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The notion of State-Owned Enterprises (SOEs) in international trade law: a legal contribution by reference to WTO law and Preferential Trade Agreements (PTAs)

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To Filippo and to my parents
Who have always believed in me before I did.

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List of abbreviations

AB	Appellate Body
AD	Anti-dumping Agreement
AoA	Agreement on Agriculture
ARSIWA	Articles on the Responsibility of States for Internationally Wrongful Acts
ASCM	Agreement on Subsidies and Countervailing Measures
ASEAN	Association of Southeast Asian Nations
CPTPP	Comprehensive and progressive Agreement for Trans-Pacific Partnership
DSS	Dispute Settlement System
DSU	Dispute Settlement Understanding
EC	European Communities
Ed/eds	Editor/editors
EEC	European Economic Community
e.g.	Exempli gratia (for example)
EU	European Union
FCN	Treaty of Friendship, Commerce and Navigation
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GPA	Government Procurement Agreement
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia
IMF	International Monetary Fund
MoU	Memorandum of Understanding
NME	Non-market economy
OECD	Organisation for Economic Co-operation and Development
POE	Privately-owned Enterprise
PTA	Preferential Trade Agreement

RCEP	Regional Comprehensive Economic Partnership
SCE	State-Controlled Enterprise
SE	State Enterprise
SIE	State-Invested Enterprise
SOE	State-Owned Enterprise
SPS	Sanitary and Phytosanitary measures
STE	State Trading Enterprise
SWF	State Wealth Fund
TPP	Trans-Pacific Partnership
TPR	Trade Policy Reviews
TRIPs	Trade Related Aspects of Intellectual Property Agreement
USMCA	United States-Mexico-Canada Agreement
WTO	World Trade Organization

Introduction

1. State-owned enterprises (SOEs) in international trade: a relevant yet undefined phenomenon

The purpose of this study is to examine the contribution of World Trade Organization (WTO) law, at the multilateral level, and Preferential Trade Agreements (PTAs), at the regional level, to define a phenomenon that is increasingly expanding, changing in form and impacting in today's global economy: State-Owned Enterprises (SOEs). Along with SOEs, other entities, known as State-Controlled Enterprises (SCEs), State Wealth Funds (SWFs), and State-Invested Enterprises (SIEs), have developed in parallel and are also worthy of attention.

State-owned enterprises (SOEs) play an ever-evolving and crucial role in the global economy, as the number, distribution, and size of State-led undertakings have steadily increased. This trend does not seem to abate but has actually mushroomed, as a result of the negative impact on both domestic and global economies of several historical and contemporary events, the latest being the Covid-19 pandemic. States have been prompted to intervene in their national markets to counteract the adverse effects on their economies brought about by unfavorable historical and contemporary circumstances. In this context, one of the tools through which States have actively participated in the markets has been through, inter alia, SOEs, which have proven to play a stabilizing role in multiple crises, both at the national level, especially with respect to employment rates, and at the international level, through cross-border trade and investment policies.

SOEs are inherently complex entities that are dispersed globally. They are present in nearly every type of economy, from market-based economies to non-market-based ones. Despite this worldwide phenomenon, their features vary considerably across national jurisdictions.[1] In developed economies, although present in relatively small numbers, SOEs conduct their activities in strategic economic sectors. They can potentially affect the economic behavior and management of other national and foreign economic operators, such as forcing efficient competitors out of the market. By contrast, in emerging economies, SOEs are complex entities and are generally used to boost industrial development. The variety of institutional forms that SOEs can adopt translates into many complex ownership and control relationships with the establishing State. Such relationships ultimately shape SOEs' governance and objectives that they pursue.[2]

The term 'SOEs' encapsulates a wide variety of entities: enterprises owned by the central government but also by local public authorities, fully publicly owned enterprises, majority-publicly-owned enterprises, and minority-owned ones. Sometimes the term is also used to refer to entities not owned by the State but significantly controlled by it.[3] Moreover, SOEs encompass a hybrid nature. On the one hand, they can be considered undertakings to the same extent as private economic operators. On the other hand, they are a public policy tool through which market externalities are addressed and,

[1] OECD, 'Ownership and Governance of State-Owned Enterprises: A Compendium of National Practices' (OECD Publishing, 2018) 17 f.

[2] Ming H Lin Cui and Jiangyong Lu, 'Varieties in State capitalism: Outward FDI strategies of Central and Local State-Owned Enterprises from Emerging Countries' (2014) 45 Journal of International Business Studies 982.

[3] OECD, 'Broadening the Ownership of State-Owned Enterprises: A Comparison of Governance Practices' (OECD Publishing, 2016); World Bank, 'Corporate Governance of State-Owned Enterprises. A Toolkit' (World Bank Publications, 2014).

ultimately, public policies implemented. This makes it particularly challenging to determine whether they constitute private or public economic operators.

Despite being a worldwide phenomenon and one of the most debated topics in international economic law, there is no shared definition of SOEs at the international law level. This definitional lacuna, however, far from reflects a harmonized interpretative and legal framework regarding these entities. Indeed, legal practitioners and scholars use the term 'SOEs' to refer to various entities with different characteristics and relationships with the State. More specifically, economic operators generally referred to under the umbrella of 'SOEs' include state-invested enterprises (SIEs), state-controlled enterprises (SCEs), and State wealth funds (SWFs).

The importance of the role played by SOEs in the global economy is also reflected in the fact that they carry out their activities in strategic sectors of the economy and that States traditionally use them to pursue public policy objectives. According to OECD estimates, in 2017 50% of SOEs operated in network industries like energy, electricity, telecommunications, and transportation.[4] In 2018, SOEs' assets amounted to 45 trillion US dollars, almost half of the global GDP.[5] In these sectors, SOEs can play different roles depending on the activity being performed. The increasing number of SOEs has ultimately raised several concerns in many fields of international economic law, from international investment to trade law.[6]

While under international investment law, discussions mainly revolve around whether SOEs can be likened to private investors or host States in given circumstances,[7] under international trade law, SOEs are discussed as a challenge to trade liberalization and transparency principles. Focusing on the

[4] OECD, 'The Size and Sectoral Distribution of State-Owned Enterprises' (OECD Publishing, 2017) 17. This data widely changes in the context of Chinese economy. In that specific context, most SOEs (58%) operate in the finance sector, followed by the primary sectors of manufacturing, transportation, electricity, and gas. See: ibid. 18.

[5] International Monetary Fund, Fiscal Monitor (2020) 53.

