The Rise of China's "International" Champions – Regulating the Foreign Expansion of Chinese State-owned Enterprises under International Economic Law

*Victor Crochet**

1. INTRODUCTION

China has built a new form of State capitalism. It has done so by weaving together the State apparatus and the business sector through the use of, among others, but not exclusively, State-owned enterprises ("***SOEs***"). This blurring of the line between the State and Chinese businesses has been dubbed "China Inc.".[1] So far, discussions over China Inc. have focused on how the behaviours of, and advantages received by,[2] Chinese SOEs may undermine international trade by squeezing imports out of the Chinese market, restricting market access for foreign firms in China and increasing Chinese SOEs' exports to third countries.[3] Hence, much has been written over the last years on how the rules of the World Trade Organization ("***WTO***")[4] and free trade agreements ("***FTAs***")[5] can be used to regulate the impact on international trade of domestic Chinese SOEs and State support thereto.

Yet, recent concerns over China Inc. are not so much that Chinese SOEs may undermine fair competition in China or in export markets, but that Chinese SOEs are "Going Out".[6] China's outward

---

* PhD student at Cambridge University & Associate at Van Bael & Bellis.

1 Mark Wu, *The "China, Inc." Challenge to Global Trade Governance*, (2016), Volume 57, Harvard International Law Journal, 261.

2 Erin Bass & Subrata Chakrabarty, *Resource Security: Competition for Global Resources, Strategic Intent and Governments as Owners*, (2014), Volume 45, Journal of International Business Studies, 961.

3 Weihuan Zhou, et al., *Building a Market Economy Through WTO-Inspired Reform of State-Owned Enterprises in China*, (2019), Volume 68, ICLQ, 977.

4 Mark Wu, n 1; Weihuan Zhou, et al., n 3; Chad Bown & Jennifer Hillman, *WTO'ing a Resolution to the China Subsidy Problem*, (2019), Volume 22, Journal of International Economic Law, 557; Philip Levy, *The Treatment of Chinese SOEs in China's WTO Protocol of Accession*, (2017), Volume 16, World Trade Review, 635; Julia Qin, *WTO Regulation of Subsidies to State-Owned Enterprises (SOES) – A Critical Appraisal of the China Accession Protocol*, (2004), Volume 7, Journal of International Economic Law, 863.

5 Kevin Lefebvre, et al., *Containing Chinese State-Owned Entreprises? The Role of Deep Trade Agreements*, (2021), World Bank Group, Policy Research Working Paper 9637; Mitsuo Matsuhita & C. L. Lim, *Taming Leviathan as Merchant: Lingering Questions about the Practical Application of Trans-Pacific Partnership's State-Owned Enterprises Rules*, (2020), Volume 19, World Trade Review, 402; Ines Willemyns, *Disciplines on State-Owned Enterprises in International Economic Law: Are We Moving in the Right Direction? Enterprises in Trade Agreements*, (2016), Volume 19, Journal of International Economic Law, 657; Julien Fleury & Jean-Michel Marcoux, *The US Shaping of State-Owned Enterprise Disciplines in the Trans-Pacific Partnership*, (2016), Volume 19, Journal of International Economic Law, 445.

6 Erin Bass & Subrata Chakrabarty, n 2.

foreign investment has been increasing exponentially, surpassing that of several major developed economies. Chinese SOEs, in particular, have been in the driving seat of this foreign investment boom.[7] The foreign economic expansion of Chinese SOEs is, however, seen as a vehicle for the Chinese State to exercise its foreign policy goals[8] alongside conventional corporate financial objectives due to SOEs hybrid nature of State and private capital.[9]

Chinese SOEs initially concentrated their foreign expansion on developing countries, focusing principally on acquiring raw materials to be exported to China to fuel its rapid industrialisation. However, they now also increasingly set up greenfield investments and bids to purchase foreign companies in strategic sectors, such as new technologies in developed countries,[10] raising concerns over the Chinese State extending its economic clout outside of its borders. Developed countries thus fear that China is on its way to out-compete them in the international economic arena by extending its China Inc. model abroad.[11]

While the cross-border expansion of Chinese SOEs has started attracting attention in the economic and political fields,[12] it has remained largely unstudied as a matter of international economic law. There is some legal literature on the topic of China's cross-border subsidies,[13] screening of SOEs' foreign investments[14] and on the question whether SOEs investing abroad may have recourse to investor-State dispute settlement.[15] However, the question of how international economic law could

---

7 Hui Yao Wang & Lu Miao, *China's Outward Investment: Trends and Challenges in the Globalization of Chinese Enterprises*, in Julien Chaisse, *China's International Investment Strategy: Bilateral, Regional, and Global Law and Policy*, (Oxford University Press, 2019).

8 Randall Stone, et al., *Chinese Power and the State-Owned Enterprise*, (2021), International Organization, 1.

9 Alvaru Cuervo-Cazurra, et al., *Governments as owners: State-Owned Multinational Companies*, (2014), Volume 45, Journal of International Business Studies, 919.

10 Bill Powell, *China Inc. Is on a Spending Spree Abroad*, 4 April 2016, Newsweek, available at https://www.newsweek.com/chinese-foreign-investments-starwood-hotels-443706.

11 *State-Owned Enterprises as Global Competitors*, (2016), OECD, available at https://www.oecd-ilibrary.org/docserver/9789264262096-en.pdf?expires=1638281824&id=id&accname=oid007055&checksum=3A606531AD37730BA99A859413FC7EB5.

12 Erin Bass & Subrata Chakrabarty, n 2; Alvaru Cuervo-Cazurra, et al., n 9; Wenjuan Nie, *China's State-Owned Enterprises: Instruments of Its Foreign Strategy?*, (2021), Journal of Contemporary China; Ilan Alon, , et al., *Chinese state-owned enterprises go global*, (2014), Volume 35, The Journal of Business Strategy, 3; Randall Stone, et al., n 8.

13 See, Gary Hufbauer, et al., *Investment Subsidies for Cross-Border M&A: Trends and Policy Implications*, (2008), United States Council Foundation, Occasional Paper No. 2; Victor Crochet & Vineet Hegde, *China's 'Going Global' Policy: Transnational Production Subsidies Under the WTO SCM Agreement*, (2020), Volume 23, Journal of International Economic Law, 841; Victor Crochet & Marcus Gustafsson, *Lawful Remedy or Illegal Response? Resolving the Issue of Foreign Subsidization under WTO Law*, (2021), Volume 20, World Trade Review, 343; Simon Evenett, et al., *The European Union's New Move Against China: Countervailing Chinese Outward Foreign Direct Investment*, (2020), Volume 15, Global Trade and Customs Journal, 413.

14 Paul Rose, *US Regulation of Investment by State-Controlled Entities*, (2016), Volume 31, ICSID Review, 77; Kevin Ackhurst, et al., *CETA, the Investment Canada Act and SOEs: A Brave New World for Free Trade*, (2016), Volume 31, ICSID Review, 58.

15 Lu Wang, *Non-Discrimination Treatment of State-Owned Enterprise Investors in International Investment Agreements?*, (2016), Vol. 31, ICSID Review, 45; Lauge Skovgaard Poulsen, *Investment Treaties and the Globalisation of State Capitalism: Opportunities and Constraints for Host States*, in Roberto Echandi & Pierre Sauvé, *Prospects in International Investment Law and Policy* (Cambridge: Cambridge University Press, 2012); Paul Blyschak, *State-owned enterprises and international investment treaties: When are state-owned entities and their investments protection*, (2011), Volume 6, Journal of International Law and International Relations, 1.

be used to address concerns over Chinese SOEs' cross-border expansion remains understudied. I intend to bridge this gap in this paper.

In order to do so, I start by assessing how Chinese SOEs are internationalizing and the concerns it is causing (**Section 2**). I then turn to assessing whether WTO rules, in particular the General Agreement on Tariffs and Trade ("***GATT 1994***"), the Agreement on Subsidies and Countervailing Measures ("***SCM Agreement***") and China's Protocol of Accession, could be used to address the foreign expansion of SOEs (**Section 3.1**). Next, I address the same question under the rules of bilateral and regional trade and investment agreements to which China is a party or aspires to accede to (**Section 3.2**). In the last section, I provide some concluding thoughts (**Section 4**).

2. THE INTERNATIONALIZATION OF CHINESE STATE-OWNED ENTERPRISES

In this first section, I start by describing how China Inc.'s SOEs operate (Section 2.1) and how they are expanding globally (Section 2.2), while highlighting the concerns that this is raising in developed countries (Section 2.3) in order to set up the stage to assess how the activities of Chinese SOEs outside of their home markets can be disciplined within the framework of international economic law.

2.1 China Inc. and State-owned enterprises

The Chinese economy has been dubbed "China Inc." to describe its unique structure. While China's economy is often called State capitalism, it does not perfectly fit this definition.[16] Indeed, China Inc. differs from other State capitalist economies, such as Saudi Arabia or Venezuela, in the way that the State, the Communist Party and market forces interact.[17] While the economic importance of a hundred large SOEs plays a critical role in China's model of State capitalism,[18] China's economy stands apart for several reasons. One of them is that China's SOEs are controlled by a single government agency: the State-owned Assets Supervision and Administration Commission of the State Council ("***SASAC***").[19]

---

16 Ian Bremmer, *The End of the Free Market* (Penguin Publishing Group, 2010), 5.
17 Mark Wu, n 1.
18 Li-Wen Lin & Curtis Milhaupt, *We Are the (National) Champions: Understanding the Mechanisms of State Capitalism in China*, (2013), Volume 65, Stanford Law Review, 697.
19 Li-Wen Lin, *A Network Anatomy of Chinese State-Owned Enterprises,* (2017), Volume 16, World Trade Review Issue, 583.

