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TRADE RULES OF STATE ENTERPRISES: A LAWMAKING PERSPECTIVE

Shixue Hu*

ABSTRACT

State Enterprises are important actors in global trade, yet their regulation is a highly contentious issue that presently troubles the WTO and U.S.-China trade talks. This article proposes a typological framework of the multinational, regional, and bilateral trade rules concerning state enterprises. It compares their similarities and divergences from a lawmaking perspective, analyzing how lawmakers mix and match legal elements of ownership, control, purpose, authorization, function, activity, and industry of state enterprises with diverse policy ends. It reveals that some elements regulate behaviors while others pay more regulatory attention to the firm’s identity. These action-oriented and actor-focused approaches provide different lawmaking options. This typological study summarizes the existing doctrinal analysis of a particular provision under the same framework. It also provides a list of available lawmaking elements for regulators to pin down their policy differences towards state enterprises in international trade, enabling future lawmaking amidst the current geopolitical struggles on these entities.

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INTRODUCTION

The issue of how to identify and regulate state enterprises (“SEs”) in international trade is an under-addressed aspect of the U.S.-China trade war and an unresolved piece of the regulatory regime of the World Trade Organization (“WTO”). In the past decade, these enterprises have played important roles in the development of many countries, yet there have been increasing concerns regarding the fuzzy distinction between state and business actors in global trade.¹ The WTO has the world’s largest multinational dispute resolution mechanism, but critics have questioned its inability to regulate SEs and described it as “an ineffective policemen of an outdated rulebook” unsuited for the challenges of the 21st century.²

In 2011, the Obama administration suspended the routine re-appointment of the WTO Appellate Body members in response to several WTO decisions it perceived as contrary to U.S. interests.³ In particular, the United States complained that the WTO’s structure and rules failed to effectively discipline Chinese SEs and state driven capitalist economies, which it considers too far from the free-market model. The United States also claimed that the existing WTO rulebook needed to be updated.⁴ In 2018, this persistent dissatisfaction eventually escalated into a trade war between the United States and China, during which the Trump Administration refused to appoint new members to the WTO’s Appellate Body and threatened to exit the WTO.⁵ Of the many issues that plague the existing WTO

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¹ See Organization for Economic Co-operation & Development [OECD], State-Owned Enterprises as Global Competitors 83 (2016).
system, it is clear that the regulation of SEs in trade has become urgent. This issue presents an existential challenge not only for the future of the U.S.-China trade relationship but also for the future of the world’s largest multinational trade organization and its rules-based system.

Some WTO members adopted regional trade agreements (“RTAs”) as an alternative legal mechanism to reshape the multilateral norms under which recent rules regarding the identification and regulation of SEs have witnessed paradigm shifts. Current discussions of RTAs usually employ a doctrinal analysis that compares a specific RTA with the existing WTO rules and cases, or approaches RTAs from a geopolitical angle that examines the strategic and economic implications for the signatories. However, typological analyses of SE rules among RTAs that either compare SE clauses among RTAs according to their geographic regions or by their length and level of comprehensiveness are just beginning to emerge. Therefore, the issue of identifying what comprises SEs continues to echo throughout the long-lasting debate in international law regarding the precise boundary between state and non-state actors.

By reviewing the SE trade rules within their policy context, this article provides a framework that highlights the divergent lawmaking methodologies that attempt to identify and regulate SEs based on different elements including their ownership, control, purpose, authorization, function, activity, and industry. It illustrates how different actors, with different policy considerations, mix and match these elements to generate SE trade rules. While


some emphasize the domestic identity of a SE, others pay more attention to their behavior in specific contexts. A unified framework helps comprehension and theorization of the existing SE trade rules, but also generates a constructive and practical legal narrative that can be used in future treaty negotiations and domestic policy discussions to resolve the contentious, dead-end geopolitical debates regarding SEs.

Part I of this article will introduce the current WTO SE rules as a background. It applies this framework to the WTO rulebook, explaining its origin and animating policy considerations. A better understanding of the existing WTO rules is essential before proposing any sound reforms to update the WTO rulebook.

Part II will pay particular attention to two divergent treaty-making approaches in RTAs, which supplement or reform the WTO rules. The actor-oriented approach singles out SEs from other entities primarily based on their level of state ownership or level of governmental control or authorization. Once identified, SEs are subject to a separate or additional set of rules. The other approach is action-oriented. It does not differentiate SEs from other types of monopolies ex ante by jurisdiction ratione personae. Instead, it subjects all types of companies and their cross-border activities to regulatory review based on their behavior. Thus, the former regulation approach is most concerned with the institution’s domestic identity, and the latter with activity. To illustrate such regulatory divergence, this part will examine the new, influential mega-RTAs as examples.

The analysis of these mega-RTAs helps reveal how the key players of global trade, notably the United States and China, have yet to reach consensus on new norms to govern SEs. Even worse, their regulatory differences have escalated into ideological conflicts that have manifested into a trade war that may eventu;lly split world trade and undermine the rules-based system. To examine and address this existential fissure, Part III of this article will apply the same framework of lawmaking to the two countries’ recent domestic regulations concerning SEs. It identifies several gaps as well as overlapping elements in their SE-related regulatory methodologies. The applications of the framework indicate a lawmaking opportunity where the two sides could and should further communicate about and negotiate SE trade rules instead of raising political and ideological hostilities in the trade talks. Part IV concludes.

I. THE MULTINATIONAL SYSTEM

This part will briefly review the evolution of SE regulations in the WTO with a focus on their historical policy considerations. The WTO generally does not base its regulations on ownership. Early lawmaking efforts only led to a principal rule in the General Agreement on Tariff and Trade

10. OECD, supra note 1, at 83.
("GATT") 1947 article XVII, which was later incorporated into the GATT 1994. By reviewing treaty negotiation history, special agreements and evolving case law, this part summarizes subtle differences between the various regulatory approaches, which reflect the organization’s effort to balance diverse policy interests in SEs.

A. Early Policy Considerations and GATT 1947

Post-war international trade was stifled under the pressure of protectionist measures during the 1920s and 1930s, then the United States and the United Kingdom, the two leaders at the time, wished to set out at least some common principles on trans-Atlantic trade. In the 1944 U.S. Draft Charter, the United States proposed a regulatory regime on SEs based on control, characterized by a broad and flexible approach, as the sole determinant for an SE. This proposal was soon challenged at the London session, where some delegates did not support the broad inclusion of all government-controlled enterprises as SEs, but instead countered with a regulatory regime based on official authorization as the determinative element of an SE, effectively narrowing the scope of regulation and providing more certainty.


Article XVII (1):

“(a) Each contracting party undertakes that if it establishes or maintains a State enterprise, . . . such enterprise shall . . . act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders.
(b) Such enterprises shall . . . make any such purchases or sales solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale, and shall afford the enterprises of the other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales.
(c) No contracting party shall prevent any enterprise . . . under its jurisdiction from acting in accordance with the principles of subparagraphs (a) and (b) of this paragraph.”


13. See JAN HOOGMARTENS, EC TRADE LAW FOLLOWING CHINA’S ASCENSION TO THE WTO 60 n.103 (2004) ("The US Draft Charter of GATT 1947 contained a definition of state enterprise in the section on state trading: ‘For the purposes of this Article, a State enterprise shall be understood to be any enterprise over whose operations a Member government exercises, directly or indirectly, a substantial measure of control.’").
for domestic trade authorities. The article put SEs and privately owned firms with special privileges from governments in the same position. The GATT’s preparatory committee explained that “the term ‘state enterprise’ in the text of article XVII did not require any special definition; it was the general understanding that the term includes . . . any agency of government that engages in purchasing or selling.” It intended to impose discipline on all possible discriminatory behaviors by actors of both private and public ownership.

Paragraph 1(b) disciplined trade activities of SEs by requiring that imports or exports by SEs be guided by commercial considerations, thus shifting the regulatory focus to the conduct of SEs. The interpretative note ad this article further explained that the policy requirement of non-discrimination under 1(a) did not aim to limit SEs’ businesses. Instead, it required that SEs trade “according to commercial considerations” afford other enterprises opportunities “in accordance with customary business practice.”

Paragraph 1(b) thus undertook a case-by-case application of this article that required careful review of the conduct of SEs.

In addition, GATT 1947 also recognized the importance of reciprocal communication and transparency to decrease possible distortions by both SEs’ unfair practices and uneven domestic regulations concerning the state sector. Article XVII’s third and fourth paragraphs urged GATT members to actively exchange information concerning domestic SEs and collaboration in future policy negotiations. These paragraphs were designed to serve two policy goals. First, more information about SEs would help regulators ensure that foreign SEs played fairly and transparently in transnational markets. Second, more communication between members would better recon-

14. Id. at 473. Some delegates at the London session of the Preparatory Committee hoped to add a reference to “effective control over the trading operations of such enterprise,” but others “considered that in such circumstances it would be proper that the government conferring the exclusive or special privileges should assume the responsibility of exercising effective control . . . .” Id.


17. See GATT 1947, supra note 11, art. XVII(1)(b).

18. Interpretative Note Ad Article XVII And Uruguay Round Understanding On Interpretation Of Article XVII, para. 3.

19. Id, para.1.

20. Id.

21. Id. art. XVII(3)–(4).
cile diverging views and regulatory rationales on SEs. Varying domestic regulations could further distort the otherwise level playing field.\(^{22}\)

GATT 1947 also includes an Ad Note to articles XI, XII, XIII, XIV, and XVIII that covers SE operations. It provides that these import or export restriction rules shall include restrictions made effective through state trading companies, putting them on an equal footing with other enterprises.\(^{23}\) In short, the substantive rules and principles generally did not single out SEs based on their domestic identity.

