OFFICIAL BUSINESS: INTERNATIONAL TRADE LAW AND THE RESURGENCE (OR RESILIENCE) OF THE STATE AS AN ECONOMIC ACTOR

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ABSTRACT

The end of the 20th century was a time of privatization; so far, the new millennium has heralded a resurgence of state capitalism. China is doubtless Exhibit A. The notion that state enterprises engage in unfair competition is now a common refrain. It is conventional wisdom that the World Trade Organization has not held up on this front, and that the WTO needs new rules to reign in state enterprises.

This Article challenges that point of view. Governments should not be able to circumvent existing WTO rules through state enterprises but putting the state sector under new special constraints is unjustified. State enterprise can be a legitimate tool of public policy. Focusing complaints about anti-competitive behavior on the state sector is unwarranted: private firms may also engage in unfair competition and abuse market power. Carefully examining the case

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law in the WTO, this Article argues that there is a strong basis in existing jurisprudence for holding governments accountable for the conduct of state firms, despite one often-cited anomalous tribunal decision. The Article advocates greater transparency & dialogue in the WTO about how ownership structure affects competition and trade—but applied equally to both public & private entities.

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I. INTRODUCTION

The end of the 20th century was a time of privatization; so far, the new millennium has heralded a resurgence of state capitalism.[1] According to a recent IMF report, "[t]he share of state-owned enterprises among the world's 2000 largest firms doubled to 20 percent over the last two decades, driven by state-owned enterprises in emerging markets—their assets are worth $45 trillion, equivalent to half of global GDP."[2]

China is doubtless Exhibit A. Its accession to the WTO was celebrated by economic liberals as a decisive step away from such practices. In a March 2008 speech, then-President Bill Clinton claimed: "By joining the WTO, China is not simply agreeing to import more of our products; it is agreeing to import one of democracy's most cherished values: economic freedom."[3] Contrary to many predictions, China did not abandon the model of a state-driven economy. Instead, it combined that model with fierce competitiveness in global markets, often supported by large subsidies.[4] Beyond China, the rise of sovereign wealth funds ("SWFs") has shown a new side to state capitalism; SWFs have been transforming themselves from passive or portfolio investors to active capitalists, involved in private equity and even venture capital.[5]

The notion that state enterprises engage in unfair competition is now a common refrain.[6] A new OECD study refers with concern to "the outsized role that SOES continue to play in the global

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[1] JOSHUA KURLANTZICK, *The State is Back in Business*, *in* HOW THE RETURN OF STATISM IS TRANSFORMING THE WORLD 1-26 (2016).

[2] Vitor Gaspar et al., *State Owned Enterprises in the Time of COVID-19*, IMF BLOG (May 7, 2020), https://blogs.imf.org/2020/05/07/state-owned-enterprises-in-the-time-of-covid-19/ [https://perma.cc/H2X5-R3EN]; *see also* INTERNATIONAL MONETARY FUND, *State-Owned Enterprises: The Other Government*, *in* FISCAL MONITOR: POLICIES TO SUPPORT PEOPLE DURING THE COVID-19 PANDEMIC 47 (2020).

[3] PAUL BLUSTEIN, SCHISM: CHINA, AMERICA AND THE FRACTURING OF THE GLOBAL TRADING SYSTEM 65 (2019)

[4] *See id.* at 111-140.

[5] *See* Bernardo Bortolotti & Alessandro Scortecci, *Sovereign Wealth Funds' New Approach to Private Markets*, IFSWF (2018), https://archive.ifswfreview.org/2018/our-partners/sovereign-wealth-funds-new-approach-private-markets [https://perma.cc/46M4-YV5D].

[6] OECD, STATE-OWNED ENTERPRISES AS GLOBAL COMPETITORS: A CHALLENGE OR OPPORTUNITY? 27-28 (2016).

economy."[7] It is conventional wisdom that the World Trade Organization has not held up on this front, and that the WTO needs new rules to reign in state enterprises.[8] In the words of one commentator: "The failure of World Trade Organization (WTO) treaties and agreements to make a proper assessment of the problem of state-owned companies has caused major imbalances and a huge image problem for free trade and its advocates, as they are seen as defending the indefensible."[9] The latest communiqué of G7 Trade Ministers calls, in the context of WTO reform, "for the start of negotiations to develop stronger international rules on market-distorting industrial subsidies and trade-distorting actions by state enterprises."[10]

This Article questions the case for international trade law targeting state enterprises in the name of fair or free ("undistorted") trade. State enterprise is a tool of public policy, to which some governments are partial while others are not. Focusing complaints about anti-competitive behavior on the state sector is unwarranted: private firms may also engage in unfair competition and abuse market power. The WTO should not prejudge governments' choices of policy instrument, provided there is compliance with WTO disciplines on non-discrimination as well as those on subsidies. I argue that state enterprises should be subject to the same trade law disciplines as the state is. Governments should not be able to circumvent trade rules by acting through state enterprises, and it is thus important that under WTO jurisprudence, the actions of state enterprises be attributable to states themselves, engaging their responsibility in WTO law. At the same time, governments should not face any *special burden or obstacle* when choosing state ownership as a policy tool.

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7 OECD, MEASURING DISTORTIONS IN INTERNATIONAL MARKETS: BELOW-MARKET FINANCE 10 (2021).

8 *See* Robert Howse, *Making the WTO (Not So) Great Again: The Case Against Responding to the Trump Trade Agenda Through Reform of WTO Rules on Subsidies and State Enterprises*, 23 J. INT'L ECON. L. 371, 372 (2020).

9 Alejandro Chafuen, *Trade by State-Owned Companies: Global But Is It Fair?* FORBES (Oct. 31, 2019, 4:33 PM), https://www.forbes.com/sites/alejandrochafuen/2019/10/31/trade-by-state-owned-companies-global-but-is-it-fair/?sh=36ecc65d20f5 [https://perma.cc/4PJ7-UYGH].

10 Department for International Trade & The Rt Hon Elizabeth Truss MP, *G7 Trade Ministers' Communiqué*, GOV.UK (May 28, 2021), https://www.gov.uk/government/news/g7-trade-ministers-communique [https://perma.cc/PL7W-8XFZ].

A major catalyst for including state enterprises[11] in the agenda for WTO reform has been the strongly negative reaction, particularly in Washington, to a WTO Appellate Body ("AB") decision that interpreted narrowly the expression "public body" in the WTO Subsidies and Countervailing Measures ("SCM") Agreement.[12] The SCM Agreement definition of subsidy, for purposes both of multilateral disciplines and permissible unilateral responses (countervailing duties), includes financial contributions not only by governments but also by public bodies. The AB held that state ownership and formal control were not per se sufficient to deem an entity a public body; rather there had to be additional evidence that governmental action (such as explicit delegation of governmental authority) was behind the financial payments by the entity.[13]

Critics of state enterprises deploy the Appellate Body decision on "public body" as a wakeup call. WTO rules, they claim, were not up to the task of preventing circumvention of the rulebook through state capitalism as exemplified by China.[14] Petros Mavroidis and Andre Sapir assert that the GATT,[15] the WTO's main treaty governing trade in goods, which originated in the post-World War II period, was unsuited to addressing state capitalism. Among the GATT's original member states (Contracting Parties), "[s]tate involvement in the workings of the economy was confined to a few

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11 In this Article, I use the term "state enterprises" to designate a range of business entities over which the state has influence beyond the use of general policy tools like regulation. What level or kind of influence triggers the concerns discussed here is itself a matter of debate and, indeed, some confusion, with the highest level of concern often being expressed over enterprises that are owned in whole or in part by the state and through which it exercises control through appointment of the board and/or managers. Yet these are hardly the only ways in which the state can influence the operational or business decisions of enterprises. Thus, in using the term "state enterprises" I leave open the question of what level of state involvement or influence, and what kind, should trigger WTO disciplines, new or proposed.

12 Agreement on Subsidies and Countervailing Measures art. 1, Apr. 15, 1994 Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14 [hereinafter SCM Agreement].

13 Appellate Body Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, ¶ 359, WTO Doc. WT/DS379/AB/R (adopted Mar. 11, 2011). The dispute concerned, in relevant part, financing of Chinese companies by state-owned Chinese banks.

14 OECD, *supra* note 7, at 61-62.

15 General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 (1994) [hereinafter GATT].

cases with special circumstances."[16] The GATT provision explicitly directed to the question of state enterprises, Article XVII, has gone largely unused, and in the one significant dispute applying Article XVII, it was largely reduced by the AB to a reaffirmation of non-discrimination norms elsewhere in the GATT architecture. In a recent paper on WTO reform the European Commission asserts:

> [T]he importance of SOEs is not yet matched with sufficient disciplines to capture any market-distorting behavior. New international SOE rules should focus on the behavior of SOEs in their commercial activities, in line with the disciplines already agreed in several free trade and investment agreements. Apart from industrial subsidies and SOE disciplines, there is a need to reflect on what other elements could be part of new WTO rules aiming at ensuring the principle of "competitive neutrality" and promoting a level playing field.[17]

This article suggests that state capitalism's skeptics tend to combine or conflate two different questions, with very distinct systemic and normative implications for the WTO system. The first question, clearly raised by the Appellate Body's decisions on "public body," is whether the existing WTO legal framework is adequate to prevent the use of state enterprises to circumvent or undermine *existing* disciplines, such as core norms against discrimination and anti-competitive subsidization. Understood in terms of general international law, this is largely a matter of state responsibility or attribution ("secondary obligations")—under what circumstances a WTO Member is responsible where a state enterprise acts contrary to an existing operative provision (or "primary obligation") such as that of non-discrimination.[18]

A quite different issue is whether state enterprises should be disfavored by new WTO rules (new primary obligations). These would discipline state enterprises, or government conduct in

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16 PETROS MAVROIDIS & ANDRE SAPIR, CHINA AND THE WTO: WHY MULTILATERALISM STILL MATTERS 68-69 (2021).

17 *Annex to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, at 9-10, COM (2021) 66 final (Feb. 18, 2021).

18 Marko Milanovic, *Special Rules of Attribution of Conduct in International Law*, 96 INT'L L. STUD. 295, 299-301 (2020).

relation to them, in ways not covered by existing WTO rules.[19] State capitalism skeptics like Mavroidis and Sapir would like to constrain state enterprises through new primary obligations. In other words, state enterprises would be more constrained than under established WTO norms such as non-discrimination *where fully applied to state enterprise conduct*.

By contrast, the basic understanding of the original GATT was that the multilateral trading system is neutral as between state enterprises and private enterprises; provided Members of the WTO do not use state enterprises to circumvent their general obligations under the WTO treaties, there is no special impediment or burden on the choice for state ownership. The GATT and indeed the WTO do not require that private ownership be dominant in all economic sectors, or at all.

In this Article, I disaggregate the question of attribution or state responsibility. I distinguish between the challenge of preventing circumvention of existing WTO obligations through the (often non-transparent) use of state enterprises and the issue of new primary obligations to "tame" state capitalism. In Parts II-V of the Paper I focus on attribution, and in Part VI the proposal for new rules targeted explicitly at state enterprises (additional primary obligations).

In Part II, I establish (contrary to, *e.g.*, Mavroidis and Sapir) state enterprises were a live issue in the GATT from its early years on. In repeated GATT panel decisions, GATT Contracting Parties were consistently held responsible for the conduct of state enterprises that was contrary to GATT norms. Indeed, GATT panels were prepared to find state responsibility even where non-state market actors engaged in GATT-inconsistent behavior, as long as government was involved in some way that was apt to influence the behavior in question (even if the involvement were non-binding "guidance," or incentives, rather than mandatory actions). GATT panels (rightly) gave considerable importance to developing legal interpretations and jurisdictional constructs that addressed the dangers of governments circumventing GATT disciplines through acting other than through formal mandatory laws and regulations. As consolidated and summarized by an early WTO panel, *Canada-Periodicals*, the state is responsible under GATT/ WTO law wherever

[19] Currently, with very few exceptions, the WTO legal framework does not extend to standards of treatment for investors or investments, or anti-trust/competition policy.

an entity is capable of being subject to governmental instructions or dependent on government action, regardless of its formal independence from government or its organizational structure, even where the entity is performing a "commercial" mandate or function.[20] Another relatively early WTO panel noted (with approval) that "panels have taken a broad view of when a governmental action is a law, regulation or requirement…."[21] The ultimate question of whether there is "sufficient government involvement"[22] has been generally affirmative in the case of state-owned and/or -controlled enterprises.

Based on the analysis in Part II, in Part III I confront the claim that GATT Article XVII on State Trading Enterprises has turned out to be ineffective or non-functional in disciplining state enterprises. Because of the general approach of GATT panels to state responsibility and attribution, as discussed in Part II, the additional obligations in Article XVII of the GATT were not needed additions to GATT rules. Thus, contrary to what is sometimes suggested, the non-application of Article XVII in disputes involving state enterprises was not due to the panels' laxity in enforcing GATT disciplines but to the contrary: liability was found based on general principles of attribution and state responsibility, and thus judicial economy dictated not deciding the further claims under Article XVII.

In the *Canada Wheat Board* dispute, a case usually invoked where the Appellate Body rejects a claim under Article XVII, as I explain, the claimant (the United States) was asserting a view of Article XVII that implied a per se prohibition on state enterprises that were capable of affecting market prices through anti-competitive behavior. But the language relied on by the United States, "commercial considerations," refers not to a prohibition on anti-competitive behavior such as monopolistic pricing, but to the basic concept of equality of competitive opportunities that has come to underpin non-discrimination jurisprudence in the GATT/WTO. This explains why the requirement of "commercial considerations" is not severable from the notion of non-discrimination, as the AB rightly held.

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[20] Panel Report, *Canada – Certain Measures Concerning Periodicals*, ¶¶ 5.35-5.37, WTO Doc. WT/DS31/R (adopted Mar. 14, 1997) [hereinafter Canada-Periodicals].

[21] Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, ¶ 10.51, WTO Doc. WT/DS44/R (adopted Apr. 22, 1998) [hereinafter Japan-Film].

[22] *Id.* ¶ 10.56.

In Part IV, I consider the criticism of the Appellate Body's decisions on the meaning of "public body" in the SCM Agreement. I agree with the critics' view as it applies to the first Appellate Body report addressing this issue. In that report, the AB appeared to require that to constitute a public body an entity had to exercise regulatory authority or delegated governmental functions. I show that this is neither consistent with the jurisprudence discussed above nor the text and structure of the SCM Agreement. Finally, this ruling of the AB seems to be based in no small part on a misapplication of general rules of state responsibility in public international law—all the while a specialized approach to state responsibility developed in the GATT case law, which was largely ignored by the AB.