In essence, SASAC is the parent company of Chinese SOEs. Created in 2003, SASAC controls China's central "national champions", many of which are some of the world's largest companies.[20] Lower levels of government mirror this structure with regional SASACs controlling regional SOEs and reporting to SASAC.[21] As controlling shareholders of China's SOEs, SASAC holds the power to select and compensate SOEs' management, and hence to influence SOEs' business direction.[22] This State influence over SOEs' management is further strengthened by internal Communist Party committees in SOEs, which are appointed by the Central Organization Department of the Chinese Communist Party.[23] As a result of these links with the State, Chinese SOEs are not judged purely based on economic returns but also on returns on the State's interests.[24] In other words, their management is guided by the market, but they are also required to serve national strategies and industrial policies.[25]

China has been reforming its SOE regime since 2013 in order to create more competitive SOEs by optimizing the use of State assets and furthering national champions through restructuring and reorganising. Contrary to some expectations, this reform process has not diminished the State's control over its SOEs. To the contrary, the current reform has strengthened effective government control by reinforcing the influence of the internal Communist Party committees over the boards of directors of SOEs.[26] While the reform did lead to increased private capitals in SOEs, the State has preserved its role as principal or controlling shareholder in some SOEs.[27] There are, however, increasing numbers of Chinese SOEs where the State now acts as a minority shareholder,[28] but which are State-controlled nonetheless.[29]

Chinese SOEs are organised into vertically integrated business groups, starting with a holding company fully owned by SASAC which, in turn, owns subholding companies in more specific business sectors.[30] These subholdings also own entities further down the value chain (such as

---

20 Mark Wu, n 1.
21 Mark Wu, n 1.
22 Angela Huyue Zhang, *The Antitrust Paradox of China Inc.*, (2018), Volume 50, International Law and Politics, 159.
23 Li-Wen Lin, n 19. See also, Commission Implementing Regulation (EU) 2021/2011 of 17 November 2021, [2021] OJ L410/51, recital 93; Commission Implementing Regulation, (EU) 2022/58 of 14 January 2022, [2022] OJ L10/17, recital 134.
24 Mark Wu, n 1.
25 Weihuan Zhou, et al., n 3.
26 See for example the findings of the European Commission in Commission Implementing Regulation (EU) 2019/915 of 4 June 2019, [2019] OJ L 146/63, at recital 69.
27 Weihuan Zhou, et al., n 3.
28 Fan Gang & Nicholas Hope, Chapter 16, *The Role of State-Owned Enterprises in the Chinese Economy*, in *US–China 2022: Economic Relations in the Next 10 Years*, (2014, China US Focus).
29 Mitsuo Matsuhita & C. L. Lim, n 5.
30 Mark Wu, n 1.

finance entities, production entities, research centres, etc.) which also cross-own each other. It is usually the subholding companies that tend to be publicly listed.[31]

Although business groups do not include a bank, there are strong monetary flows from Chinese State-owned banks to China's SOEs. SASAC is not a shareholder to State-owned banks. They are owned indirectly by China's sovereign wealth fund.[32] Both SASAC and China's sovereign wealth fund report to the State Council and the Communist Party. This allows the channelling of funds to desired sectors of the economy, which are controlled by the State through its SOEs. As a result, Chinese SOEs are the principal receivers of financial instruments and often receive those on preferential terms.[33]

The main holding companies are in charge of the business group's development strategies. They coordinate the relationships amongst subsidiaries, and between the State and the downstream entities of the group, by transmitting policies to their subsidiaries downward and information to the State upward.[34] Interfaces between SOEs and the State also exist in the form of institutional bridges, linking SOEs to government ministries or State-run business associations.[35]

2.2 State-owned enterprises "Going Out"

The first foreign ventures of Chinese SOEs can be traced back to the late 1970s.[36] However, it is since the enactment of China's "Going Out" policy in 1999 that Chinese SOEs have increasingly gone abroad. This policy aimed to give Chinese firms a global presence through State funding in the form of financing from State-owned banks, the government and SASAC,[37] coupled with diplomatic efforts to encourage third countries to welcome Chinese investment[38] and easier licensing for Chinese outward investment in State-encouraged sectors.[39]

---

31 Li-Wen Lin, n 19.
32 Mark Wu, n 1.
33 Li-Wen Lin, n 19.
34 Li-Wen Lin, n 19.
35 Li-Wen Lin, n 19.
36 Chih-shian Liou, *The Politics of China's "Going Out" Strategy: Overseas Expansion of Central State-Owned Enterprises*, (2010), University of Texas, available at https://repositories.lib.utexas.edu/bitstream/handle/2152/ETD-UT-2010-05-826/LIOU-DISSERTATION.pdf?sequence=1&isAllowed=y.
37 See for example, Commission Implementing Regulation (EU) 2018/1690 of 9 November 2018 , [2018] OJ L285/1; Commission Implementing Regulation (EU) 2020/776 of 12 June 2020, [2020] OJ L189/1.
38 Randall Stone, et al., n 8.
39 Chih-shian Liou, n 36.

The enactment of China's "Going Out" policy was followed by rapid growth in outward foreign investment by Chinese SOEs which further accelerated after the launch of China's Belt and Road Initiative in 2013.[40] The Belt and Road Initiative is China's plan to build infrastructure for China's trading partners so as to increase their connectivity to China and further assist Chinese companies in going abroad.[41] Although China's "Going Out" policy is still ongoing, the Belt and Road Initiative has added a new dimension to China's foreign economic expansion. Under this initiative, China has further strengthened its diplomatic efforts by signing memoranda of understandings with many countries to support Chinese investments in their territories.[42] It has also created new domestic and regional financing vehicles where funding is primarily directed at Chinese SOEs, such as the Silk Road Fund[43] and the Asian Infrastructure Investment Bank.[44]

As a result, in recent years, Chinese SOEs, provided with financial and diplomatic resources, have gone on a shopping spree by acquiring companies and assets worldwide.[45] Through this, Chinese SOEs abroad have aligned their business expansion plans with national strategic priorities.

While Chinese SOEs going out originally focused their outward investments to developing countries, they increasingly also targets developed countries.[46] Initially, their investments focused mostly on access to raw materials in third countries with the goals of extracting these raw materials and subsequently exporting them to China to be processed into finished goods.[47] Having established its manufacturing dominance, China Inc.'s foreign expansion now also focuses on acquiring strategic assets such as research & development ("***R&D***") capabilities, new technologies and brand names.[48] At the same time, China tries to alleviate excess industrial capacity in China by assisting Chinese companies in setting up new factories abroad.[49]

---

40 Randall Stone, et al., n 8.
41 OECD, *China's Belt and Road Initiative in the Global Trade, Investment and Finance Landscape*, (2018) OECD Business and Finance Outlook.
42 Heng Wang, *China's Approach to the Belt and Road Initiative: Scope, Character and Sustainability*, (2019), Volume 22, Journal of International Economic Law, 29.
43 OECD, n 41. See also, Commission Implementing Regulation (EU) 2018/1690, n 37.
44 David Dollar, *The AIIB and the 'One Belt, One Road'*, (2015), Brookings, available at https://www.brookings.edu/opinions/the-aiib-and-the-one-belt-one-road/.
45 Li-Wen Lin, *China's National Champions: Governance Change Through Globalization?*, (2017), Volume 11, University of Pennsylvania Asian Law Review, 82.
46 Ilan Alon, et al., n 12.
47 Erin Bass & Subrata Chakrabarty, n 2.
48 Ilan Alon, et al., n 12.
49 Victor Crochet & Vineet Hegde, n 13.

China Inc.'s going out has followed a similar structure to its domestic architecture. While there is some outward foreign direct investment by private Chinese companies, the majority of it is conducted through SOEs.[50] Nearly all of China's largest outward foreign investors are ultimately business groups owned by SASAC.[51] These groups set up greenfield subsidiaries in the host country,[52] fully or partially acquire targeted companies,[53] or create joint ventures with local companies in the host country.[54] This is done either by a subholding companies in the business group or subsidiaries thereof. SASAC, the Silk Road Fund and Chinese State-owned banks then provide financing either directly to the foreign subsidiaries or indirectly through the holding and subholding companies which carry it forward to their foreign subsidiaries.[55]

While the business groups which are centrally owned by SASAC compete against each other domestically, certain groups have been encouraged by the State to collaborate in overseas projects to increase their global competitiveness and their global expansion.[56] In this regard, Chinese foreign outward investments must be approved by the National Development and Reform Commission which has directed foreign investment towards national industrial policies interests such as energy, resources, technology and R&D or manufacturing.[57] SOEs' expansion is also coordinated by the State through preferential financing and simplified procedures in encouraged investment sectors. SASAC also recently increased its oversight of SOEs' foreign ventures through additional regulations as well as stricter audits and reporting obligations.[58] This oversight by SASAC is complemented by annual reviews by MOFCOM of SOEs which are increasingly focused on their behaviours abroad.[59] In addition, SOEs' foreign subsidiaries have internal Communist Party committees as their articles of association mirror those of their parent companies including the provisions regarding the establishment of the Communist Party Committee.[60] Hence, in contradiction to the Chinese proverb

---

50 Li-Wen Lin, n 45.
51 Li-Wen Lin, n 45.
52 Commission Implementing Regulation (EU) 2020/776, n 37.
53 Commission Implementing Regulation (EU) 2018/1690, n 37.
54 Li-Wen Lin, n 45.
55 Commission Implementing Regulation (EU) 2018/1690, n 37; Commission Implementing Regulation EU) 2022/72 of 18 January 2022, [2022] OJ L12/34, recital 284.
56 Li-Wen Lin, n 19.
57 Vivienne Bath, *Chinese Companies and Outbound Investment, The Balance between Domestic and International Concerns*, in Lisa Toohey, et al., *China in the International Economic Order new directions and changing paradigms*, (Cambridge University Press, 2015).
58 Li-Wen Lin, n 45.
59 Vivienne Bath, n 57.
60 The Chinese Communist Party Constitution also provides that a primary-level organization shall be formed where there are three or more members in any enterprise so that an oversea SOE subsidiary should set up some party if it has three or more party members.

that “heaven is high and the emperor is far away”, when it comes to the transnational expansion of Chinese SOEs, the emperor is not.

2.3 Growing concerns over the internationalization of State-owned enterprises

Concerns over China Inc.’s SOEs in international economic law literature have thus far been focusing on the extensive role that SOEs have played in consolidating the Chinese State’s grip over its domestic economy.[61] This is due to the variety of advantages given to SOEs, from subsidies and preferential financing to privileged access to information, regulatory advantages, protected monopolistic positions, and other forms of government support.[62] Since Chinese SOEs are the main economic drivers and the government’s tool to implement industrial and public policies, the government’s financial and regulatory support to China’s SOEs has led to foreign competitors in the domestic market being squeezed out.[63] The creation of these behemoth national champions has also led to concerns about their export potential as they have been accused of undercutting international prices with the help of the State. Additionally, SOEs have been pictured as vehicles to block access to foreign competitors wishing to enter the Chinese market.[64] Chinese SOEs’ domestic activities have thus led to “serious concerns for the proper functioning of international trade”.[65]

The foreign expansion of SOEs has led to a growing fear that the Chinese State is unduly extending its economic power over third countries by expanding its State capitalist economic model overseas. As such allegations against China Inc. are no longer limited to SOEs’ operations in China but now relate to their behaviour abroad. These allegations are not merely confined to unfair competition. They now extend to economic geopolitics, as developed countries increasingly view Chinese SOEs venturing abroad as vehicles for the Chinese State to exercise its long-term foreign economic policy goals.[66] This seems to be partly true: respecting government policies and receiving government support have proved to be some of the main reasons why Chinese SOEs go abroad.[67]

---

61 See notes 4 and 5 above.
62 OECD, n 11.
63 Weihuan Zhou, et al., n 3.
64 Peter Harrell, et al., *China’s Use of Coercive Economic Measures*, (2018), Center for a New American Security, available at https://s3.amazonaws.com/files.cnas.org/documents/China_Use_FINAL-1.pdf?mtime=20180604161240.
65 Joint Statement by the United States, European Union and Japan at MC11, 12 December 2017 available at https://ustr.gov/about-us/policyoffices/press-office/press-releases/2017/december/joint-statement-united-states.
66 Alvaru Cuervo-Cazurra, et al., n 9.
67 Ilan Alon, et al., n 12.

