service of the SOE’.\textsuperscript{89} This design immediately equates the foregoing situation with adverse effects and substantially lowers evidential threshold. It is due to this design, the article argues, that the NCA rule opens the door for form-based control. To understand this point, it is important to bring back to light a lingering question about the causation assessment.

4.2[c] **Lingering Issue with Causation Assessment**

In general, there should be a causality link between the challenged subsidy and the claimed adverse effects.\textsuperscript{90} Under the SCM Agreement, the causality test entails a

\textsuperscript{84} Article 17.6.2 of the CPTPP.


\textsuperscript{86} Article 6.3(b) of the SCM Agreement (emphasis added).


\textsuperscript{88} Under the NCA rule, the applicability of contextual support is extended to three markets. Further, Art. 6.4 contains the term ‘non-subsidized like product’, based on which the panel in \textit{EC – Large Civil Aircraft} introduced the ‘clean hands’ requirement. To contrast, NCA imply mentions ‘like product and serve’ and deletes the expression of non-subsidized. Art. 17.7 of the CPTPP.

\textsuperscript{89} Article 17.7(2) of the CPTPP. This description copies Art. 6.4 of the SCM with some light modifications.

\textsuperscript{90} Ibid.
'genuine and substantial relationship' between the challenged subsidy and the market phenomenon.  

A question arising about Article 6.4 (a) – which Article 17.7(2) of CPTPP is modelled upon – was whether proving causation between a subsidy and the contextual support is necessary. Following the opinion of the panel in *Indonesia-Autos*, the panel in *European Community (EC)-Large Civil Aircraft* considered that the increase in the relative market share of subsidized products was sufficient to demonstrate market impedance or displacement. Hence, a causation test is unnecessary. Now, as NCA brings the contextual support to prominence, the issue is carried over to the emerging SOE rules.

In operation, this design may weaken the requirement for injury to competing industries. Indeed, the NCA rule, as with Article 6.4 of the SCM Agreement, mentions that the market share change should occur ‘to the disadvantage of’ the competing products. Yet, it is unclear whether this is a presumption *a priori* or an outright requirement regarding harmful effect. If the former holds true, the following logic of the NCA rule ensues: any subsidies specific to SOEs are actionable if they relate to a (significant) rising trend in the relative market shares of production and sales of one or some of the beneficiaries. Moreover, owing to the SOE-pertinent specificity test of NCA, complaints could already be filed as long as a subsidy specific to SOEs is found. Thereafter, it should be sufficient to demonstrate that the challenged subsidy has improved the market position of any subsidy-receiving SOE; the question of whether or not this improved position brings harm to competitors or competition can be sidestepped. In this way, as with the renewed commercial considerations doctrine, NCA rule works to preclude SOEs from transforming subsidies, as one of their privileges, into advantageous competitive position.

To be clear, as the interpretation remains open, the article does not suggest the NCA rule already amounts to *per se* analysis. But it must, again, be highlighted that the NCA rule remains scant in PTAs. The task of limiting SOEs’ competitive behaviour is largely left to the obscure commercial considerations discipline.

---

93 But *see* criticism in, for instance, Coppens, *supra* n. 52, at 156–160. Under the SCM Agreement, in normal situations, the volume of subsidized imports only ‘forms part of an overall assessment of injury to the domestic industry and is conducted so as to provide guidance to the investigating authority in the context of this assessment of injury and causation’. *See* Panel Report, *EC-Countervailing Measures on DRAM Chips*, para. 7.920.
94 At least, under the SCM Agreement, this phrase does not lead WTO’s adjudicating bodies to ascertain a causation test.
95 *Note* that Art. 6.3(d) of the SCM Agreement also mentions the effect of the subsidy as an increase in the world market share, but that of primary product or commodity.
5 BEHAVIOUR ANALYSIS AND SOE REFORM IN CHINA

Juxtaposing section 3 and section 4, suffice it to argue that although the new SOE disciplines resemble the GATT-WTO-based SOE rules in terms of norm structure and terminology used, their regulatory rationale already deviates from that of the latter. The present section appraises the emerging SOE rules’ behaviour-based, \textit{per se} approach. The section amplifies that, from cross-border SOE regulation, developing a level playing field for SOEs and POEs is of the utmost importance; however, a poorly conceived behaviour-focused approach will ultimately undermine this objective.