From 1948 to 1994, the regulation of SEs and the issue of subsidies appeared and were further clarified by different GATT organizations. The first discussion arose in 1959 when a Panel on Subsidies and State Trading Enterprises discussed SEs and their subsidies. The Panel interpreted the scope of SEs in GATT 1947 paragraph 1(a) as including authorization of the government and organizational function to evaluate SEs’ market power.\(^{24}\) Later, in 1964, the Committee on the Legal and Institutional Framework of the GATT in Relation to Less-Developed Countries responded to a request from developing countries to interpret article XVII on State Trading Enterprises. The Committee agreed that GATT 1947 does not distinguish SEs from private corporation merely because they are publicly owned or endowed with specific public purposes, nor does it prevent a state from establishing or maintaining SEs in its early stages of development. Notably, it pointed out that “in interpreting the provisions contained in article XVII of the GATT 1947, contracting parties should be sympathetic to the need for developing contracting parties to make use of state-trading enterprises as one means of overcoming difficulties in their early stage of development.”\(^{25}\) The 1989 Korea – Beef Panel rejected government control as the sole determinant to identify SEs but emphasized their specific activity in clarifying whether or not the SE in question was implementing governmental measures. The panel held the view that “the mere existence of producer-controlled import monopolies could not be considered as a separate import restriction inconsistent with the General Agreement” and noted that “the activities of such enterprises had to conform to a number of rules contained in the General

22. OECD, supra note 1, at 86.


24. Panel on Subsidies and State Trading, Final Report on State Trading, ¶ 21, L/1146 (May 24, 1960). (The Panel wrote in its report that “the word ‘enterprise’ is not to mean any instrumentality of government . . . . The term ‘enterprise’ was used to refer either to an instrumentality of government which has the power to buy or sell, or to a nongovernmental body with such power and to which the government has granted exclusive or special privileges.”).

Agreement.” In Japan – Agricultural Products, the Panel held that the purpose of the Ad Note was “to extend to state-trading the rules of the General Agreement governing private trade and to ensure that the contracting parties cannot escape their obligations with respect to private trade by establishing state-trading operations.”

The above lawmaking elaborations and cases during the lifespan of GATT 1947 showed the WTO’s early effort to balance diverse policy goals. To minimize possible distorting effects due to the privileges granted to SEs, GATT 1947 incorporated an analysis of function as a supplement to state authorization, thus avoiding a fixed definition of SEs that might have been improperly used by states as an excuse to escape their trade commitments. It took a flexible approach and slightly enlarged the scope of application; the rule would not be limited to enterprises with governmental authorization but to all types of entities that might enjoy exclusive privileges from the government. In addition, the case law of GATT 1947 reemphasized activity so that all government-related entities and their trades would be covered, regardless of the type of ownership. This balance among policies encouraged developing states to establish SEs as development tools, so long as those SEs acted in accordance with GATT principles.

B. GATT 1994

The Uruguay Round of Negotiations established the WTO and GATT 1994, inheriting GATT 1947 rules and its regulatory focus on SEs’ authorization, function, and activities. The attached Understanding on the Interpretation of article XVII explicitly adopted the elements of the previous GATT 1947 rules and did not emphasize ownership.

The regulatory focus of later WTO cases continued to review and emphasize authorization from the government, the entity’s function and status in the domestic market, and its operational activities in trade. For example, the Panel in Korea – Beef first reviewed the Korean enterprise’s authorization from the government and its function and operations in the relevant

28. General Agreement on Tariffs and Trade 1994, para.1
29. Understanding on the Interpretation of Article XVII, Apr. 15, 1994, Marrakesh Agreement, supra note 11, Annex 2 (The Understanding identifies SEs as “[g]overnmental and non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports.”).
domestic market.\textsuperscript{30} It found that the organization enjoyed a monopoly position on both importation and distribution over its allocated share of Korea’s import quota on beef.\textsuperscript{31} Accordingly, the imposition of any restrictive measure on the enterprise, including its internal measures, would have an adverse effect on the importation of the products concerned.\textsuperscript{32} The Panel then reviewed the SE’s activities to determine whether it acted in line with the general principle of non-discrimination under article XVII.\textsuperscript{33} It held that “the list of variables that can be used to assess whether a state-trading action is based on commercial consideration (prices, availability, etc.) are to be used to facilitate the assessment of whether the state-trading enterprise has acted in respect of the general principles of non-discrimination.”\textsuperscript{34} After examining the trade-related activities of the SE, the Panel concluded that its practices led to import restrictions on foreign beef, thus acting in contravention of Korea’s article XI obligations.\textsuperscript{35} In Canada – Wheat Exports, the Appellate Body held that the right understanding of article XVII, paragraph 1(b) should be “on a case-by-case basis, and must involve careful analysis of the relevant market . . . as well as how those considerations influence the actions of participants.”\textsuperscript{36} It suggested that an SE’s activities should be examined in their local context when applying the general principle of non-discrimination.

From the early negotiation history to the more recent case law, the evolution of GATT rules shows that the regulatory focus on SEs has developed over time. While the early Anglo-American Negotiations mainly emphasized control and authorization, the phrasing of GATT 1947 implies a further focus on SEs’ function and activity. As more members from developing

\begin{thebibliography}{9}
\bibitem{30} Panel Report, Korea–Measures Affecting Imports of Fresh, Chilled and Frozen Beef, ¶ 751, WTO Doc. WT/DS161/R (adopted Jan. 10, 2001). In this case, the United States alleged that Korea imposed a mark-up on sales of imported beef, limited import authority to certain so-called “super-groups” and the Livestock Producers Marketing Organization and provided domestic support to the cattle industry in Korea in amounts which cause Korea to exceed its aggregate measure of support as reflected in Korea’s schedule. These restrictions applied only to imported beef, thereby denying equal treatment to beef imports. The United States alleged that the support to the domestic industry amounts to domestic subsidies that contravene the Agreement on Agriculture. The Livestock Producers Marketing Organization is designated as a state trading enterprise in relation to beef.
\bibitem{31} Id.
\bibitem{32} Id. ¶¶ 14–26, ¶¶ 312–13.
\bibitem{33} Id. ¶¶ 752–58.
\bibitem{34} Id. ¶¶ 757–58.
\bibitem{35} Id. ¶¶ 763–69.
\bibitem{36} Appellate Body Report, Canada–Measures Relating to Exports of Wheat and Treatment of Imported Grain, ¶ 144, WTO Doc. WT/DS276/AB/R (adopted Sep. 27, 2004). In this case, according to the United States, the actions of the Government of Canada and the Canadian Wheat Board (an entity enjoying exclusive rights to purchase and sell Western Canadian wheat for human consumption) related to export of wheat appeared to be inconsistent with paragraphs 1(a) and 1(b) of Article XVII of GATT. Id.
\end{thebibliography}
economies joined the WTO, GATT 1994 concerns domestic economic development and other WTO principles. To encourage economic development, the WTO respects its members’ regulatory sovereignty to “establish or maintain state enterprises or grant exclusive or special privileges to private enterprises.” Meanwhile, GATT emphasizes that activities of these enterprises that are closely connected to trade should comply with WTO principles and with commercial considerations. The review of the early history and cases reveals a diverse policy background about how GATT has progressively focused on SEs’ activity, authorization, and function in trade.

C. Agreement on Subsidies and Countervailing Measures

After GATT 1947 established the general principles in article XVII and its provisional rules, States started to discuss the possibility of having SE rules focused on subsidies. At the end of the Tokyo Round of Negotiations in 1979, a small number of GATT members created several special agreements between them, which are often referred to informally as “codes.” Eventually, at the end of the Uruguay Round of Negotiations in 1994, a formal annex, the Agreement on Subsidies and Countervailing Measures (the “SCM Agreement”), was added to the GATT paradigm.

The SCM Agreement does not contain a specific provision concerning SEs as intermediaries or recipients of subsidies from governmental agencies. Nevertheless, several provisions shed light on the roles of SEs and their possible attribution to states. Per Article 1 of the SCM Agreement (“Article 1”), a subsidy exists if “there is a financial contribution by a government or any public body . . . where a government makes payments to a funding mechanism or entrusts or directs a private body to carry out one or more of the type of functions . . . which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments.”

This definition of a subsidy leaves room for the perception of SEs as public bodies. Notably, the term “public body” was not in the first draft of the SCM Agreement but was added into the text of the second draft, which

40. Agreement on Subsidies and Countervailing Measures, April 15, 1994, Marrakesh Agreement, supra note 11, Annex 1A [hereinafter SCM Agreement].
41. Michael D. Cartland (Chairman of the Negotiating Group on Subsidies and Countervailing Measures), Status of Work in the Negotiating Group: Report by the Chairman to the GNC, GATT Doc. MTN/GNG/NG10/W/38 (July 18, 1990); Michael D. Cartland (Chairman of the Negotiating Group on Subsidies and Countervailing Measures), Draft Text by the Chairman, GATT Doc. MTN/GNG/NG10/W/38/Rev.1 (Sept. 4, 1990).
has caused some speculation on the reasons for this change. The definition may have been added to ensure that the post-Cold War transitioning economies, whose SEs were dominating domestic markets, were covered and disciplined by the SCM Agreement. However, the negotiators could not agree upon the scope and criteria of the term “public body” so they deliberately left it open-ended. Nonetheless, Article 1 implies the existence of two conditions for identifying whether an SE is itself a “public body” that provides subsidies or an intermediary of governmental subsidies: first, whether the SE in question carries out a governmental function; and second, whether the SE’s activity would typically be considered governmental practice.