[6] On SOEs and international investment law see: Ming Du, 'The Status of Chinese SOEs Enterprises: Much Ado About Nothing?' (2022) 20 (4) Chinese Journal of International Law 785- 815; Bianca Nalbandian, 'State Capitalists as Claimants in International Investor-State Arbitration' (2021) 81 QIL Zoom-out 7; Carlo De Stefano, *Attribution in International Law and Arbitration* (OUP, 2020); Giulio Alvaro Cortesi, 'ICSID Jurisdiction with Regard to State-Owned Enterprises—Moving Toward an Approach Based on General International Law' (2017) 16(1) Law & Practice of International Courts and Tribunals 10; Lu Wang, 'Non-Discrimination Treatment of State-Owned Enterprise Investors in International Investment Agreements?' (2016) 31(1) ICSID Rev-FILJ 45; Mark Feldman, 'The Standing of State-Owned Entities under Investment Treaties' in Karl P Sauvant (ed) *Yearbook on International Investment Law & Policy 2010-2011* (OUP, 2012); Luca Schicho, *State Entities in International Investment Law* (Nomos, 2012); Nick Gallus, 'State Enterprises as Organs of the State and BIT Claims' (2006) 7(5) Journal of World Investment and Trade 761; Paul Blyschak, 'State-Owned Enterprises and International Investment Treaties: When Are State-Owned Entities and Their Investments Protected?' (2010) 6 Journal of International Law and International Relations 1. On SOEs and international trade law see: Petros C Mavroidis and André Sapir, *China and the WTO: Why Multilateralism Still Matters* (Princeton University Press, 2021); Yingying Wu, *Reforming WTO Rules on State-owned Enterprises: In the Context of SOEs Receiving Various Advantages* (Springer, 2019); Weihuan Zhou, Henry Gao and Xue Bai, 'Building a Market Economy Through WTO-Inspired Reform of State-Owned Enterprises in China' (2019) 68(4) International & Comparative Law Quarterly 977; Yang Xiaoyan, 'State-Owned Enterprises: A Real Challenge to the World Trade Organization' (2018) 8(1) Journal of WTO & China 5-34; Li-Wen Lin, 'A Network Anatomy of Chinese State-Owned Enterprises' (2017) 16(4) World Trade Review 583-600; William E Kovacic, 'Competition Policy and State-Owned Enterprises in China' (2017) 16(4) World Trade Review 693-711; Ines Willemyns, 'Disciplines on State-Owned Enterprises in International Economic Law: Are We Moving in the Right Direction? (2016) 19 Journal of International Economic Law 657–680; Przemyslaw Kowalski and others, 'State-Owned Enterprises, Trade Effects and Policy Implications', OECD Trade Policy Papers No. 147, 2013; Antonio Capobianco and Hans Christiansen, 'Competitive Neutrality and State-Owned Enterprises: Challenges and Policy Options', OECD Corporate Governance Working Papers No. 1, 2011. Further contributions are considered throughout the relevant chapters of this study.

[7] De Stefano (n 6); Schicho (n 6); Paul Blyschak, 'State-Owned Enterprises and International Investment Treaties: When Are State-Owned Entities and Their Investments Protected?' (2011) 6(2) Journal of International Law and International Relations 1-52.

field of international economic law, the close link SOEs share with the government raises several concerns. Indeed, owing to their proximity to the State, SOEs may enjoy regulatory, economic, and financial advantages, which other economic operators, such as privately owned enterprises (POEs), do not. Moreover, issues arise when States use SOEs to confer economic advantages to POEs or other SOEs; for example, by using SOEs as intermediaries to perform those type of conferral and circumvent WTO rules, especially rules on subsidies. In sum, from the perspective of international trade regulation, the relationship between SOEs and governments is perceived mainly as a subsidy issue.

In this context, scholars and legal practitioners have been arguing that the WTO legal framework lacks the legal tools to properly address the challenges brought about by SOEs within international trade.[8] Over the last two decades, the framework has been further complicated by China's accession to the WTO because of its socialist market economy and the overarching role that SOEs play in the Chinese economy.[9] In the WTO context, SOEs have been predominantly conceived as a subsidy issue.[10] Accordingly, concerns mainly revolve around the application of multilateral regulation on subsidies to SOEs, the use of subsidies by WTO Members as means to escape their multilateral obligations or discriminate between trading partners, as well as the high evidentiary burden required to contest subsidies provided to or through SOEs and the inefficiency of remedies. Moreover, the way in which WTO adjudicating bodies have addressed these issues have been highly criticized. More specifically, a tense debate has been sparked by the Appellate Body (AB)'s qualification of SOEs as 'public body' pursuant to Article 1.1 ASCM, which restricted SOEs to being an 'entity that possesses, exercises or is vested with governmental authority'.[11] The common feature that all these concerns share is that SOEs have escaped WTO law.[12]

The proliferation of preferential agreements, where the most relevant issues concerning the impact of SOEs' participation in international trade and investment emerges, may introduce further fragmentation or present new elements regarding these complex economic operators.[13]

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[8] See *ex multis*: Andrea Mastromatteo 'WTO and SOEs: Article XVII and Related Provisions of the GATT 1994' (2017) 16(4) World Trade Review 601–618; Mark Wu, 'The "China, Inc." Challenge to Global Trade Governance' (2016) 57(2) Harvard International Law Journal 261 f.; Hao Liang, Bing Ren and Sunny Li Sun, 'An Anatomy of State Control in the Globalization of State-Owned Enterprises'(2015) 46(2) Journal of International Business Studies 223-240. This perspective however has also been challenged based on the argument that there are WTO rules that are appropriate for regulating SOEs but they are underused. See: Weihuan Zhou and Henry S Gao, *Between Market Economy and State Capitalism: China's State-Owned Enterprises and the World Trading System* (CUP, 2022).

[9] Petros C Mavroidis and André Sapir, 'China and the World Trade Organization: Towards a Better Fit', Brugel Working Paper, Issue 6, 2019; Robert Wolfe, 'Sunshine over Shanghai: Can the WTO Illuminate the Murky World of Chinese SOEs?' (2017) World Trade Review 16(4) 713-732; William E Kovacic, 'Competition Policy and State-Owned Enterprises in China' (2017) 16(4) World Trade Review 693–711; Deborah Z Cass, Brett G Williams and George Barker (eds), *China and the World Trading System* (CUP, 2003).

[10] Chad P Bown and Jennifer A Hillman, 'WTO'ing a Resolution to the China Subsidy Problem' (2019) 22 Journal of International Economic Law 557-57; Julia Y Qin, 'WTO Regulation of Subsidies to State-Owned Enterprises (SOEs) – A Critical Appraisal of the China Protocol (2004) 7(4) Journal of International Economic law 863-919.

[11] See Julia Y Qin, 'WTO Regulation of Subsidies to State-owned Enterprises (SOEs) – A Critical Appraisal of the China Accession Protocol' (2004) 7(4) Journal of International Economic Law 863–919.

[12] Petros C Mavroidis and André Sapir, *China and the WTO: Why Multilateralism Still Matters* (Princeton University Press, 2021); Michel Cartland, Gérard Depayre and Jan Woznowski 'Is Something Going Wrong in the WTO Dispute Settlement?' (2012) 46(5) Journal of World Trade 979-1015; Yan Xiaoyan, 'State-Owned Enterprises: A Real Challenge to the World Trade Organization' (2018) 8(1) Journal of WTO and China 5-34; Jaemin Lee, 'State Responsibility and Government-Affiliated Entities in International Economic Law' (2015) 49(1) Journal of World Trade 117-152; Ru Ding, '"Public Body" or Not: Chinese State-Owned Enterprise' (2014) 48(1) Journal of World Trade 167-190.