In Part V, I respond positively to the suggestions of some critics of state enterprise that the AB's shift in direction in these subsequent cases should be consolidated through a presumption that state ownership and/or control is a sufficient basis for attribution, whether under the "public body" rubric of the SCM Agreement or more generally as in the earlier cases, including those from the GATT era. I seek to defend this presumption on a number of grounds. First, as Ming Du notes in the case of China, "even where state-enterprises are structured as independent from government and government officials are actually mandated by the state not to interfere with day-to day business operations, "the management of SOEs continues to be influenced by policy considerations."[23] Second, as Sappington and Stiglitz suggest, public ownership makes government intervention less costly in terms of transaction costs than regulation and taxation.[24] This can create a temptation to achieve policy or political objectives by influencing the decisions of publicly owned enterprises. Third, and not unrelated, unlike regulation and taxation, intervention in state enterprises can be quite informal and non-transparent. Therefore devising legal norms to prohibit informal influence or require transparency is a complex undertaking, and enforcing them in dispute settlement is even more daunting.

Finally, the incentive structure for managers in state enterprises may lead to types of favoritism that would undermine WTO rules. Managers in state enterprises often have careers more like those of

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[23] Ming Du, *China's State Capitalism and World Trade Law*, 63 INT'L & COMPAR. L.Q. 409, 418 (2014).

[24] *See* David Sappington & Joseph Stiglitz, *Privatization, Information and Incentives* 2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 2196, 1987).

national civil servants (or *are* civil servants). Their future employment prospects depend less on performance that can be observed and evaluated in the transnational market for managers than on long-term relationships with domestic politicians and high-level officials.[25] They may well act in such a way as to preserve or enhance relationships with domestic public officials, including managers of other state enterprises who are clients and suppliers, and who may have influence on their future career prospects. This could include favoritism inconsistent with GATT principles of non-discrimination.[26]

In Part VI, I consider the case for new primary WTO obligations targeted specifically at state enterprises. I attempt to unpack the elements of what the advocates of such new rules label "competitive neutrality." I argue that there should be a strong presumption against new, state enterprise-specific, primary obligations. First, the problem of circumvention or cheating on *existing* WTO obligations through state enterprises is soluble with a modest evolution of the existing framework for attribution and state responsibility, as argued in Parts II–V. Second, singling out state enterprises for special disciplines risks violating the long-standing approach of neutrality with regard to state versus private ownership in economic policy. Doing so can undermine the pluralism of social and economic systems on which multilateral trade liberalization depends. Third, a number of issues that are raised through the "competitive neutrality" rubric can be addressed through proper application of non-discrimination norms, such as a state enterprise like a liquor or cannabis monopoly using its commercial privileges to favor domestic products over imports, or state enterprises that are both gatekeepers in network industries (electricity or telecommunications) abusing the gate keeper function to favor themselves as predominant suppliers or domestic suppliers versus imports more generally. In these kinds of cases, the behavior in question is discriminatory under GATT principles, and anti-trust conceptions of anti-competitive behavior are not necessary to capture and discipline it (or specialized rules already exist, such as the Telecommunications Reference Paper).

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25 *See generally* THE WORLD BANK, BUREAUCRATS IN BUSINESS: THE ECONOMICS AND POLITICS OF GOVERNMENT OWNERSHIP (1995) (offering a comparison, especially in chapter 3, between contracting with public managers as agents of state capitalism and contracting with private managers as agents of state capitalism).

26 *See* Jean Tirole, *Hierarchies and Bureaucracies: On the Role of Collusion in Organizations*, 2 J.L. ECON. & ORG. 181, 184 (1986).

Along similar lines, many of the supposed competitive advantages of state enterprises, or their capacity to distort competition through economic decision-making, are addressed through the Subsidies and Countervailing Measures Agreement, including the multi-faceted definition of "financial contribution" attributable to government.

Fourth, the kinds of provisions favored by critics of state enterprises are found in trade and investment agreements, which address topics that have been consciously rejected as part of the WTO framework, namely investment and anti-trust. Bringing these topics in by the back door, to target state enterprises specifically, circumvents the need to obtain a consensus among WTO Members that now the time is right to commence negotiations in these areas (the EU has long wanted these matters dealt with in WTO negotiations but has accepted very reluctantly their removal at the Cancun Ministerial summit).[27] Applying anti-trust norms to state enterprises without introducing such principles for private firms would create a bias against social and economic systems favoring an active state sector. This seems arbitrary and unjustified at a time when many key concerns about anti-competitive conduct, and abuse of economic power more generally, focus on private entities such as Amazon, Facebook, and Google.

At the same time, I see value in efforts at greater transparency and information exchange about state enterprises through policy dialogue and perhaps eventually voluntary understandings of best practices, rather than rules that are characteristic of traditional WTO law. Such efforts could be built into the current plurilateral WTO negotiations on investment facilitation. Establishing the principle of non-discrimination between like enterprises, national treatment as applied to investment might be seen as extension of the non-discrimination norm already applied to goods and services, subject to public policy exceptions of the kind found in the GATT. But transparency and information exchange should not be limited to state enterprises. They should also create more openness concerning ownership structures in the case of private economic actors, with a view to removing policy distortions based on the form of ownership (those designed, for instance, to avoid taxation in high-tax jurisdictions).

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[27] *See* Amrita Narlikar & Rorden Wilkinson, *Collapse at the WTO: A Cancun Post-Mortem*, 25 THIRD WORLD Q. 447, 450 (2004).

II. STATE ENTERPRISE AND THE GATT CASE LAW

Mavroidis and Sapir claim that state involvement in the economy by the original participants of the GATT "was confined to a few cases with special circumstances." [28] A vast literature in economic history and political economy shows that the reverse is true. The public sector played a crucial role in post-war economic construction in virtually every major country in Western Europe. As Paul Cohen observes:

> Between 1944 and 1946, the state took control of businesses in energy, transportation, and finance. Private coal companies were reorganized into the public mining giant Charbonnages de France; gas and electricity producers were likewise nationalized to create Électricité de France and Gaz de France. The state absorbed Air France. It nationalized the country's eleven largest insurance companies, along with Banque de France and the four biggest commercial banks (including Crédit Lyonnais, Société Générale, and what would later become BNP). . . . Taken together, these measures transformed the state into a giant economic actor: in 1946, it directly controlled 98 percent of coal production, 95 percent of electricity, 58 percent of the banking sector, 38 percent of automobile production, and 15 percent of total GDP. Beginning with Jean Monnet, the first director of the General Commissariat for Planning, the government managed public enterprises and drafted five-year plans in order to shape long-term economic development.[29]

In the case of the United Kingdom, Eichengreen & Ritschl observe:

> Nationalization proceeded from the Bank of England, the coal industry and BOAC in 1946 to the railways, waterways and electricity in 1947, gas in 1948, and iron and steel in 1949.

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28 MAVROIDIS & SAPIR, *supra* note 16, at 69.

29 Paul Cohen, *Lessons from the Nationalization Nation: State-Owned Enterprises in France*, DISSENT (2010), https://www.dissentmagazine.org/article/lessons-from-the-nationalization-nation-state-owned-enterprises-in-france [https://perma.cc/Y7GF-DLHG].

By 1951 more than two million workers were employed in public corporations.[30]

As for West Germany, Eichengreen and Ritschl further note that the Marshall Plan and other public funds and state-owned banks were the major sources of financing for coal, steel, public utilities, and transport.[31] The state participated in the economy as a financier rather than a direct owner of industrial assets, while greatly influencing prices, wages, and production through corporatist bargaining of the social contract. According to Vitois, the Bank for Reconstruction (Kreditanstalt für Wiederaufbau) successfully oversaw the rebuilding of the German economy after World War II.[32]

One of the architects of what would eventually become the GATT, James Meade (a United Kingdom government official), wrote in his 1942 "Proposal for an International Commercial Union": ". . . the removal of trade restrictions do [sic] not, however, imply laissez-faire and are *in no way* incompatible with a system of state trading."[33] Alexandre Kojeve, the French left-wing philosopher who chaired the sub-committing charged with drafting of the GATT, saw the predominant emerging socio-economic model in the post-war West as one combining elements of both socialism and capitalism, a mixture of private and public enterprise.[34]

While there was thus considerable awareness of the issue of states as market participants in the first decades of the GATT, the significant role of state capitalism in European reconstruction almost naturally led to the view that state enterprise in the broadest sense (including the provision of advantages or privileges to privately-owned firms) was a perfectly legitimate tool of economic

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30 Barry Eichengreen & Albrecht Ritschl, *Understanding West German Economic Growth in the 1950s* 27 (London Sch. of Econ., Dep't of Econ. Hist. Working Paper No. 113/08, 2008), https://www.lse.ac.uk/Economic-History/Assets/Documents/WorkingPapers/Economic-History/2008/WP113.pdf [https://perma.cc/VR33-3Y2Q].

31 *Id*. at 30.

32 Sigurt Vitois, *Financial Systems and Industrial Policy in Germany and Great Britain: The Limits of Convergence* 14 (WZB Berlin Soc. Ctr., Working Paper No. FS I 95-311, 1995), http://bibliothek.wzberlin.de/pdf/1995/i95-311.pdf. [https://perma.cc/BD9A-DYFF].

33 James E. Meade, *A Proposal for an International Commercial Union*, *reprinted in* DOUGLAS A. IRWIN ET AL., THE GENESIS OF THE GATT annex A-2, at 214 (2008).

34 Robert Howse, *Kojeve's Latin Empire*, HOOVER INST. (Aug. 1, 2004), https://www.hoover.org/research/kojeves-latin-empire [https://perma.cc/76WC-5VMY].

policy. This is reflected most clearly in the statement of a GATT Committee in 1964: "the General Agreement [does not] sanction discrimination against State-trading enterprises which are, in this regard, placed on the same basis as any other enterprise."[35]

At the same time, GATT panels consistently found GATT Contracting Parties responsible for conduct of state enterprises that would, if engaged in by the state itself, violate GATT norms of non-discrimination. Indeed, as we shall see, state influence or guidance of private actors could suffice to trigger responsibility. State ownership and/or control certainly would. Thus, a doctrine developed that, while the GATT system does not prefer or discriminate in favor of private enterprise relative to state enterprise, state enterprise may not be used (overtly or indirectly) as a vehicle for circumvention of GATT obligations.

The 1988 GATT Panel *Canada – Provincial Liquor Boards (EEC)* held Canada responsible for practices of provincial liquor monopolies that were government-owned, despite Canada's insistence that these entities had a "commercial" profit-making mandate.[36] This case is an illustration that, quite apart from Article XVII, the GATT was well-designed to prevent circumvention of obligations through the conduct of state enterprises.

The panel found that the practice of higher mark ups for imported alcoholic beverages than domestic products undermined Canada's commitments under Article II:4 of the GATT. Article II:4 prohibits the circumvention of tariff bindings through the protectionist conduct of monopolies, either state owned or established or authorized by the state.[37]

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[35] Panel Report, *Report of the Committee on the Legal and Institutional Framework of the GATT in Relation to Less-Developed Countries*, ¶ 10, WTO Doc. L/2281 (adopted Oct. 26, 1964) [hereinafter Report of Institutional Framework].

[36] Panel Report, *Canada – Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies*, ¶¶ 4.8-4.16, WTO Doc. L/6304 (adopted Mar. 22, 1988) [hereinafter 1988 Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies].

[37] GATT, *supra* note 15, at art. 2 ("If any contracting party establishes, maintains or authorizes, formally or in effect, a monopoly of the importation of any product described in the appropriate Schedule annexed to this Agreement, such monopoly shall not, except as provided for in that Schedule or as otherwise agreed between the parties which initially negotiated the concession, operate so as to afford protection on the average in excess of the amount of protection provided for in that Schedule. The provisions of this paragraph shall not limit the use by contracting parties of any form of assistance to domestic producers permitted by other provisions of this Agreement.").

The Interpretative Note for Article II:4 provides for application of this discipline by reference to Article 31:4 of the Havana Charter, which stipulates, in relevant part:

> The import duty negotiated under paragraph 2… shall represent the maximum margin by which the price charged by the import monopoly for the imported product (exclusive of internal taxes conforming to the provisions of Article 18, transportation, distribution and other expenses incident to the purchase, sale or further processing, and a reasonable margin of profit) may exceed the landed cost.[38]

As the Panel noted, the provincial liquor boards could charge markups on imported products in excess of those on domestic products. where justified by additional costs associated with transportation, marketing, etc., and the need for a "reasonable" profit margin.

Beyond this, the provincial boards' markups constituted violations of Article II:4, because they undermined Canada's bound commitments to market access (on tariffs and other duties and charges) in Article II. While applying Article II:4 as a specialized legal norm directed at the situation of import monopolies, the Panel also suggested that greater markups for imported than domestic alcoholic beverages might violate National Treatment (Article III:4 of the GATT).

In addition, the Panel held that liquor board practices of limiting listings of imported alcoholic beverages constituted a violation of Article XI:1[39] of the GATT:

> The Panel observed that the note to Articles XI, XII, XIII, XIV and XVIII provided that throughout these Articles "the terms 'import restrictions and 'export restrictions' include restrictions made effective through state-trading operations". The Panel considered it significant that the note referred to "restrictions made effective through state-trading operations" and not to "import restrictions"…. The Panel

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[38] Havana Charter for an International Trade Organization art. 31 ¶ 4, U.N. Doc. E/Conf. 2/78 (Mar. 24, 1948).

[39] GATT, *supra* note 15, at art. 11.1 ("No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.")

> considered that systematic discriminatory practices of the kind referred to should be considered as restrictions made effective through "other measures" contrary to the provisions of Article XI:1.[40]

In other words. any *practice* of a state enterprise, regardless of its form, that has effects on market access equivalent to an import restriction will violate the GATT.

In a second case concerning Canadian provincial liquor boards, *Canada – Provincial Liquor Boards (US)*,[41] the Panel again held Canada responsible for the discriminatory practices of provincial liquor boards, without the need to invoke Article XVII. One of the practices in question was the setting of a minimum price for beer. While this minimum price was origin-neutral, the Panel had no difficulty finding that it violated Article III:4 National Treatment, because the price was set such as to prevent American brewers from exploiting their cost advantage relative to Canadian competitors.[42] The Panel also found that the practice of having different delivery systems for domestic and imported beer violated the National Treatment obligation of the GATT to the extent that domestic beer producers were given the option of private delivery at a competitive cost, whereas producers of imported beer did not have this option.[43]

The willingness in the Canada liquor cases to attribute discriminatory practices of state enterprises to the state itself was paralleled by other developments in GATT case law. In the *Canada-FIRA*,[44] *Japan-Semiconductors*,[45] and *Japan-Agricultural Products* cases, the Panels attributed to the respondent state as violations of the

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[40] 1988 Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies, *supra* note 36, ¶ 4.24.

[41] Panel Report, *Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, WTO Doc. DS17/R (adopted Feb. 18, 1992) [hereinafter Canada- Provincial Marketing Agencies].