The two-pronged test was illustrated and developed by the Appellate Body in several trade disputes in which SEs were accused of providing subsidies as governmental intermediaries. United States – Anti-Dumping and Countervailing Duties (China) comprehensively discussed the issue of whether Chinese state-owned commercial banks were public bodies under the SCM Agreement. In this case, the United States advocated for analyzing the Chinese banks on an approach of majority ownership and government control, “principally based on the uncontested fact that [the SEs] were majority government-owned.” By contrast, China defined a “public body” not based on ownership, but on whether the entity “exercise[s] powers or authority vested in [it] by a ‘government’ for the purpose of performing functions of a governmental character.”

The Panel interpreted the term “public body” in the SCM Agreement to mean “any entity controlled by a government.” It supported the United States’ approach and considered “government ownership to be highly relevant and potentially dispositive evidence of government control,” and, on that basis, upheld the United States’ argument that the Chinese state-owned banks constituted “public bodies” as identified in the SCM Agreement. This interpretation, however, was rejected by the Appellate Body. It opined that the essence of government is “in part, from the functions performed by a

44. These cases include but are not limited to: Secretariat Summary, Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products, WTO Doc. WT/DS103/33 (May 2003); Secretariat Summary, United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WTO Doc. WT/DS379/12/Add.7 (Aug. 21, 2012); Secretariat Summary, United States—Countervailing Duty Measures on Certain Products from China, WTO Doc. WT/DS437/26 (Jun. 27, 2018).
46. Id. ¶ 8.55 (emphasis added).
47. Id. ¶ 8.94.
48. Id. ¶ 8.134.
government and, in part, from the government having the powers and authority to perform those functions.” By denying ownership and control as the determinants of a “public body,” the Appellate Body instead proposed a combination of authority and function to determine whether state-owned banks are “public bodies,” which more closely resembled China’s approach. In subsequent paragraphs, the Appellate Body reasoned at length about how to decide the function of SEs. It considered not only the specific activities of the entity involved, as suggested by GATT, but also a broader range of conduct that included both the questionable conduct in the specific context of the state involved, as well as the general practices of other WTO members.

This approach was reaffirmed in United States – Carbon Steel (India). The Appellate Body found that the Panel erred in treating the government’s ownership and ability to control an SE as determinative factors in clarifying whether the SE was a public body. It also rejected India’s argument that an entity must have the power to regulate, control, or supervise individuals or otherwise restrain others’ behavior in order to be a public body. The Appellate Body opined that the more vital determinants should be: whether the SE has a governmental function, whether the SE has been vested with governmental authority, and what the evidence shows regarding its specific activities. It explained further that whether the conduct of an entity is that of a public body must in each case be determined on its own merits, with due regard to the core characteristics and functions of the relevant entity, its re-


50. Id. ¶ 326. To be sure, the Appellate Body expressly rejected the argument of the complainant, China, according to which there exists a presumption that State-owned entities are private bodies. The Appellate Body then went on to examine the authority and function of the Chinese state-owned bank to determine whether the state-owned and controlled banks are “public bodies.” Id.

51. Id. ¶ 297. The Appellate Body suggested that both “whether the functions or conduct are of a kind that are ordinarily classified as governmental in the legal order of the relevant Member” and “the classification and functions of entities within all WTO Members generally” should be evaluated when answering the questions of what features are normally exhibited by public bodies. Id.

52. See generally Appellate Body Report, Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India, WTO Doc. WT/DS436/AB/R (adopted Dec. 8, 2014). In this case, India challenged the U.S. Department of Commerce’s countervailing duties levied on steel products from India through various instruments, as well as provisions of the U.S. Tariff Act and Code of Federal Regulations on customs duties. India appealed the Panel’s findings regarding the U.S. Department of Commerce’s determination that the National Mineral Development Corporation of India is a public body within the meaning of Article 1.1(a)(1) of the SCM Agreement. Id.

53. Id. ¶ 4.10.

54. Id. ¶ 4.17.
relationship with the government, and the legal and economic environment prevailing in the country in which the investigated entity operates.\textsuperscript{55} The SE issue reoccurred again in US-Countervailing Measures (China). The Panel cited and followed the Appellate Body’s interpretation and found that United States Department of Commerce (“USDOC”) acted inconsistently with the SCM Agreement when it determined or pre-assumed that certain Chinese SEs and companies were “public bodies” based solely on their public ownership or governmental control.\textsuperscript{56} It opined that “the critical consideration is the question of authority to perform governmental functions.”\textsuperscript{57} Meanwhile, it rejected China’s narrow interpretation of government authorization as “[requiring] the effective power to regulate, control, supervise individuals, or otherwise restrain their conduct, through the exercise of lawful authority.”\textsuperscript{58} Instead, the determination should depend on further inquiry and comprehensive analysis of the characteristics and activities of the enterprise.\textsuperscript{59}

In a more recent case, the Panel in United States – Pipes and Tubes (Turkey) found that the mere connection between the SE board with military and governmental personnel, the domestic benefits from property and tax status, and the mandatory contributions to national pension funds were insufficient to establish that the SE in question had acted pursuant to governmental authority or been under the meaningful control of the government.\textsuperscript{60} In short, the language of the SCM Agreement requires an analysis of the SE’s function and activity to determine whether an SE constitutes a “public body,” and the relevant case law further examines the SE’s authorization. The test from the case law not only considers the elements of SE rules in GATT, but also includes a broader consideration of the general practices of the WTO members. This approach does not single out any particular type of enterprise per se, which lends it valuable flexibility to cover all the possible vehicles of subsidies even though it is criticized as creating uncertainties.\textsuperscript{61}

\textsuperscript{55} Id. ¶ 4.52.
\textsuperscript{57} Id. ¶¶ 7.65–7.66.
\textsuperscript{58} Id. ¶¶ 7.67–7.69.
\textsuperscript{59} Id. ¶¶ 7.70–7.71.
\textsuperscript{60} Panel Report, United States–Countervailing Measures on Certain Pipe and Tube Products (Turkey), ¶ 7.39, WTO Doc. WT/DS523/R (adopted Dec. 18, 2018). After the Panel report was circulated, the United States appealed the case. However, the Appellate Body would not be able to circulate the report by the end of the 60-day period nor within the 90-day time-frame provided for in Article 17.5 of the dispute settlement process due to the paralysis of the Appellate Body since October, 2018. See Understanding on Rules and Procedures Governing the Settlement of Disputes art. 1, Apr. 15, 1994, Marrakesh Agreement, supra note 11, Annex 2 [hereinafter DSU].
\textsuperscript{61} OECD, supra note 1, at 89; see also Ding, supra note 42.
D. Trade in Services

The rules governing trade in services rest on three pillars: first, the framework agreement (General Agreement on Trade in Services, or “GATS”) listing the basic obligations that apply to all WTO members; second, a number of annexes addressing particular sectors in services that are considered to be of special regulatory importance; and third, individual national schedules of commitments. The following review of these three parts shows that SE regulations in services are more flexible and uneven among the WTO members.

Generally, GATS does not single out SEs from other types of entities in its rules concerning monopolies (article VIII), business practices that may restrain competition (article IX), governmental procurement (article XIII), and subsidies (article XV). It takes an ownership-neutral approach when identifying the regulated monopolies and exclusive service suppliers, as reflected by its general definition provision (article XXVIII). Nonetheless, it contains two provisions that specifically concern SEs. First, GATS regards SEs’ behaviors as governmental measures if they “exercise . . . powers delegated by . . . governments or authorities.” Therefore, GATS implies a review of SEs’ conduct and authorization to determine whether they behave as government agencies. In the second situation when SEs are service providers, if their services are “supplied neither on a commercial basis, nor in competition with one or more service suppliers,” GATS will regulate their activities.

One of GATS’ annexes, the Annex on Financial Services, explicitly lists the elements to consider in deciding whether an SE is a “public entity.” According to the definition contained in the Annex, if a financial service enterprise is “owned or controlled by the state” and principally engaged in activities that are “carrying out governmental functions or for governmental purposes,” such enterprise should be treated as a “public entity.” This identification does not aim to discipline SEs engaged in supplying financial services on commercial terms, but a privately-owned entity would be treated as a public entity if it were to perform governmental functions. The typical governmental functions in finance are then listed, including activities in pursuit of monetary or exchange policies, concerning social security or retirement plans, and for the governmental account or using governmental resources. Although this Annex does not require governmental authorization

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63. Id. art. XXVIII.

64. Id. art. I(3)(ii).

65. Id. art. I(3)(c).

66. Id., Annex on Financial Services, ¶ 5(c).

67. Id.
under its identification of “public entities,” one may reasonably speculate that any entity in the financial sector would need to obtain some level of governmental permission to take on the above governmental functions.

Under member-specific commitments through GATS, WTO members may refrain from granting national treatment to foreign service providers other than their own, or grant more favorable treatment to domestic SEs in particular sectors, or by a particular mode of service. In China—Electronic Payment Services, for instance, the United States alleged that China breached its obligations under the GATS by allowing a Chinese SE in the electronic payment service industry to monopolize the supplier market for domestic card transactions. The Panel recognized the SE’s monopoly status but rejected the U.S. claim because China’s GATS schedule did not include such a commitment for foreign suppliers. The Panel found, however, that China’s schedule included a market access commitment that allowed foreign suppliers to supply their services through commercial presence in China, so long as a foreign supplier met certain qualifications requirements related to the local currency business.68

Compared to the SE rules covering trade in goods, the rules governing identification of SEs in services are less consistent and are highly fragmented, as GATS obligations are country-specific and uneven. This is due to the policy concerns expressed in the early 1980s, when the idea of having unified multinational rules on trade in services first emerged. Many of the developing countries were skeptical and even opposed to such an idea because they were worried about losing their governments’ ability to pursue national policy objectives via SEs and eventually constraining their sovereignty to regulate.69 As a response, the call for respecting regulatory power and national policy objectives prevailed in the following negotiations on GATS.70 The agreements were drafted and then developed to allow a high degree of flexibility, both in the text of the SE rules and in the structure of their application, to meet the strong demand of strengthening domestic capacity for developing countries and considering the difficulties of the least developed ones.