[13] On SOEs regulation in PTAs: Weihuan Zhou, 'Rethinking the (CP)TPP as a Model for Regulation of Chinese State-Owned Enterprises' (2021) 24(3) *Journal of International Economic Law* 572–590; Leonardo Borlini, 'When the

2. The objective of the study and the research question: defining SOEs in international trade law and why does it matter

Considering the lack of a shared definition of SOEs and the role and challenges they raise, the study seeks to explore and understand the notion of SOEs within international treaty regimes that apply to international trade. More specifically, the analysis focuses on the definitional framework concerning these entities that has emerged from the regulation of international trade within the multilateral legal framework of the WTO and of plurilateral and bilateral preferential treaty regimes. The aim is to map the constitutive criteria from each of the treaty frameworks and determine whether a unified definitional framework for SOEs and a related emerging definition can be identified. This approach is ultimately functional in order to understand to what extent the existing legal regimes cover SOEs, or alternatively the time has come for a specifically dedicated set of rules for these entities. In light of this, the study addresses the following questions: what is considered to be an SOE under international trade law? Is it possible to identify the constitutive criteria of these enterprises in existing international trade legal regimes? And, is there any substantial difference between SOEs and related enterprises, such as SCEs, STEs, and SWFs in that context?

It should be stated from the outset that absent a shared definition at the international level, reconstructing the constitutive criteria of SOEs emerging from international treaty regimes on trade necessarily requires a comparison between two notions. On the one hand, there is a factual notion, i.e., what SOEs are in the phenomenological world with the features that they display. On the other hand, there is a legal notion, i.e., those of the economic operators currently being regulated under the existing treaty regimes. From a legal perspective, this might be seen as a limit of this study. Notwithstanding this, an investigation of the definitional aspects of SOEs within international trade law remains relevant for multiple reasons.

From a practical standpoint, the lack of a definition of SOEs hinders the development of a shared understanding regarding which type of enterprises fall under the notion. Indeed, discrepancies in this context are very much likely to arise, considering the differences existing at the domestic level. In other words, leaving SOEs undefined makes it challenging to understand what they are, their characteristics, and features that require regulation. Consequently, it is difficult to determine their actual presence and development in international markets. This is because a definition makes it possible to determine the features that are relevant to the notion and its scope. In other words, different definitions correspond to different outcomes, depending on how they are delineated, the elements they include, and those they exclude. While SOEs' rapid expansion in international markets can be taken as an objective fact, the actual quantitative impact of such growth is measured differently

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Leviathan Goes to the Market: A Critical Evaluation of the Rules Governing State-Owned Enterprises in Trade Agreements' (2020) 33(2) Leiden Journal of International Law, 313-334; Julien Sylvestre Fleury and Jean-Michel Marcoux, 'The US Shaping of State-Owned Enterprises Disciplines in the Trans-Pacific Partnership' (2016) 19(2) Journal of International Economic Law 445-465; Gary Clyde Hufbauer and Cathleen Cimino-Isaacs, 'How Will the TPP and TTIP Change the WTO System?' (2015) 18(3) Journal of International Economic Law 679-696; Joost Pauwelyn and Wolfgang Alschner, 'Forget about the WTO: The Network of Relations between PTAs and Double PTAs' in Andreas Dür and Manfred Elsig, *Trade Cooperation: The Purpose, Design and Effects of Preferential Trade Agreements* (CUP, 2015); Kyle W Bagwell and Petros C Mavroidis, *Preferential Trade Agreements: A Law and Economic Analysis* (CUP, 2011); Joost Pauwelyn, 'Adding Sweeteners to Softwood Lumber: The WTO–NAFTA "Spaghetti Bowl" is Cooking' (2006) 9(1) *Journal of International Economic Law* 197–206.

depending on the extension of the boundaries of the definition adopted. In other words, estimates regarding SOEs' presence and activity yield different results depending on whether a wider or narrower definition of these enterprises is adopted. For instance, going back to OECD estimates, in 2016, the OECD calculated that more than 15% of the largest enterprises worldwide were SOEs, in which the State retained more than 10% ownership shares, which disclosed a growing trend compared to previous years.[14] However, the objectivity of this assessment can be appreciated only to a certain extent because the definition on which it was based is broader than previous studies conducted on the same issue.[15] Moreover, the lack of a definition of SOEs makes dispute resolution the natural venue for solving matters related to what constitutes an SOE. This means it would ultimately leave it to international courts to define these enterprises. Far from filling the definitional void, this adjudicative solution could bring about a highly-fragmented framework as definitions of SOEs would likely change on a case-by-case basis.

From a legal perspective, the lack of a definition makes it particularly challenging to establish an efficient and effective legal framework for SOEs. Indeed, provocatively, one may argue that something that is not defined does not exist in the eye of the law. This would translate into the impossibility of properly regulating something that is not considered under a given legal framework. From this perspective, a definition makes it possible to identify a given situation and acknowledge that it deserves to be regulated and, also, which aspects deserve to be regulated. Hence, without definitions, there is neither regulation nor an effective, or inspired-by legal certainty legal framework. Looking at SOEs, in the absence of their definition, it becomes challenging to understand if they are covered under current international legal regimes on trade, and if yes, to what extent.

Against this background, this study argues that, to establish an effective and efficient regulation of SOEs under the multilateral trade legal framework, a debate on their definition is needed. Such a debate would be beneficial from multiple perspectives. First of all, it would make it possible to determine whether a unique definition applicable to all legal fields covered under WTO Agreements is feasible and even desirable. Secondly, it would make it possible to find, if not a solution, at least a shared understanding of the qualification of SOEs as public or private bodies. Finally, such discussions would help clarify which constitutive elements of SOEs are conceived as hindering international trade and require regulation. This type of discussion has already partially taken place outside the institutional framework of the WTO, and more specifically in PTAs. Indeed, both plurilateral and bilateral PTAs increasingly explicitly regulate SOEs, including their definition. This tendency might be seen as a confirmation of the necessity to define these enterprises at the multilateral level and also as a result of the impossibility or unwillingness to do so.

In light of these considerations, the study aims to identify the scope of rules applicable to SOEs and assimilated entities to understand whether a definition of SOEs can be identified in primary and secondary rules of international trade law. Secondly, the study investigates the emerging regulatory framework applicable to SOEs, particularly plurilateral and bilateral PTAs. It is believed that this methodological approach helps not only understand whether the current legal regime, which finds its origins in the post-World War II era, is capable of addressing the issues raised by the variety of emerging economic actors in today's global economy but also ascertain whether it is possible to identify an emerging definition of SOEs in the primary and secondary sources of international law,

[14] OECD, 'State-Owned Enterprises as Global Competitors: A Challenge or an Opportunity?' (OECD Publishing 2016).
[15] Przemyslaw Kowalski, 'On Traits of Legitimate Internationally Present State-owned Enterprises', in Luc Bernier, Massimo Florio and Philippe Bance, *The Routledge Handbook of State-Owned Enterprises* (Routledge, 2020) 147.

with particular reference to the legal framework of international trade law. In this regard, the study also focuses on the differences between SOEs and related entities in order to identify, if any, the convergent or divergent defining features of each entity in relation to others.