[42] MAVROIDIS & SAPIR, *supra* note 16, at 120 (claiming that there "is no case law" under the GATT or WTO that addresses minimum sales prices). But the Canadian beer minimum price example shows that this is not so. This is another example of how lack of attention to the existing jurisprudential resources in the GATT/WTO legal system may lead Mavrodis and Sapir to hasty conclusions about the need for new rules.

[43] Canada- Provincial Marketing Agencies, *supra* note 41, ¶¶ 5.13-5.16.

[44] Report of the Panel, *Canada – Administration of the Foreign Investment Review Act*, L/5504 (Feb. 7, 1984), GATT BISD (30th Supp.), at 140 [hereinafter Canada - FIRA].

[45] Report of the Panel, *Japan – Trade in Semi-Conductors*, L/6309 (May 4, 1988), GATT BISD (35th Supp.), at 116 (1989), [hereinafter Japan – Semi-Conductors].

GATT the conduct of non-state actors that was susceptible to having been influenced by government, even by means of informal pressure or non-mandatory practices such as "administrative guidance" of the private sector (the case of Japan).[46] Indeed, any action by government likely to induce discriminatory conduct could be considered as falling within the expression "laws, regulations, and requirements" in GATT Article III:4.[47]

Early in the WTO era, WTO Panels synthesized and affirmed the GATT jurisprudential *acquis* on attribution and state responsibility. In *Canada-Periodicals*, the WTO Panel examined, *inter alia*, certain pricing policies of the Canada Post Corporation, a state enterprise that nevertheless had an independent corporate status under Canadian law.[48] Canada claimed that the pricing policies of Canada Post were part of its "commercial operations" and not governmental measures. The claimant, the United States, maintained that since Canada Post was owned and controlled by Canada, all such practices should be attributed to it. Thus, as the Appellate Body put it:

> The United States argues that Canada Post is a government entity fully subject to Canadian Government direction because it is a wholly-government-owned, government-created chartered body, managed by a board of directors appointed by the Canadian Government. Canada argues that the different rates charged by Canada Post are a reflection of competitive situations and that the degree of control the Government exercises over Canada Post's commercial operations (including delivery of periodicals) is one dictated by the Government shareholder's interests. In other words, Canada argues here that Canada Post's pricing policy is not a governmental measure subject to Article III:4. The essential question then is whether Canada Post is implementing Canadian Government policy in such a manner that its postal rates on periodicals may be viewed as governmental regulations or requirements for the purposes of Article III:4.[49]

46 *Id.*

47 Canada-FIRA, *supra* note 44, ¶ 5.4.

48 Canada-Periodicals, *supra* note 20, ¶ 5.35.

49 *Id.* ¶ 5.34.

The panel went on to find that Canada Post operated under "governmental instructions" and that even though Canada Post had a commercial "mandate," this commercial mandate was itself derived from governmental decisions. Given the level of control that Canada was able to exercise over Canada Post, it was implausible that Canada Post would have maintained discriminatory pricing practices that advantaged Canadian periodicals, unless these practices aligned with government policy.[50] In sum, the doctrine on attribution and state responsibility as it applies to state enterprises focuses on the ability of government to control or direct the enterprise and its general dependency on governmental action. The government need not have instructed or directed, or even have recommended the challenged measures itself (here, pricing of delivery services that were *not* part of Canada Post's universal service mandate and monopoly in relation to letter mail).

In a later dispute, *Japan-Film,* the WTO panel articulated the doctrine at a higher level of generality: action may be attributed to the state "if there is sufficient government involvement with it . . . . Thus, that possibility will need to be examined on a case-by-case basis." [51] Ownership and/or control constitutes "sufficient government involvement," because the government can use these tools whenever it sees fit to align, or realign, the conduct of the enterprise with its political and policy priorities. It is understandable that managers in state enterprises will often attempt to anticipate the government's concerns, avoiding such intervention.

Finally in the recent *Saudi Arabia-Intellectual Property* dispute, the adopted panel reiterated the approach to attribution and state responsibility in the GATT/WTO system:

> . . . [A] Member is responsible for actions at all levels of government (local, municipal, federal) and for all actions taken by any agency within any level of government. Thus, the responsibility of Members under international law applies irrespective of the branch of government at the origin of the action having international repercussions. . . . As one panel observed, "what appear on their face to be private actions may nonetheless be attributable to a government because of some governmental connection to or

[50] *Id.* ¶ 5.35

[51] Japan-Film, *supra* note 22, ¶ 10.56.

> endorsement of those actions". While there must be a sufficient nexus between the action of private entities and the action of a government (or other organ of the Member) for that government to be held responsible for that action, "it is necessary to take into account that there is a broad variety of forms of government of action that can be effective in influencing the conduct of private parties". The fact that acts or omissions of private parties "may involve some element of private choice" does not negate the possibility of those acts or omissions being attributable to a Member insofar as they reflect decisions that are not independent of one or more measures taken by a government (or other organ of the Member).[52]

III. GATT ARTICLE XVII: STATE TRADING ENTERPRISES AND JUDICIAL ECONOMY

Critics of state enterprises often buttress their argument about the inadequacy of existing WTO rules by pointing to the fact that dispute settlement organs have largely avoided adjudicating claims under GATT Article XVII, which is specifically directed to the conduct of state trading enterprises, including both enterprises under state ownership and control as well as those granted special trading rights or monopolies. GATT Article XVII is "toothless" and irrelevant, US business lobby group asserted in its testimony before the Senate Finance Committee.[53]

The lobby group Coalition for a Prosperous America *is* correct that Article XVII has been seldomly applied in WTO adjudication. Yet this lack of use does not suggest the ineffectiveness of Article XVII so much as the adequacy of more general GATT disciplines on non-discrimination for disciplining state enterprises and preventing the use of state firms to circumvent WTO obligations. Thus, in the cases discussed in Part II, Article XVII, while usually pleaded by

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[52] Panel Report, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, ¶¶ 7.50-7.51, WTO Doc. WT/DS567/R (adopted June 16, 2020) [hereinafter Saudi Arabia – IP] (footnotes omitted).

[53] Michael Sturmo, *Written Testimony Before the Senate Finance Committee*, COAL. FOR PROSPEROUS AM. (Aug. 12, 2020), https://prosperousamerica.org/written-testimony-before-the-senate-finance-committee/ [https://perma.cc/49EW-ULNW].

claimants, and was the subject of some obiter dicta,[54] does not need to be applied to find that the defending state had violated the GATT.

Article XVII (1) reads as follows:

> 1.* (a) Each contracting party undertakes that if it establishes or maintains a State enterprise, wherever located, or grants to any enterprise, formally or in effect, exclusive or special privileges,* such enterprise shall, in its purchases or sales involving either imports or exports, *act in a manner consistent with the general principles of non-discriminatory treatment* prescribed in this Agreement for governmental measures affecting imports or exports by private traders.
>
> (b) The provisions of subparagraph (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,* including price, quality, availability, marketability, transportation and other conditions of purchase or sale, and shall afford the enterprises of the other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales.
>
> (c) *No contracting party shall prevent* any enterprise (whether or not an enterprise described in subparagraph (a) of this paragraph) under its jurisdiction from acting in accordance with the principles of subparagraphs (a) and (b) of this paragraph.[55]

According to Mavroidis' reading of the negotiating history, what animated the drafters of Article XVII was the fear that "through the operation of [State-trading Enterprises], market economies might be circumventing their obligation to avoid discriminating between domestic and imported goods."[56] The non-circumvention function of Article XVII is most clearly displayed in the obligation in paragraph (1)(c), which prohibits GATT *Contracting Parties* from

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[54] MAVROIDIS & SAPIR, *supra* note 16, at 118-20. These dicta have not had any impact on the development of case law, though they have been the subject of occasional academic commentary.

[55] GATT, *supra* note 15, at art. 17 (emphasis added).

[56] PETROS MAVROIDIS, THE REGULATION OF INTERNATIONAL TRADE 400 (1st ed., 2016).

directing a state enterprise to engage in discriminatory conduct contrary to GATT principles and in particular to make purchases or sales based on other than commercial considerations. In the case law discussed in Part II, Canada had mooted a different view, which was that Article XVII was a *lex specialis* on discrimination for state trading enterprises such that so long as such enterprises operate according to "commercial considerations" within the meaning of Article XVII(1)(b), no claim can be brought for discrimination under other provisions of the GATT, such as Article III:4 or Article XI. Put slightly differently, Article XVII(b) would constitute a *defense* against state responsibility for violations of primary obligations such as Article III:4 and Article XI.

In the WTO *Canada-Wheat Board* dispute, the claimant the United States urged a yet different view of the role of "commercial considerations." According to the US, the obligation to act in accordance with commercial considerations constrained a state trading enterprise in using market power acquired through rights conferred by the government, including monopoly rights.[57]

On the US view, such behavior would violate Article XVII, regardless of whether there was discrimination of the kind that violated other operative provisions of the GATT, such as Article III:4. Thus, the US asserted that inherent in the kind of monopoly rights granted the Canadian Wheat Board was the facilitation of anti-competitive conduct, in the sense of price discrimination among export markets. The US used the concept of "commercial considerations" to make an argument that Article XVII, rather than being an anti-circumvention provision, covered conduct not otherwise disciplined under GATT; Article XVII(b) created an independent obligation not dependent on a finding of discrimination under Article XVII(1)(a).

The GATT contains neither a code on anti-trust nor any obligation of non-discriminatory treatment as between *like or similar enterprises or investments.* The WTO Trade-Related Investment Measures Agreement (TRIMs) addresses non-discrimination but only through affirming that treatment of foreign investment must not result in discrimination between like imported and domestic

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[57] Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, ¶ 146, 147, WTO Doc. WT/DS267/AB/R (adopted Aug. 30, 2004) [hereinafter Canada-Wheat Board].

products contrary to GATT Article III.[58] By contrast, International Investment Agreements, or newer PTAs that cover both trade and investment, typically impose a National Treatment obligation with respect to investors and investments. This requires non-discriminatory treatment of investors or investments from other treaty parties where the latter are in like circumstances with domestic investors or investments.[59]

As the Appellate Body put it: "We see no basis for interpreting that provision as imposing comprehensive competition-law-type obligations on STEs, as the United States would have us do."[60] Even if, for the sake of argument, the Appellate Body were *wrong* in assuming that Article XVII does not impose "competition-law type obligations," the language of "commercial considerations" would not be adequate to articulating such obligations. Much anti-competitive behavior by private economic actors with market power is "commercial" in the sense that it is commercially rational for a profit-maximizing private monopolist to use its market power anti-competitively. As Hoekman and Trachtman suggest, "what matters from the perspective of the WTO (Article XVII) is whether any observed price discrimination across foreign markets or between domestic and foreign markets would also be pursued by a private firm" that had market power.[61] They further note: "evidence of extensive product differentiation in the wheat market suggests that private firms would also pursue price discrimination strategies in markets where they have (some) pricing power."[62]

In *Canada-Wheat Board*, the Appellate Body ultimately found that "commercial considerations" qualifies the "scope" of the general non-discrimination obligation in XVII(1)(a). The obligations of non-discrimination reflected in the other provisions of the GATT are the controlling law, such that if there is no apparent breach of those obligations, there is no need for addressing "commercial considerations."

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[58] Agreement on Trade-Related Investment Measures Agreement arts. 2-3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186 [hereinafter TRIMS Agreement].

[59] *See* U.N. Conference on Trade and Development, *National Treatment*, U.N. Doc. UNCTAD/ITE/IIT/11 33-34 (1999).

[60] Canada-Wheat Board, *supra* note 57, ¶ 145.

[61] Bernard Hoekman & Joel P. Trachtman, *Canada-Wheat: Discrimination, Non-Commercial Considerations, and State Trading Enterprises* 9 (World Bank Dev. Rsch. Grp., Policy Research Working Paper No. 4337, 2007), https://ssrn.com/abstract=1011084.

[62] *Id.*

As the Appellate Body emphasized:

> . . . even if Article XVII:1 itself did not exist, this would not imply that STEs would be subject to no disciplines under the GATT 1994…. We need not identify, for purposes of this appeal, all of the provisions of the GATT 1994 that may apply to STEs, nor consider how these disciplines interact with and reinforce each other. We do, however, believe that these other provisions reveal that, even in 1947, the negotiators of the GATT created a number of *complementary* requirements to address the different ways in which STEs could be used by a contracting party to seek to circumvent its obligations under the GATT…. This is also consistent with the view that Article XVII:1 was intended to impose disciplines on one particular type of STE behaviour, namely discriminatory behaviour, rather than to constitute a comprehensive code of conduct for STEs.[63]

At the time the GATT came into force, it was unclear how the concept of discrimination would be articulated with respect to the National Treatment and MFN obligations of the GATT. Rather late in the GATT era, the case law began to consolidate behind an approach that emphasizes equality of competitive opportunities as the core concept of non-discrimination, rather than protectionist intent or whether measures are based on overt distinctions between products of different national origins; the competition-based approach became the dominant and eventually the exclusive one in the WTO era.[64]

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[63] Canada-Wheat Board, *supra* note 57, ¶ 98 (emphasis added).

[64] The key judicial precedents include: Panel Report, *Japan – Taxes on Alcoholic Beverages*, WTO Doc. WT/DS8/R, WT/DS10/R, WT/DS11/R (adopted Nov. 1, 1996), *modified by* Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WTO Doc. WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (adopted Oct. 4, 1996) [hereinafter Japan-Alcoholic Beverages]; Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc. WT/DS135/AB/R (adopted Apr. 5, 2001) [hereinafter EC-Asbestos]; Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 5.82, WTO Doc. WT/DS400/AB/R WT/DS401/AB/R (adopted May 22, 2014). In this last case the Appellate Body made it clear that the competition-based approach to discrimination applies both to MFN and National Treatment: "we observe that, notwithstanding the textual differences between Articles I:1 and III:4, each provision is concerned, fundamentally, with prohibiting discriminatory measures by requiring, in the context of Article I:1,

In the Canada liquor board cases, one can observe the GATT Panels assessing the impact of the state enterprises' retailing practices on competitive opportunities for imported relative to domestic products. Markup, listing, and minimum price requirements all operated in such a way as to alter the conditions of competition in favor of domestic alcoholic beverages, thus denying equality of competitive opportunities. This reading of GATT Article III as requiring that state enterprises' trading practices provide *equality* of competitive opportunities seems, in effect, to subsume fully the obligation in Article XVII to afford adequate opportunity to compete.