5.1 LEVEL PLAYING FIELD AND ADVERSE EFFECTS

The rationale of cross-border SOE disciplines, as advocated by their major norm entrepreneurs, necessarily rests upon the premise that the law’s primary concern is with the uneven playing field. The idea of ‘level playing field’ in essence conveys a concern with SOEs’ competitive advantages and their concomitant adverse impact on competitors. Arguably, this is also the only normative premise on which the reasonableness and legitimacy of the new SOE rules could safely rest. Without this premise, it would be hard to explain why we need ownership-based rules that go beyond modern competition law.\footnote{See further in s. 2.}

The concept of the ‘level playing field’ is an elusive term that is yet not novel in trade law parlance.\footnote{Jackson, \textit{supra} n. 75, at 21.} Cass and Boltuck note that the term normally encapsulates three features of a circumstance:

\begin{quote}
‘[F]irst, the nature of the activity at issue is a contest; second, the outcome of the contest is affected not only by the contestants’ skill and determination but also by externally imposed rules of the game and by ‘environmental’ factors (weather, field conditions, and so on) and; third, the goal of the external authority in charge of the contest should be to make the terms of the contest equal, to provide each contestant a fair opportunity to prevail’.\footnote{Ronald A. Cass & Richard D. Boltuck, \textit{Antidumping and Countervailing Duty Law: The Mirage of Equitable International Competition}, in \textit{Fair Trade and Harmonization: Legal Analysis} 358 (Jagdish N. Bhagwati & Robert E. Hudec eds, The MIT Press 1996).}
\end{quote}

In the lexicon of trade law, this metaphor is used either in relation to the embodiment of the state’s moral imperative to ensure equal competition\footnote{Ibid., at 356.} or market access in relation to trade remedies and asymmetrical regulatory environments.\footnote{James Christensen, \textit{Fair Trade, Formal Equality, and Preferential Treatment}, 41 Soc. Theory & Prac. 505 (2015). In the words of Bhagwati, the notion of ‘level playing field’ is a modern American parlance referring to a perceived full equality of market access and reverse market access’, Jagdish Bhagwati,} It is concerned with state intervention. It implies that a market
in optimal condition must exclude government-granted treatments in favour of
certain groups.\textsuperscript{101} Therefore, the mission for policy makers and regulators, as the
Organization for Economic Cooperation and Development (OECD) advanced, ‘is
to ensure that distortions of the competitive landscape do not occur, or, to the
extent that they occur that their effects on competition are not harmful in the
marketplace in question’.

On this account, the mission of levelling the playing field leads to two
regulatory paths in trade law: either to govern the behaviour of states so as to
prevent competition-altering state interference, or to repair or neutralize their
negative externalities on other countries.

By disciplining SOEs’ competitive conduct as such rather than the state’s conduct
of granting privileges to SOEs, the rule-maker of the CPTPP in effect opts for the
second path, namely to neutralize the adverse effects.\textsuperscript{103} Following this second path, it
is imperative to identify the competitive edges and the resulting adverse effects. How
SOEs behave is a matter that is, at best, adjacent. On this account, a misfocus on SOEs’
behaviour could easily render the rules oscillating between under-inclusive and over-
inclusive, as will be demonstrated below in light of Chinese SOE reform.

5.2 COMMERCIALIZATION IN THE CONTEXT OF CHINESE SOE REFORM

The SOE reform underway in China commenced at the Third Plenum of the
eighteenth Party Congress in 2013.\textsuperscript{104} The third Plenum Decision, as an outcome
of this Congress, reaffirmed the dominant role of public ownership in the Chinese
economy.\textsuperscript{105} Therefore, the paramount objective of the ongoing SOE reform is
neither to eliminate SOEs by way of privatization nor to augment state-capital
through incentive mechanisms, but rather to align the allocation of state capital
with policies through institutional recalibration.\textsuperscript{106} The recent twentieth National
Congress of the Chinese Communist Party again proclaimed this objective.\textsuperscript{107} In