3. The methodology

With the aim of addressing the definitional issues surrounding SOEs in international trade law, the study identifies the constitutive criteria emerging from treaty legal regimes on international trade, first, at the multilateral level and then in plurilateral and in bilateral PTAs.
On the one hand, the analysis of WTO legal provisions deemed to apply to SOEs is led by the following questions: What definitions are found in the WTO agreements? Do they explicitly or implicitly encompass SOEs? Moreover, are the economic operators falling within the scope of WTO Agreements close or related to the notion of SOEs? What are the constitutive elements of economic operators covered under WTO law and to what extent they can be used to define SOEs? Provided the different rationale on which each WTO Agreement is premised, is it possible to find a unique definition of SOEs emerging from that regulatory context or is the framework more fragmented?
On the other hand, when focusing on the constitutive elements of SOEs and assimilated entities as encapsulated within selected plurilateral and bilateral PTAs, the guiding research question is whether it is possible to find constitutive criteria of SOEs agreed upon by States at the plurilateral level in cross-regional preferential arrangements on international trade. But also, what is the approach adopted at the bilateral level with regard to the definition of SOEs by leading economies under the WTO? In this context, the selection of considered PTAs has been guided by several criteria. Adopting the China's accession to the WTO as the moment in which SOEs started to be perceived as a disruptive element in the international trade context, only PTAs concluded starting from 2001 on are considered. Then, a thematic research method is introduced in the analysis. On the one side, the research delves into the most relevant agreements concluded at the plurilateral level generally considered to be the most important ones when it comes to SOEs notion and regulation. In this perspective, the research considers the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP); the United State-Mexico-Canada Agreement (USMCA); and the Regional Comprehensive Economic Partnership (RCEP). On the other hand, the research focuses on bilateral PTAs concluded by China, the European Union (EU), the United States and Australia. These countries have been selected not only for the wide geographical perspective they provide, but also based on the role that SOEs play in their economies in terms of assets, employment and sectoral distribution. Also, these are the governments that advocate for SOE regulation at the international trade law level the most. Consequently, the analysis of their approaches at the bilateral level towards SOEs and related entities is deemed essential to understand if and to what extent the definitional approaches towards these economic operators differ from the approach followed at the multilateral level.
To address the abovementioned questions, the research follows four main methods of research.[16] First, following a descriptive approach, the study lays the foundation on which the analysis is based. The aim is to describe the provisions considered and, in light of their scope and meaning, to identify the subjects covered therein. Second, a thematic method is adopted. Starting from the wording of relevant WTO and PTAs provisions the research maps the constitutive criteria characterizing

[16] Lina Kestemont, *Handbook on Legal Methodology. From Objective to Method* (Intersentia, 2018).

economic operators falling therein. The State practice and case law related to the provisions of WTO Agreements analyzed is also considered. This methodological approach is deemed essential to identify definitional patterns and recurring meanings attached to the notions covered under the current international trade legal framework. Third, once the definitional criteria are mapped and relevant data gathered, an analytical method of research is followed. Accordingly, the identified and mapped criteria are critically analyzed, classified and interpreted in light of the definitional issue of the notion of SOEs and of the concerns raised by SOEs under international trade law. Lastly, a comparative approach method of research is used. More in detail, the analysis focuses on convergences and divergences of SOE definitional approaches at a double level. First, under WTO law, the analysis compares all gathered definitional patterns with the notion of SOEs as emerging in the current global economy scenario. The aim is to understand if and to what extent SOEs are regulated under WTO Agreements or whether they escape multilateral regulation on trade. Second, definitional approaches towards SOEs and related entities are compared among plurilateral and bilateral PTAs. The ultimate aim is to map differences and convergences of the definitional approaches adopted at the preferential level and those characterizing the WTO Agreements. This approach is deemed necessary to allow the study to formulate conclusions and related recommendations based on evaluations emerged from the comparative perspective.

4. The structure of the study

In light of the above, the study is divided into three parts. The first part sets out the foundations of the study by outlining the notion of SOEs, their relevance to international trade, and the economic models in which they operate. The second part concerns the multilateral legal framework of the WTO. In this respect, both primary and secondary rules are considered. The third part looks outside the institutional framework of the WTO to PTAs, focusing on the definitional approach to SOEs adopted. Then, the study concludes by providing an overall assessment of the research findings and proposing possible interpretations and solutions.

Within the three parts, the study develops throughout seven chapters.

The first chapter aims to build the theoretical foundation necessary for analyzing the existing law applicable to SOEs in international trade law. It also aims to provide an overview of the notion of SOEs from a practical perspective. To this end, first, the historical origins of SOEs, as a tool that States traditionally exploit to reach public policy goals and intervene in the economy, are observed. The underlying assumption is that SOEs' relevance and complexity in the current global economy can only be fully understood by examining where the origin of public ownership in economic operators is rooted and how it developed. From this perspective, the study retraces the most important events that impacted the development of modern SOEs, shedding light on the complexity that characterizes SOEs nowadays in terms of their relationship with the State. The study illustrates how the alternation of privatization and/or nationalization policies has resulted in the formation of different instruments and models of State ownership and control. Next, the study looks at definitional attempts of SOEs put forward by international organizations, the sectors of distribution, and the issues brought about by SOEs' proximity to the State. These issues may include the difficulty of maintaining a level playing field, the preferential economic and legal treatment they often enjoy, and the politically-motivated interference they experience in their activities.

The second chapter focuses on two main models of state intervention in the economy that are relevant to international trade. On the one hand, there is the notion of State capitalism. Here, the study considers different definitions of this phenomenon provided by scholars in order to highlight the State's multifaceted role in the economy. Under State capitalism, SOEs come to the fore because they are one of the essential instruments through which State capitalist countries operate and under whose label it is possible to find a variety of entities with very different characteristics. On the other hand, the embedded liberalism model is examined as it is encapsulated in the institutional context of the WTO. The aim is to identify the historical and legal context and the general principles in which the multilateral and preferential regulation on SOEs under scrutiny has developed. In this regard, SOEs are relevant as a tool whose exploitation in international trade can be guided through the balance that the embedded liberalism model wishes to reach. That is, between trade liberalization and the States' power to intervene in their economy to pursue public policy objectives. Finally, the study elaborates on the need to identify a definition of SOEs and explains why this is important from an international trade law perspective.

The third chapter is the first of three chapters that focuses on the constitutive elements of SOEs emerging from the WTO legal framework. More specifically, the study aims to bring some clarity to the definitional aspects of SOEs by exploring their relationship with STEs through the interpretation of Article XVII of the GATT 1994. This provision, by requiring WTO Members to ensure that STEs carry out their purchases and sales - involving either imports or exports – in accordance with the non-discrimination principle and pursuant to commercial considerations, allows governments to establish or maintain this type of economic operators. Although this article is generally referred to when SOEs regulation under the multilateral trade system is discussed, it has not substantially changed since the system was established after World War II (WWII). Indeed, the complexity and variety of SOEs in terms of structure and functioning suggest the overlap or distinction between what are generally referred to as 'SOEs' and GATT Article XVII 'STEs' deserves further exploration.