Under the equality of competitive opportunities approach to MFN and National Treatment, there is a focus on commercially relevant factors in determining whether products are "like." Some early jurisprudence, and much academic commentary, suggested that likeness analysis could use government policy objectives like environmental protection to distinguish products as "unlike" even if they have similar physical characteristics or are in market competition. The WTO Appellate Body from its earliest rulings adopted an approach to likeness that is based on the 1970 GATT *Working Party on Border Tax Adjustment*.[65] The factors determinative of likeness in this framework are physical characteristics, end uses and consumer tastes and habits. There is no explicit role for public policy.

This market competition-based approach obviously dovetails with GATT Article XVII(1)(b), which refers to price, quality, availability, marketability, transportation, and other conditions of purchase or sale. All of these relate to one or more of a product's physical characteristics or end uses, and/or affect market behavior of consumers.

In sum, thanks to the evolution of GATT/WTO non-discrimination jurisprudence, an assessment of the practices of state enterprises under Articles (1)(a) and (1)(b) will likely come to the same conclusion as an inquiry into whether such conduct is attributable to the state as a breach of other GATT provisions on non-discrimination, such as MFN and National Treatment (along

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equality of competitive opportunities for like imported products from all Members, and, in the context of Article III:4, equality of competitive opportunities for imported products and like domestic products. It is for this reason that neither Article I:1 nor Article III:4 require a demonstration of the *actual* trade effects of a specific measure."

65 *See* Japan-Alcoholic Beverages, *supra* note 64; EC-Asbestos, *supra* note 64.

the lines of the Canadian liquor board cases and the *Canada-Periodicals* case). Article XVII and other non-discrimination norms in the GATT are mutually reinforcing or complementary: there is no reason to interpret Article XVII(1)(b) as branching out in a different direction.

At the same time, whether there is a violation of MFN and/or National Treatment under, respectively, Article I and III of the GATT or a violation of Article XVII, the scope for a WTO Member to justify the state enterprise behavior as directed to a legitimate public policy objective is the same. The Article XX General Exceptions clause (covering objectives such as protection of public morals, human or animal life and health, and conservation of exhaustible natural resource) applies to the entire GATT treaty.[66]

There *is* one plausible line of argument that Article XVII articulates not just the principle of anti-circumvention but also a distinctive primary obligation. Thus, Article XVII might be read as an obligation on a state that establishes a state trading enterprise to use its powers to *design, control, and supervise the conduct of that entity* in such a way that it does not engage in discrimination of the kind prohibited under other Articles of the GATT.

This would address the concern that state trading enterprises might well not be transparent in their buying and selling practices, making it difficult to identify specific decisions of those enterprises in conflict with GATT non-discrimination principles. Also, managers of state enterprises, anticipating that their political owners/controllers would approve of such conduct, might be inclined to engage in favoritism toward domestic economic actors.

If so, the imposing a positive obligation on the state to preclude such behavior of a state enterprise through the way in which its mandate is established, for example, or the way managers must account for their performance, might make sense. Such a positive obligation would still be ministerial to the overall non-circumvention function of Article XVII. But is such a function needed if (as is indicated by the GATT cases) dispute panels are prepared to attribute presumptively discriminatory conduct of state enterprises to the state, with the existence of discrimination being determined by an approach that emphasizes the conditions of competition in the marketplace?

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66 How the legitimate policies listed in Article XX are weighed in relation to obligations such as MFN and National treatment is presented in detail in Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27 EUR. J. INT'L L. 9, 45-53 (2016).

At the same time, Article XVII reflects the understanding that not all issues concerning state enterprises may be capable of resolution under general GATT rules or indeed the Article's own provisions. Thus, Article XVII calls for "negotiations on a reciprocal and mutually advantageous basis designed to limit or reduce" obstacles to trade from state trading enterprises. The reference to reciprocity seems to indicate what is intended is not additional *general rules* on state trading enterprises but adjustment of existing aspects of the GATT/WTO bargain in the light of specific concerns between two or more WTO Members. These concerns would relate to specific state-trading enterprise practices and their impact on trade of one or more Members. Accordingly, Article XVII(4) allows any individual contracting party (WTO Member) to request information from another about a particular state trading enterprise which the requesting contracting party believes is having adverse effects on it. Early talks that led to the GATT negotiations raised the possibility that such an agreement would contain some general provisions on state trading but that addressing trade between "private enterprise" countries and those where the state dominates economic decision-making might entail "negotiating bilateral agreements" where "the private enterprise" country would provide concessions in return for specific undertakings concerning the behavior of the state enterprise of the socialist country.[67]

The result would be a reciprocally determined "mutually satisfactory arrangement" applicable between the contracting parties concerned (as opposed to new general rules that would bind all WTO Members).[68] Chad Bown has advocated this type of "side deal" approach to dealing with China's state enterprises:

> [An] SOE agreement need not be negotiated under the context of a full Doha- like round or a single undertaking that would include the entire WTO membership. It would be better negotiated as a plurilateral agreement with a critical mass of countries but including China. Examples of recent

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[67] DOUGLAS A. IRWIN ET AL., *supra* note 33, annex A-3, at 222 ("Anglo-American Discussions under Article VII: Commercial Policy").

[68] GATT, *supra* note 15, at art. 17.3.

plurilateral deals include the first and second Information Technology Agreements.[69]

IV. ATTRIBUTION, STATE RESPONSIBILITY, AND THE MEANING OF "PUBLIC BODY" IN THE WTO SUBSIDIES AND COUNTERVAILING MEASURES (SCM) AGREEMENT

As noted in the Introduction to this essay, the Appellate Body ruling on public body in the *US – Anti-Dumping and Countervailing Duties (China)* case is a key data point for the critics of state enterprises, indicating that existing WTO disciplines on state capitalism are inadequate. The GATT *acquis* on attribution and state responsibility discussed in Part II above does not directly address the question of subsidies. Prior to the creation of the WTO in 1995, the multilateral trading system did not contain any enforceable legal disciplines on domestic subsidies. The treatment of such subsidies in the GATT was two-sided: their legitimacy as tools of public policy was affirmed while their capacity to distort trade was also acknowledged. Countermeasures against such subsidies were permitted in the form of countervailing duties in cases where the subsidies caused "material injury" to domestic industry in the importing country. The Uruguay Round's SCM Agreement placed export subsidies and domestic content requirements in the category of "prohibited" measures.

The agreement introduced a category of domestic subsidies termed "actionable," which may either be challenged in WTO dispute settlement, or alternately, countervailed where certain legal criteria are met. In order that a subsidy challenged in WTO dispute settlement be "prohibited" or "actionable," it must fall within the definition in Article 1 of the SCM Agreement, which means it must entail a "financial contribution:" governmental financial assistance to firms, from cash payments to equity infusions to the provision of goods and services below market prices. It must also confer a "benefit" on an enterprise.

A benefit constitutes some competitive advantage to the recipient when gauged against some benchmark for a normal or

[69] *Hearing on U.S. Tools to Address Chinese Market Distortions Before the U.S.-China Economic and Security Review Commission*, 115th Cong. 16-29 (2018) (statement of Chad Bown, Reginald Jones Senior Fellow, Peterson Institute of International Economics) (alteration in original).

perfectly competitive market. The measure must also be "specific," either *de jure* (legally targeted at a particular industry or enterprise or group of industries or enterprises) or *de facto* (in fact used only or disproportionately by a particular industry, enterprise, or group of industries or enterprises). Article 2.1(b) of the SCM Agreement refines the concept of specificity:

> Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.[70]

In the case of "prohibited" subsidies, for example export subsidies, specificity is presumed and does not have to be proven by the claimant. If a subsidy meets the above criteria for actionability, a WTO member may either challenge the subsidy in WTO dispute settlement, seeking the remedy of removal of the offending measure, or it may countervail the subsidy. If a member pursues the first option, it must show the existence of certain "adverse effects" on WTO members other than the subsidizing member, including the complaining member. These adverse effects include "serious prejudice to the interests of another member," which can include displacement of imports or exports, as well as price suppression.

To return to Article 1 of the SCM Agreement, a "financial contribution" can exist when it is made by government, when the government directs or entrusts a private body with so doing, or when the contribution comes from a "public body." Obviously, as just explained, the existence of "financial contribution" is only one element that determines whether a subsidy is "actionable," which means that it is either countervailable or a valid complaint in WTO dispute settlement. But it is equally obviously an essential element. The notion of a financial contribution clearly encompasses ways in which government, a public body, or a private actor entrusted or directed by government, provides aid of monetary value to state enterprises, including loans, equity infusions, and loan guarantees. According to Article 14 of the SCM Agreement, these are deemed to confer a benefit when provided on non-commercial terms

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[70] SCM Agreement, *supra* note 12, at art. 2.1(b).

inconsistent with normal practice of private investors.[71] Government provision of goods and services at below market prices, or purchase of goods and services at above market prices are deemed to confer a benefit.

In *US – Anti-Dumping and Countervailing Duties (China)*, the issue was the lending by Chinese state-owned banks to Chinese industrial enterprises. Based on the facts of state ownership and control, the panel found no violation of the SCM Agreement in the US agency's determination that the banks were "public bodies," and thus that the lending of these banks to Chinese firms could be considered as involving a "financial contribution" within the meaning of Article 1 of the SCM Agreement. The Appellate Body reversed. Its ruling has generated such controversy and criticism that even those who consider the AB findings in this Report a key piece of evidence regarding the inadequacy of WTO rules on state capitalism often fail the disaggregate the different dimensions of what the AB did—and did *not*—decide in this case. Understanding the impact of the decision on WTO discipline of the state as a market actor depends upon just such a fine-grained analysis. A clear conception of what was, and what was not, decided by the AB is especially needed if the decision is to be taken as a departure point for the design of new WTO rules, as it is by Mavroidis and Sapir, for instance.

In reversing the panel on public body, the AB made a range of findings. First, the AB held that the definition of public body did not coincide with state-owned enterprise. Second, the AB considered that public body pointed to the kind of entity that exercises governmental authority, as understood in Article 5 of the International Law Commission Articles on State Responsibility. Third, the AB found that state ownership and/or control were,

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71 Article 14 reads in relevant part: "(a) government provision of equity capital shall not be considered as conferring a benefit, unless the investment decision can be regarded as inconsistent with the usual investment practice (including for the provision of risk capital) of private investors in the territory of that Member; (b) a loan by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market. In this case the benefit shall be the difference between these two amounts; (c) a loan guarantee by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the guarantee pays on a loan guaranteed by the government and the amount that the firm would pay on a comparable commercial loan absent the government guarantee. In this case the benefit shall be the difference between these two amounts adjusted for any differences in fees . . . . " SCM Agreement, *supra* note 12.

however, relevant to determining whether an entity is a public body, though not normally dispositive. Fourth, in applying its legal analysis to the facts, the AB held that, in some contexts, here China, an agency's general background knowledge of how the country's government and political economy function could allow it to find that state ownership and control constituted sufficient evidence that the entity is a public body.

Let us take each of these findings in turn.

a. Public Body Does Not Mean the Same as State-Owned Enterprise

The Appellate Body had no warrant to find that the definition of public body was state enterprise or state-owned enterprise. This latter terminology is use in a range of international economic agreements; as we discussed above, the GATT contains the expression "state trading enterprises" for example, which includes a range of forms of government involvement. As will be discussed further below, "public body" might well include entities not owned or controlled by the government in any conventional sense, such as research foundations or pension funds, for instance, but with other kinds of connections to government operations and policy that could influence their dispersal of financial assistance to others. Thus, the AB was correct to consider that evidence of varying forms of involvement or connection to government may well be probative of whether an entity is a public body. Indeed this approach is consistent with the GATT *acquis* as elaborated in Part II above, as summarized in *Japan-Film*, a case-by-case assessment by the panel of whether there is sufficient "government involvement."

b. Exercise of Governmental Authority

According to the AB, in determining whether an entity is a public body:

> What matters is *whether* an entity is vested with authority to exercise governmental functions, rather than *how* that is achieved . . . in all instances, panels and investigating authorities are called upon to engage in a careful evaluation of the entity in question and to identify its common features and relationship with government in the narrow sense,

> having regard, in particular, to whether the entity exercises authority on behalf of government.[72]

There are two key jurisprudential moves that led the AB to consider the exercise of governmental authority as central to the determination that an entity is a public body. The first is a forced reading of language in Article 1 of the SCM Agreement. The reasoning in question and its logical flaws are well-summarized by the United States statement to the WTO Dispute Settlement Body following the ruling:

> [T]he report relies in part on . . . a subparagraph in the definition of a subsidy that establishes that financial contributions can also be provided through private bodies when they are entrusted or directed to so by a government or a public body. The report then asserts that **every** public body must therefore be able to entrust or direct private bodies to provide financial contribution, . . . that public bodies must necessarily possess governmental authority in order to do so . . . the report [also] reasons that . . . a particular action listed in the definition of a subsidy –"a decision to forego or not collect government revenue that is otherwise due" – "appears to constitute conduct inherently involving the exercise of governmental authority."[73]

There is, clearly, an unwarranted leap of logic on the part of the Appellate Body. The fact that *some* forms of financial contribution imply the exercise of governmental authority does not mean that *all* forms do, and therefore a public body could well engage in the exercise of making "financial contributions" without having any delegated governmental powers or exercising governmental authority. Providing a loan to a domestic firm on concessional (i.e. better than commercial) terms is an obvious example, applicable to the facts of the case at hand.

The second unwarranted jurisprudential move of the Appellate Body was to assume that the notion of public body is an expression

[72] GATT, *supra* note 15, ¶¶ 318-319.

[73] Written Submission by the United States, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R (Nov. 3, 2011), https://ustr.gov/sites/default/files/enforcement/DS/379.Mar25.2011.DSB.Stmt.as%20deliv.fin.pdf [https://perma.cc/GX99-HK5T] (emphasis in original).

of the principle of attribution to the state in Article 5 of the ILC Articles of State Responsibility.[74] Article 5 reads in relevant part:

> [T]he conduct of a person or entity *which is not an organ of the State* under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.[75]

The ILC Articles on State Responsibility contemplate the possibility that a specialized regime in international law, in this case, the WTO, will have its *own* rules on state responsibility, including attribution. The *lex specialis* will prevail to the extent inconsistent with the default rules stated in the ILC Articles. The AB failed to apply Article 5 in the context of the GATT *acquis* on attribution and state responsibility, as summarized and affirmed in the WTO era by panels such as *Canada-Periodicals* and *US-Film* (these findings were not appealed and so these are adopted rulings that form part of the jurisprudence a WTO adjudicator is required to consider). Second, and relatedly, the AB never considered how ILC Article 5 fit with the various textual features of Article 1 of the SCM Agreement. Third, the AB ignored the relationship of ILC Article 4, which refers to the concept of "state organs," to Article 5.