70. Marchetti & Mavroidis, supra note 69, at 698. For a brief negotiation history of the GATS, see Negotiating Mandates, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/serv_e/neo_mandates_e.htm (last visited Feb. 11, 2023), and for details regarding the GATS negotiations amongst least developed countries, see Trade in Services and LDCs, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/serv_e/lde Mods Negs_e.htm (last visited Feb. 11, 2023).
In short, the WTO core principle of non-discrimination applies to all types of enterprises regardless of their ownership so that its code book disciplines a broad set of activities that may distort global trade. Taking a closer look at its legal texts’ negotiation history and case law, the above review reveals a more complex picture. The WTO system has in fact faced many difficulties in balancing several policy prerogatives: to minimize the potential distortion effects in trade due to privileges granted to SEs while at the same time to restrain undue protectionist measures against SEs. The SE rules need to ensure home states’ regulatory sovereignty via SEs is kept intact and address other states concerns on SEs’ close relationship with the government. The law, in practice, is nuanced from the rulebook, even though the Dispute Settlement Body has dedicated significant efforts towards maintaining unity in interpretation of the SE provisions.

II. DIVERGENT APPROACHES IN REGIONAL TRADE AGREEMENTS

RTAs have been popular supplements to the multinational trade system and indispensable legal instruments that facilitate regional trade and economic integration. Of the 342 RTAs that have been referred to the WTO, more than half of the agreements (186 out of 342) contain provisions and regulations on SEs or state-designated monopolies. Notably, the number of RTAs with SE-related provisions has significantly increased after the millennium. More than two-thirds of those agreements (125 out of 186) have been concluded and entered into force in the past twenty years. By contrast, only seven RTAs included SE-related provisions during the 1990s. New generation RTAs have undoubtedly paid more regulatory attention to SEs. The following analysis will use two recent mega-RTAs as examples to explain how divergent treaty-making approaches have been adopted to regulate SEs.


72. Numbers calculated by the author based on publicly available RTA data at Regional Trade Agreement Database. WORLD TRADE ORG., http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx (last visited Feb. 11, 2023). WTO members usually report their Free Trade Agreements and Economic Integration Agreements under GATT article XXIV and the GATS article V and custom union arrangement under GATT article XXIV to the WTO Trade Policies Review Division. In 2009, the RTA section of the WTO Trade Policies Review Division established an RTA Database as part of WTO’s Transparency mechanism. By the end of March 2021, 342 RTAs had been reported to WTO and 326 of them have been mapped. Id.

73. Id. (data on file with the author).

74. Id. (data on file with the author).
A. The Regional Comprehensive Economic Partnership as an Example of Action-Oriented Lawmaking

The Regional Comprehensive Economic Partnership (“RCEP”) is a mega treaty. It was initiated by the Association of Southeast Asian Nations (“ASEAN”) with the hope of integrating and upgrading the existing trade deals with its major trading partners. After eight years of negotiations, it was signed at the end of 2020 and included twenty chapters and additional schedules of country-specific commitments.

One of the main chapters is dedicated to competition, which takes an action-oriented regulatory approach to address SE competition issues. It requires all RCEP members to take appropriate measures to prevent SEs’ and other entities’ anti-competitive activities. Although the chapter does not prevent members from pursuing public interest purposes via SEs, such arrangements and exemptions are required to be transparent, decided and implemented under the rule of law, and communicated to the other parties through cooperative mechanisms. The competition rules do not single out SEs for their public ownership or domestic functions and create additional or separate standards to discipline their trade. Instead, the RCEP asks its members to regulate anti-competitive behaviors of all kinds of business entities.

The action-focused regulatory approach is taken to address varying development levels and models among the participating countries. Many RCEP participating states have a large public sector where SEs have been playing an indispensable role in domestic economic growth, such as Malaysia, Singapore, and China. Other RCEP members lacking a significant state sector may also enshrine their domestic private companies as national champions, Japan and Korea being the best examples. Having diverse state-business relationships, the RCEP parties did not set up a clear and

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75. Regional Comprehensive Economic Partnership Agreement, Nov. 15, 2020, ASEAN, http://rcepsec.org/legal-text (last visited Nov. 15, 2022) [hereinafter RCEP]. RCEP was concluded between the ten states of the Association of Southeast Asian Nations (“ASEAN”) (Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam) and its six trade partners (Australia, China, India, Japan, New Zealand, and the Republic of Korea).

76. Id. India eventually withdrew from further negotiations and has not signed RCEP.

77. Id. art. 13.3(5) (“Each Party shall apply its competition laws and regulations to all entities engaged in commercial activities, regardless of their ownership. Any exclusion or exemption from the application of each Party’s competition laws and regulations, shall be transparent and based on grounds of public policy or public interest.”).

78. Id. arts. 13.3, 13.4, 13.8.

79. Id. art. 13.2.


comprehensive SE identification system or framework nor regulate different types of ownership separately. Instead, the RCEP relies primarily on individual parties to enforce their competition laws and regulate domestic monopolies, so long as they are consistent with trade principles, leaving huge policy spaces for states.82

The action-oriented approach also has procedural considerations. Most obviously, it relieves the negotiating states from answering the thorny question of SEs’ identities, saving much time in treaty negotiations. In addition, the competition rules discipline all types of enterprises in business, regardless of types of ownership and institutional features. It covers SEs and other privately-owned enterprises that might be nonetheless affiliated or sponsored by the government. Without selecting the regulated companies, the action-oriented approach vastly extends the application of competition rules to all types of ownership and entities of diverse governmental intervention. Moreover, rules that emphasize behavior instead of ownership do not discriminate against states with large public sectors. They mitigate the concern of discrimination in multiparty negotiations, where the participating states have diverse public sectors. In these aspects, the action-oriented lawmaking enables participating states to conclude negotiations in time with an open-ended legal mechanism for further cooperation in developing more detailed competition rules among participating States.83

In brief, the RCEP’s action-focused competition rules facilitate negotiations and treaty conclusion, as they avoid a clear definition of the scope of regulated SEs. The competition rules thus apply to all types of ownership, and companies of different degrees of proximity to their governments. Their indifference to public ownership could be arguably perceived as not specifically targeting SEs in trade. When the treaty remains silent, it leaves ample policy space between the lines for domestic regulators of member states to develop and implement competition rules that concern their SEs, where the standards of fair competition may vary among different members. In this regard, the flexibility provided in the treaty has been criticized as a “shallow” regional integration of trade regulations.84

B. The Comprehensive and Progressive Agreement for Trans-Pacific Partnership as an Example of Actor-oriented Lawmaking

Another mode of regulation is creating special or additional rules for SEs. The best example is the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (“CPTPP”), the first mega-regional RTA with

82. RCEP, supra note 75, arts. 13.1, 13.2.
83. See Id. arts. 13.4, 13.6.
a stand-alone chapter on the subject of SEs. Allegedly, it aims to regulate SEs that compete with private companies in international trade and investment. The United States initiated the treaty negotiation during Obama’s presidency as the Trans-Pacific Partnership (“TPP”), a new trade platform in the Asia-Pacific region. The United States later abruptly withdrew from its negotiations under the Trump Administration. Nevertheless, the CPTPP inherited the original agreement among the other parties and is likely to have a vast referential influence on future trade negotiations.

The CPTPP, adopting an actor-oriented regulatory approach, singles out SEs from other business entities and establishes a specific trade regulation chapter. The foremost provision concerns SE identification, which determines the regulatory coverage of the CPTPP. It primarily used ownership and control elements to define the targeted entities: first, where the majority shares are under state ownership; or second, when a state can take control of the entity either through ownership interests or personnel management. Moreover, to avoid an outcome where a state evades its obligations by delegating its authority to other types of SEs, the CPTPP includes rules requiring any corporations that operate under a delegated authorization to abide by the agreement, including both state-owned and private-owned enterprises. In addition, the SE chapter requires participating countries to obtain domestic jurisdiction over commercial activities of foreign SEs, so that a foreign SE cannot evade legal actions against it by claiming sovereign immunity. Compared with the RCEP, which does not narrow its competition rules to specific actors, namely state-owned and state-controlled enterprises, the CPTPP SE chapter is actor-oriented.