With this in mind, the chapter illustrates the scope of Article XVII of the GATT 1994 based on the canons of interpretation of the Vienna Convention on the Law of the Treaties (VCLT), starting with the wording of Article XVII of the GATT. Then, the study moves to the instruments made by parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. These include the Interpretative Note Ad Article XVII GATT, the Understanding on the Interpretation of Article XVII of the GATT and the 1999 Illustrative List of the Working Party on State Trading Enterprises. The study also focuses on elements that encapsulate subsequent State practice. In this regard, Protocols of Accession, STEs notifications submitted by Members, and Trade Policy Reviews (TPRs) provide valuable indicators as to what is, and is not, perceived to be a constitutive element of STEs. Next, the preparatory works of Article XVII of the GATT are considered. In this regard, the study reconstructs the debate that occurred among negotiating parties about the notion of STE and about state trading practices that Members decided to tackle at the beginning of the GATT system. Finally, relevant case law is explored. This approach makes it possible to identify not only the constitutive elements of STEs that the current legal framework has acknowledged but also those emerging from the dynamics of trade negotiations and practice.

The fourth chapter focuses on the relevant provisions concerning SOEs in WTO Agreements other than the GATT, namely the ASCM, the GATS, the GPA, and the AoA. The study first addresses Article 1 of the ASCM. Multilateral subsidy regulation is the regulatory framework, where challenges brought about by SOEs are the most evident under WTO law, as these enterprises have traditionally

been seen as a subsidy issue. Under Article 1 ASCM specifically, the definition of subsidy envisages three types of subsidy providers: the government, 'any public body', and private bodies entrusted or directed by the government to carry out governmental functions. Using this scheme, the analysis investigates under which conditions an SOE falls under the category of 'public body' or that of 'private' entities. From a legal perspective, this assessment is crucial for defining the scope of the legal regime applicable to SOEs under the multilateral subsidy regulation. Indeed, from the qualification of SOEs in one way or another, different consequences materialize, such as the intensity of the scrutiny to be exercised on SOEs' conduct under the ASCM, together with the remedies available to WTO Members to counteract negative spillovers and the standard of proof required to do so. In this context, this section aims to map the constitutive elements emerging from the wording of Article 1 ASCM and the related case law. This analysis of decisions adopted by WTO adjudicating bodies is relevant because several definitions of public and private bodies have been put forward within the dispute settlement mechanism. Ultimately, the mapping of criteria used to qualify SOEs as either public or private can help shed light on the public or private nature of these entities.

Then, the study focuses on provisions relevant to SOEs under the multilateral regulation of services. This is a particularly important legal field for SOEs, as these entities are often employed to deliver essential services that would not be supplied or would not be supplied on the same terms by market forces or private capital alone. In order to map which constitutive elements are useful to define SOEs emerging from the GATS, the study first explores the notion of 'Member' under the Agreement. This facilitates understanding the extension of the notion of 'State' under multilateral regulation on trade in the domain of services and to determine when the boundaries of the 'State' leave space for related yet distinct entities. Next, relevant notions are considered, such as 'juridical person', 'service supplier', 'monopoly service supplier' and 'exclusive service supplier' under Articles VIII and XXVIII GATS, as well as the notion of 'public entity' under the Annex on Financial Services.

In addition to this, the plurilateral framework of the GPA is examined. In the context of government procurement procedures, SOEs may generate concern because they would be able to present better offers than their competitors, based on the advantages that their ties with the State may provide them. From the international trade law perspective, this dynamic can inhibit the liberalization of markets and violate the transparency principle. It therefore becomes necessary to understand whether they are regulated, and if yes, to what extent under the plurilateral context of the GPA. Being a plurilateral agreement, the GPA only binds WTO Members that specifically agreed to it. It is interesting to note that Members that rely on SOEs the most, such as China and Russia, are not parties to the GPA. The analysis focuses on constitutive elements of SOEs and assimilated entities that emerge from the subjective scope of the GPA. Specifically, the focus is on Annex 3 of Appendix I to the Agreement that deals with procuring entities other than central government and sub-central government entities.

Finally, the study focuses on the constitutive elements of SOEs emerging from the AoA. In the agricultural sector, States traditionally intervene in the economy to support the development of the agricultural sector and to protect it from the volatility that characterizes the production of natural products. The multilateral regulation of agriculture, as encapsulated within the AoA acknowledges the active role that States can play in protecting their agricultural markets, which makes it particularly interesting to consider for the purposes of this study. SOEs can be a crucial tool at the State's disposal to ensure the pursuit of domestic food policies and protect domestic food security. SOEs could also be market stabilizers in times of crisis. Under the AoA, the notion that can help shed light on the notion of SOEs and their relationship with the government is contained in Article 9 AoA dealing with

subsidies provided 'by governments or their agencies'. Here, the study focuses on the relationship between the State and other entities and the related case law.

Against this backdrop, the fifth chapter focuses on the boundaries of the notion of SOEs as they emerge from secondary rules on the international responsibility of States, specifically from the rules which qualify the notion of attribution. The aim is to understand whether there is a *lex specialis* on attribution under WTO law that could serve the purpose of defining SOEs.

Premised on the ongoing doctrinal debate concerning the distinction between primary and secondary norms in international law on the responsibility of States, the analysis focuses on the qualification of SOEs based on the notion of attribution and related criteria in the context of international rules on the international responsibility of States as encapsulated in the context of ARSIWA. In this regard, the analysis considers Articles 4, 5, and 8 ARSIWA. The aim is to delineate the constitutive elements emerging from the notions of 'State organ', 'entities exercising elements of governmental authority', and 'persons or group of persons acting on the instructions of, or under the direction or control of' the State and to determine how they may be relevant for the qualification of the notion of SOEs. Next, the focus shifts to the qualification of SOEs under the WTO DSS related to attribution. The study maps the connecting criteria for the purposes of attribution related to the categories of entities, which WTO adjudicating bodies refer to when dealing with the matter. These categories include the notions of 'Member', an entity exercising governmental authority, and private bodies.

The sixth and seventh chapters address the notion of SOEs under plurilateral and bilateral PTAs. Overall, PTAs under scrutiny are those notified to the WTO. However, since notified agreements do not necessarily mean that they are all those actually in force, also notified PTAs, which are currently in force according to the official portals of each government, are selected for analysis. The aim is to assess emerging constitutive criteria of SOEs and related entities in plurilateral and bilateral preferential arrangements, thereby providing a comprehensive overview of the current coverage of these enterprises in existing treaty legal regimes on trade.

This more comprehensive approach makes it possible to determine whether arrangements reached outside the WTO can capture a wider variety of State-owned and State-led entities than multilateral agreements. Following an outline of the phenomenon of the proliferation of PTAs and their relationship with the multilateral legal framework of the WTO, which is necessary to understand the legal value for analyzing them in the context of this specific study, the analysis focuses on plurilateral preferential agreements that explicitly define and regulate SOEs or contain a legal framework that is broad enough to be applicable to them. In particular, the study examines the CPTPP, the USMCA, and the more recent RCEP. These PTAs, which encompass States from different geographic areas and based on different domestic economic models, are relevant for the purposes of the study because they serve as an example of a possible shared regulation of SOEs between different jurisdictions outside the constraints of the WTO multilateral legal framework.