In fact, the language of Article 5 seems to fit well the notion of the power to *entrust or direct a private body* to provide a financial contribution. Given that Article 5 seems to be mirrored in the notion of entrustment and direction of non-state actors in SCM 1, it behooved the Appellate Body to reflect on whether some principle of attribution *other* than that articulated in Article 5 was more appropriate to the notion "public body" in the SCM Agreement. Article 5 on its own terms only applies where the entity in question is *not* an organ of the state within the meaning of ILC Article 4. The AB seems to have read Article 4 (if it read it at all) as equivalent to *government* within the meaning of SCM Article 1. Since SCM Article 1 refers to contributions by government *or* a public body, the AB apparently assumed that a public body could not be an Article 4 organ, or part thereof. However, ILC Article 4:1 provides:

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[74] *Report of the International Law Commission to the General Assembly*, 56 U.N. GAOR Supp. No. 10, art. 5, U.N. Doc. A/56/10 (2001).

[75] *Id.*

> [T]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or *any other functions*, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or a territorial unit of the State.[76]

The language "any other functions" indicates that an entity may be an organ even when not performing or even having any of the roles- "legislative, executive, judicial"- normally or characteristically identified with "government." Thus, the *Saudi-Arabia Intellectual Property* Rights panel would note, some years later, the concept of "organ" makes the state responsible for "*all* actions taken by *any agency* within any level of government."[77]

In ignoring Article 4, the AB failed to consider a significant body of jurisprudence where investor-state arbitral tribunals have applied the ILC Articles to complaints against the conduct of state enterprises. In many instances, though not all, these tribunals have found state enterprises, especially where owned and/or controlled by the state, to be Article 4 organs.[78] The role of "public body" might well be to ensure that there is attribution to the state even where uncertainty exists about whether the entity in question is an Article 4 "organ."

As Markovic points out:

> Logically, there can be two types of special attribution rules: positive or negative. A positive special attribution rule would *expand* the circle of natural or legal persons whose conduct is attributable to the State beyond the circle of such persons identified by the general attribution rules codified in the ASR. A negative special attribution rule, by contrast, would *restrict* the applicability of one of the attribution rules in the ASR and narrow the circle of persons whose conduct would be regarded as that of the State in comparison to the general rules.[79]

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[76] *Id*. at 44 (emphasis added).

[77] Saudi Arabia – IP, *supra* note 52, at 62

[78] Freya Baetens, Lifting the Corporate Veil between China and its State-Owned Enterprises: Revisiting the International Rules on Attribution of State Conduct 11-17 (Feb. 2021) (unpublished manuscript) (on file with author).

[79] Milanovic, *supra* note 18, at 305.

The AB interpretation seems to veer toward considering "public body" a negative, or restrictive, special rule of attribution, understanding "public bodies" as *not* "organs" under the ILC Article 4, with the consequence that attribution would only occur where the body exercises delegated governmental authority within the meaning of Article 5. It seems highly implausible that the drafters of the SCM Agreement intended the concept of "public body" in state responsibility to *narrow* the range of situations where conduct would be attributable to the state relative to what general international law provides.

For all these reasons, the Appellate Body was unjustified in giving a central place to exercise of governmental authority in determining whether an entity is a public body. When one takes into account Article 4 of the ILC Articles, as well as the practice of international tribunals, attribution of conduct of state owned and/or controlled enterprises to the state need not hinge on exercise of governmental authority, even if it is a relevant consideration in an overall judgment of the extent of "governmental involvement" in the entity. The same goes for the GATT *acquis* as affirmed by WTO panels: exercise of governmental authority is not a necessary element for finding the requisite level of "governmental involvement." Nor is the exercise of governmental authority a central test or evidentiary requirement in a more general assessment of "governmental involvement."

c. State Ownership and Control Relevant but Not Dispositive Evidence of a Public Body

As suggested above, if anything, the concept of public body is *more* capacious than that of a state enterprise as defined by state ownership and/or control. There is a large variety of entities that are not obviously state-owned and/or controlled but with other close connections to the state. Public pension funds, public health insurance bodies, or public research institutions may be organized in ways that do not obviously bespeak governmental ownership or control in the manner of classic state industrial enterprises. The best reading of "public body" is that which fits with the GATT *acquis* on attribution and state responsibility—the expression "public body" is intended to ensure that entities that are capable of being influenced or guided by government are subject to SCM disciplines. From this point of view, the AB's rejection of a single-minded focus on ownership and control as evidence of a public body is justified.

While the AB was right not to view state ownership and control as *necessary* for a finding of public body, the AB was off course in rejecting ownership and/or control as not *sufficient* for such a finding. As GATT panels have held, ownership and/or control indicate a very significant degree of governmental involvement and, as a legal matter, provide an easily accessible tool for the government to intervene. As Sappington and Stiglitz suggest, state ownership makes government intervention less costly in terms of transaction costs relative to regulation and taxation; this creates a general bias toward government's achieving policy, or political, objectives through influencing the decisions of state-owned enterprises.[80] These interventions are typically less transparent than regulation and taxation and thus more difficult to discipline under many WTO rules. Even where a government does not use its ownership and/or control rights to intervene in the business decisions of state-owned enterprises, managers may seek to avoid decisions that may be displeasing to the government and may be inclined to take those that anticipate its political objectives.

There is also a principal-agent problem inherent in the incentive structures for managers in many state enterprises. In some instances, the mangers are competitive on the transnational market for managers. Some sovereign wealth funds have asset managers, for example, who are interchangeable with those hired by private funds; they may move between a sovereign wealth fund and, say, BlackRock and back again. But many managers in state enterprises have careers more like those of national civil servants. Their future employment prospects depend less on performance that can be observed and evaluated in the transnational market for managers than on long-term relationships with domestic politicians and high-level officials.[81]

Even if their explicit mandate from the government is to maximize the commercial advantage of the state enterprise, managers may have an incentive to depart from such commercial advantage-maximizing behavior to preserve or enhance relationships with domestic officials who may have influence on

[80] *See* David Sappington & Joseph Stiglitz, *Privatization, Information and Incentives* (Nat'l Bureau of Econ. Rsch., Working Paper No. 2196, 1987).

[81] *See generally* WORLD BANK, BUREAUCRATS IN BUSINESS: THE ECONOMICS AND POLITICS OF GOVERNMENT OWNERSHIP 107-74 (1995) (discussing contracting with public and private managers as agents of state capitalism).

their future career prospects, or sometimes such behavior may constitute mutual back-scratching.[82] Managers may thus collude with public officials (or other domestic agents) to operate the enterprise in ways that supports the objectives of those officials, even if the principal (the legislature or the people, let us say) has sought to prevent such interference. Here the favoritism or cronyism at odds with WTO disciplines is due to the incentives facing the *agent*, not the agent enacting the protectionist agenda of the *principal*.

As Tirole observes, "anticipating that their members have incentives to collude, organizations can and do set up incentive schemes that restrict the formation and thus the effect of coalitions."[83] In the case of state-owned and/or controlled enterprises, it is the government as "principal" that is in a position to implement mechanisms that control collusion in such as a way to prevent conduct that is inconsistent with WTO norms. Attributing behavior to the state where an enterprise is state-owned and/or controlled thus makes sense in terms of giving the "principal" an incentive to control such collusion, which may result in protectionist forms of favoritism and cronyism.

d. The China Exception

Finally, the AB noted that, while in several of the investigations, the US agency went no further than to consider formal ownership and control rights, in one of them the agency incorporated by reference earlier research that documents a pattern of actual Chinese government influence over the practices of state-owned banks. This was sufficient for the AB to hold that the US agency had made a reasoned, evidence-based judgment that in fact the entities in question were public bodies within the meaning of the SCM Agreement. In so finding, the AB greatly limited the extent to which its ruling gives a get out of jail card to Chinese state enterprises. There are contexts, and China may be one of them, where state ownership and/or control will be sufficient to establish that an entity is a public body. The fundamental question becomes one of proof—establishing a systemic link between government ownership

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[82] *See generally* Tirole, *supra* note 26, at 187-92 (designing a model to characterize the collusion behavior between principle, supervisor, and agent on various levels).

[83] *Id.* at 187.

and/or control on the one hand and influence on the other. Should a domestic agency bear a heavy burden of proof to inquire into the fundamentals of the responding Member's political and economic system? Such judgments are themselves politically sensitive and arguably could risk creating stereotyped views that are at odds with the commitment of the multilateral trading system to the diversity of domestic political and economic systems.

V. THE SOLUTION: A PRESUMPTION BASED UPON STATE OWNERSHIP AND/OR CONTROL

The most problematic feature of the AB's approach to public body in *US – Anti-Dumping and Countervailing Duties (China)* is the centrality given to the exercise of governmental authority in the determination of public body. Also problematic, in terms of preventing circumvention of obligations under the SCM Agreement, is the finding that state ownership and control is not normally dispositive evidence of a public body.

On the first point, in later Reports the AB appears to have backed off from giving the exercise of governmental authority a central role. In the *US-Carbon Steel (India)* case, the AB considered that performing governmental functions could be sufficient evidence of "authority."[84] This considerably blunts the undue narrowness of the AB focus in *US-Antidumping and Countervailing Duties-China*, since it would be very rare that a government established a state-owned and/or controlled enterprise without having it in mind that some governmental function is being served; even a sovereign wealth fund managing the state's investment portfolio to attain a risk-adjusted rate of return has a governmental function, namely the management of public finances. The AB also re-emphasized the significance of the "legal and economic environment prevailing in the country in which the investigated entity operates."[85] Some critics of the AB do not even seem to be aware of this major step toward diluting the notion of regulatory authority, perhaps because they are focused only on disputes with China. Still the diluted approach is also evident in the 21.5 AB Report in *US-Antidumping*

84 Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, ¶ 4.7, WTO Doc. WT/DS436/AB/R (adopted Dec. 19, 2014) [hereinafter U.S. – India].

85 *Id.* ¶ 4.9.

and Countervailing Duties-China.[86] There, the AB clarified that under SCM Article 1, an entity need not be performing a governmental function when it makes the "financial contribution" at issue, as long as it has (i.e. as an entity in general) *some* "governmental function."[87]

With the shift from "exercise of authority" to mere possession of a "governmental function" as sufficient evidence of "authority," for practical purposes, the clearly objectionable features of AB approach in *US-Antidumping and Countervailing Duties (China)* have been neutralized. It would be truly surprising that a WTO adjudicator would conclude that an enterprise owned and/or controlled by the state has no "function" of any kind connected with government. Certainly, that would be a most implausible finding in connection with the kinds of state enterprises that engage in behavior that might be considered as in violation of subsidies disciplines.

Still as discussed above, one could also object to the layering on of any additional evidentiary burden on a complainant or a domestic agency once it is established that an entity is state-owned and/or controlled; this alone suggests a significant level of government involvement and possible influence, even indirect, on the behavior of managers. For this reason, I agree with the proposal of Mavroidis and Sapir that there should be an Appellate Body presumption that a public body exists in the case of majority share ownership by the state.[88] In addition to the considerations discussed above concerning why ownership and/or control represent significant "governmental involvement" in an entity, I would add that I do not see much risk of unfairly or unreasonably attributing to the defendant WTO Member conduct for which they have no direct or indirect responsibility. First, a presumption is just that, and it can be refuted. Suppose a WTO Member has established a sovereign wealth fund staffed with managers who follow the practices of investment professionals in the private sector. The SWF acquires a particular company as an asset in the portfolio. Of course, formally the asset is owned by the government through the SWF, but it may be possible for the defending WTO Member to overcome the presumption of a public body by pointing to the nature of the ownership here: passive ownership of a firm as a financial asset

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[86] Appellate Body Report, *United States – Countervailing Duty Measures on Certain Products from China*, WTO Doc. WT/DS437/AB/RW (adopted July 16, 2019) [hereinafter U.S. – China].

[87] *Id*. ¶¶ 5.104-5.105.

[88] MAVROIDIS & SAPIR, *supra* note 16, at 193.

overseen by SWF managers drawn from investment professionals whose careers may well be mostly in the private sector.

Second, the attribution of a financial contribution to a WTO Member through a finding of public body does not, itself, establish internationally wrongful conduct. As would be the case with a financial contribution by government, the financial contribution of the public body must confer a benefit and be specific to be "actionable," and in addition, for a finding of international wrongfulness, adverse effects must be found. Where countervailing duties are at issue, benefit and specificity must be established, as well as injury to the domestic industry. Normally, as noted above, a finding of benefit will entail a conclusion that the financial contribution of the public body was not made on commercial or market-based terms. This is a further safeguard against the presumption leading to WTO Members being responsible for the conduct of entities that are in fact operating based on normal market considerations.

Finally, it is worth reiterating that the presumption of public body in the case of state ownership and/or control is consistent with the GATT *acquis* on attribution and state responsibility; as discussed above, GATT panels have generally considered ownership and control by the state as a significant level of "governmental involvement."

VI. IS THERE A NEED FOR NEW PRIMARY OBLIGATIONS TO DISCIPLINE STATE ENTERPRISES?

a. "Competitive Neutrality"

Critics of state enterprises have typically used the issue of attribution and state responsibility (especially the question of "public body") to promote a much larger agenda to constrain state capitalism. Usually, this effort is under the banner of "competitive neutrality." The notion of equality of competitive opportunities between like products and services underpinning the non-discrimination norms of the GATT and related WTO agreements could be understood as one form of competitive neutrality. Unless justified under one of the policy exceptions in the relevant agreement (such as Article XX of GATT or Article XIV of General

Agreement on Trade in Services[89]) the government may not skew competitive opportunities in favor of domestic producers or service providers. The SCM Agreement also functions to discipline governments creating a non-neutral playing field through selectively providing financial support to domestic companies. WTO subsidies disciplines target situations where the result of financial assistance is that the recipient obtains a competitive advantage in the marketplace, a form of competitive *non*-neutrality. The comparator is the position a firm would be in if market conditions alone determined its situation.

i. So, What Is Inadequate or Not Captured by the Notion of "Competitive Neutrality" in Existing WTO Disciplines?

Proposals for new rules on state enterprises rarely define "competitive neutrality." An OECD study on the subject states: "[c]ompetitive neutrality implies that no business entity is advantaged (or disadvantaged) solely because of its ownership."[90] The authors of the OECD study elaborate, citing a definition from the Government of Australia: "Competitive neutrality requires that government business activities should not enjoy *net* competitive advantages over their private sector competitors simply by virtue of public sector ownership."[91] However, the same study also cites a rather different formulation of competitive neutrality from EU law and policy, which imposes competition law rules on *both* private enterprises and state enterprises.[92]

As was noted at the outset, it was established in the GATT era that the multilateral trading system is neutral between public and private enterprise generally: "the General Agreement [does not] sanction discrimination against State-trading enterprises which are, in this regard, placed on the same basis as any other enterprise."[93] Moreover, as is illustrated in the text of GATT Article XVII, as we

89 General Agreement on Trade in Services art. XIV, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 [hereinafter GATS].