In particular, some developed countries have raised concerns that the Chinese State uses its SOEs to secure access to raw material supplies in both developed and developing countries. For example, Chinese mining SOEs have been trying to purchase mining firms in Australia and Canada.[68] Similarly, Chinese SOEs have secured interests in mines throughout sub-Saharan Africa and South-East Asia, ensuring that the minerals extracted there are subsequently exported to fuel mainland Chinese factories.[69] This has led developed countries to fear that China is about to gain "supremacy" over access to raw materials as China's SOEs now control access to raw materials needed for classic industrial goods as well as, increasingly, those used to produce new technologies.[70] In a sense, they fear that China got ahead of the game by directing its SOEs to secure access to raw materials abroad based on long-term prospects.[71] At the same time, Western companies invest mainly based on business interests, thereby leaving it up to their governments to utilise trade deals and other diplomatic means to secure access to essential raw materials for new technologies.[72]

Concerns regarding the expansion of Chinese SOEs overseas relate not only to upstream manufacturing interests (i.e. access to raw materials), but also to the entire value chain.[73] Indeed, China's cross-border economic expansion, although diversified, has been focused on the manufacturing industry.[74] Through cross-border mergers and acquisitions, as well as setting up new green field factories, Chinese SOEs have begun a vertical consolidation of certain industries on a global scale, raising concerns that complete value chains are now controlled by China.[75] In some cases, raw materials and inputs are exported by Chinese-owned factories abroad to China for further processing and assembly.[76] In others, Chinese-owned downstream factories using upstream Chinese products are set up abroad, raising concerns that these may be done with the aim of

---

68 Jeff Lewis & Melanie Burton, *A series of Chinese mining deals is seen stalling on regulatory hurdles*, 7 July 2020, Artic Today, available at https://www.arctictoday.com/a-series-of-chinese-mining-deals-is-seen-stalling-on-regulatory-hurdles/.

69 IDE-JETRO, *China in Africa*, available at https://www.ide.go.jp/English/Data/Africa_file/Manualreport/cia_08.html; Tongam Panggabean & Dustin Roasa, *Disaster Shadows Chinese Mining Ventures in Southeast Asia*, 28 January 2021, The Diplomat, available at https://thediplomat.com/2021/01/disaster-shadows-chinese-mining-ventures-in-southeast-asia/. See further on China's investments in mining companies, Shunyu Yao & Jason Holden, *Chinese foreign mining investment — China's private sector eyes low-cost regions*, 12 March 2021, S&P Global, available at https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/chinese-foreign-mining-investment-8212-china-s-private-sector-eyes-low-cost-regions-63066809.

70 Frédéric Simon, *Europe faces up to China's supremacy on raw materials*, 5 October 2020, Euractiv, available at https://www.euractiv.com/section/circular-economy/news/europe-faces-up-to-chinas-supremacy-on-raw-materials/.

71 Erin Bass & Subrata Chakrabarty, n 2.

72 Giorgio Leali, *Europe's hunger for lithium sparks tensions with Chile*, 7 December 2020, Politico, available at https://www.politico.eu/article/europes-hunger-for-lithium-sparks-tensions-with-chile/.

73 See for example regarding the automotive industry, Seung-Youn Oh, *China's Race to the Top: Regional and Global Implications of China's Industrial Policy*, (2021), Volume 20, World Trade Review, 169.

74 Hui Yao Wang & Lu Miao, n 7.

75 Hui Yao Wang & Lu Miao, n 7.

76 Seung-Youn Oh, n 73.

circumventing trade defence measures[77] or delineating product markets between the foreign subsidiary and the Chinese parent in order to increase exports from the latter.[78]

More recently, Western governments have been increasingly suspicious and vocal against Chinese SOEs' foreign investments in new technology companies such as data, intelligence, robotics, and drones.[79] They have also been concerned about Chinese companies' acquisition of foreign strategic assets such as R&D capabilities, established brand names or technical and managerial expertise.[80] This phenomenon has been dubbed "the reverse Marco Polo effect" as it is now the Chinese who are going to the West to acquire superior technology and know-how.[81] Similar to Western governments' concerns over raw material access, these governments fear that investments by SOEs are not made purely out of business interests, but instead follow the long-term strategic goals of the Chinese State to pursue a new "technological arms race".[82] This sentiment is further reinforced by the fact that investments in some sectors is often viewed as linked to national security interests[83] and that Chinese SOEs are allegedly able to outbid competing potential investors thanks to State support.[84]

As SOEs purchase foreign strategic assets by using cheap credit from sponsors at home, developed countries' politicians have shown increasing disquietude that, in a globalized world where economic prosperity requires not only sound domestic economic policies but also the securitization of vital foreign interests, China Inc. is getting ahead of the game thanks to the going out of its SOEs.[85] But this is not all. Chinese SOEs' going out has given rise to a sentiment that, thanks to the instructions and support of the Chinese State, Chinese SOEs may well grow sufficiently to take the spot of Western multinationals as business hegemons.[86] In other words, having supported its SOEs to

---

77 Commission Implementing Regulation (EU) 2022/301 of 24 February 2022, [2022] OJ L46/31.
78 Commission Implementing Regulation (EU) 2018/1690, n 37.
79 Lizzie Knight & Tania Voon, (2020), Volume 21, *The Evolution of National Security at the Interface Between Domestic and International Investment Law and Policy: The Role of China*, Journal of World Investment & Trade, 104.
80 Ilan Alon, et al., n 12.
81 Rebecca Valli, *Italian entrepreneurs turn to Chinese for help*, 14 September 2012, VOA New, available at https://www.voanews.com/a/italian-entrepreneurs-turn-to-chinese-for-help/1507976.html.
82 Marc Bungenberg & Fabian Blandfort, *Investment Screening – a New Era of European Protectionism?*, in Michael Hahn & Guillaume Van Der Loo, *Law and Practice of the Common Commercial Policy*, (Brill, 2020), 161.
83 See, for example*, Government of the United Kingdom, New and improved National Security and Investment Act set to be up and running*, 20 July 2021, available at https://www.gov.uk/government/news/new-and-improved-national-security-and-investment-act-set-to-be-up-and-running. See also recently, *US bans China Telecom over national security concerns*, 27 October 2021,The Guardians, available at https://www.theguardian.com/us-news/2021/oct/27/us-bans-china-telecom-from-operating-over-national-security-concerns.
84 European Commission, White Paper on levelling the playing field as regards foreign subsidies, 17 June 2020, COM(2020) 253 final.
85 Alvaru Cuervo-Cazurra, et al., n 9.
86 Lourdes Casanova & Anne Miroux, *The Era of Chinese Multinationals - Competing for Global Dominance*, (Academic Press, 2020), pp. 217-220.

become “national champions”[87] there is now a suspicion that the Chinese State wants to turn them into “international champions” capable of outperforming Western firms.

3. REGULATING THE FOREIGN EXPANSION OF STATE-OWNED ENTERPRISES UNDER INTERNATIONAL ECONOMIC LAW

As Chinese SOE’s going out is expected to pick up steam,[88] it is necessary to assess whether developed countries’ concerns can be addressed under international economic law rules. In recent years, there has been much discussion regarding whether these rules could be used to tame Chinese SOEs’ domestic impact on international trade.[89] While the question is not yet settled, in this section, I turn to assess whether international economic law rules may be of any assistance in addressing some of the concerns recently raised by Chinese SOEs’ going out. I start by discussing the rules of the WTO Agreements (Section 3.1) before turning to the specific rules regarding SOEs in bilateral and regional trade and investment agreements (Section 3.2).

3.1 Regulating State-owned enterprises’ foreign expansion under the WTO Agreements

As discussed, there are two main underlying reasons for developed countries’ concerns over China Inc.’s going out. The first one relates to the behaviours of Chinese SOEs which are considered to pursue State interests rather than business profits while the second is that the State provides financial supports to SOEs investing abroad which undermines fair competition. As a result, I start by addressing whether WTO rules can be used to address State’s interferences in the conduct of its SOEs (Section 3.1.1) before turning to WTO rules regarding financial support to SOEs going out (Section 3.2.2).

3.1.1 Ownership-neutrality of WTO rules

Rules contained in the original WTO Agreements are said to be mostly “ownership-neutral”[90] and, except for a few provisions, these rules do not differentiate between private and State-owned

87 Mark Wu, n 1.
88 Ilan Alon, et al., n 12.
89 See footnotes 4 and 5 above.
90 Julia Qin, n 4.

companies. Instead, they focus on how governments interfere with international traders regardless of their ownership.[91]

A few exceptions can be found, such as XVII of the GATT 1994, which scope is broadened under China's Protocol of Accession, setting out disciplines on State-trading enterprises ("***STEs***") and Articles 27.13 and 29 of the SCM Agreement regarding privatization programs and transitioning economy WTO Members, respectively. These rules, however, do not appear useful in regulating the new concerns raised by China Inc.'s going out, for two main reasons.

First, the rules regarding STEs cover companies which have been granted special privileges by the government regarding import/export, production or distribution of goods. They require these companies to respect the principles of non-discrimination enshrined in the GATT 1994 and to act in accordance with commercial considerations.[92] These rules are thus usually aimed at regulating trading companies, such as marketing boards[93] or trading monopolies.[94] As a result, even though these rules apply to STEs "wherever located",[95] which means that they would also cover STEs located outside of the relevant WTO Member's territory, they do not seem to be relevant to regulate the concerns over Chinese SOEs venturing abroad as these SOEs have been granted no special privileges.

The Report of the Working Party on China's accession to the WTO,[96] deviates from the "ownership-neutral" approach of the WTO by also including specific commitments regarding SOEs. In particular, China committed that it "would ensure that all state-owned and state-invested enterprises would make purchases and sales based solely on commercial considerations […] and that the enterprises of other WTO Members would have an adequate opportunity to compete for sales to and purchases from these enterprises on non-discriminatory terms and conditions."[97] The Government of China added that it would not influence its SOEs' commercial decisions regarding the quantity, value or country of origin of any goods purchased or sold except in a manner consistent with the WTO

---

91 John Jackson, et al., *Legal Problems of International Economic Relations – Cases, Materials and Text*, (4th edn, West Group, 2002), 402.

92 GATT 1994, Article XVII:1; WTO, Working Party on State Trading Enterprises, Illustrative List of Relationships Between Governments and State Trading Enterprises and the Kinds of Activities Engaged in by These Enterprises , G/STR/4, 30 July 1999. See also, GATT 1994, Article II:4 with regard to State monopolies.