Then, bilateral preferential agreements are studied. More specifically, the bilateral agreements concluded by China, the EU, the US, and Australia are analyzed. The contribution of these countries to the international regulation of SOEs is crucial because they are prominent proponents of PTAs globally. They are also the countries that are most involved in the topic of SOEs under the WTO legal framework, either because they are great advocates of regulating these enterprises or because they are based on an economic model that heavily rely on SOEs and assimilated enterprises. Moreover, bilateral PTAs have been selected for analysis on a chronological basis. Only agreements signed after

2001 are reviewed. It is considered here that the year of China's accession to the WTO marked the beginning of the 'SOE issue' at the international trade level, including its plurilateral or bilateral turn.

Part I
Foundations

Chapter One
STATE-OWNED ENTERPRISES (SOEs): A PHENOMENOLOGICAL EVOLUTION

1. SOEs as a phenomenon: an introduction on their key role in the global economy

Despite being a worldwide phenomenon, there has yet to be an agreed definition of State-owned enterprises (SOEs) at the international level. Rather, in international law and in international economic law in particular, the term has been used to refer to various entities featuring diverse characteristics and relationships with the State. These include but are not limited to, state-invested enterprises (SIEs), state-controlled enterprises (SCEs), and State wealth funds (SWFs). This work wishes to examine SOEs as a category in the context of existing treaty legal regimes that apply to international trade. The aim is to establish whether a unified definitional framework for SOEs can be identified. In turn, this would clarify whether and to what extent existing legal regimes regulate SOEs, or rather the time has come for a specifically-dedicated set of rules for these entities. Considering that SOEs are a global phenomenon, the study does not focus on SOEs from a specific region or country, such as China. Instead, a broader perspective is adopted with the aim of evaluating the definitional criteria of SOEs as emerging from international trade law.

In the last few decades, SOEs have increasingly played a crucial role in the global economy.[17] The number, distribution, and size of State-led undertakings and their involvement in cross-border operations have incrementally increased. It has been calculated that, between 2011 and 2012, 10% of the 2,000 largest enterprises listed in the Forbes Global list were SOEs.[18] This share further increased to 14% in the following year. Similarly, SOEs revenues have also increased, going from 6% in 2000 to 20% in 2011.[19] These trends do not seem to abate—quite the contrary. In 2018, SOEs' assets amounted to 45 trillion US dollars, almost half of the global GDP.[20] Moreover, the breakout of the Covid-19 pandemic prompted States to intervene in their economies and, inter alia, SOEs were used to counteract the adverse economic effects of related crises. SOEs were also entrusted to deliver essential medical products and services.[21] Hence, the overall active participation of the State in the economy through the establishment and management of State-led entities will likely continue in the following years.

Economic entities related to the State by virtue of public ownership can be traced back to ancient Egypt and the Roman Empire.[22] However, their features were so different from those of modern

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[17] OECD, Sustainable and Resilient Finance Business and Finance Outlook 2020 (2020) 147.

[18] Przemyslaw Kowalski and others, 'State-Owned Enterprises: Trade Effects and Policy Implications', OECD Trade Policy Papers No. 147 (OECD Publishing, Paris, 2013).

[19] Hans Christiansen and Yunhee Kim, 'State-Invested Enterprises In the Global Marketplace: Implications For a Level Playing Field', OECD Corporate Governance Working Papers No. 14. (OECD Publishing, 2014). See also: OECD, 'State-Owned Enterprises as Global Competitors: A Challenge or an Opportunity?' (OECD Publishing, 2016).

[20] International Monetary Fund, Fiscal Monitor (2020) 53.

[21] For an account of State interventionism and the use of SOEs during the Covid-19 pandemic see Leonardo Borlini, 'Economic Interventionism and International Trade Law in the Covid Era' (2023) 24(1) German Law Journal 1; Bastian van Alpendoor and Nanà de Graaf, 'The State in Global Capitalism Before and After the Covid-19 Crisis' (2022) 28(3) Contemporary Politics 306.

[22] See: Giuseppe Bognetti, 'History of Western State-Owned Enterprises. From the Industrial Revolution to the Age of Globalization', in Luc Bernier, Massimo Florio and Philippe Bance, *The Routledge Handbook of State-Owned Enterprises* (Routledge, 2020), 25. For a historical perspective on public enterprises: Robert Millward, *Private, and Public Enterprise in Europe: Energy, Telecommunications and Transport.t 1830-1990* (CUP 2002); Richard Hemming and Ali M Mansoon, *Privatization and Public Enterprises* (IMF, 1988).

enterprises that their study would shed hardly any light on modern economic operators and their relationship with the State.[23] Legal persons, who engaged in economic cross-border activities (including trade) linked with the State by virtue of establishment or ownership, started to emerge between the fifteenth and the seventeenth century. However, enterprises owned by the State started to display features similar to those of modern SOEs in the period between the two world wars. Then, starting from the 1980s-1990s, due to their increasing activities in international markets, these entities started to be perceived as a source of concern in many areas of international economic law, from international trade to investment law. Although they exist in virtually every economic model, academic literature seems to focus on SOEs mainly in the context of economies characterized by a strong influence of the State, such as State capitalist countries and China in particular.[24] In national economies, SOEs' economic activity shares range from 0.5% to 2% in developed economies and from 10% to 30% in developing ones.[25] Overall, SOEs have become more and more active at the international level and increasingly engage in cross-border economic operations.[26] Indeed, it has been calculated that 22% of the first 100 largest firms in the world are state-controlled entities - one of the highest percentages to be recorded in recent history -[27] and that they operate in contexts that are crucial for international trade operations, such as supply chains.[28] While this increasing internationalization is a by-product of the nature of activities performed, sometimes it is also the result of national policies specifically designed to this end.[29]

SOEs are critical economic actors in both economies based on free market principles, such as market economies (MEs), and economies characterized by a strong public sector and heavy State intervention, such as non-market-based economies (NMEs) or State capitalist countries. Notwithstanding this point of convergence, SOEs also represent a point of geopolitical and legal tension between different economic models due to the diverging principles on which State interventionism and State ownership in economic operators are premised across national contexts. Indeed, from a general perspective, SOEs in developed and based on free-market principles economies are relatively less numerous, their activity is usually limited to key sectors of the economy, and they operate based on market forces with a profit-oriented and wealth-maximization attitude. Conversely, least developed economies with a high level of State interventionism resort to SOEs in several economic sectors for political purposes and to pursue non-commercial objectives, ultimately