90 Antonio Capobianco & Hans Christiansen, *Competitive Neutrality and State-Owned Enterprises: Challenges and Policy Options* 3 (OECD Corp. Governance Working Papers No. 1, 2011).

91 *Id.* at 5.

92 *Id.* at 14.

93 Report of Institutional Framework, *supra* note 35, at 3.

noted early on in this essay, where the governments confer special rights or privileges on enterprises, they are required to behave in a manner consistent with GATT non-discrimination norms *regardless of whether they are privately or publicly owned*. Thus, as far as Australia's concept of "competitive neutrality" is the correct one, the deep structure of the multilateral trading system embodies this concept.

After decades of dogmatic espousal of privatization, policymakers are now recognizing that an abstract preference or bias in favor of private ownership is unjustified. As Joseph Stiglitz suggests:

> The experiences of the last 15 years have cast a pallor over this unbridled enthusiasm for privatization…. a new, more pragmatic consensus is developing—more consistent with economists' normal two-handed stance, "it depends." Privatization has had some successes, but it has also been marked by dramatic failures and disappointments. There are dramatic successes, and failures, in state ownership.[94]

Assuming neutrality, or equal treatment of different *enterprises,* were introduced as an appropriate subject matter for WTO rules, the issue of determining "net" advantages would not be an easy one. Privately-owned firms may operate under different kinds of constraints or be able to exercise different kinds of market power depending on whether they are capitalized through public offerings, through private equity, through venture capital vehicles, or through institutional investors who may in some cases be engaged in long-term investing,[95] as opposed to seeking short-term gains in stock price.[96] Indeed, long-term investment may entail accepting that an

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[94] Joseph Stiglitz, *Foreword* to PRIVATIZATION: SUCCESSES AND FAILURES ix (Gerard Roland, ed., 2008). For trade-offs between private and public ownership from a social welfare perspective, see JEAN-JACQUES LAFFONT & JEAN TIROLE, A THEORY OF INCENTIVES IN PROCUREMENT AND REGULATION 19-34 (1993); Carl Shapiro & D.R. Willing, *Economic Rationales for the Scope of Privatization* (Princeton, Woodrow Wilson Sch., Working Paper No. 41, 1990).

[95] *See* Dominic Barton & Mark Wiseman, *Focusing Capital on the Long Term*, HARV. BUS. REV., Jan.–Feb. 2014. (2014), https://hbr.org/2014/01/focusing-capital-on-the-long-term [https://perma.cc/T7NC-9KLL].

[96] In fact, as Laffont and Tirole point out, "economists have never demonstrated that the stock market in the only instrument, or even the most efficient instrument to obtain outside information about a firm's health." Jean-Jacques Laffont & Jean Tirole, *Privatization and Incentives* 4 (MIT Working Paper No. 572, 1990).

enterprise realize losses for a significant number of years before it turns around.

Apart from that, the availability of these different forms of capital to private enterprises is itself in many ways determined or shaped by the state through securities and corporate governance regulation (for example disclosure requirements), tax rules (the tax advantage that private equity partnerships may enjoy for instance), and other norms such as fiduciary duties. In sum, the kinds of business strategies or (anti-) competitive practices that *private* firms engage in are also in many ways constrained or enabled by state policies. How then does one net all this out to determine that state-owned firms *overall* have more state-created advantages than comparable private firms or investors? Further, how does a net advantage of state-owned over *domestic private* firms create a trade barrier or distort trade, provided as there is no discrimination against, or alteration of the conditions of competition to the detriment of, *foreign* competitors? As we have seen in Parts II–V, *in extenso*, where state ownership is used to discriminate against imports, the non-discrimination rules of the GATT/WTO fully apply to discipline this protectionism. But there is a widespread perception, especially in America and Europe, that these disciplines do not work well to constrain Chinese practices that, in fact, undermine or prevent equality of competitive opportunities. The focus on state enterprises is due in part to such enterprises being emblematic or symbolic of China's non-market economy, sometimes also described as "state capitalism."

The recent OECD Recommendation on Competitive Equality represents a more sophisticated approach to the idea of a level playing field between enterprises with different ownership structures.[97] The recommendation also applies to differences in treatment between private firms based on ownership structures.[98] The notion is, above all, that distortions should not be introduced by differential treatment of different ownership structures, i.e. where such differential treatment is not justified by a clear public policy objective. One area where ownership (as among different structures used by private capital) has introduced regulatory distortions is taxation, for example. Internationally active businesses may create

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97 OECD, *Recommendation of the Council on Competitive Neutrality*, at 3, Doc. OECD/LEGAL/0462, (May 31, 2021).

98 "The objective of the Recommendation is to ensure a level playing field both between state-owned and privately-owned enterprises, and between different privately-owned enterprises." *Id.* at 3.

ownership structures specifically to avoid taxation or shift revenues to low-tax jurisdictions.[99] Some financial instruments may receive less strict regulatory treatment than others, avoiding onerous disclosure and trading practices requirements, without a sound policy justification for the difference in treatment. State enterprises, on the other hand, may enjoy forbearance of environmental performance requirements or may be immunized from tort liability—again, there may be no sound public policy justification for these kinds of accommodations based on ownership structure.

b. China and Beyond

As Mark Wu has shown, many features of China's non-market economy make it difficult to apply the sort of constructs and benchmarks characteristic of WTO law. In a political and economic system such as China's, there are myriad informal, non-transparent ways that the state and/or Communist Party can influence the behavior of private firms, as Wu has explained.[100] New rules on state enterprises, applicable to all WTO Members, are both under- and overinclusive. Underinclusive because, in fact, the perceived problems with China extend to a wide range of non-market economy practices, not just state enterprises. Overinclusive, because the issue here is about state enterprises in China, a non-market economy, and in the case of most WTO Members, their state enterprises function in market economies.

As Milhaupt and Zheng explain:

> focusing on the SOE–POE dichotomy fosters two assumptions that skew analysis of Chinese state capitalism and may lead policy makers astray . . . Neither theory nor practice suggests that the Chinese state "controls" SOEs to the degree its equity ownership would indicate. At the same time, however, it is misleading to view "private" firms in China as insulated from the state in ways that set them wholly apart from SOEs. Rather, the human agents managing Chinese SOEs and POEs respond in similar fashion to their institutional environment, fostering close ties

99 Mitchell Kane, *Ownership Neutrality, Ownership Distortions, and International Tax Welfare Benchmarks*, 26 VA. TAX REV. 53, 75 (2006).

100 *See* Mark Wu, *The 'China, Inc.' Challenge to Global Trade Governance,* 57 HARV. INT'L L.J. 261, 280-82 (2016).

> to party-state organs, seeking state largesse, and resisting government policies that are not in their interests . . . Even the labels "SOE" and "POE" are misleading because the boundary between state and private ownership of enterprise is often blurred in contemporary China.[101]

Milhaupt and Zheng thus argue that "special rules to regulate the market[-]distorting activities of state-owned firms that are not adequately addressed by existing trade and investment regimes" is not an appropriate response to China's state capitalism.[102]

In a groundbreaking study, Zhou, Gao, and Bai explain that so far as activities of SOEs themselves are concerned (as opposed to the overall system of Chinese state capitalism), the special rules in China's Protocol of Accession, together with the existing WTO legal framework, are sufficient to respond to concerns about circumvention.[103] The USTR admits that the issue of Chinese state enterprises is really part of a larger problem—a symptom (albeit an obvious one) rather than the disease: "China's state-owned and state-invested enterprises and China's private companies also benefit from a wide array of other state intervention and support designed to promote the development of domestic industries."[104] Another USTR report focusing on China contains the same acknowledgement.[105] In the Report, accordingly, state enterprises figures as one among several dozen "key US concerns."

There is little doubt but that the solution of existing trade conflicts with China, if a solution is to be had, may require China-specific agreements, given the unique character of China as a non-market economy with global economic power. As discussed above, Article XVII of the GATT in fact foresees the possible need for this kind of deal (at the time, the drafters would have had the USSR in

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101 Curtis J. Milhaupt & Wentong Zheng, *Beyond Ownership: State Capitalism and the Chinese Firm*, 103 GEO. L.J. 665, 670-71 (2015).

102 *Id.* at 707.

103 Weihuan Zhou et al., *China's SOE Reform: Using WTO Rules to Build a Market Economy*, 68 INT'L & COMPAR. L.Q. 977, 977-79 (2019).

104 UNITED STATES TRADE REPRESENTATIVE, 2021 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE 28 (2022)

105 UNITED STATES TRADE REPRESENTATIVE, 2020 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE 27-29 (2020).

mind, not China).[106] China seems prepared to negotiate bilaterally and reciprocally on specific practices of concern (as is evidenced by the US China Phase I trade agreement).[107] But it seems implausible that China would tolerate an agenda of WTO reform aimed at the achievement of general rules that are in fact tilted against its system. Constructing a multilateral trading agenda to target China is undoubtedly going to come into collision with China's conception of sovereignty and the co-existence on the global plane of different social and economic systems. It is also unreasonable to expect other WTO Members who use state ownership in a different policy context to accept general rules that are in fact intended not for them, but to settle conflicts with a different type of economic actor, namely China.

Beyond the case of China, what is the evidence of trade barriers created by state enterprise conduct not already disciplined under WTO rules? The USTR publishes an annual National Trade Estimate Report on Foreign Trade Barriers. The latest Report, published in March 2021, elaborates many thousands of foreign government practices that are viewed by the USTR as trade barriers.[108] Given the economic significance of state enterprises, and their dominant role in a range of sectors and countries, it is notable that they are mentioned, directly or indirectly, perhaps a hundred times at most. There is an analogous annual report of the European Commission to the Parliament; the latest version, which covers 2019, hardly mentions state enterprises as a trade barrier, except implicitly as part and parcel of the discussion of China's "state-led" economic model.[109] The absence of state enterprises as a theme beyond the case

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[106] GATT, *supra* note 15, art. 17 ("[A] mutually satisfactory arrangement."). Gregory Shaffer has recently suggested that such bilateral understandings may be important to managing trade relations with China. *See* Gregory Shaffer, *Governing the Interface of US-China Trade Relations*, 115 AM. J. INT'L L. 622, 622 (2021).

[107] Economic and Trade Agreement Between the Government of the United States and the Government of the People's Republic of China, China-U.S., Jan. 15, 2020,
https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic_And_Trade_Agreement_Between_The_United_States_And_China_Text.pdf [https://perma.cc/WWR3-LXZR].

[108] *See generally* UNITED STATES TRADE REPRESENTATIVE, 2021 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS (2021).

[109] *Report of the Commission to the Parliament and the Council on Trade and Investment Barriers 1 January 2019 – 31 December 2019*, at 16 (June 2020), https://trade.ec.europa.eu/doclib/docs/2020/june/tradoc_158789.pdf [https://perma.cc/FD6E-FCHH].

of China is especially noticeable, since the report covers not only trade but also investment barriers.

c. Rethinking Competitive Neutrality

We have seen that new general WTO rules on state enterprises are not the appropriate response to a broad range of issues with China's trade practices. If we set aside China, is there really a serious problem with existing WTO law from the perspective of "competitive neutrality?" As we saw with the GATT disputes concerning the practices of Canadian government liquor monopolies, non-discrimination norms in the GATT go quite far in preventing an enterprise from using government-acquired market power to deny equality of competitive opportunities to imports. As the example of the minimum price requirement for beer illustrates, this extends to denying imports market-based competitive advantages through measures that are facially neutral.

i. National Treatment of Enterprises in Like Circumstances

As discussed above, the recent OECD Recommendation on Competitive Neutrality goes beyond the notion of a level playing field between state and private enterprises to the more coherent doctrine that differences in ownership structure should not result in differences in regulatory treatment that are not justified by public policy objectives.[110] From the perspective of the multilateral trading order, the question here would be whether such differences result in less favorable treatment of enterprises of other WTO Members, whether public or private, and then whether nevertheless legitimate public policy goals could justify the differences.

Provision of non-financial benefits to state enterprises (competitive advantages not captured by subsidies rules, for example, relief from environmental or other regulatory obligations) *can* be a legitimate trade concern where those state enterprises compete with foreign firms. Here, the appropriate comparator is not the treatment of domestic private firms; it is with competing foreign firms in like circumstances (and these could be either privately or

[110] OECD, *supra* note 96, at 6.

publicly owned and/or controlled). As discussed at length in Parts II–V, this kind of regulatory protectionism may be caught in some instances when it effects the conditions of competition in markets for goods and services produced by the competing firms in question. But there are strong arguments for disciplining regulatory protectionism as discrimination in favor of domestic enterprises. While in practice some governments may be more inclined to protect state enterprises than domestic private firms from international competition, the essential gap here is not the lack of rules targeted at state enterprises but instead the failure to extend the concept of National Treatment to encompass conditions of competition among firms, not only goods and services.

WTO law does not extend the obligation of non-discrimination to the requirement of competitive equality between *enterprises*. This is a consequence of the failure to negotiate a WTO Agreement on investment protection. That gap reflects, in the first instance, opposition of many developing countries to multilateral negotiations on investment. [111] It also reflects the highly controversial nature of the international investment regime, especially when enforced through investor-state dispute settlement.[112]

International Investment Agreements (IIAs) including recent comprehensive trade agreements typically have a chapter on investor protection, which includes non-discrimination obligations such as National Treatment). In the case of National Treatment, the obligation is that of treatment no less favorable of like or similar investors. Such a provision may catch the conduct of a state enterprise that gains advantages from government and uses these as a competitive advantage over competing *foreign* firms. It is in GATS that the WTO legal system extends furthest toward a norm of equality of treatment as between enterprises: Article XVII of the GATS requires treatment no less favorable of not only like services, but like *service suppliers*, of other WTO Members. But to move toward a requirement of competitive neutrality *between enterprises generally* would squarely re-introduce into the multilateral trading system the issue of investment protection. Perhaps already, with

[111] Narlikar & Wilkenson, *supra* note 27, at 456-57.

[112] *See* Joseph Stiglitz, *Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities,* 23 AM. U. INT'L L. REV. 451, 542 (2008); Robert Howse, *International Investment Law and Arbitration: A Conceptual Framework*, *in* INTERNATIONAL LAW AND LITIGATION 363, 363-446 (Hélène Ruiz-Fabri ed., 2019).

plurilateral negotiations occurring on investment facilitation, the WTO system is veering in that direction, but as the controversies surrounding the investment regime in existing bilateral and regional accords show, it is a momentous choice to bring this subject matter into the WTO. Thus, working drafts from the investment facilitation negotiations display a strong determination to create a fire wall between these negotiations and the investment regime as reflected in IIAs and ISDS.[113]

It is notable that the main issues of controversy surrounding the investment regime concern the use-some would argue abuse-by arbitrators of rules on indirect expropriation as well as the fair and equitable treatment standard (*not* National Treatment) to force states to pay compensation for legitimate regulatory change. Most of the treaties in question do not have public policy exceptions like that of GATT Article XX, compounding the problem. While this legacy has made investment protection institutionally toxic for the WTO, there is a good argument in principle for extending National Treatment as equality of conditions of competition to include not only goods and services but also investments, with corresponding applicability of public policy exceptions like Article XX of the GATT and Article IV of the GATS.