Another fundamental regulatory difference between the RCEP and the CPTPP concerns state sovereignty to regulate. While the former relies primarily on the participating states to implement their diverse domestic competition rules, the latter makes a greater effort to even the playing field among the signatories, requiring its participating parties to ensure that their SEs operate like other actors and conform to the CPTPP standards. First, the

86. Id.
87. Yong-Shik Lee, Future of Trans-Pacific Partnership Agreement: Just a Dead Trade Initiative or a Meaningful Model for the North-South Economic and Trade Integration, 51 J. WORLD TRADE 1, 7, 26 (2017).
88. Wang, supra note 84.
90. Id. art. 17.3.
91. Id. art. 17.5.
92. Compare id. arts. 17.3, 17.5, with RCEP, supra note 75, art. 13.3.
93. See supra Part I.A.
CPTPP requires member states to regulate both SEs and private companies impartially, and not use their regulatory authority to provide preferential treatment to their SEs.\(^\text{94}\) Second, the SE chapter not only requires the states to make non-discrimination commitments but also directs SEs and designated monopolies to behave and make decisions like private enterprises, making purchases and sales on the basis of commercial considerations.\(^\text{95}\) Third, the CPTPP contains limitations on non-commercial assistance in SEs who involve in trade of goods and services. The parties must ensure that their assistance to SEs, either directly or indirectly, would not bring any adverse effects to the interests of other parties, or cause injuries to other domestic industries.\(^\text{96}\) Following this broadly defined commitment, a participating state needs to evaluate the potential impact on other countries when adopting its own SEs as domestic policy vehicles.\(^\text{97}\) In short, the regulatory approach of CPTPP is not to leave policy space for state authorities and the use of SEs, but to make states ensure that a member state’s SEs do not harm other members’ industries by providing advantages than private enterprises.

Other recent RTAs and RTA drafts also take the actor-oriented approach. For example, the textual proposal of the Transatlantic Trade and Investment Partnership (“TTIP”) with the European Union (“E.U.”) identifies SEs as any enterprise influenced by states through ownership, votes attached to the ownership, or managerial control.\(^\text{98}\) In the U.S.-Mexico-Canada Agreement, “state enterprise” is defined as an enterprise owned or controlled by a member state.\(^\text{99}\) CPTPP closely follows the U.S. interpretation advanced in the aforementioned WTO cases,\(^\text{100}\) where SE identifications center on the institutional features, such as ownership, control, or gov-

\(^{94}\) CPTPP, supra note 89, art. 17.5(2).

\(^{95}\) Id. art. 17.3. The notion of “commercial considerations” is further defined in art. 17.1, as follows: “commercial considerations means price, quality, availability, marketability, transportation, and other terms and conditions of purchase or sale, or other factors that would normally be taken into account in the commercial decisions of a privately owned enterprise in the relevant business or industry.” Id. art. 17.1.

\(^{96}\) Id. art. 17.6.

\(^{97}\) Borlini, supra note 8, at 331–32 (as countries may otherwise be subjected to countermeasures).


\(^{100}\) Supra Introduction; Fleury & Marcoux, supra note 7.
ernmental authority. These U.S.-led treaties reflect its particular interest in regulating SEs separately from other actors through RTAs.

Although the CPTPP has created ambitious new norms to regulate SEs in trade, it suffers from several shortcomings in its own design. To start, the simple definition that identifies SEs, via ownership and governmental control, has been criticized for being too rigid to capture the potential distortions in international trade that the treaty had wished to address. The bright-line rules ignore the nuance of complexity between states and enterprises, and may lead to “over-or-under-inclusive results.” For the former, a firm with 51% state ownership acting as a passive investor or other professional private investors would still be burdened with more obligations and costs under the CPTPP than firms with fewer state shares but more implicit governmental controls. In the latter scenario, wholly private-owned companies could be crowned as national champions, influence senior governmental officials and local authorities, and receive preferential treatment in international trade. The CPTPP may arguably address top-down control; it nevertheless keeps silent on bottom-up collusion.

In addition, the CPTPP has many carve-outs where states can easily avoid purportedly comprehensive and high-standard obligations. General exemptions apply to sub-central SEs and SEs in particular sectors, such as financing, where SEs could enjoy regulatory privileges without triggering the CPTPP’s obligations. These carve-outs imply negotiating parties’ reluctance to fully comply with the so-called “gold standards” according to their national interests. The CPTPP also allows its members to create country-specific reservations under the multinational obligations, or take reservations to SE provisions. Such designs were perceived as addressing the division between levels of development among the CPTPP countries. Unfortunately, both developed and developing countries under the CPTPP have intensively used reservations to escape their general commitments, which inevitably undermines the comprehensiveness and effectiveness of the treaty. Tensions exist among the CPTPP countries that have been
struggling between a unified high-standard SE regulation and diverse interests in SEs.

C. Evaluation of the Two Approaches

The above review of the largest mega-RTAs represent two lawmaking approaches to reforming the existing WTO rulebook on SEs. One is actor-oriented, which differentiates entities according to their institutional features, as displayed in the CPTTP. The other is action-oriented, which focuses on anti-competitive behavior regardless of the actors’ domestic identity, which was the preferred approach adopted by the RCEP members. Each approach has its own strengths and weaknesses if evaluated in light of the different goals present in RTA treaty-making. These goals include comprehensiveness of the text, non-discrimination among the signatories, and compatibility with the multinational system.

From the perspective of comprehensiveness, the CPTTP’s action-oriented approach more effectively covers the entities concerned, as it contains a stand-alone chapter with clear SE identification and high-standard state commitments. It also establishes a unified legal framework with a dispute settlement mechanism, which helps to increase state compliance.\(^{109}\) Aside from carve-outs and state reservations, the rules are detailed and comprehensive. By comparison, the RCEP is less specific in its definition of SEs and may not be as effective as the CPTTP to capture SEs. However, it could be more inclusive in covering all types of entities that may distort the market without specifying particular actors and without distinction.

The RCEP relies heavily on states to fulfill treaty obligations and carry out substantive SE regulations. Other states cannot directly bring a case to formalized regional dispute settlement if they are dissatisfied with the treaty’s implementation.\(^{110}\) The RCEP gives the parties more flexibility to design competition rules that match individual state’s development needs. Domestic regulators thus have more policy space under the RCEP and can maintain diverse practices among SEs. The treaty, however, is limited, as it is too soft to bind its members, and the level of regional regulatory integration is much shallower than that of the CPTTP.

There is also a concern of systematic discrimination. The CPTTP’s stand-alone SE chapter covers selectively regulated SEs.\(^{111}\) It poses more legal obligations on the captured SEs, under the assumption that these SEs distort trade more than other types of SEs or business enterprises. The \textit{ex ante} ownership-based identification does not address the ultimate concern of trade distortions that widely exist in all types of ownership, and have diverse formats in different development models. It inevitably creates a systematic bias against states that have already had these enterprises, while

\(^{109}\) CPTTP, supra note 84, art. 28.3.

\(^{110}\) Supra note 71, art. 13.9.

\(^{111}\) Supra notes 90-93.
providing incentives for others to restructure their interference in business firms. The selective regulation is less fair than the action-oriented approach, which does not discriminate against states with more public ownership and state-level SEs.

As for the compatibility between RTAs and the WTO, RCEP’s action-oriented approach follows the existing WTO format, as it does not filter out public ownership or subject such entities to special rules. Different types of ownership and companies of various degrees of governmental involvement come under the same set of rules. The CPTPP, in comparison, establishes a specific and separate chapter about SEs in trade, which does not exist in the current WTO rulebook. The CPTPP’s actor-oriented approach uses ownership and control to first capture certain companies and then design specific rules to ensure these companies do not cause adverse effects to other members. The actor-oriented rules make a sharp turn in the treaty-making format and conflict with the WTO’s ownership-neutral approach.

From one vantage point, the substantive provisions of the CPTPP make noticeable progress from the WTO rules. First, they establish clear definitions of “state-owned enterprises” and “commercial considerations,” filling a gap in the WTO law. The SE chapter largely extends the GATT rules to services and investments in addition to international trade in goods. Second, the TPP, and consequently the current CPTPP, allows courts to claim jurisdiction over foreign SEs and draw an adverse inference from the non-compliance of the responding party, which provides transnational means to induce compliance of state commitments. It thus provides “bite” to regulate SEs’ activities within domestic territories. Finally, the non-discriminatory treatment and commercial consideration rules in the CPTPP are cumulative, whereas the WTO case law interpreted them as illustrative of each other. Scholars suggest that the TPP and CPTPP present more obligations than the WTO commitments, setting up higher standards for trade liberalization. The CPTPP bridges the gaps in the WTO rules and ostensibly addresses the potential distortions of SEs.

The actor-oriented lawmaking approach, however, has explicit conflicts with the WTO system. The CPTPP includes ownership and control as pri-

112. Supra, Part II. A.
113. Supra, Part II. B.
114. Compare GATT Secretariat, supra note 15 and supra Introduction, with CPTPP, supra note 89, art. 17.1.
115. Borlini, supra note 8, at 329.
116. Kim, supra note 7, at 253.
117. CPTPP, supra note 89, art. 17.4(1).
119. See Borlini, supra note 8, at 329; Kim, supra note 7, at 253–54.
mary determinants in SE identification, whereas the WTO system places more emphasis on their function and government authorization.\textsuperscript{120} Also, the elements of ownership and control are broadly defined in the CPTPP and not necessarily cumulative in determining whether an entity is included under the CPTPP SE chapter, which can arguably perceive to expand its application scope as wide as possible to directly regulate foreign SEs that have a business in the RTA’s member states.\textsuperscript{121} The WTO, however, uses various legal elements to balance different practices and policies of its members, avoiding an overly broad scope of SEs.\textsuperscript{122} Moreover, SEs that act commercially are still held to be non-private firms under the CPTPP and are regulated separately under Chapter 17.\textsuperscript{123} They bear more obligations, while the WTO rules put SEs and other types of entities under the same principles and generally do not differentiate between types of SEs.\textsuperscript{124} By selecting different lawmaking elements, the CPTPP establishes SE identification that alters the WTO’s ownership-neutral regulatory approach. More problematically, these elements have been expressly denied by the WTO Appellate Body.\textsuperscript{125} While the effectiveness of the CPTPP remains untested, the actor-oriented identification nonetheless deviates from the WTO approach and increases tensions between the multinational system and regionalism.\textsuperscript{126} The WTO rules evolved balancing policy goals for a larger number of members,\textsuperscript{127} whereas the CPTPP followed treaty practices of some countries and represents their interests.\textsuperscript{128} The legality of the CPTPP’s actor-oriented lawmaking in the multinational trade system is questionable, because the WTO welcomes RTAs with the expectations of complementing the system and not undermining it.\textsuperscript{129}