[23] Bognetti ibid.
[24] Arguably, the debate on SOEs has been boosted by the growth of China's economic importance in the global economy. Academic literature on Chinese SOEs is extensive. See *ex multis*: Petros C Mavroidis and André Sapir, *China and the WTO: Why Multilateralism Still Matters* (Princeton University Press, 2021); Yingying Wu, *Reforming WTO Rules on State-Owned Enterprises: In the Context of SOEs Receiving Various Advantages* (Springer, 2019); Weihuan Zhou, Henry Gao and Xue Bai, 'Building a Market Economy Through WTO-Inspired Reform of State-Owned Enterprises in China' (2019) 68(4) International & Comparative Law Quarterly 977; Li-Wen Lin, 'A Network Anatomy of Chinese State-Owned Enterprises' (2017) 16(4) World Trade Review 583-600; William E Kovacic, 'Competition Policy and State-Owned Enterprises in China' (2017) 16(4) World Trade Review 693-711; Yang Xiaoyan, 'State-Owned Enterprises: A Real Challenge to the World Trade Organization' (2018) 8(1) Journal of WTO & China 5-34.
[25] OECD, The Size and Sectoral Distribution of State-Owned Enterprises (OECD Publishing, 2017).
[26] It is interesting to note that this trend has been reported consistently by the OECD. See: OECD, 'SOEs Operating Abroad: An Application of the OECD Guidelines on Corporate Governance of State-Owned Enterprises to the Cross-Border Operations of SOEs (OECD Publishing, 2009).
[27] OECD (2016) (n 3) 11.
[28] OECD, 'Maintaining Competitive Neutrality: Voluntary Transparency and Disclosure Standard for Internationally Active SOEs and their Owners' (OECD Publishing, 2021) 5.
[29] Kowalski and others (n 2) 15. The most recent and notable example in this regard is probably the 'go global' policy implemented by China, *inter alia*, through bilateral agreements and Chinese SOEs activities. See Chapter 5 of this work.

seeking political gain.[30] Such tensions should be put in the context of globalization, a process that has been accelerated by the liberalization of international markets and that brought about a high level of interdependence between States on a global scale.[31]

In light of the above, SOEs have become a topical issue in international economic law. Indeed, in the current globalized and interconnected economic context, there is increasing skepticism over the objectives that SOEs are trying to achieve through their growing involvement in international economic activities.[32] In this respect, SOEs raise a variety of concerns.[33] First of all, there are political concerns, as governments fear that foreign States' public policy goals - rather than economic ones - guide SOEs' operations internationally, outward or inward. Secondly, there are concerns stemming from the advantageous position enjoyed by SOEs due to their close relationship with the State that could disrupt the level playing field between economic operators in international markets and thus hinder international commerce. Thirdly, there is concern that operations carried out by SOEs could target strategic sectors and damage national security interests.[34] In the context of international economic law, SOEs have attracted scholarly attention mostly in the field of foreign investments,[35] where issues arise with reference to the qualification of SOEs as 'investor' and their right to institute proceedings before international tribunals and arbitrators.[36] However, SOEs constitute a potentially disruptive element for international trade too. The challenge in this regard stems from SOEs' link with the State, which allows them to enjoy regulatory and economic advantages that ultimately may result in a misallocation of resources.[37] Finally, concerns revolve around the potential infringement of competitive neutrality and transparency principles that may result from the conduct and

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[30] Ian Bremmer, *The End of the Free Market: Who Wins the War Between States and Corporations?* (Portfolio, 2010) 57; Ian Bremmer, 'State Capitalism Come of Age: The End of Free Market?' (2009) 88(3) Foreign Affairs 40-55; Jędrzej Górski, 'The Changing Paradigm of State-controlled Entities Regulation: Laws, Contracts and Disputes' (2020) 17(6) TDM 1; Julien Chaisse, Jędrzej Górski and Dini Sejko, 'Confronting the Challenges of State Capitalism: Trends, Rules, and Debates', in Julien Chaisse, Jędrzej Górski and Dini Sejko *Regulation of State Controlled Enterprises: An Interdisciplinary and Comparative Examination* (Springer, 2022) 2.

[31] Robert Howse, 'From Politics to Technocracy - And Back Again: The Fate of the Multilateral Trading Regime' (2002) 96 American Journal of International Law 95.

[32] Leonardo Borlini and Stefano Silingardi, 'The Foundations of International Economic Order in the Age of State Capitalism', in Panagiotis Delimatsis, Georgios Dimitropoulos and Anastasios Gourgourinis (eds), *State Capitalism and International Investment Law* (Hart Publishing, 2023) 21.

[33] About non-commercial concerns raised by SOEs: Steven Globerman and Daniel Shapiro, 'Economic and Strategic Considerations Surrounding Chinese FDI in the United States' (2009) 26(1) Asia Pacific Journal of Management 163; Karl P Sauvant (ed), *The Rise of Transnational Corporations from Emerging Markets: Threat Or Opportunity?* (Edward Elgar Publishing 2009).

[34] Looking at international investments, a highly debated topic is whether SOEs can act as claimants before an international court or arbitration tribunal. On this point, see: Ming Du, 'The Status of Chinese SOEs Enterprises: Much Ado About Nothing?' (2022) 20 (4) Chinese Journal of International Law, 785- 815; Bianca Nalbandian, 'State Capitalists as Claimants in International Investor-State Arbitration' (2021) 81 QIL Zoom-Out 7.

[35] See *ex multis*: Du ibid; Lu Wang, 'Non-Discrimination Treatment of State-Owned Enterprise Investors in International Investment Agreements?' (2016) 31(1) ICSID Rev-FILJ 45; Mark Feldman, 'The Standing of State-Owned Entities under Investment Treaties' in Karl P Sauvant (ed) *Yearbook on International Investment Law & Policy 2010-2011* (OUP, 2012); Nick Gallus, 'State Enterprises as Organs of the State and BIT Claims' (2006) 7(5) Journal of World Investment and Trade 761.

[36] See Paul Blyschak, 'State-Owned Enterprises and International Investment Treaties: When are State-Owned Entities and Their Investments Protected?' (2010) 6 Journal of International Law and International Relations 6 1; Nalbandian (n 18) 17-18; Carlo De Stefano, *Attribution in International Law and Arbitration* (OUP, 2020); Giulio Alvaro Cortesi, 'ICSID Jurisdiction with Regard to State-Owned Enterprises—Moving Toward an Approach Based on General International Law' (2017) 16(1) Law & Practice of International Courts and Tribunals 108.

[37] OECD (2016) (n 3) 84. See Talis J Putniņš, 'Economics of State-Owned Enterprises' (2015) 38(11) International journal of Public Administration 815- 832.

management of SOEs.[38] This is especially true in a context that has developed and thrives on the benefits of free trade in goods and services and non-discrimination and market principles, such as that of the World Trade Organization (WTO).
Against this background, the study aims to map the definitional criteria of SOEs as they emerge from treaty legal regimes on international trade. To this end, the analysis is structured as follows. Firstly, the study gives an overview of SOEs as a phenomenon in its historical evolution, current configuration and relevance in international trade is provided. Secondly, the research, on the one hand, addresses SOEs in the context of State capitalism, an economic and political model where the State plays a central role in the economy and where SOEs are a key tool for its expansion. On the other hand, embedded liberalism is considered to be the model on which the multilateral trade regulation is based seeking a balance between market liberalization and national State intervention to pursue public policy objectives. Finally, the study focuses on why a definition of SOEs in international trade is needed.