If we view external contracting (trade) and internal contracting (investment) as alternative ways of operating transboundary economic activity that are often combined, regulatory protectionism[114] would operate in a similar way in both instances to increase costs to consumers and distort the allocation of resources. Helpman has noted the considerable interdependency of trade and FDI:

> Evidently, foreign direct investment can feed foreign trade in complicated ways, making trade and FDI interdependent. On the one hand, patterns of FDI influence patterns of trade. On the other hand, the profitability of different forms of FDI

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[113] *See generally WTO Structured Discussion on Investment Facilitation for Development: Consolidated Document by the Coordinator*, WTO Doc. INF/IFD/RD/74/Rev.1 (July 23, 2021).

[114] Alan O. Sykes, *Regulatory Protectionism and the Law of International Trade*, 66 U. CHI. L. REV. 1, 5 (1999) ("[R]egulatory protectionism is economically inefficient, in part for the same reasons that protectionism of any sort is inefficient. Protectionism draws high cost domestic firms into the market while excluding low cost foreign firms, and it prices out of the market some consumers who would be willing to purchase goods at a price exceeding the marginal cost of production of efficient suppliers.").

> depends on the profitability of various trade options. As a result, a firm's choices of multinational integration strategies depend on trade opportunities. Under the circumstances, trade and FDI become inseparable twins.[115]

Notably, Stiglitz—who is generally skeptical of investor protection through treaties—accepts the logic of a non-discrimination norm with respect to investment.[116]

ii. State Enterprises and the Limits of Existing WTO Subsidies Disciplines

The invocation of "competitive neutrality" sometimes reflects a concern that existing subsidies disciplines in the WTO don't adequately capture the extent of government financial support to state enterprises—even beyond the issue of attribution raised by the Appellate Body's reading of "public body." One set of issues relates to transparency and notification: the sense that subsidizing states are not providing the information required for Members affected in their trade by such aids to identify and challenge them in the WTO. There is a legitimate concern about the relative ineffectiveness of current transparency and notification requirements, which (in theory) should cover subsidies to state enterprises. This ineffectiveness is arguably a result of the lack of will of WTO Members to comply fully with the requirements. A chronic difficulty with transparency rules that are intended to support enforcement is that Members may regard a notification as a kind of admission of a possible WTO violation.

Beyond this, however, the call for norms to assure "competitive neutrality" may reflect an intuitive judgment that the very act of capitalizing a firm from state finances confers an advantage over the competitive conditions facing private entrepreneurs who must resort to the "normal" capital market. Thus, even if the existing rules cover specific instances of equity infusions, loans and loan guarantees to state enterprises, they do not fully assure competitive

115 ELHANAN HELPMAN, UNDERSTANDING GLOBAL TRADE 129 (2011). For further discussion of the relationship between trade and FDI, see Elhanan Helpman, *A Simple Theory of International Trade with Multinational Corporations*, 92. J. POL. ECON. 451, 452-58 (1984); Gene M. Grossman & Elhanan Helpman, *Outsourcing Versus FDI in Industry Equilibrium*, 1 J. EUR. ECON. ASS'N 317, 317-23 (2003).

116 *See* Stiglitz, *supra* note 94, at 2-3.

neutrality. A new OECD study is the first (to my knowledge) to articulate this intuition in a rigorous economic analysis; the study suggests that governments generally tolerate a lower risk-adjusted rate of return for state enterprises than would be the norm for private investors holding non-state assets.[117] This may allow such enterprises to make capital investments with less constraint, for instance, contributing to overcapacity and distortions in international trade. Admittedly, the concepts of financial contribution and benefit in the existing WTO rules do not envisage acceptance of a lower risked-adjusted rate of return by the state as a subsidy subject to WTO discipline. However, there are reasons why the government might accept a lower risk-adjusted rate of return, which are compatible with a "level playing field." The return that a private investor receives from a given investment will likely, at some point, be subject to tax liability (capital gains). But the government does not typically pay taxes to itself, as it were. Also, there are different kinds of private investors, and to achieve a given risk-adjusted rate of return from a given investment, the principal (the ultimate owner of the asset) may well have to pay fees or commissions to a financial intermediary—a fund, a manager, etc.—that manages and monitors its investments.

While some government equity holding entails costs of the services of financial intermediaries (for example, holdings by sovereign wealth funds) this is not the case with the kind of state enterprise that evokes the most concern by critics of state capitalism—a state industrial company that is majority or entirely state-owned and is state controlled. Private investors understandably demand a higher rate of return for a given level of risk, knowing that their ultimate receipts from the investment will be reduced by tax liabilities and external management fees.

More generally, the risk-adjusted rate of return that investors require for equity investments reflects, *inter alia*, the nature of agency costs and bankruptcy risks in the private sector. These are different for state companies and any real comparison between returns in the two cases would require a thorough appreciation of these differences.[118]

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[117] *See* OECD, *supra* note 7, at 50.

[118] In the case of bankruptcy, a private equity holder is merely a residual claimant on the firm, standing behind other claimants in priority; in the case of

Finally, the OECD study also notes that in some cases acceptance of a lower rate of return may reflect the government's imposition of a mandate on the state enterprise to produce public goods. This raises the question of policy space under the SCM Agreement, which does not have a GATT Article XX-type exception for legitimate public policy objectives. Certainly, the requirement that a subsidy be specific to be actionable or countervailable at least indirectly reduces the risk that measures of general application aimed at generating public goods such as education or R&D would be caught by WTO disciplines. Still the lack of a list of "good" subsidies that are exempt from disciplines, as well as the absence of a general public policy exceptions clause, raises the possibility that any further tightening of WTO SCM disciplines would reduce needed policy space. In the circumstances of a challenging economic recovery from a pandemic (with some WTO Members in a vastly different place in recovery than others), this would open into a full-blown debate about what is justified industrial policy and what is impermissibly distortive trade policy.

The OECD notes state enterprises tend to invest more than comparable private firms in capital equipment, expanding productive capacity. In this sense, state enterprises may indeed be part of the overcapacity problem that has led to trade tensions and distortions in some industries. Still, one must exercise caution not to over-identify the overcapacity problem with state enterprises; in the case of solar panels, for instance, even in the case of China, this sector is dominated by privately-owned firms, albeit with active industrial policy by the government through other means, including subsidies to private firms and consumers, and public/private partnerships.[119] The loans to China's solar giants are already in principle covered by WTO rules, assuming a proper interpretation of "public body" that applies to China's state banks.[120]

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insolvency or illiquidity of a state enterprise, the state has the possibility of using its sovereign powers to impose a restructuring that is bespoke to the situation, without the same transaction costs of bargaining to agreement with other claimants on the firm.

119 Annette Wiedenbach, *The Chinese Government as Solar Power Entrepreneur: the Example of Suntech and Longi Green Energy Technology Company*, CLIMATE SCORECARD: CHINA NEWS BRIEF AND ACTION ALERT (Apr. 6, 2021), https://www.climatescorecard.org/2021/04/the-chinese-government-as-solar-power-entrepreneur-and-the-examples-of-suntech-and-longi-green-energy-technology-company/ [https://perma.cc/E7TQ-3MTW].

120 *See supra* Parts II–V.

Overcapacity is an important trade and adjustment challenge in certain industries, to be sure. But there is an argument that undercapacity, inadequate investment by firms in productive capacity, is looming as the larger economic challenge. In such circumstances, the greater tendency of state enterprises to spend on capital equipment, etc., might be viewed in a positive rather than a problematic light. With some admitted journalistic exaggeration, a recent Bloomberg article claims:

> Copper, iron ore and steel. Corn, coffee, wheat and soybeans. Lumber, semiconductors, plastic and cardboard for packaging. The world is seemingly low on all of it. . . . the capacity to produce more of what's scarce — with either additional capital or labor — is slow and expensive to ramp up.[121]

Several decades ago, industrial policy scholars such as the Harvard Business School's Michael Porter were already warning of short-termism in the capital markets and a resultant inadequate (re-) investment by industrial firms in new capital equipment and related productive resources.[122] The story is one of activist investors such as funds pressuring for the highest short-term returns, as well as the compensation and promotion of managers favoring strategies maximizing quarterly performance. Often capital investments that have only a long-term payoff in increased revenues and profits are at odds with this strategy.[123] Even skeptics of the short-termism story such as Lucian Bebchuk generally admit that managerial incentives are not well-aligned with long-term firm performance.[124]

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121 Brendan Murray et al., *The World Economy is Suddenly Running Low on Everything*, BLOOMBERG (May 17, 2021, 12:01 AM), https://www.bloomberg.com/news/articles/2021-05-17/inflation-rate-2021-and-shortages-companies-panic-buying-as-supplies-run-short?utm_source=twitter&utm_medium=social&utm_content=business&utm_campaign=socialflow-organic&cmpid=socialflow-twitter-business&sref=zG5NaSoy [https://perma.cc/4FB5-B7A7].

122 Michael E. Porter, *Capital Disadvantage: America's Failing Capital Investment System*, HARV. BUS. REV., Sept.–Oct. 1992, https://hbr.org/1992/09/capital-disadvantage-americas-failing-capital-investment-system?registration=success [https://perma.cc/HP7B-6N9T].

123 Barton & Wiseman, *supra* note 95.

124 Lucian Bebchuk, *Don't Let the Short-Termism Bogeyman Scare You*, HARV. BUS. REV., Jan.–Feb. 2021, https://hbr.org/2021/01/dont-let-the-short-termism-bogeyman-scare-you [https://perma.cc/6KTS-GUN2] ("The attention that

In public enterprises managerial incentives vary widely. But perhaps the greater tendency to (re-) investment suggests that these are better aligned with long-term performance than is typically the case in many private enterprises. Ironically, it is often the supposition that state enterprises *fail* to incentivize performance of managers that fuels criticisms of state capitalism.

In any case, the OECD study itself wisely stops short of advocating that lower than "market" risk-adjusted rate of return be added to the SCM Agreement definition of subsidy and/or benefit.

iii. "Competitive Neutrality" as an Anti-Trust Concept

Let us now turn to the EU concept of competitive neutrality and the question of subjecting state enterprises to anti-trust or competition law norms, which admittedly do go beyond existing WTO disciplines. It will be recalled that, in *Canada-Wheat*, the Appellate Body noted the difference between "preventing certain types of discriminatory behaviour . . . [and] imposing comprehensive competition-law-type obligations on STEs." [125] While the EU and some other WTO Members have, since the Singapore Ministerial Conference in 1996, sought WTO negotiations on "comprehensive competition law-type obligations," developing country resistance has taken anti-trust off the WTO negotiating agenda (as with investment protection).

Would introducing competition law-type disciplines applicable exclusively to state enterprises serve the goal of "competitive neutrality?" The answer is most certainly that it would not. The result would be competitive *non*-neutrality between state-owned and privately-owned firms since the former would, under the WTO, be subject to disciplines that private firms with market power or otherwise capable of engaging in anti-competitive practices are free from. Were negotiations opened in the WTO on anti-trust, to be sure, any resulting norms could be expected to cover both private and public enterprise. *That* would indeed be required by competitive neutrality. Selectively applying such norms only to

corporate leaders give to quarterly earnings and meeting analyst expectations could well be excessive. . . . In particular, compensation arrangements, which directors and executives themselves put in place, incentivize managers to attach weight to short-term results and their stock price effects.").

[125] Hoekman & Trachtman, *supra* note 61, ¶ 145.

public enterprises would *violate* competitive neutrality, as would the reverse—allowing state enterprises to be exempt from disciplines applied to private firms. Targeting state enterprises seems arbitrary if not perverse in a world where the anti-competitive practices of privately held firms like Google and Amazon, and the consequences of their market power, are what preoccupy many policy analysts and economic justice activists.[126]

In the first case, it is unclear why existing WTO disciplines would be insufficient, provided that, as discussed above in Parts II–V, a correct approach to attribution and state responsibility is adopted. The second concern goes to coverage of the WTO Government Procurement Agreement, where it may indeed be a useful goal to seek more explicit commitments concerning state enterprises. The third concern requires revisiting the existing rules in the SCM Agreement. As already discussed, these rules cover provision of debt or equity on preferential, i.e. non-commercial, terms, whether to private or state enterprises. One could raise the question of whether the benchmarks panels and the Appellate Body have employed to determine what is non-commercial need to be revisited in the specific context of aid to state enterprises. Yet the advocates of WTO reform on state enterprises have yet to indicate what kind of improvement is needed here. There is of course a gap in that WTO rules apply only to goods, not services. But this is surely an issue that is much broader than the question of state enterprises.

This brings us to market access in services. There is a range of situations where a state enterprise or former state monopoly controls access to a network or infrastructure required for a foreign provider to sell its services in a competitive market. The state enterprise or former state monopoly at the same time as controlling access to the network competes with other entities to provide services dependent on the network; it thus has an incentive to make access to the network more costly or difficult for the competitors (who may be foreign service providers).[127] There is a clear importance in addressing this kind of conduct under the GATS in

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126 *See* OECD, *supra* note 97, at recommendation II:1 (recognizing the notion that public and private enterprises should be subject to the same or equivalent competition laws, and that there should be equal enforcement of competition laws "regardless of [the] . . . ownership, location or legal form" of the enterprise in question).

127 For a general presentation of this problem, see Jean-Jacques Laffont & Jean Tirole, *Access Pricing and Competition*, 38 EUR. ECON. REV. 1673, 1673-76 (1994).

sectors such as telecommunications, postal/express delivery services, and financial services. At one level, again assuming an adequate approach to attribution and state responsibility, Articles XVI and XVII of the GATS (Market Access and National Treatment, respectively) would seem to discipline most of this conduct. At the same time, the issue of network access was deemed so significant in the case of telecommunication that WTO Members agreed on a Reference Paper setting out more specific rules.[128] The rule on interconnection states in part:

> Interconnection with a major supplier will be ensured at any technically feasible point in the network. Such interconnection is provided[:] (a) under non-discriminatory terms, conditions (including technical standards and specifications) and rates and of a quality no less favourable than that provided for its own like services or for like services of non-affiliated service suppliers or for its subsidiaries or other affiliates; (b) in a timely fashion, on terms, conditions (including technical standards and specifications) and cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided; and (c) upon request, at points in addition to the network termination points offered to the majority of users, subject to charges that reflect the cost of construction of necessary additional facilities.[129]

The general provision in GATS on monopolies and exclusive service suppliers, Article VIII states, in relevant part:

> Where a Member's monopoly supplier competes, either directly or through an affiliated company, in the supply of a service outside the scope of its monopoly rights and which is subject to that Member's specific commitments, the Member shall ensure that such a supplier does not abuse its monopoly position to act in its territory in a manner inconsistent with such commitments.[130]

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[128] *Telecommunications Reference Paper*, WTO (Apr. 24, 1996), https://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm [https://perma.cc/G5DS-AMRC].