93 Panel and Appellate Body Reports, *Canada – Wheat Exports*.

94 GATT Panel Report, *Canada – Provincial Liquor Boards (EEC)*; Panel Report, *Korea – Beef*.

95 GATT, Article XVII:1(b).

96 Report of the Working Party on the Accession of China, 1 October 2001, WT/ACC/CHN/49, para. 342.

97 Ibid., para. 46.

Agreement.[98] These commitments go further than the rules of Article XVII of the GATT 1994 and have been suggested as a potential tool to regulate the domestic behaviours of Chinese SOEs.[99]

However, they have done little to regulate these behaviours in practice due to the vague terminology used.[100] Furthermore, these commitments relate solely to the purchases and sales of goods by SOEs. Thus, they are also unlikely to be of any assistance in regulating China SOEs going out since there seems to be no claim that Chinese SOEs abroad discriminate in their purchases and sales.[101]

Second, Article 27.13 of the SCM Agreement provides that some of the rules of the SCM Agreement shall not apply to certain types of subsidies granted to support privatization programs, so long as they eventually result in the privatization of SOEs. Article 29 of the SCM Agreement provides for a grace period for subsidies granted in order for a WTO Member to transform from a centrally planned economy into a market economy.[102] Since the Government of China's financial assistance to support SOEs' expansion abroad does not fall under these categories, these provisions also seem irrelevant to address Chinese SOEs' expansion into foreign markets.

In sum, the provisions of the WTO Agreements addressing the relationship between the State and SOEs' behaviours seems irrelevant to regulating the behaviour of Chinese SOEs abroad except if these SOEs were found to not make purchases and sales based solely on commercial considerations.

3.1.2 Regulation of cross-border production subsidies to Chinese State-owned enterprises under the SCM Agreement and China's Protocol of Accession

While the provisions of the WTO Agreements regulating State-owned companies are of little help in disciplining the going out of Chinese SOEs, certain provisions of the SCM Agreement may be. As outlined below, the SCM Agreement's provisions could address financing from the Chinese State to Chinese SOEs' subsidiaries established abroad (Section 3.1.2.1), domestic Chinese SOEs establishing greenfield investments abroad and channelling this financing to their foreign subsidiaries

98 Ibid., para. 46.
99 Weihuan Zhou, et al., n 4.
100 Philip Levy, n 4.
101 For example, while there are concerns of vertical integration of Chinese ownership of entire global value chains or of vertical integration of Chinese companies on a global scale, Chinese raw material and input producers abroad do not seem to discriminate when selling to foreign companies, Elizabeth Economy & Michael Levi, *How China's Resource Quest is Changing The World - By All Means Necessary*, (Oxford University Press, 2015).
102 For more details, see Julia Qin, n 4.

(Section 3.1.2.2) or acquiring foreign assets (Section 3.1.2.3). However, using the SCM Agreement to regulate support to SOEs going abroad has significant shortcomings (Section 3.1.2.4).

As a preliminary note, the provisions of the SCM Agreement do not apply to subsidies provided for the supply of services.[103] They only apply to subsidies for the production of goods.[104] As such, the analysis developed below will be of no assistance in disciplining support Chinese SOE service suppliers abroad and may only be useful with regard to the support granted to Chinese SOEs engaged in production activities ("***Chinese production SOEs***").

3.1.2.1 Subsidies to Chinese production SOEs established abroad

With regard to subsidies granted by the Government of China to Chinese production SOEs incorporated abroad, the relevant questions are whether financial support to these SOEs established outside the territory of China falls under the definition of a subsidy under Article 1.1 of the SCM Agreement, and whether the SCM Agreement provides an avenue for other WTO Members to challenge these subsidies.

Article 1.1 of the SCM Agreement provides that a subsidy exists if there is a "financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as ('government') that confers a "benefit". The qualifier term "within the territory of a Member" in Article 1.1(a)(1) only refers to "'a government or a public body" and does not concern the term "financial contribution" so that it does not indicate where the recipient of the financial contribution must be located. This is because the qualifier directly follows the term "a government or any public body" and because the term "by a government or any public body" is not between commas. This interpretation is further confirmed by the insertion immediately after the definition of "government" between brackets, which clarifies the term to mean "a government or any public body within the territory of a Member".[105] Article 1.1(b) of the SCM Agreement then provides that "a benefit is thereby conferred" and therefore does not further limit the geographical scope of application of the definition of a subsidy.[106] However, since the benefit element must be bestowed upon an "economic entity"[107] that

---

103 This is covered by Article XV of the GATS which does not provide any substantial rule with regard to the subsidies provided for the supply of services. It is relevant to note, however, that subsidies in the form of the provision of services to goods producers are covered under the SCM Agreement. See, SCM Agreement, Article 1.1(a)(1).

104 Panel Report, *Canada — Aircraft*, para. 7.54. *See* also, Gary Hufbauer, et al., n 13.

105 Panel Report, *US — Anti–Dumping and Countervailing Duties (China)*, para. 8.67.

106 Victor Crochet & Vineet Hegde, n 13; Victor Crochet & Marcus Gustafsson, n 13.

107 Appellate Body Report, *US — Countervailing Measures on Certain EC Products*, para. 112.

is "actually engaged in production",[108] the subsidy must benefit the production of goods,[109] even if indirectly.[110] Thus, a subsidy granted by the Government of China to Chinese SOEs incorporated abroad would only fall within this definition so long as it benefits SOEs engaged in the production of goods.[111]

Article 1.2 of the SCM Agreement indicates that for a WTO Member to have recourse to multilateral remedies against a "subsidy" at the WTO, a subsidy needs to be either "prohibited" (Section 3.1.2.1(a)) or "actionable" (Section 3.1.2.1(b)).

(a) Prohibited export subsidies

Article 3 of the SCM Agreement provides for two types of prohibited subsidies which can be the object of a multilateral challenge without the need to demonstrate any additional element. Article 3.1(a) prohibits export subsidies - subsidies which aim at increasing the receiving entities' exports - while Article 3.1(b) prohibits import-substitution subsidies - subsidies aimed at increasing the receiving entities' use of domestic products over imports. While it is unlikely that the latter would be useful in regulating the concerns over China SOEs going out, the former may well be.

Article 3.1(a) prohibits subsidies that are conditional upon export performance or are dependent for their existence on export performance.[112] This standard applies to both *de jure* and *de facto* export contingencies, but the evidence to prove each type of contingency is different.[113] *De jure* export contingency is established on the basis of the terms of the relevant act, even if implicitly.[114] Proof of *de facto* export contingency is met when the subsidy is granted so as to provide an incentive to the recipient to export in a way that is not simply reflective of the conditions of supply and demand in the domestic and export markets undistorted by the granting of the subsidy.[115] If the subsidy skews the ratio between domestic and export sales, this may demonstrate export contingency.[116] *De facto* export contingency may also be inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy,[117] including a government's motivation for granting a

---

108 Ibid. See also, GATT, Article VI and SCM Agreement, at footnote 36.
109 Panel Report, *Canada — Aircraft*, para 7.54. See further on this issue Gary Hufbauer, et al., n 12 .
110 Sherzod Shadikhodjaev, *How to Pass a Pass-Through test: The Case of Input Subsidies*, (2012), Volume 15, Journal of International Economic Law, 621.
111 For a full analysis of this issue, see Victor Crochet & Vineet Hegde, n 13; Victor Crochet & Marcus Gustafsson, n 13.
112 Appellate Body Report, *Canada – Aircraft*, para. 166.
113 Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 1038.
114 Appellate Body Report, *US – FSC*, para. 112.
115 Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1045.
116 Ibid., para. 1047.
117 Ibid., para. 1038.

particular subsidy,[118] the export-orientation of the recipient,[119] the proximity of the export market from the funded project[120] or the lack of domestic demand for the subsidised product.[121]

As such, some of the concerns highlighted in section 2 regarding Chinese SOEs going out could potentially be regulated by the SCM Agreement's prohibition of export subsidies. One of the concerns of developed countries' governments is that the Government of China provides preferential financing to its SOEs for them to acquire, set up or run mining operations in third countries with the goals of extracting raw materials and subsequently exporting them to China to be processed into finished goods. There are similar concerns with regard to subsidies granted to Chinese SOEs abroad to export intermediate inputs back to China for further processing and assembly.[122] Arguably, if financing to these SOEs constitutes a subsidy under Article 1.1 of the SCM Agreement, it could be established that this financing meets the standard of export contingency insofar as it skews anticipated sales of towards exports to China in countries with little to no local demand for the raw materials extracted, or intermediate inputs produced, therein. Such argument would be in line with the ordinary meaning of Article 3.1(a) of the SCM Agreement which prohibits exports contingent "upon export performance".

Such an argument may, however, not be in line with the context of that provision, which is that prohibited subsidies are more prone to cause adverse effects within the meaning of Articles 5 and 6 of the SCM Agreement. Indeed, these subsidies are prohibited as they are presumed to lead to increased exports from the subsidizing WTO Member to third countries, thereby causing adverse effects to these countries' industries.[123] Articles 5 and 6 also reflect the object and purpose of the SCM Agreement to discipline, not all subsidies, but only those "that distort trade".[124]

Hence, it remains to be tested whether a subsidy provided to a recipient established in the territory of a WTO Member which is not the subsidizing WTO Member on the condition that the goods produced are exported to the subsidizing WTO Member constitutes a prohibited export subsidy within the meaning of Article 3.1(a) of the SCM Agreement.

---

118 Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.675.
119 Panel Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 7.1518.
120 Appellate Body Report, *Canada – Aircraft*, fn 35.
121 Panel Report, *Canada – Aircraft Credits and Guarantees*, para. 7.372.
122 Erin Bass & Subrata Chakrabarty, n 2; Seung-Youn Oh, n 73.
123 Decision by the Arbitrator, *US – FSC (Article 22.6 DSU)*, para. 5.35.
124 Panel Report, *US – Export Restraints*, para. 8.63.

On the other hand, when subsidies are granted to Chinese SOEs' factories set up abroad in order to supply their traditional export markets, in countries with little to no domestic consumption for the manufactured products, it could more certainly be argued that such subsidies meet the standard of export contingency under Article 3.1(a) of the SCM Agreement. For example, in the anti-subsidy investigation on *Glass fibre fabrics* from Egypt, the European Commission ("***Commission***") found that the subsidiaries of two Chinese SOEs ultimately owned by SASAC incorporated in Egypt had received direct subsidies in the form of loans from the Government of China.[125] In that case, the Commission had to rely on some questionable legal engineering to take actions against these subsidies under the European Union ("***EU***")'s anti-subsidy rules due to the particular wording of these rules.[126] However, under the SCM Agreement, an argument could be made that these subsidies constitute prohibited export subsidies. Indeed, the two subsidiaries had little to no domestic sales[127] and were set up in Egypt with financial backing from the Government of China in order to provide a basis to serve nearby export markets such as the EU and Turkey.[128] Hence, subsidies provided to the two Egyptian subsidiaries could arguably have constituted *de facto* prohibited export subsidies within the meaning of the SCM Agreement.