In past decades, more and more WTO members have shown interest in concluding new RTAs as a way to actively “build on and try to fill the gaps

\begin{itemize}
\item \textsuperscript{120} With that said, although the CPTPP does not include examinations on governmental authorization or organizational purposes in the definition of SEs, it does allow a carve out for some entities that might fall within the scope of the definition. In other words, governments can still authorize what entities should not be treated as SEs ex ante when they join the CPTPP. Annex IV includes extensive carve-outs for a sub-set of parties, which include almost all of the negotiating states. Moreover, CPTPP’s interpretation of “commercial activities” and “commercial consideration” involves an examination of the purpose of the SE’s business decisions and its de facto effects in the relevant markets. See CPTPP, supra note 89, art. 17.1.
\item \textsuperscript{121} Supra Part I.B.
\item \textsuperscript{122} Supra Introduction.
\item \textsuperscript{123} See CPTPP, supra note 89, ch. 17 (particularly art. 17.2 on Scope).
\item \textsuperscript{124} Supra Part I.
\item \textsuperscript{125} See supra Part I.A.
\item \textsuperscript{126} Ajibo, Collins C. et al, RCEP, CPTPP and the Changing Dynamics in International Trade Standard-Setting, 16 Manchester J. Int’l Econ. L. 425 (2019).
\item \textsuperscript{127} See id.
\item \textsuperscript{128} Sec. e.g., OFF. U.S. TRADE REP., supra note, 85; see also Fleury and Marcoux, supra note 7, 453–55.
\item \textsuperscript{129} GATT, supra note 11, art. XXIV.
\end{itemize}
in the existing WTO system by providing clearer definitions, more precise interpretations of certain related concepts[...]and by including additional obligations” for the regulation of SEs. 130 However, the new paradigms expressed in these RTAs reflect the divergent regulatory approaches reviewed above: one is actor-focused, while the other is action-oriented. Each approach has been adopted by recent mega-RTAs and it is unlikely that one approach will prevail globally in the short term. For either to be adopted in the long term, the tensions between the regional mechanisms, between the RTAs and their member states’ regulations, as well as with the WTO system, ought to be coordinated. The next question, then, is whether such coordination is legally possible?

III. APPLICATION TO THE U.S.-CHINA TRADE CONFLICTS

One way to manage the above tensions is from the bottom up, by generating consensus among states, as there are a significant number of overlapping members in both CPTPP and RCEP. 131 That said, uncertainty remains because the leading members in trade, especially the United States and China, have mixed attitudes towards SEs and the role of government in business. The last section will apply the same framework to identify their law-making differences and policy gaps, as well as to evaluate if their recent domestic reforms could potentially generate some consensus. Whether or not these differences would turn into new SE rules or confrontations will determine the success of RTAs and influence the multinational trade order.

A. Revisiting the U.S.-China Debate at the WTO

The United States and China have very different perspectives concerning SEs’ roles in international trade. The U.S. trade ambassador argued before the WTO that Chinese SEs should be treated as “non-market” actors for three main reasons. First, the United States argued that Chinese SEs are controlled by the Chinese government, as the Communist Party exercises control over SEs through the appointment of key executives and the provision of preferential access to land, energy, and capital as well as other important inputs. 132 The United States contends that this level of governmental and political control should determine whether the entity is considered market-

130. OECD, supra note 1, at 94.
131. The CPTPP has 11 participating countries: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. The RCEP has 15 participating countries: Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam and Australia, China, Japan, South Korea, and New Zealand. Thus, 7 countries, Australia, Brunei, Japan, Malaysia, New Zealand, Singapore, and Vietnam, are under both RTAs.
oriented under the WTO. Second, the United States argued that the purposes of Chinese SEs and their reforms are not market-oriented: “For China, economic reform means perfecting the government’s and the [Communist] Party’s management of the economy and strengthening the state sector, particularly state-owned enterprises.” The United States questions whether Chinese SEs are market-oriented, even though it recognized that market-oriented efforts are taken in China’s economic and financial reforms. Finally, the United States claimed that Chinese SEs could not act independently in a party-lead-all environment. It believed the activities of Chinese companies could not be completely commercial or independent, because Chinese companies could not do business without maintaining a good relationship with the party-state. Based upon these aspects, the U.S. trade ambassador believed that the United States had good reason to treat Chinese SEs as non-market oriented actors and targets for defensive trade duties on their concerned exports.

China rejected the above allegations. Quoting its Constitution and revisions, China contended that its SEs had been reformed into independent market entities that have decision-making power over their business operation and management. According to China, these market-oriented practices and policies have remained unchanged since then. It argues that the United States’ “denial of SEs’” independence in their management activities is baseless, as the United States lacks “evidence to support its assertion that the Chinese state ‘controls’ enterprises.” China contended that US’s approach ignores the possibility that enterprises might act independently of approved industrial policies “on a systemic or consistent basis.”

133. Id.; see also Dennis Shea, U.S. Ambassador to the WTO, China’s Trade Disruptive Economic Model and Implications for the WTO, Remarks Before the WTO General Council (July 26, 2018), http://geneva.usmission.gov/2018/07/27/55299.

134. Communication from the United States, supra note 132, ¶ 5.2. Similarly, the United States Trade Representative (“USTR”) claims that, “when WTO negotiators agreed that China should join in 2001, they expected it to evolve towards Western-style capitalism.” The World Trading System Is Under Attack, supra note 5.

135. Communication from the United States, supra note 132, ¶ 1.4, 2.8, 5.1.

136. Id. ¶ 1.1–1.15.

137. Minutes of the Meeting, ¶ 1.306, 1.316, WTO Doc. WT/GC/M/173 (July 26, 2018). For the cited PRC Constitution, see XIANFA art.16, art.17 (1993) (China) compared with XIANFA (1982) One major legal revision in the 1993 Amendments to the PRC’s Constitution is the removal of the article requiring SEs to obey the government’s economic plans and guidance. Under the PRC’s Constitution, Chinese SEs are not authorized to perform governmental functions.

138. Minutes of the Meeting, supra note 137, ¶ 1.309.

139. Id. ¶ 1.316; see also Tom Miles, U.S. and China Clash at WTO Over Ideology, State’s Role, REUTERS (July 26, 2018), http://www.reuters.com/article/us-usa-trade-wto/us-and-china-clash-at-wto-over-ideology-states-role-idUSKBN1KG22G.

140. Id. ¶ 2.13.
tively, it cited the WTO’s 7th Trade Policy Review on China and argued that there are counter evidence about Chinese SE practices.\textsuperscript{141}

This debate represents the two perceptions concerning SEs in trade. The United States emphasizes the identities of the firm in the domestic political environment, selecting ownership, control, and institutional purpose as determinants. In contrast, China suggests analyses of legal authority, function in the market, and specific activities. One side emphasizes who SEs are; the other focuses on what they are doing. More recent domestic regulatory changes in the United States and China further develop these differences.

B. The United States: Increasing Concerns Regarding Companies’ Domestic Identity

In mid-2017, U.S. Senator John Cornyn sponsored a legislative amendment to section 721 of the Defense Production Act of 1950, the previous national security law.\textsuperscript{142} The amendment, entitled the Foreign Investment Risk Review Modernization Act (“FIRRMA”), was proposed after the passage of the Foreign Investment and National Security Act of 2007.\textsuperscript{143} This amendment aimed to improve the U.S. national security review system, especially the administrative power of the President and the Committee on Foreign Investment in the United States (“CFIUS”), to counter national security threats posed by foreign-government investment. The proposed amendment soon gained bipartisan support in the Senate and the House and was quickly signed by the President as FIRRMA 2018.\textsuperscript{144} FIRRMA 2018 significantly expanded the criteria of SEs’ identification so that the CFIUS can extend its jurisdiction over SEs’ investments in the United States.

According to the new amendment, the national security investigation is primarily based on the analysis of control of the foreign investor. More specifically, “control of a foreign investor” is not limited to foreign SEs that are controlled by foreign governments, but also includes non-SEs whose investment will result in a controlling position in the U.S. market, whether or not in interstate commerce.\textsuperscript{145} It provides a definition of “control” for the


\textsuperscript{143}. Id.


\textsuperscript{145}. Under the old rule, the Committee on Foreign Investment in the United States (“CFIUS”) reviewed three types of transactions in interstate commerce, including but not limited to “foreign government-controlled transaction” and transactions that “would result in control of any critical infrastructure of or within the United States by or on behalf of any foreign person.” FIRRMA 2018 stretches the rule’s scope by deleting the “interstate commerce” requirement. It also provides a more complete list and empowers CFIUS to define its jurisdiction. See id. § 1703.
first time which has a wider coverage than the governmental-controlled enterprises. The definition of “control” requires an analysis of power, but the definition of “foreign government-controlled transaction” implies another examination of the authority.

Next, FIRMA 2018 mandates that transaction parties must report to CFIUS any “covered transaction” where a foreign government has a “substantial interest.” FIRMA 2018 directs CFIUS to further define “substantial interest” with special attention to the means by which “a foreign government could influence the actions of the foreign person, including through board membership, ownership interest or shareholder rights.” The mandatory report rules in FIRMA suggest that special considerations be given to ownership and its influence on specific activities of the SE’s investment.