\begin{itemize}
\item Protectionism 36 (The MIT Press 1988); see in general, A. B. Zampetti, Fairness in the World Economy:
US Perspectives on International Trade Relations (Edward Elgar 2006).
\item OECD, \textit{supra} n. 2.
\item See the competitive neutrality path and the ‘adverse-effect’ path in Zhou, \textit{supra} n. 9. See also, Xueji Su,
\textit{A Critical Analysis of the EU’s Eclectic Foreign Subsidies Regulation: Can the Level Playing Field be Achieved?},
50 Legal Issues of Economic Integration 67 (2023).
\item CPC Central Committee, Decision of Several Major Issues of Comprehensively Deepening the
Reform, 12 Nov. 2013.
\item Ibid.
\item See for instance, Luyao Che, \textit{Legal Implications of the Deepened Reform of Chinese State-Owned Enterprises:
What Can Be Expected from Recent Reforms?}, 8 Tsinghua China L. Rev. 171 (2016).
\item Full text of the report to the twentieth National Congress of the Communist Party of China 23–24 (22
Oct. 2022), \url{https://www.fmprc.gov.cn/eng/xw/xw_662805/202210/t20221025_10791908.htm}
\end{itemize}
this context, Chinese SOEs have been designated to lead the strategic industries that are identified as driving forces for economic growth.\footnote{European Union Chamber of Commerce in China, China Manufacturing 2025: Putting Industrial Policy Ahead of Market Forces (7 Mar. 2017).}

The overarching political disposition notwithstanding, Chinese SOE reform in essence advocates the commercialization of SOEs. The 2015 Guiding Principle of the State Council proposed ‘to promote SOEs to become independent market profits and assume losses independently, bear risks on their own, practice self-discipline and pursue self-development pursuant to the law.’\footnote{Guiding Opinions of the CPC Central Committee and the State Council on Deepening The Reform of State-Owned Enterprises, 24 Aug. 2015, para. 2.} The critical steps taken toward commercialization include strengthening ‘modern enterprise system’, classifying SOEs into different sectors, promulgating mixed ownership, and establishing state asset management companies as an additional corporate layer between the SOEs and their supervisory authority.\footnote{See a discussion of SOE reform in Weihuan Zhou, Henry Gao & Xue Bai, Building a Market Economy Through WTO-Inspired Reform of State-Owned Enterprises in China, 68 Intl & Comp. L. Q. 977 (2019).}

Further, for the purpose of curtailing industrial overcapacity, the reform led to the clearing out of insolvent and ill-performed SOEs by way of concentration.\footnote{European Union Chamber of Commerce in China, 2020/2021 Executive Position Paper (10 Sep. 2020).} As a consequence, consolidation in strategic industries emerged, with recent examples to be found in sectors such as shipping, railway equipment, steel, and industrial equipment.\footnote{See for instance, Alexandr Svetlicinii, Consolidation of the State-Owned Enterprises in China: A Missed Opportunity for the EU Merger Control?, 13 J. Eur. Competition 17 (2022).} On the corporate governance level, Chinese SOEs have been increasingly subject to government or independent audits endowed by the government to ensure a commercial rate of return in recent years. Their business pricing would have to maintain affordability to create profit and drive take-up rates. These policies, despite indicating a general commercial orientation, did not lead to the diminishing of SOE sector in China.\footnote{Nicholas Lardy, The State Strikes Back: The End of Economic Reform in China? (Peterson Institute for International Economics 2019).}

Nor do they seem capable of preventing SOEs from enjoying government-granted and rent-seeking privileges or from gaining a dominant or oligopolistic position. On the contrary, foreign investors in China reported increased encroachment on market share by Chinese SOEs.\footnote{See for instance, European Union Chamber of Commerce in China, supra n. 111, at 21–23.} As such an increase in market share does not entail ex ante loss, once an SOE has crowded out their competitors by virtue of their privileges, they are not incentivized to engage in any particular non-commercial ‘behaviour’ to recoup. In this situation, while SOEs will constitute an economic barrier for POEs, there will be no punishable non-commercial behaviour by SOEs under the emerging SOE rules. We could take a step further to
assume that PTAs could set up certain specific commercialization requirements on
SOEs, such as requiring SOEs to adhere to the commercial rate of return or not to
price below cost. Yet, as could be inferred from Chinese SOE reform, these
requirements would also be inadequate. Moreover, the commercialization require-
ments are more likely to drive SOEs into anticompetitive conduct, a conse-
quence contrary to the requirement of a ‘level playing field’.

Another repercussion of self-standing behaviour analysis is overregulation. As
mentioned in section 2, SOEs could engage in various commercial behaviours;
nonetheless, not all their advantages derive from public ownership, and not all their
conduct restricts competition or trade. In this regard, the report of the OECD
noted that, the concerns with SOEs’ competitive edge ‘do not translate into any
perceived anti-competitive conduct (i.e., with regard to anti-competitive mergers,
cartels, monopolisation or abuses of dominance)’. Further, even if SOEs engage
in certain anti-competitive conduct, it would not pose an actual threat to competi-
tion or competitors unless the SOEs at play had market power.