(b) Actionable subsidies

With regard to subsidies which do not fall under the categories of prohibited export subsidies within the meaning of Article 3 of the SCM Agreement, subsidies will nonetheless be regulated under WTO rules if they are "actionable". A subsidy is actionable if it is "specific" in accordance with Article 2 of the SCM Agreement and if it causes adverse effects within the meaning of Part III of the SCM Agreement. In this section, I thus assess in turn whether direct subsidies production SOEs abroad could be found to be specific under the SCM Agreement and China's WTO Protocol of Accession (Sections 3.1.2.1(b)(i) and 3.1.2.1(b)(ii) respectively) before turning to whether these subsidies could be found to cause adverse effects (Section 3.1.2.1(b)(iii)). I then assess whether an alternative argument could be made that direct subsidies to production SOEs abroad constitute indirect subsidies to domestic Chinese production SOES and, as a result, qualify as actionable subsidies (Section 3.1.2.1(b)(iv)).

---

125 Commission Implementing Regulation (EU) 2020/776, n 37, at recital 659.
126 Ibid., at recitals 674-699. See further, Victor Crochet & Vineet Hegde, n 13.
127 Commission Implementing Regulation (EU) 2020/492 of 1 April 2020, [2020] OJ L108/1, at recital 298.
128 Hou Liqiang, *Chinese companies boost operations in Egypt*, 15 February 2016, China Daily, available at http://www.chinadaily.com.cn/business/2016-02/15/content_23481956.htm; Commission Implementing Regulation (EU) 2020/776, n 37, at recital 679.

(i) Specificity under the SCM Agreement of direct subsidies to production SOEs established abroad

The recipient of the subsidy needs to be "within the jurisdiction of the granting authority" for a subsidy to be found to be specific in accordance with Article 2 and, hence, for multilateral remedies to be available under the SCM Agreement.

The traditional understanding of State jurisdiction is, as explained in the *Lotus* case, "certainly territorial; it cannot be exercised by a State outside its territory".[129] This reading seems to be in line with the findings of the Panel in *US – Countervailing Measures (China)* which stated that "the ordinary meaning and context of the chapeau, as well as the negotiating history of Article 2, suggest that the reference to 'within the jurisdiction of the granting authority' firstly indicates that specificity may only exist within the territory of a Member".[130] This reading also seems to be in line with the context of the provision as well as the object and purpose of the SCM Agreement.[131] Hence, the interpretation of the term "jurisdiction" in Article 2.1 of the SCM Agreement as meaning "territory" appears to be the most appropriate so that for a subsidy to be specific it must be granted to an entity within the territory of the subsidizing WTO Member. This is not the case for subsidies granted by the Government of China to Chinese SOEs incorporated abroad, since they are located outside of the territory of China.[132]

(ii) Specificity under China's WTO Protocol of Accession of direct subsidies to production SOES established abroad

China's WTO Protocol of Accession provides a way around the requirement that a subsidy be granted to an entity within the jurisdiction of the granting authority for it to be specific. Its Article 10 provides that "subsidies provided to state-owned enterprises will be viewed as specific if, inter alia, state-owned enterprises are the predominant recipients of such subsidies or state-owned enterprises receive disproportionately large amounts of such subsidies."

As such, subsidies provided to Chinese SOEs will constitute specific subsidies within the meaning of Article 2 and multilateral remedies will hence be available under the SCM Agreement regardless of the location of the recipient SOE as long as Chinese SOEs are the predominant recipients of, or

129 S.S. "Lotus", France v Turkey, Judgment, (1927), PCIJ Series A no 10, ICGJ 248 (PCIJ 1927), 7 September 1927, para 45.
130 Panel Report, *US - Countervailing Measures (China)*, para. 7.247.
131 Victor Crochet & Vineet Hegde, n 13.
132 Further on this issue, see Victor Crochet & Vineet Hegde, n 13; Victor Crochet & Marcus Gustafsson, n 13.

receive disproportionately large amounts of, such subsidies. Article 10 of China's Protocol of Accession can thus be used to regulate subsidies provided by the Government of China to support Chinese SOE's going out.

These subsidies often take the form of capital injections or grants by SASAC (which are only available to SASAC's subsidiaries which are all SOEs), preferential financing by State-owned banks or financial support from the Silk Road Fund (which are mainly directed at SOEs).[133] This was for example the case in the *Glass fibre fabrics* investigation, where the two Egyptian subsidiaries received subsidies in the form of capital injections from SASAC through their holding companies in China as well as loans from Chinese State-owned banks.[134] As a result, it could be argued that Chinese SOEs are the predominant recipients of, or receive disproportionately large amounts of, subsidies granted in support of China Inc.'s going out. Therefore, subsidies granted to Chinese SOEs abroad could be found to be specific within the meaning of Article 2 of the SCM Agreement in accordance with Article 10 of China's WTO Protocol of Accession.

(iii) Adverse effects of direct subsidies to production SOES established abroad

For a non-prohibited subsidy to be challenged multilaterally before the WTO, it is, however, not sufficient that this subsidy meets the specificity criteria of Article 2 of the SCM Agreement. This subsidy must also cause adverse effects to the interests of another WTO Member in accordance with Article 5 of the SCM Agreement. Such adverse effects can take the form of injury to the domestic industry of that WTO Member by subsidized imports into that WTO Member's territory[135] or displacements of that WTO Member's exports to third countries by the subsidized products.[136]

Consequently, it would be difficult to show that subsidies granted to Chinese production SOEs abroad engaged in exports of raw materials or semi-finished products to China cause adverse effects to the interests of another WTO Member. Indeed, the subsidized products would be unlikely to cause injury to the domestic industry of another WTO Member producing the same product.[137] The main issue with these subsidies is rather that they would cause adverse effects to producers that compete with Chinese producers of downstream products purchasing the exported inputs before subsequently

133 OECD, n 41.
134 Commission Implementing Regulation (EU) 2020/776, n 37, at recitals 726-735 and 758-777.
135 SCM Agreement, Article 5(a).
136 SCM Agreement, Article 6.3(a) to (c).
137 This is so because Article 6.3 concerns the negative effects of the sales of the "subsidized product" on the "like product". The product being subsidized must therefore be the same as that which is negatively affected and, as such, cannot be an upstream product.

selling their downstream products in China or in third countries' markets. In some situations, the subsidized products could, however, be considered to displace exports of the same products to China by another WTO Member but this would only occur in rare instances where there is competition at the level of the raw materials or input exported back to China.

On the other hand, subsidies granted to Chinese production SOEs abroad engaged in exporting final products to developed countries' markets could more easily be shown to cause adverse effects as their exports compete with like products in the countries of importation and in third markets.

With regard to subsidies granted to Chinese production SOEs established in developed countries in order to support them in supplying these countries' market from within, it would however not be possible to show adverse effects because there is no trade in goods taking place.[138]

Thus, while Article 10 of China's Protocol of Accession seemed at first to be a promising work around the hurdle of the wording of Article 2 of the SCM Agreement, it may not help in regulating many further types of subsidies given to Chinese production SOEs established abroad than Article 3 of the SCM Agreement. Indeed, this work around may only be useful in the situation where a non-prohibited subsidies granted to Chinese production SOEs abroad, which export their production either to China for further processing, or to other export markets to be sold to independent customers, is shown to cause adverse effects.

(iv) Direct subsidies to production SOEs established abroad as indirect subsidies to Chinese downstream industries

A possible way around the limitations of Articles 2, 3 and 5 of the SCM Agreement to address subsidies granted to Chinese production SOEs abroad, which export their production to China for further processing, could be to consider that, while these subsidies are granted to entities abroad, they indirectly benefit Chinese downstream industries. In turn, these Chinese downstream industries' products cause adverse effects to other WTO Members' industries producing like downstream products.

[138] Victor Crochet & Marcus Gustafsson, n 13.

WTO panels have acknowledged that the recipients of the financial contribution and the benefit do not have to be one and the same in all cases[139] and that a financial contribution can have several beneficiaries.[140] In fact, the phrase "a benefit is thereby conferred" in Article 1.1(b) of the SCM Agreement does not specify a particular manner in which a benefit should accrue.[141] Consequently, a financial contribution by a government to one recipient may be found to benefit a separate entity, for example, if that entity sells inputs to a downstream entity.[142] Similarly, in case of export buyer financing, although the financial contribution is initially granted to the purchaser established abroad, a benefit is ultimately conferred on the exporting producer in the subsidizing WTO Member.[143] Such a pass-through of the benefit cannot, however, be assumed. It must be established that the benefit from the initial financial contribution was passed downstream to another entity.[144]

It could therefore be argued that financing granted to Chinese production SOEs abroad, which export their production to China for further processing, indirectly benefits Chinese downstream industries to which these products are exported, thereby constituting subsidies to these downstream industries. In order to do so, it would have to be demonstrated either that the sales of the exported products back to China are not made at arm's-length, or that these sales confer a benefit on the Chinese purchasers (for example, because they are made at lower than market prices).[145]

If this can be demonstrated, a subsidy would be deemed to exist under the SCM Agreement. Yet, for multilateral remedies to be available, it would still need to be shown that the subsidy is specific. In this regard, in establishing specificity, "[t]he necessary limitation on access to the subsidy can be affected through an explicit limitation on access to the financial contribution, on access to the benefit, or on access to both."[146] Since the ultimate recipients of the benefit under this line of reasoning are located within the territory of China, the hurdle of Article 2 of the SCM Agreement that the recipient

---

139 Appellate Body Reports, *US – Countervailing Measures on Certain EC Products*, para. 110, *US – Softwood Lumber IV*, para. 142; Panel Report, *Brazil – Aircraft (Article 21.5 – Canada II)*, paras. 5.27-5.28.

140 Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 110.

141 Sherzod Shadikhodjaev, n 110.

142 Ibid.

143 This situation was at issue in Panel Report, , *Brazil – Aircraft*, paras. 2.1-2.6 and 4.19-4.20.

144 Appellate Body Reports, *US – Upland Cotton*, para. 464; Panel Report, *US – Large Civil Aircraft (2nd complaint)*, para. 7.277. In the context of countervailing measures, see Panel Reports, *US – Supercalendered Paper,* paras. 7.234-7.235, *US — Softwood Lumber III,* paras. 7.68-7.78, *US — Ripe Olives from Spain*, para. 7.154.