Lastly, FIRMA indicates that factors including nationality of the investor and industry of the investment are important to evaluate, in order to assess national security risks. The initially proposed FIRMA 2017 draft distinguishes investments according to their home countries by asking whether the investment is from a “country with special concerns.” Although FIRMA 2018 does not adopt these exact words, it requires the Secretary of Commerce to produce a biannual report with information on all foreign direct investment from Chinese companies until 2026. FIRMA 2018 requires this report to indicate whether the investment is governmental and whether it is aligned with the Chinese domestic industrial policy called “Made in China 2025.” These amendments show increasing concerns and review of investment from China, regardless of whether the investor is

146. Id. § 1703(a)(3). “The Term ‘control’ means the power . . . to determine, direct, or decide important matters affecting an entity.”

147. Id. § 1703(a)(7). “The term ‘foreign government-controlled transaction’ means any covered transaction that could result in the control of any United States business by a foreign government or an entity controlled by or acting on behalf of a foreign government.” Id. (emphasis added).

148. Id. § 1706.

149. Id.

150. The draft of FIRMA 2017 defines such countries as “a country that poses a significant threat to the national security interests of the United States.” However, it does not require CFIUS to maintain such a list, at least for the public. See FIRMA 2017, H.R. 4311 § 3(a)(4)(A). The final version of FIRMA 2018, however, omits these clauses, but still includes the expression of “country of special concern” in the first section. See FIRMA 2018 § 1702.

151. FIRMA 2018 § 1719.

152. Id. “Made in China 2025” is a Chinese government-proposed policy initiative to upgrade Chinese industry. The stated objective of the program is for China to become a major competitor in advanced manufacturing, a goal that will bring the country increasingly into direct competition with the United States. See Kristen Hopewell, What Is ‘Made in China 2025’ — and Why Is It a Threat to Trump’s Trade Goals?, WASH. POST (May 3, 2018), http://www.washingtonpost.com/news/monkey-cage/wp/2018/05/03/what-is-made-in-china-2025-and-why-is-it-a-threat-to-trumps-trade-goals/?noredirect=on&utm_term=.33aafaaf7468.
owned or controlled by the state. Under these standards, private companies could also be perceived as SEs if they invest in the identified industries under China’s industrial policies.

By introducing different identifications to the law, FIRRMA effectively expands the SE definition and regulatory jurisdiction. While it remains to be evaluated whether the increasing administrative power may effectively defend U.S. national security, the quick expansion of regulations and aggressive administrative power are not implemented without cost. This includes an extra burden on domestic taxpayers and on potential foreign investors who have or need to maintain some level of connection with their governments but nonetheless need to go through extra procedures and bear the additional transactional costs. The additional opportunity cost might occur as well when the expanding administrative power is not harnessed with proper checks and discourages potential investors who want to invest in the U.S. market.153

C. China’s Reform on SEs: Easier to Clarify Their Identities?

On August 24th, 2015, China’s State Council announced a new round of SE reform.154 This nationwide reform aims to decrease governmental interference in SEs’ management and increasing their efficiency and market performances.155 The State Council published a detailed plan that establishes two types of companies, capital investment companies and capital operating companies, which represent “state capital in SEs” and serve as “professional platforms for market-based operations of state-owned capital.”156 It is arguably expected that the professional capital management institutions, which replace governmental agencies as shareholders in Chinese SEs, could further reduce governmental interference in SEs. If carried out successfully, the reform will impact future legal identifications of SEs in several aspects.

First, it would seem easier to identify the purposes of Chinese SEs depending on the type of their public professional shareholders. The aforementioned two types of capital companies have set up different purposes in SEs’ management. The goal of state-owned capital investment companies is to “serve the national strategy, optimize state-owned capital distribution,


155. Id.

156. Id; see also CCP Central Committee and State Council, Zhonggong Zhongyang Guowuyuan Guanyu Shenhua Guoyou Qiye Gaige de Zhidao Yijian (中共中央、国务院关于深化国有企业改革的指导意见) [Guiding Opinions of the CPC Central Committee and the State Council on Deepening the Reform of State-owned Enterprises] (promulgated by the State Council, Aug. 24, 2015, effective Aug. 24, 2015), § 2(4), http://www.lawinfochina.com (China) [hereinafter China SOE Reform Guidelines 2015].
enhance industrial competitiveness, and promote industrial structure in major areas and industries concerning national security and economy.” In contrast, the goal of state-owned capital operations companies is simply to “enhance operations effectiveness of state-owned capital, and increase returns on state-owned capital.” The former represent the state in their invested SEs, trying to align the decisions of SEs with national strategies via the power of capital. The latter invest in SEs as passive investors, expecting profitability from ownership. The distinction between the state shareholders makes it possible to identify the general purposes of Chinese SEs. SEs that only have state-owned capital operations companies, as shareholders should be regarded as independent commercial market players, since they are not involved in any national strategies. By contrast, SEs that have state-owned capital investment companies as shareholders would be more likely to be considered public bodies because their shareholders aim to achieve national strategic goals through these entities.

Second, the reform will categorize Chinese SEs by their function in industries and regulate accordingly. One type is called “public welfare” SEs, whose products or services are usually provided by the municipal administrations as public goods, such as electricity and water. The second type consists of commercial SEs in sectors concerning national security. The third category includes commercial SEs that usually operate in competing industries and will be treated as equal to other players and ownerships in the market. It will be comparatively easier to identify the third type as commercial companies based on their functions. However, it is not easy to differentiate between the first and the second group because both accomplish some public or strategic functions in the domestic market.

The third key part of the reform focuses on the control of SEs and adopts a market-oriented approach with “Chinese characteristics.” The reform emphasizes the advanced modern model of corporate governance while, at the same time, it explicitly highlights the leading political role of China’s Communist Party in Chinese SEs. For example, the reform promotes the independence and prominence of the board of directors, emphasizing their expertise and reassuring their power in the decision-making process, while simultaneously empowering the Party’s primary-level branch in SEs as the core organization in dealing with political affairs.
form maintains the political tradition that the Party’s Central Committee on Personnel approves top managers of central-level SEs, who are the major players in Chinese overseas investment and trade. 166 At the same time, the reform increases the quota for directors that are professional managers and those selected from fair market competition. 167 It seems that the reform tries to promote both market-oriented corporate governance and party-controlled political awareness in Chinese SEs. 168 These two entangled policy goals make the identification of control in SEs more difficult.

Ownership is the fourth element. The reform encourages “mixed-ownerships” or public-private-partnership, a merger between the capital of SEs and other companies in the market, including foreign private firms. 169 It purports to “make the best use of different types of capital” to promote domestic development. 170 While it is currently uncertain how this design will attract other types of ownership, it will surely result in an even blurrier line between public and private corporations, if the division continues to be based solely on ownership.

China’s embrace of both form and function in its approach to SE regulation both clarifies and complicates the task of identifying Chinese SEs. By differentiating SEs according to their core business and industrial functions, its mixed-ownership policy does not distinguish firms based on the absolute percentile of public shares. The implications of the mixed-ownership policy are twofold. For one, it facilitates clear analysis by providing transparent and publicly available indicators of SE purposes, based upon information of their ownership of those shares by new capital management institutions. For another, however, the emphasis on both corporate governance and political control of the party leaves the identification of Chinese SEs still complicated and vulnerable to domestic political turns.

China’s recent domestic reform does not focus on one single aspect of SEs. It does not use ownership as the sole element to determine its reform policies but pays more attention to SEs’ business activities and functions in industries. It contends that the purposes of SEs may be easily inferred from their supervision and capital management institutions; however, the party’s ever increasing political control makes the identification of Chinese SEs still


167. Id. §§ 3(8), 3(9), 7(25).

168. See also Curtis J. Milhaupt, The State as Owner—China’s Experience, 36 Oxford Review of Economic Policy 362 (2020). (which highlight the serious tension inherent in the party-state’s dual goals of maintaining SOEs as a tool for advancing non-financial social and industrial policy objectives and addressing the corporate governance challenges of these enterprises.)

169. Id. § 5(17).

170. Id. § 5(17)–(18).
difficult for outsiders when determining their boundaries with the government.

D. Legal Way-out for New Rules on State Enterprises Amidst U.S.-China Trade War

By applying the lawmaking framework to the domestic rules of the United States and China, the above analysis identifies several gaps that can be summarized. First, the United States defines control broadly and indifferently, without considering the different types of control in SEs, whereas China’s reform aims to deemphasize the relevance of a government’s control of an SE’s business activities while increasing the party’s political control. Second, U.S. regulators assume that public ownership automatically represents a governmental interest and would inevitably result in increasing influence on SEs; by contrast, China’s policymakers seem to believe that establishing new specialized professional institutions that represent state ownership in SEs would further decrease the state’s influence on SEs’ operations. Third, although both the United States and China make it clear that the category of industry will be an important reference to determine SE regulations, they nevertheless have disparate policy positions: China differentiates its SE groups largely based on their nature of business in the industries, whereas the United States attaches the importance of an industry additionally to the enterprise’s leadership status. The U.S. lawmaking approach puts more weight on the features of the entity itself, such as nationality, ownership, and control, whose activities are subjected to different regulations accordingly.171 China’s approach starts from analyzing the SE activities in the industry. The SEs are grouped depending on the nature of the activities, then public ownership or party control are adjusted accordingly.172

Their differences regarding SE domestic lawmaking are closely linked with their positioning at the WTO. FIRRMA mirrored the United States’ proposal in the early GATT years that aimed to establish global SE rules by identifying public ownership or governmental control.173 China’s reform differentiates its SEs depending on their business sectors and directs their operations in accordance with its industrial plan, which is consistent with its argument in the WTO cases that the “public body” review of SEs should not generally focus on ownership or control but take a more nuanced review of activities and governmental authorization.174 The U.S.-China conflicts on the SE topic at the WTO are extensions of their different domestic policies.