[129] *Id.*

[130] GATS, *supra* note 89, at art. VIII.

In the *China-Electronic Payment Services* dispute, a WTO panel addressed the role of ChinaUnionPay ("CUP") as a state enterprise that was a dominant player in the Chinese market for payment card services. The panel had no difficulty applying the National Treatment obligation in the GATT in adjudicating US claims that CUP in combination with the Chinese government used its position to restrict market access for foreign services suppliers. The panel found, for example (as summarized by Hoekman and Meagher), "all cards issued by Chinese banks were capable of being processed over the CUP network, whereas . . . . suppliers of other Members would have to convince issuers to join their networks," and that:

> CUP was guaranteed access to all merchants in China that accepted credit cards, while foreign. . . suppliers had to market themselves to each. . . terminal user. . . CUP therefore had 'automatic and universal acceptance of its bank cards' whereas a foreign. . . supplier would have to market itself to individual merchants and acquiring banks.[131]

At the same time, as Hoekman and Meagher note, the panel seemed less comfortable in its application of the GATS Market Access obligation (Article XVI) to the facts of the case, in particular the concept of "monopoly or exclusive service supplier."[132] Despite the overwhelming dominance of CUP, and explicit government measures that gave it "a very preferred status," the panel was unwilling to find on the basis of this evidence the existence of a "monopoly or exclusive service supplier."[133] This may be a warning sign that introducing competition-type concepts into WTO norms without a full-scale anti-trust code is likely to create problems for dispute panels. By contrast, examining the conditions of competition from a National Treatment standpoint grounds panels' analyses is an extensive WTO jurisprudential *acquis*.

The peril of introducing competition-type norms selectively into WTO legal practice is also illustrated by the *Telmex* case, where the panel struggled with applying the Telecommunications Reference Paper mentioned above. As Mavroidis and Neven show in a devastating critique of this decision, the panel seemed confused about the scope and nature of the competition policy norms that

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131 Bernard Hoekman & Niall Meagher, *China-Electronic Payment Services: Discrimination, Economic Development and the GATS*, 13 WORLD TRADE REV. 409, 435 (2014).

132 *Id.* at 434.

133 *Id.* at 431, 434.

were imported through the Reference Paper, extending these without justification to cartel-like practices in the export of telecommunications services.[134]

d. The Fundamentally Misguided Approach to State Enterprises in the Comprehensive Progressive Trans-Pacific Partnership

Critics of state enterprises sometimes point to provisions in recent regional trade agreements as a more satisfactory basis for addressing the trade impacts of the conduct of such enterprises than existing WTO law. An example often cited is the Comprehensive Progressive Trans-Pacific Partnership (CPTPP).[135]

A careful reading of the CPTPP chapter on State-Owned Enterprises and Designated Monopolies (Chapter 17) suggests that the CPTPP does not, overall, address the potential trade barriers associated with state enterprises in a more coherent or satisfactory manner than existing WTO rules and case law. First, the Chapter applies only to state-*owned* enterprises, defined by state ownership of more than 50% of share capital or majority of voting rights or the power to appoint a majority of the board.[136] But even where these formal criteria are absent, there may be structures that allow the government to exert considerable influence. As elaborated in Parts II–V above, the GATT/WTO jurisprudential *acquis* has the advantage of a flexible test of government influence that can take into account de facto as formal connections to government. Second, government procurement in excluded.[137] Sovereign wealth funds and pension funds are largely excluded.[138] On non-discriminatory treatment and "commercial considerations,"[139] the CPTPP largely repeats the content of Article XVII of the GATT, albeit including services as well as goods. There are two main differences. The first is that the obligation to act "in accordance with commercial considerations" (except to "full any terms" of a public service

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[134] Damien J. Neven & Petros C. Mavroidis, *Mexico – Measures Affecting Telecommunications Services (WT/DS204/R) A Comment on "El Mess in TELMEX"*, 5 WORLD TRADE REV. 188, 212-17 (2006).

[135] Comprehensive and Progressive Agreement for Trans-Pacific Partnership, art. 14.2, *opened for signature* Mar. 8, 2008, 6.08.20 NZTS 2018 10 [hereinafter CPTPP].

[136] *Id.* at art. 17.1.

[137] *Id.* at art. 17.2 ¶ 6.

[138] *Id.* at arts. 17.5–6.

[139] *Id.* at art. 17.4.

mandate) is separated from the obligations on non-discrimination. This goes back to the discussion of the *Canada Wheat Board* case above in Parts II–V. Why *should* trade law be concerned with whether state enterprises act commercially as a general matter, apart from situations where the non-commercial behavior reflects an alteration in the conditions of competition that disadvantages imports? The general definition of "commercial considerations" includes any "factors that would normally be taken into account in the commercial decisions of a privately[-]owned enterprise in the relevant business or industry."[140]

It merits considering how such a notion would be justiciable by an international dispute panel. Private ownership includes many different structures, from publicly traded corporations to businesses held by private equity funds, banks or other institutions, to family offices. This raises serious issues as to the choice of appropriate benchmarks for comparison with state enterprises. Esty and Cort observe: "an ever-expanding number of mainstream investors have begun to insist that their portfolios better reflect their *values*—including their concerns across a spectrum of environmental, social, and governance (ESG) issues."[141] In the circumstances, it would be inappropriate to exclude ESG issues from the notion of "commercial considerations." What then is the determinate meaning of "non-commercial" behavior by state enterprises? Much more concrete is the focus in applying the existing National Treatment and related non-discrimination obligations in the GATT and GATS: Are the decisions of state enterprises in their purchases and sales treating less favorably the otherwise competitive goods and services of other WTO Members? If so, can this be justified nonetheless based on one of the public policy objectives stated in the General Exceptions provision (GATT Article XX and GATS Article XIV)?

In case of monopolies, as opposed to state-owned enterprises in general, the CPTPP requires the states parties to ensure that a designated monopoly "does not use its monopoly position to engage in, either directly or indirectly . . . anticompetitive practices in a non-monopolised market in its territory that negatively affect trade or investment between the Parties."[142] The limitation here to situations of formal or legal monopoly recalls the *China-Payments* WTO

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140 *Id.* at art. 17.1.

141 Dan Esty & Todd Cort, *Sustainable Investing at a Turning Point*, *in* VALUES AT WORK: SUSTAINABLE INVESTING AND ESG REPORTING 3, 4 (2021).

142 CPTPP, *supra* note 135, at art. 17.4 ¶ 2(d).

dispute, where the panel was reluctant to find the existence of a monopoly or exclusive service supplier regardless of clear evidence of market dominance by the entity in question. Under the GATT/WTO *acquis*, where a state enterprise operates such that the conditions of competition are affected in a manner that results in less favorable treatment of like imports, the obligation of National Treatment is violated. As we saw with the *China-Payments* case, this is as true for trade in services as for trade in goods. Relative to National Treatment, as interpreted by panels and the Appellate Body, the obligation in Article 17.4 seems underinclusive.[143] Rather than encompassing all protectionist conduct, it is limited to conduct that can be proven to be attributable to a "monopoly position." Moreover, the notion of "anti-competitive practices" remains undefined the CPTPP. Thus, ultimately, as in indicated by the footnote to this provision, Article 17.4 ultimately reduces to an obligation to apply *domestic* competition laws and related policies to the conduct of monopolies as far as it affects conditions of competition in non-monopoly sectors.[144]

Chapter 17 of the CPTPP also contains a set of rules on subsidies ("Non-Commercial Assistance"). The concepts used in these provisions are somewhat different than those in the WTO SCM Agreement. The definition of "non-commercial assistance" largely overlaps with that of subsidy in the SCM Agreement, including direct transfer of funds, grants or debt forgiveness, loans and loan guarantees and equity investment on terms inconsistent with the practice of private investors.[145] The main difference with the WTO framework is that these subsidies disciplines apply to services as well as to goods.

The GATT/WTO principle of neutrality between private ownership and state ownership would be undermined by following here the example of the CPTPP: there is simply no justification for limiting legal restraints on services subsidies to those provided by or to state enterprises. Subsidies to privately-owned service suppliers can have *equally* distortive impacts on competition.

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[143] *See id.*

[144] *See id.* at art. 17.4 ¶ 2(d) n.14 ("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.").

[145] *See id.* at art. 17.1.

To sum up, for the reasons explored above, the case for new primary WTO obligations targeted at state enterprises is problematic. Beyond discrimination (Article III of GATT and Article XVII of GATS), and practices restrictive of imports or exports (Article XI of GATT and Article XVI of GATS), which are covered by existing disciplines, the proper context for considering "anti-competitive" practice of state enterprises would be the negotiation of a comprehensive WTO Agreement on competition where both public and private anti-competitive practices would be covered, with no bias or presumption against state capitalism in particular. By contrast, if one examines the provisions of agreements such as the CPTPP that are heralded as a model for WTO reform on state enterprises, the approach seems arbitrary both in terms of the enterprises included in the disciplines as well as which practices of state enterprises are addressed and which are exempted. Key concepts such as "anti-competitive practices" or "commercial considerations" are either not defined or given open-ended meanings that make consistent and coherent dispute settlement and enforcement unlikely.

VII. CONCLUSION

A ruling by the WTO Appellate Body that state ownership and/or control may not suffice for subsidies rules to be applied to a government entity as a "public body" has raised alarm concerning the adequacy of existing WTO rules to address the impact of state capitalism on international trade. This was, fundamentally, a question of attribution of state enterprise conduct and the issue of non-circumvention of WTO rules through bodies that have the mere appearance of independence from governmental, and, indeed, political decision-making. I have argued in this Article that the AB ruling on public body is a deviation from the GATT/WTO jurisprudence on attribution and state responsibility for state enterprises, which implements a robust doctrine of anti-circumvention. This could be further consolidated by a presumption of state responsibility in the case of state-owned and/or controlled companies, given the pervasive possibility and temptation of government direction, guidance, or other influence.

The Appellate Body's decision on public body brought to the fore anxieties or suspicions that state enterprises undermine the rules-based trading order through a range of non-transparent anti-competitive practices not captured by existing WTO norms. To some extent, such concerns may represent a revival of the position that competition and investment should be covered in the WTO. Outside the context of opening negotiations on competition and investment, the case for new disciplines on state enterprises seems poorly thought through. This is the case both with respect to identifying the offending practices of state enterprises, including the impact on trade, as well as considering the strengths and weaknesses of additional rules, such as those found in recent regional agreements such as USMCA and CPTPP. Some critics seem to have a built-in bias against state enterprise, or perhaps a starting belief that it is inconsistent with a "liberal" trading order. By contrast, respecting the differences between economic, social and political systems (what Joanna Langille and I have termed "pluralism"[146]) is crucial to the WTO's vitality today, where China and India are as important players as the United States, for example.[147] The long-standing GATT/WTO notion that the multilateral trading order should be as neutral as to private versus public ownership is as important as ever, if not more so.

The best cure for suspicion is enlightenment. If there is any aspect of the existing rules on state enterprises that has really failed, it is the requirements of notification and transparency. Such strictures are inherently hard to enforce on their own, in a system where the remedy for non-compliance is ultimately the withdrawal of commercial concessions commensurate with the breach (impossible to determine when the breach is that of a reporting requirement taken on its own). A way forward may be to reframe a renewed commitment to transparency not as a disciplinary exercise but as an opportunity for information exchange and best governance practices. A precedent is the Santiago Principles on Sovereign Wealth Funds. The International Forum on Sovereign Wealth Funds (IFSWF) was created as a response to mounting perceived concerned about such entities having hidden agendas and lack of clarity about whether the goals being pursued were political rather than of a business nature, or to what extent.[148] The Forum, in which the

[146] Robert Howse & Joanna Langille, *Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values*, 37 YALE J. INT'L L. 367, 368 (2012).

[147] *See* Shaffer, *supra* note 106, at 628.

[148] *See* Joseph J. Norton, *The 'Santiago Principles' for Sovereign Wealth Funds: A Case Study on International Financial Standard-Setting Processes*, 13 J. INT'L ECON. L. 645, 657-59 (2010).

Funds themselves took a lead role, produced a non-binding code on transparency and best practices that most major funds now subscribe to. It paved the way to greater understanding not just among states about the use of SWFs but between the enterprises themselves. A similar effort might be undertaken under WTO auspices—the currently plurilateral negotiations on investment facilitation, for instance, already have transparency of investment conditions as a central concern.[149]

There is a corresponding need to increase transparency with respect to *private* ownership. Private capital is becoming ever more private. A leading investment advisory firm noted recently: "[o]ver the past 20 years, private-market capital has grown at more than double the rate of public[ly traded] capital globally, and, at the moment, there's no slowdown in sight."[150] Privately-held capital is much less transparent than that represented by publicly traded companies; it is harder to know what exact interests are controlling the assets in question, with what motivations, as well as governance and management practices that shape the exercise of market power transnationally by such interests. For instance, it is widely known that private economic interests create transnational corporate structures designed for tax avoidance and/or opportunistically to construct a nationality as a legal person that allows taking advantage of investment treaties with generous protections for foreign investors (the so-called Dutch Sandwich).[151] In terms of transparency and governance norms, understanding how ownership and control structures for capital shape the global economy including international trade, would be one-sided and likely distorted if the focus did not extend to private capital.[152]

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149 *See* SOFÍA BALIÑO ET AL., THE JOINT INITIATIVE ON INVESTMENT FACILITATION: DEVELOPMENTS FROM 2020 AND THE ROAD AHEAD TO MC12, at 10 (2021) https://www.iisd.org/system/files/2021-04/joint-initiative-investment-facilitation.pdf [https://perma.cc/79XF-UXTR].

150 Hugh McArthur et al., *Public vs. Private Assets: The Big Switch*, BAIN & COMPANY (Feb. 25, 2019), https://www.bain.com/insights/private-multiples-global-private-equity-report-2019/ [https://perma.cc/R46V-3JBX].

151 *See* Anup Srivastava et al., *Doubling Down on Double-Sandwich Tax Schemes*, CAL. MGMT. REV. (Mar. 30, 2020) https://cmr.berkeley.edu/2020/03/doubling-down [https://perma.cc/PF96-HZDM]; *see also* David Gaukrodger, *Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law* 12-32 (OECD Working Papers on Int'l Inv., 2014).

152 *See generally* DOREEN LUSTIG, VEILED POWER: INTERNATIONAL LAW AND THE PRIVATE CORPORATION 1886-1981 (2020).