145 Appellate Body Reports, *US – Upland Cotton*, para. 464; Panel Report, *US – Large Civil Aircraft (2nd complaint)*, para. 7.277. In the context of countervailing measures, see Panel Reports, *US – Supercalendered Paper,* paras. 7.234-7.235, *US — Softwood Lumber III,* paras. 7.68-7.78, *US — Ripe Olives from Spain*, para. 7.154. See also, Sherzod Shadikhodjaev, n 110.

146 Appellate Body Report, *US — Anti-Dumping and Countervailing Duties (China)*, para. 378.

be located “within the jurisdiction of the granting authority” with regard to direct subsidies granted to Chinese SOEs abroad would be avoided.

Finally, for actions to be taken against such indirect specific subsidies, it would remain to be determined that they cause adverse effects to other WTO Members’ industries producing like downstream products. This could be established because these subsidies cause adverse effects to foreign producers that compete with Chinese producers of downstream products purchasing the inputs of the subsidized export before subsequently selling their downstream products in China or in third countries’ markets. As such, under this line of reasoning, the indirectly subsidized product is “like” the products negatively affected so that adverse effects can be established under Article 5 and 6 of the SCM Agreement.

3.1.2.2 Subsidies granted to domestic Chinese SOEs to establish greenfield production investments abroad or support their foreign production subsidiaries

The case of assistance granted to domestic Chinese SOEs in order to set up green field investments abroad or to support their foreign production subsidiaries raise slightly different legal issues, as in that case the receiver of the financial contribution is located within the territory of China, but the benefit is ultimately bestowed upon the production entity resulting from the investment abroad.

This factual situation arose in the above-mentioned anti-subsidy investigation against *Glass fibre fabrics* from Egypt. In that case, in addition to direct support from the Government of China to one of the subsidiaries incorporated in Egypt, the Commission also found that Chinese State-owned banks provided loans to the parent company in China which were subsequently channelled through to the Egyptian subsidiary due to inter-company loans between the subsidiary and the parent company.[147] The Commission also found that thanks to potential assistance from the Silk Road Fund and SASAC, the business group’s holding company was able to invest capital into one Chinese production SOE which, in turn, injected capital in a similar order of magnitude into its Egyptian subsidiary.[148]

147 Commission Implementing Regulation (EU) 2020/776, n 37, at recitals 745-757.
148 Ibid., at recitals 760-777.

A financial contribution provided to a domestic Chinese SOE but passed on to a subsidiary located abroad could fall within the definition of a subsidy under the SCM Agreement if the investigating authority established that the benefit of the initial subsidy was passed on downstream.[149] In order to be regulated under the SCM Agreement, such subsidies would also need to either constitute prohibited export subsidies or be specific and cause adverse effects to the interest of another WTO Member. In this regard, the issues and legal avenues would be similar to those discussed in Section 3.1.2.1 regarding subsidies granted to Chinese production SOEs incorporated abroad.

However, another legal path could be used in this case to demonstrate that the subsidy was granted to an entity "within the jurisdiction of the granting authority", so as to be specific in accordance with Article 2 of the SCM Agreement. As explained,[150] in establishing specificity, the limitation can be on access to the financial contribution, access to the benefit, or access to both.[151] In this sense, with regard to subsidies granted to domestic Chinese SOEs in order to set up green field investments abroad or to support their foreign production subsidiaries, while the benefit is ultimately bestowed upon the production entity outside of the Government of China's jurisdiction, the initial receiver of the financial contribution is established in China. It thus follows that such subsidies could also be found to be specific within the meaning of Article 2 of the SCM Agreement without having recourse to China's Protocol of Accession. However, only subsidies indirectly granted to Chinese production assets abroad which export their production either to China for further processing or to other export markets to be sold to independent customers could be regulated due to the limitations on available remedies imposed by Articles 3 and 5 of the SCM Agreement. Thus, subsidies provided to SOEs established abroad to supply the market within which they are established could not be addressed.

3.1.2.3 Subsidies granted to domestic Chinese SOEs to acquire foreign production assets

With regard to support granted to domestic Chinese production SOEs in order to acquire foreign production assets, the question of the geographical scope of application of the provisions of the SCM Agreement does not arise since the recipient enterprises are located within the territory of China.

---

149 Panel Reports, *US – Supercalendered Paper,* paras. 7.234-7.235, *US — Softwood Lumber III,* paras. 7.68-7.69. See also, Panel Report, *US — Ripe Olives from Spain*, para. 7.154. Sherzod Shadikhodjaev, n 110.

150 See Section 203.1.2.1(b)(iv) above.

151 Appellate Body Report, *US — Anti-Dumping and Countervailing Duties (China)*, para. 378.

Since the SCM Agreement does not specifically regulate "investment" subsidies,[152] the difficulties in regulating these subsidies under the SCM Agreement resides, instead, in establishing that this support directly, or indirectly, benefits the production of goods.[153]

Another difficulty is to demonstrate that these subsidies constitute prohibited subsidies or cause adverse effects in terms of trade flows to the interests of another WTO Member. Indeed, often the domestic Chinese SOEs will receive financial support to invest into foreign production assets and, as a consequence, will be in a better position than their competitors to put in a successful bid and purchase a foreign enterprise.[154] Yet, this support will generally not be tied to exportation and may not even have an impact on trade flows. This is so because in many instances, the acquisition of foreign production assets is not meant to increase exports but, instead, merely to supply that asset's market more directly from within or to acquire know-how, technical capabilities or sales networks.

In certain specific situations, the provisions of the SCM Agreement may, however, regulate subsidies granted to domestic Chinese SOEs to acquire foreign production assets. One such situation arose in the anti-subsidy investigation on imports of *Tyres* from China initiated by the Commission. In that case, the Commission found that one of the Chinese exporting producers, an SOE ultimately owned by SASAC, had received funding from SASAC, the Silk Road Fund and State-owned banks in order to facilitate its acquisition of a majority stake in the Pirelli Group, an Italian tyre manufacturer.[155] The Commission found that this funding constituted a subsidy. It enabled the Chinese exporting producer to acquire the necessary technology to produce and export product types which it could not previously manufacture and to restructure the group so as to segment the products produced in Italy by Pirelli and in China by the Chinese production SOE.[156] The Commission then went on to conclude that these subsidies were prohibited export subsidies because they specifically targeted Chinese SOEs making outward foreign investment and, importantly, that the aim of this particular investment was to increase exports from China by leveraging Pirelli's international sales network and segmenting products within the group.[157] The facts in this investigation were rather specific but would potentially have led to similar conclusions if assessed under the SCM Agreement, instead of the EU's anti-subsidy rules.

---

152 Gary Hufbauer, et al., n 12.
153 Panel Report, *Canada — Aircraft*, para 7.54. See further on this issue Gary Hufbauer, et al., n 12.
154 Gary Hufbauer, et al., n 12.
155 Commission Implementing Regulation (EU) 2018/1690, n 37, at recitals 334-339.
156 Ibid., at recitals 383-384.
157 Ibid., at recitals 379-416.

Thus, in most cases, "investment" support to domestic SOEs to acquire foreign production assets would not qualify as a subsidy susceptible to multilateral remedies under the SCM Agreement. Yet, in some instances, where such support indirectly benefits the production of goods and results in adverse trade effects, it may.

3.1.2.4 Shortfalls of using the SCM Agreement to regulate SOEs' "Going Out"

While the rules of the SCM Agreement could potentially cover some of the situations where the Government of China provides support to its SOEs for going out, it is unlikely that it would provide an adequate framework to address developed countries' concerns.

The rules of the SCM Agreement have already proven somewhat inappropriate in addressing China's domestic SOE subsidy problem. At most, these rules have, together with those of the Anti-Dumping Agreement, managed to reduce trade frictions caused by Chinese imports into developed countries by allowing them to impose countervailing and anti-dumping measures on these imports, sometimes at higher rates due to specific provisions under China's Protocol of Accession.[158] Indeed, no WTO dispute against China's provision of subsidies has ever moved to the panel stage.[159] This absence of litigation over China's domestic SOE subsidies does not arise because of lack of regulation over these subsidies, but rather due to lack of transparency regarding these subsidies, difficulties in proving that the conditions to regulate such subsidies are met as well as a lack of appropriate remedies under the SCM Agreement.[160] These deficiencies in dealing with China's support to domestic SOEs will also prevent the provisions of the SCM Agreement from adequately addressing the concerns over government support to SOEs going out.

Regarding the issue of a lack of transparency of Chinese domestic subsidies, Article 25 of the SCM Agreement provides that WTO Members shall notify the subsidies they grant. While China has worked towards providing more thorough subsidy notifications, these have solely focused on subsidy programs (such as tax exemptions) and not on one-off subsidies (such as loans, grants or capital injections).[161] Thus, the record of notification with regard to subsidies granted specifically to Chinese

---

158 Mark Wu, n 1; Weihuan Zhou, et al., n 3; Chad Bown & Jennifer Hillman, n 4; Andrew Land, *Heterodox markets and 'market distortions' in the global trading system*, (2019) Volume 22, Journal of International Economic Law, 677.

159 See, *China — Subsidies to Producers of Primary Aluminium*, *China — Domestic Support for Agricultural Producers*, *China — Certain Measures Affecting the Automobile and Automobile-Parts Industries* and *China — Measures concerning wind power equipment*, which never moved past the consultation stage.

160 Chad Bown & Jennifer Hillman, n 4.

161 See New and full Notification pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures, China, 27 August 2021, G/SCM/N/372/CHN.

SOEs has been poor,[162] since support to SOEs mostly takes the form of one-off subsidies (that is subsidies which are not granted under a program such as individual loans or capital injections).[163] This is exacerbated as there is no penalty for failing to notify subsidies.[164] This lack of notification, resulting in deficient information available, has hindered the use of the rules of the SCM Agreement to challenge support granted to domestic Chinese SOEs before the WTO. When it comes to subsidies granted to SOEs abroad, Article 25.2 of the SCM Agreement in any event limits the geographical scope of the obligation to notify to subsidies "granted or maintained within [the subsidizing WTO Members'] territories". As such, China is under no obligation to notify subsidies granted to Chinese SOEs' foreign subsidiaries.

The issue in using the rules of the SCM Agreement to regulate government support granted to Chinese SOEs going out is further accentuated by the fact that this support has mostly taken the form of one-off subsidies.[165] One-off subsidies have historically been difficult to regulate under WTO rules as they are not enshrined in published legal acts nor are their details disclosed. As such, mounting a WTO challenge against such subsidies or even raising concerns over them at the WTO SCM Committee has proven a difficult task. These subsidies are by consequence usually only addressed through anti-subsidy investigations which grant the investigating WTO Member evidence gathering powers.[166]

A further issue with regulating one-off subsidies through WTO challenges is that such challenges only provide for prospective remedies. Indeed, for subsidies found to be prohibited, the remedy is that the subsidy must be withdrawn.[167] For those found to be specific and causing adverse effects, the remedy is that appropriate steps to remove the adverse effects of the subsidy must be taken or the subsidy must be withdrawn.[168] Since one-off subsidies are, by their very nature, occurring at once or over a short period of time, they cannot be withdrawn for the future. Litigating such subsidies therefore leads to limited results in terms of implementation of an adverse ruling by the subsidizing

---

162 Robert Wolfe, *Sunshine over Shanghai: Can the WTO Illuminate the Murky World of Chinese SOEs?*, (2017), Volume 16, World Trade Review, 713.
163 Commission Implementing Regulation (EU) 2018/1690, n 37, recital 377.
164 Chad Bown & Jennifer Hillman, n 4.
165 See Section 2.2 above.
166 SCM Agreement, Article 12.
167 Ibid., Article 4.7.
168 Ibid., Article 7.9.