Unfortunately, the differences in SE regulations and policies were presented by the U.S. leadership as the democratic market-oriented model versus the authoritarian state capitalist model in the increasing geopolitical

171. See supra Part II.B.
172. See supra Part II.C.
173. See supra Part I.A.
174. See supra Part I.C.
wrestling between the United States and China.\textsuperscript{175} This narrative represents a long-lasting domestic political disagreement in the United States since the Cold War about whether it should confront or cooperate with China.\textsuperscript{176} The debates are grounded in an ideological perceptual dichotomy: either China should reform its state-led economic model toward a more westernized one, also known as the “integrate-and-reform” approach; or the United States should divorce from its relationship with China, the so-called “decoupling.”\textsuperscript{177} Escalating policy differences into ideological adversaries neither facilitates finding policy common grounds nor helps negotiate new rules. Now the regulatory differences are not intended to be resolved via legal mechanisms, instead leading to finger-pointing and tariff wars, which brings more harms that are not intended.

Most obviously, tariff measures have not yielded anticipated results, but instead, hurt the U.S. domestic economy. Data shows that the U.S.-China trade war has resulted in a sharp decline in bilateral trade and higher prices for U.S. consumers, as well as costs for Chinese exporters.\textsuperscript{178} Moreover, a lose-lose trade war has negatively delayed global economic advancement by undoing “three to five years’ worth of growth among global value chains in affected countries.”\textsuperscript{179} The tariff measures turn out to be ineffective, self-harming, and spill out negative externalities to long-term development.

In addition, politicizing the policy differences postpones more constructive rule-making and serious institutional changes. In January 2020, after two years of tariff wars, the United States and China finally concluded a bilateral Phase One trade deal.\textsuperscript{180} However, it was preliminary and did not address the real disagreements, especially those on the SEs issue and industrial policies, which are left to be addressed in the Phase Two negotiations.\textsuperscript{181} Since President Biden assumed office, his administration has maintained the


\textsuperscript{176} See, e.g., HENRY KISSINGER, WORLD ORDER 212–33 (2014).


\textsuperscript{178} Alessandro Nicita, Trade and Trade Diversion Effects of United States Tariffs on China 13 (U.N. Conf. on Trade & Dev. Rsch., Paper No. 37, 2019); see also Pushing Back: Joe Biden Is Determined, supra note 175 (finding that the U.S. tariffs hurt America more than they hurt China).


tariff measures of his predecessor, virtually all the sanctions, export controls, and tariff measures. 182 It has also added a few more measures that were initiated before the power transition. 183 Rising political conflicts block Washington and Beijing from negotiating the Phase Two deal, which is long overdue as part of the Phase One agreement.184

More generally, it jeopardizes the multinational trade system and threatens the crowned values of the United States. The measures of paralyzing the WTO dispute resolution body and starting a tariff war are problematic themselves, regardless of how noble their proclaimed liberal values are. 185 It was only after decades of multilateral diplomacy efforts that the international community, under U.S. leadership and liberal ideas, progressively established a multilateral legal mechanism and dispute settlement body to resolve trade conflicts, preventing global trade from capricious politics and arbitrary tariffs. 186 The unilateral measures of the United States not only breach its WTO obligations but also undermine the rule-based multilateral legal system that it used to lead and believe was the right and the better approach for the world trade order.

A trade war is neither economically sensible nor globally sustainable. To address the divergence of SE regulations, a purely political approach will precipitate more unnecessary confrontations, whereas a purely ideological approach will raise fears of Western hegemony. 187 The United States and China, being the largest economies, need to reach a consensus that prevents arbitrary tariff wars and reinstate the preexisting legal mechanisms in a way that is less pliant to political turbulence. A legal way out can stop the two sides peddling cheap lip service and requires decision-makers to better understand each other’s policy concerns while discussing a more nuanced and feasible approach to discipline SEs in the global trade regulations. The trade policymakers must at least try legal mechanisms to address their aspirational, political, and ideological adversary.

A legal way out is not unimaginable. The framework provided by this research can be used for further SE lawmaking negotiations under at least three different legal mechanisms, which can be parallel or supplementary. Bilaterally, the framework is a toolkit that can be used to compare and eval-

182. Supra, note 168.
185. Supra, note 3-6.
quate regulatory approaches, or at least help generate a more nuanced understanding of the other side between the United States and China. The application of the framework to the domestic legal changes of the two sides has highlighted some lawmaking elements, which should lead to a constructive roadmap for debate and dialogue. Although Washington and Beijing have different interpretations of the relationship between control and ownership, they nonetheless use these elements in making new policies. In addition, both sides have paid enough attention to the industries where SE activities and functions are related to their leadership. Both sides, if they plan, can start working on their differences in these aspects to negotiate detailed rules. In addition, there is also support from economists who eschew the binary political choice between “integration” and “decoupling,” instead advocating for efforts to “promote productive [industrial policy] negotiations about how to share the benefits and minimize the harms.” All these efforts pick up public policies and feasible solutions for the economies, avoiding the undesirable accumulation of distrust from political declarations. A legal way out advocates more policy exchanges on specific SE trade issues and can break the deadlock between the United States’ binary political camps regarding China.

At the regional level, China has officially applied to join the CPTPP, which was once led by the United States and adopts its actor-oriented regulatory approach towards SEs. China also started regulatory experiments in the domestic Special Economic Zones, incorporating the CPTPP standards and applying them to limited regions to test the waters. The framework provides a list about the lawmaking disparities between China’s domestic SE regulations and the comprehensive SE standards in the CPTPP. The United States, together with its allies or trading partners sharing similar SE policies, should take regional treaty negotiation as an opportunity to reemphasize their policies and secure commitments from China before it joins the partnership.

Finally, more discussions under the same lawmaking framework can hopefully introduce new norms that are not yet available under the existing multinational trade system. The WTO not only performs quasi-judicial functions for trade conflicts but also serves as a monitor for different regulatory

188. Zhou & Gao, supra note 181, at 606.
models and a forum for negotiations. 191 Under a binary political narrative, the United States dismissed the reform efforts of a handful of WTO members, claiming that their proposals did not adequately address the threat China’s economic model poses to the multilateral trading system. 192 The antagonism in the U.S.-China trade relationship will split the world and bifurcate global trade. If the two sides start to focus on policies and lawmaking, it would prevent the multinational trade system from falling victim to bilateral political disagreements. The conceptual framework with the lawmaking elements provided by this study can be applied to the reform of the most important trade system for better SE regulations. The unsettled SE issue is arguably vital to the future U.S.-China trade relationship, and more importantly, whether their domestic regulations and policy adjustments will turn into a rule or rivalry will shape the future world order.

CONCLUSION

SEs are important actors in global trade. International trade mechanisms, including multinational, regional, and bilateral types, adopt diverse SE regulations for different policy purposes. This paper proposes a unified conceptual framework to compare the similarities and the divergence of SE regulations, analyzing how different lawmaking approaches and elements have bred the differences between lines, and how they have interacted with policy and political contexts.

Being the most influential multinational trade system, the WTO generally does not single out any particular enterprise, which lends it useful flexibility to cover all trade behaviors regardless of the company’s ownership structure or domestic governmental control. To determine whether an SE constitutes a public body and thus is subject to a state’s international obligations, the regulation of trade in goods requires an analysis of the SE’s function and activity, while the relevant case law also examines the state authorization of the SE’s function. The regulation of SEs in services are more flexible and country-specific, which allows governments to pursue national policy objectives and ensure their sovereignty to regulate via SEs. The WTO’s lawmaking history and cases show the organization’s diligent efforts to maintain a necessary unity in SE regulations; however, it also faces difficulties in keeping a perfect balance of diverse trade policies and divergent state preferences.

Regional trade agreements are encouraged under the WTO to complement the multilateral trading system. The number of RTAs with SE-related provisions has significantly increased after the millennium, indicating the importance of SEs in trade and the growing need for more comprehensive rules. The paradigm shifts in RTAs present an opportunity to update the old

192. See USTR, supra note 4, 26–27.
WTO rulebook. However, the new RTA rules have adopted divergent regulatory approaches that are actor-oriented and action-oriented respectively. Both have been adopted in separate mega-RTAs that involve the world’s largest markets. Their regulatory divergences, therefore increase the tension between regionalism and globalism, which could only be resolved among the states by reaching a certain level of consensus on the new SE norms.

A lawmaking framework of SE rules helps us better understand the policy concerns and strengths of different regulatory approaches. It also can be applied to bilateral trade talks between the United States and China, which has so far been narrowly constructed as an unfortunately politicized, ideological dichotomy. A political approach to address the regulatory differences is not sustainable, as it has led to a lose-lose trade war and undermined the rules-based trade system. Better policymaking should shift from a binary zero-sum narrative to a legal solution for political and ideological adversaries. It requires more comprehensive evaluations of different regulatory approaches and some mutual understanding of the trade policies behind the rules. This study on lawmaking elements of SE rules thus provides a practical perspective for future policymakers and trade negotiations. A serious legal solution would not only save world trade from unpredictability and bifurcation, but also contribute to the multinational legal system by exploring new norms via the rule of law.