It is questionable why these behaviours, whether commercial or not, should
be prohibited, whereas they are allowed for POEs. Additionally, some of SOEs’
non-commercial behaviours in commercial sectors are aimed at correcting market
failure and may not harm the market. For instance, SOEs might set prices lower
than the cost to stabilize price growth or provide an entry-level price structure. In
this context, SOEs will be less likely to avail themselves of the market position
earned through their ensuing marketing strategy. Hence, there might be price
undercutting, but no anti-competitive intention or consequence exists. By inten-
tionally or inadvertently controlling these behaviours, a sole behaviour analysis
might lead to overregulation. And, as a result, instead of creating a level playing
field, the emerging SOE rules tilt the playing field against SOEs.

Finally, indeed, a per se approach has merit in the context of cross-border SOE
regulation. For instance, a per se approach reduces the evidentiary burden for
enforcers and adjudicators. But this is perhaps the rare, if not the only, benefit
that cross-border SOE regulation could gain by following a per se approach. Some
of the other inherent benefits that the per se approach might offer, such as
enhancing legal certainty, are lost in this scenario. This is due to the fact that the
term ‘commercial’, which defines the ‘reasonableness’ of SOE conduct in the

---

115 According to Sappington and Sidak, if an SOE that carries public service obligation is also saddled with
profit-making duties, it might be driven into anti-competitive conduct, piggybacking on its advanta-
geous market position. See Sappington & Sidak, supra n. 19; see also Rees, A Positive Theory of the
Public Enterprise, in The Performance of Public Enterprises: Concepts and Measurement 179 (Maurice
116 OECD, supra n. 2.
117 See for instance, Capobianco & Christiansen, supra n. 20.
118 See for instance, Wu, supra. n. 2.
emerging SOE rules, is nebulous and requires a case-by-case evaluation. Consequently, the adjudicators will have to exert effort to scrutinize specific behaviours, and the final verdict will inevitably be discretionary and unpredictable.

Based on these analyses, this article contends that a self-standing behaviour analysis in the emerging SOE rules lacks conceptual rigor and is more likely to lead to over- and under-inclusive. In the end, the article makes a plea for a revisit and refocus on effect and for a set of cross-border SOE rules that could better achieve their purpose.

6 CONCLUSION

International trade law has a long history of regulating the state interference in trade activities. However, the growing power of state capitalism, together with the increasingly widespread economic footprint of SOEs, has posed another challenge to trade law: regulating SOE as competitors. As competitors, for-profit SOEs engage in daily competition with POEs, benefit from government support, and could potentially distort resource allocation. In response to the mounting concerns, a set of dedicated SOE rules emerged in the PTAs. A salient example is the SOE rules included in the CPTPP. Although the emerging SOE rules are largely modelled after the GATT-WTO-based SOE disciplines, the former is endowed with an additional mission of curbing SOEs’ competitive behaviour.

Along with this novel regulatory objective, what has also been altered is the underlying methodology. The new SOE rules attach little weight to the consideration of injury to trade or competition. Consequently, a violation of the new SOE rules could be established irrespective of whether SOEs’ behaviour has caused a harmful trade or competition effect. This article cautions against this formalistic tendency. It points out that how SOEs behave, a matter which the current emerging SOE rules focus on, is in fact tangential to cross-border SOE regulation. The idea of a level playing field is initially formulated and justified upon ‘effect’ rather than ‘form’ of behaviour. As a result, an artificial emphasis on behaviour and reliance on per se analysis would deviate cross-border SOE regulation from its premise and risk being either underinclusive or overinclusive.

The article notes that the new rules and the per se approach are not the outcome of deliberation or meticulous design. Rather, it is a repercussion of overreliance on the GATT-WTO-based rules. The emerging SOE rules are formulated with the aim to swiftly establishing a platform to curb state capitalism. However, a consensus on SOE disciplines in the international community remains wanting. In this context,

---

the objective of obtaining consent from states and fostering a new consensus among them has precedence over the development of a set of rules that could adequately regulate SOEs. As a result, in the rule-making process for SOE regulations, norm architects have demonstrated a propensity to avoid thorny, conceptual issues. Cross-fertilization and the use of ‘agreed language’ from other platforms served as a strategic move to prevent conflicts at the negotiation stage and to facilitate the socialization process; hence, the excessive reliance on the WTO formula and the poorly designed behaviour analysis result. This article shows the need for a reconsideration of the emerging SOE rules’ rationale and a change of course.