WTO Member. As a result, one-off subsidies have only been challenged at the WTO in cases of one-off subsidies of significant magnitude such as in the aircraft disputes.[169]

As discussed in Section 2.2, China's support to its SOEs for going out do not take the form of subsidy programs such as tax exemptions or even financing programs. Instead, this support takes the form of a myriad of one-off measures such as loans by State-owned banks or grants and capital injections by SASAC and the Silk Road Fund. Hence, it seems unlikely that the rules of the SCM Agreement could be used to adequately address subsidies granted to Chinese SOEs going out as developed countries have little information at their disposal to ascertain how this support exactly takes place and litigating these subsidies often does not lead to useful remedies.

3.2 Regulating State-owned enterprises' foreign expansion under bilateral and regional trade and investment agreements

In the past five years, the regulation of SOEs has played an increasing role in FTAs signed by several large trading powers such as the United States of America ("***US***"), the EU, Australia, Canada, and Japan.[170] In this section, I thus assess whether bilateral and regional agreements' rules on SOEs and support thereto could be used to address the concerns of China Inc.'s going out. I start by assessing the rules of bilateral and regional agreements to which China is a party (Section 3.2.1). I then turn to the EU – China Comprehensive Agreement on Investment ("***CAI***") which has been agreed in principle but not yet ratified by the EU and China (Section 3.2.2).[171] Finally, I address the provisions of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("***CPTPP***") which China is seeking to join (Section 3.2.3).[172]

3.2.1 Free Trade Agreements to which China is a Party

China currently has seventeen FTAs in place with its trade partners, including developed countries such as Australia, Switzerland, South Korea and New Zealand. This number also includes the recently concluded Regional Comprehensive Economic Partnership Agreement ("***RCEP***") covering

---

169 See, WTO disputes, *US – Large Civil Aircraft* and *EC and Certain Member States – Large Civil Aircraft*.

170 Leonardo Borlini, *When the Leviathan goes to the market: A critical evaluation of the rules governing state-owned enterprises in trade agreements*, (2020), Volume 33, Leiden Journal of International Law, p. 313.

171 European Commission, *EU and China reach agreement in principle on investment*, 30 December 2020, available at https://trade.ec.europa.eu/doclib/press/index.cfm?id=2233.

172 Mireya Solis, *China moves to join the CPTPP but don't expect a fast pass*, 23 September 2021, Brookings, available at https://www.brookings.edu/blog/order-from-chaos/2021/09/23/china-moves-to-join-the-cptpp-but-dont-expect-a-fast-pass/.

sixteen countries in East Asia.[173] While these FTAs go further than the WTO Agreements in many respects, they do not include rules regarding SOEs and subsidies.[174] As the main bargaining force behind these agreements, it thus seems that China has been reluctant to include provisions on these issues. As a result, FTAs to which China is a Party will not provide any basis to regulate Chinese SOEs and support thereto, let alone SOEs going out.

3.2.2 EU – China Comprehensive Agreement on Investment

The EU and China reached an agreement in principle on 30 December 2020 regarding the CAI. While its prospects for ratification remain uncertain at this point due to a row of sanctions between the EU and China,[175] the provisions of the CAI are worth looking at because the CAI constitutes the first trade-related agreement between China and another major economic power. In this regard, the provisions of the CAI regarding SOEs discussed below are relatively similar to those found in other recent FTAs concluded by the EU, such as the EU – UK Trade and Cooperation Agreement[176] or the EU – Vietnam FTA,[177] and are thus likely to represent the EU's standard provisions on this issue.

Article 3bis of Section 2 of the CAI is of particular relevance for this paper as it relates to "covered entities". The term "covered entity" is synonym to SOE and is defined quite broadly.[178] Article 3bis(1) covers enterprises in which a Party to the agreement, either directly or directly, owns a majority of the capital, controls a majority of voting rights, holds the power to appoint a majority of the board or has the power to control the decisions of the enterprise through any other ownership interest. It also covers enterprises in which a Party has the power to direct its actions or exercise an equivalent level of control through its laws and regulations.[179]

---

173 For a full list of FTAs to which China is a party, please refer to the website of the Ministry of Commerce of the People's Republic of China available at http://fta.mofcom.gov.cn/index.shtml.

174 Leonardo Borlini, n 170.

175 European Parliament, *MEPs refuse any agreement with China whilst sanctions are in place*, 20 May 2021, available at https://www.europarl.europa.eu/news/en/press-room/20210517IPR04123/meps-refuse-any-agreement-with-china-whilst-sanctions-are-in-place.

176 Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (hereafter "***EU - UK TCA***"), Articles 376-382.

177 Free Trade agreement between the European Union and the Socialist Republic of Viet Nam (hereafter "***EU – Vietnam FTA***"), Chapter 11.

178 Although SOEs with a turnover of less than 200 million Special Drawing Rights are excluded from the scope of the substantive obligations discussed below. See, CAI, Section II, Article 3bis(2)(d).

179 CAI, Section II, Article 3bis(1)(a). The scope also extends to State designated monopoly or oligopoly of suppliers/purchasers.

These covered entities are required to "act in accordance with commercial considerations in their purchases or sales of goods or services in the territory of the Party" and to accord treatment no less favourable than they accord, in like situations, to investors and enterprises of the other Party in their purchases and sales of goods or services.[180] Finally, each Party must endeavour to ensure that its covered entities respect international good practices of corporate governance and transparency.[181]

These provisions constitute an important step forward in regulating Chinese SOEs' behaviours as they are more far reaching than those of the WTO regarding STEs. The scope of the definition of a covered entity is particularly interesting when compared with that of a "state-owned enterprise" under the CPTPP, discussed below,[182] as it covers entities directly or indirectly controlled by the government through any form of interest or through its laws. Most of China Inc.'s SOEs are likely to fall under this definition including downstream subsidiaries and joint ventures. However, similar to the WTO rules on STEs, these provisions appear of limited value in regulating SOEs going out given that they are limited to regulating covered entities' "purchases or sales of goods or services in the territory of the Party".[183] As such, concerns over Chinese SOEs going out fall outside both the geographical and substantial scope of these provisions.

While the substantive provisions of the CAI regarding SOEs' behaviour may not address the concerns over China's SOEs going out, the transparency provisions may be of assistance in better understanding China Inc.'s structure and functioning. Indeed, a Party to the CAI may request the other Party to provide further information regarding the covered entities of that other Party if it has reasons to believe that the commercial activities of a covered entity adversely affect its interests under Article 3(bis). The information thereby provided should cover share ownership, voting rights, special shares, organisational structure of the enterprise, annual revenue or total assets, and a description of which competent authority is responsible for exercising the government's ownership functions with respect to the enterprise.[184]

---

180 CAI, Section II, Article 3bis(1) and Article 3bis(3).

181 CAI Section II, Article 3bis(4)(b). See also in this regard, EU - UK TCA, Article 381(1) which provides that "[e]ach Party shall respect and make best use of relevant international standards including the OECD Guidelines on Corporate Governance of State-Owned Enterprises."

182 See Section 3.2.3.1 below.

183 CAI, Section II, Article 3bis(1) and Article 3bis(3).

184 CAI, Section II, Article 3bis(4)(a)(i)-(vi).

When it comes to subsidies, the provision entitled "Transparency of Subsidies" in the CAI[185] sets out that a subsidy shall be deemed to exist if the conditions set out in Article 1.1 of the SCM Agreement are fulfilled, "irrespective of whether it is granted to an enterprise operating in services or non-services sectors".[186] This provision, however, only applies if the subsidies are specific within the meaning of Article 2 of the SCM Agreement.[187] Furthermore, it only provides for transparency and consultation mechanisms with a view to limiting the negative adverse effects of subsidies between the Parties.[188] As such, while the subsidy provision of the CAI extends to the supply of services in addition to the production of goods, it will be of no further assistance in regulating subsidies granted to Chinese SOEs' going out due to the geographical limitation of the specificity criterion under Article 2 of the SCM Agreement which restricts its scope of application.[189] This is further hindered by the lack of legal remedies available.[190]

3.2.3 Comprehensive and Progressive Agreement for Trans-Pacific Partnership

The CPTPP is an FTA between Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore and Vietnam that entered into force on 30 December 2018. It was conceived as the Trans-Pacific Partnership ("***TPP***"), which was spearheaded by the US, fell through. It could not be ratified by the US following the election of President Donald Trump who opposed the deal.

One of the reasons behind the TPP was to agree on new rules, including amongst others on SOEs, without China at the negotiating table, before subsequently inviting China to join the deal once it had entered into force.[191] While the TPP fell through, the CPTPP incorporates by reference the provisions of the TPP.[192] On 16 September 2021, China officially applied to join it.[193]

There have been discussions as to whether the provisions of the CPTPP do indeed constitute a step forward in regulating SOEs and support thereto as compared to the rules enshrined in the GATT

185 CAI, Section III, Subsection II, Article 8.
186 CAI, Section III, Subsection II, Article 8(1).
187 CAI, Section III, Subsection II, Article 8(2).
188 CAI, Section III, Subsection II, Articles 8(5) to 8(7).
189 See Section 3.1.2.1 above.
190 CAI, Section III, Subsection II, Article 8(10).
191 Julien Fleury & Jean-Michel Marcoux, n 5.
192 CPTPP, Article 1.
193 Mireya Solis, n 172.

1994, the SCM Agreement and China's WTO Protocol of Accession.[194] However, no one has discussed whether these provisions could assist in regulating the activities of Chinese SOEs abroad. As such, it is worth addressing in this paper whether the provisions of the CPTPP on SOEs could be used to address Chinese SOEs going out. This is particularly relevant as similarly worded provisions have been included in recent FTAs signed between the US and third countries[195] as well as between Australia and the United Kingdom.[196]

3.2.3.1 Scope

An SOE under the CPTPP is defined as an enterprise in which a Party to the agreement directly owns a majority of the capital, controls a majority of voting rights or holds the power to appoint a majority of the board.[197] This definition[198] is significantly narrower than that of a "covered entity"[199] under the CAI as it excludes entities over which the government has a *de facto* effective influence through minority shareholding[200] or other legal means, such as through a Chinese SOE's Communist Party committee.[201]

In this regard, similar to China's WTO Protocol of Accession or the CAI, the definition of SOEs under the CPTPP does not seem to draw a distinction between SOEs incorporated in the State-owner's territory or abroad. However, Article 17.2.1 provides that these provisions apply to "the activities of [SOEs] of a Party that affect trade or investment between parties within the free trade area".[202] Furthermore, certain of the obligations of the CPTPP with regard to SOEs draw a distinction between SOEs and SOEs which are "a covered investment in the territory" of another Party.[203] This seems to indicate that substantial obligations with regard to SOEs under the CPTPP only extend to SOEs

---

194 Ines Willemyns, n 5 arguing that they do and Weihuan Zhou, *Rethinking the (CP)TPP as a Model for Regulation of Chinese State-Owned Enterprises*, (2021), Volume 23, Journal of International Economic Law, 1 arguing that they do not.

195 United States-Mexico-Canada Agreement ("***USCMA***"), Chapter 22.

196 Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and Australia ("***UK – Australia FTA***"), Chapter 18.

197 CPTPP, Article 17.1.

198 It is also worth noting that many SOEs are excluded from the scope of the substantive obligations including those at sub-central levels of government. See, CPTPP, Annexes 17-D, 17-E and 17-F.

199 As under the CAI, SOEs with a turnover of less than 200 million Special Drawing Rights are excluded from the scope of the substantive obligations discussed below. See, CPTPP, Article 17.13.5 and Annex 17-A.

200 This is, however, covered under the definition of SOE in the USMCA. See, USMCA, Article 22.1.

201 Weihuan Zhou, n 194. See arguing otherwise, Mitsuo Matsuhita & C. L. Lim, n 5 with whom I do not concur.

202 Footnote 9 thereto adds that it also covers situations where the activities of a Party's SOEs displace, impede or undercut like goods of another Party in the market of non-Party.

203 CPTPP, Articles 17.6.3, 17.7 & 17.8.

established abroad insofar as the relevant provision provides so and, in any event, do not extend outside the combined territory of the Parties.

3.2.3.2 Substantive obligations

The first substantive obligation provided by the CPTPP with regard to SOEs is that SOEs are required to act in accordance with commercial considerations in their purchases or sales of goods or services. The second obligation is that they must accord treatment no less favourable in their sales or purchases of goods and services from enterprises of other Parties as well from enterprises of another Party that are covered investment in the territory of the State-owner than to like domestic goods or services or like goods or services from any other country.[204] These obligations are similar to those discussed above under the CAI and appear of limited value in regulating China Inc.'s going out because they are limited to the purchase and sale of goods.

However, the CPTPP does go a step further than the CAI in regulating SOEs as it contains substantive provisions regarding non-commercial assistance to SOEs. These provisions, in essence, replace the subsidy chapters traditionally found in FTAs.[205] They prohibit a Party from causing adverse effects to the interests of another Party or injury to its domestic industry through the provision of non-commercial assistance to SOEs. "Non-commercial assistance" is defined in rather similar terms to "a subsidy" under the SCM Agreement except that it is not limited to assistance for the production of goods and must be granted "by virtue of [the SOE]'s government ownership or control" to meet the definition.[206] This term introduces a test akin to the specificity test under Article 10 of China's WTO Protocol of Accession as it must be demonstrated that the Party limits the assistance to SOEs, the assistance is predominately used by SOEs, is disproportionately provided to SOEs or discretionarily favours SOEs in providing the assistance.[207]

Under the CPTPP, "adverse effects"[208] first arise in situations where subsidised goods negatively affect imports of like goods from another Party into the market of the Party providing the non-commercial assistance, or into the market of another Party or a non-Party.[209] Interestingly, adverse

---

204 CPTPP, Article 17.4.
205 Julien Fleury & Jean-Michel Marcoux, n 5.
206 CPTPP, Article 17.1.
207 CPTPP, Article 17.1.
208 Interestingly, the concept of "adverse effects" under the CPTPP appear to cover both the concepts of "injury to the domestic industry of another Member" and of "serious prejudice to the interests of another Member" under the SCM Agreement while the concept of "injury to a domestic industry", discussed below, is defined differently under the CTPP and the SCM Agreement.
209 CPTPP, Articles 17.6.1(a), 17.6.2(a), and 17.7.1(a) to (c).

effects also cover situations where subsidised goods negatively affect the domestic sales of like goods of an enterprise that is a covered investment in the territory of another Party.[210] As such, these provisions also grant a further level of protection to SOEs of one Party established in the territory of another Party.[211] The first real novelty is, however, the inclusion under adverse effects of the situations where SOEs supply subsidized services into the territory of another Party from the territory of the State-owner, but also through an enterprise that is a covered investment in the territory of any other Party.[212] The latter is particularly noteworthy with regard to regulating Chinese SOEs going out. It could be used to address situations where Chinese SOEs established abroad receive support from the Government of China in order to supply services in the territory of the Party where they are established or to other Parties' markets.[213]

"Injury to a domestic industry" Party, under the CTPPP, arises when the use of non-commercial assistance provided to an SOE which is a covered investment in the territory of a Party negatively affects the domestic industry[214] of that Party producing like goods.[215] These provisions thus fill the gap discussed above with regard to the provisions of the SCM Agreement[216] as they can be used to address situations where Chinese SOEs established abroad cause injury to the industry of the Party within which they are established as a result of the support they receive from the Government of China.

Finally, the CPTPP provides for transparency obligations with regard to SOEs which go slightly further than the CAI, as they also cover information regarding policy or programmes concerning non-commercial assistance to SOEs, including for the provisions of one-off subsidies such as loans and grants.[217]

---

210 CPTPP, Article 17.7.1(a) and (b)(i).
211 Mitsuo Matsuhita & C. L. Lim, n 5.
212 CPTPP, Articles 17.6.1(c), 17.6.2(c), 17.7.1(d) and (e).
213 CPTPP, Annex 17-C provides that the Parties should conduct further negotiations to extend the scope of these disciplines to the supply of services by SOEs in the market of non-Parties.
214 The "domestic industry" of a Party excludes the SOE which is a covered investment and has received the non-commercial assistance. CPTPP, fn 19 to Article 17.6.3.
215 CPTPP, Articles 17.6.3 and 17.8.
216 See, Section 3.1.2.1.
217 CPTPP, Article 17.10.

3.2.3.3 Dispute resolution

The CPTPP sets up a dispute resolution mechanism which covers the provisions of SOEs.[218] An interesting feature in attempting to solve some of the evidentiary issues arising from the litigation of subsidies is that it introduces a mechanism whereby, in case of non-cooperation in the information-gathering process by the respondent, the panel should draw "adverse inferences" in making factual findings to solve the dispute.[219] The remedies provided by the CPTPP are, however, similar to those under the SCM Agreement, as the Party found to violate the agreement must "eliminate the non-conformity", provide compensation or face the suspension of benefits.[220]

4. CONCLUSION

Having consolidated the functioning of its new form of State capitalism at home, China has been expanding its economic model into foreign markets. Its SOEs have been at the forefront of this expansion, setting up greenfield investments abroad and acquiring foreign targets. This has raised concerns in developed countries that, in doing so, Chinese SOEs are not only pursuing State interests but that the Chinese State is turning them into "international champions", capable of taking the spots of Western multinationals as business hegemons. This sentiment is exacerbated by the understanding that Chinese SOEs expand abroad with the financial backing of their government.

There are ongoing discussions as to whether international economic law is adequate to discipline Chinese SOES domestically. In any event, one thing is for certain: international economic law does not provide an adequate avenue to respond to concerns over Chinese SOEs foreign economic expansion. To start with, regarding State's intervention in SOEs behaviours, the rules of the WTO and FTAs at most provide that SOEs cannot discriminate, and must act in accordance with commercial considerations, in their sales and purchases of goods and services. Such rules are of limited use in addressing concerns of Chinese SOEs going out. The rules of the WTO and FTAs, however, are more relevant when it comes to regulating the financial backing that the Government of China gives to its SOEs going out. The rules of the SCM Agreement could potentially prove useful in regulating State's support to SOEs established or expanding abroad when they are engaged in exports of raw materials and semi-finished products to China or of final products to developed countries' markets. At the same time, the provisions of certain FTAs, and in particular those of the

218 CPTPP, Article 28.
219 CPTPP, Article 17.15 and Annex 17-B.
220 CPTPP, Articles 28.19 and 28.20.

CPTPP, could be used in situations where Chinese SOEs established abroad receive support from the Government of China in order to supply services or to produce and sell goods in the territory of the country where they are established. While these constitute a step in the right direction in dealing with concerns over China SOEs going out, they only cover a fraction of these concerns.

This lack of adequate framework in international economic law to solve the issues arising from China Inc.'s going out is what may have led to a backlash of unilateral measures against Chinese SOEs expanding abroad, ranging from measures by the US against Chinese companies established therein[221] to additional investment screening mechanisms on investments by SOEs in many developed countries.[222] While such responses may be useful in addressing some of the effects of China Inc.'s going out in developed countries' markets, they tend to ostracize China which may see them as arbitrary and discriminatory.

Furthermore, such responses do nothing to solve developed countries' concerns in foreign markets. In that regard, developed countries have attempted to design multilateral responses to Chinese SOEs going out in third countries. They have tried to coerce allies into aligning with their interests in taking unilateral actions against Chinese SOEs,[223] to create rival schemes to China's Belt and Road Initiative,[224] and to redouble efforts to secure access to foreign raw material sources through diplomatic means.[225] Despite these efforts, it seems that China Inc.'s is gaining speed in pursuing its foreign economic expansion while the West is stalling.

A better solution to respond to SOEs going out might be to engage in further thinking on how to draft legal provisions which could be inserted in future FTAs with China. Such provisions should perhaps not only focus on situations of harmful financial assistance to Chinese SOEs going out. They should also address the underlying issue that, when the State is the owner, companies may not be motivated only by profits, but also by State interests.

---

221 *The western backlash against China's dealmaking*, 9 April 2019, Financial Times; Simon Lester, *China Telecom Americas Asks for Stay of FCC Order*, 14 November 2021, China Trade Monitor.

222 Australia, Foreign Acquisitions and Takeovers Act 1975 and Foreign Acquisitions and Takeovers Fees Imposition Act 2015; Canada , Investment Canada Act; US, Foreign Investment and National Security Act.

223 Laura Hughes & Helen Warrell, *Mike Pompeo calls on UK to choose sides on China*, 10 June 2020, Financial Times.

224 European Commission, Joint Communication to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank - The Global Gateway, Brussels, 1.12.2021 JOIN(2021) 30 final.

225 European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Critical Raw Materials Resilience: Charting a Path towards greater Security and Sustainability, 3 September 2020, COM(2020) 474 final.