2. The historical evolution of SOEs, their current configuration and relevance in international trade

SOEs are a topical issue in international trade discussions. Their relevance and complexity in the current economy arguably can only be fully understood by looking at where the origin of public ownership in economic operators is rooted and how it developed. With this in mind, the following section begins by providing an overview of the most important historical events that led to the formation of modern SOEs, starting from the first forms of enterprises established and owned by the government up until today. Then, the current distribution and configuration of modern SOEs are discussed. Lastly, the study highlights the features that make SOEs relevant in the context of international trade and the main issues related to them.

2.1. State ownership in economic operators: an overview of the main historical events from the fifteenth century until today

The fragmentation and ramification of State ownership patterns characterizing State-led economic entities involved in international trade are the result of the historical evolution of the multifaceted role of the State in the economy.[39] There are a few key historical events that can be taken into consideration in this regard.
Although, as mentioned already, the initial forms of public enterprises already existed in medieval times,[40] the first examples of conflation of governmental powers with commercial objectives in enterprises engaging in trade activities emerged around the fifteenth and seventeenth century from the practice of European states.[41] During the colonial era, the major economic players between

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[38] De Stefano (n 20); Paul Blyschak, 'State-Owned Enterprises and International Investment Treaties: When are State-Owned Entities and their Investments Protected?' (2011) 6(2) Journal of International Law and International Relations 1.
[39] Aldo Musacchio and Sergio Lazzarini, *Reinventing State Capitalism. Leviathan in Business, Brazil and Beyond* (Harvard University Press, 2014) 23.
[40] Judith Clifton, Francisco Comín and Daniel D Fuentes, *Privatisation in the European Union. Public Enterprises and Integration* (Springer, 2003) 7; Albert Badia, *Piercing the Veil of State Enterprises in International Arbitration* (Wolters Kluwer, 2014) 1 f.
[41] Kate Miles, *The Origins of Investment Law. Empire, Environment and the Safeguarding of Capital* (CUP, 2013) 33 f.

Western countries, i.e., the Netherlands, France, and England, founded public-private ventures and subjected them to their control. These enterprises were entrusted with the task to explore newly-discovered territories and establish colonies there.[42] The English East India Company and the Dutch *Vereenigde Oost-Indische Compagnie* (VOC) and were among the most important such public-private entities.[43] This category of subjects usually enjoyed sovereign rights bestowed upon them by the government through which they were allowed to conclude treaties with local rulers and administrators, and by doing so they projected the power of the colonizing power over colonized territories.[44] They also enjoyed privileges to carry out their activities in the selected territories, which allowed them to overcome their competitors. Such advantages typically entailed monopolistic positions over trade in assigned territories.[45] Moreover, because of their structure as corporations and joint-stock companies, they had legal personality. All these features finally enabled them to function in a manner that nearly resembled that of a State in terms of the exercise of powers and activities. Once they completed their tasks, privileges were revoked, and the enterprise rarely survived afterward.[46]

A closer look at the English East India Company reveals a few elements of interest for the analysis. Looking at its structure and governance, the English East India Company was a commercial body exercising governmental functions over foreign territories.[47] Its shareholders were members of the British aristocracy and merchants, from which the members of the Court of Directors of the undertaking were selected. Their duty was to appoint governors who managed the company's local branches in India.[48] Looking at its functioning and powers, the East India Company was expressly authorized to enter into treaties with local rulers and thus impose British legal standards on Indian territories.[49] This practice allowed the British government to rule over India.[50]

Another interesting example of a commercial entity exercising governmental functions was the Dutch VOC. Established in 1602 by the States General,[51] the company's shares were held by two categories

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[42] Marc Ferro, *Colonization: A Global History* (Routledge, 2005) 5. See also: K. Stapelborek, 'Trade, Chartered Companies, and Mercantile Associations', in Bardo Fassbender, Anne Peters and Simone Peter (eds), *The Oxford Handbook of the History of International Law* (OUP, 2012) 338-358.

[43] On British companies see: Franklin A Gevurtz, 'The Historical and Political Origins of the Corporate Board of Directors' (2004) 33(1) Hofstra Law Review 115.

[44] Giuseppe Dari-Mattiacci and others, 'The Emergence of the Corporate Form' (2017) 33(2) The Journal of Law, Economics and Organization 207. In this regard, it should be noted that treaties concluded by chartered companies were not international treaties regulated by international law. In this regard, it has been noted that chartered companies concluded unequal treaties and contracts with indigenous populations as a means to extend their possession in the designated area, together with conquest operations. See: Martine van Ittersum, 'Empire by Treaty? The Role of Written Documents in European Overseas Expansion, 1500-1800' in Adam Clulow and Tristan Mostert, *The Dutch and English East India Companies. Diplomacy, Trade and Violence in Early Modern Asia* (Amsterdam University Press, 2018) 158-159.

[45] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP, 2012) 32 f.

[46] Wu (n 8), 16. See also: Samuel Williston, 'The History of Law of Business Corporations before 1800', (1888) Harvard Law Review 114 f.

[47] Michael Mulligan, 'The East Indian Company: Non-State Actors as Treaty-Maker', in James Summers and Alex Gough (eds), *Non-State Actors and International Obligations: Creation, Evolution and Enforcement* (Brill, 2018) 40.

[48] Mulligan ibid. 41.

[49] D.P. O'Connell, 'International Law and Boundary Disputes' (1960) 54 Proceedings of the American Society of International Law at its Annual Meeting (1921-1969) 81. These treaties ultimately aimed at establishing a projection of the colonizing power in colonized territories.

[50] Mulligan (n 31) 39.

[51] For a detailed account on the VOC's establishment and operations: Giuseppe Dari-Mattiacci and others, 'The Emergence of The Corporate Form', Amsterdam Law School Legal Studies Research Paper No. 2013-11, Amsterdam Center For Law & Economics Working Paper No. 2013-11 (2013).

of shareholders. On the one hand, there were the participants who simply provided capital to the undertaking. On the other hand, there were the *bewindhebbers*, who were responsible for the company's management. The VOC had a Panel of Directors, a group of seventeen individuals that worked in close collaboration with the government and represented the channel through which political objectives could impact, and thus influence, the commercial activities of the undertaking.[52] Therefore, the Dutch company, too, enjoyed special rights and powers of a governmental nature. It retained monopoly rights over trade activities in Asia and was allowed to conclude treaties and even maintain armed forces to protect its commercial interests.[53] These powers eventually enabled the VOC to exercise and expand its commercial dominance while establishing a State-in-the-State in Jakarta, then renamed Batavia. By enacting rules and establishing courts and tribunals that would follow Dutch law, the corporation assumed control of the region and was responsible for law enforcement.

The preceding analysis illustrates how non-State actors were involved in trade operations and, at the same time, exercised sovereign rights, including the ability to conclude treaties and the right to deploy armed troops to conquer foreign territories.[54] These companies are arguably the first examples of entities merging the pursuit of commercial objectives with the exercise of sovereign rights and the protection of national interests abroad. Interestingly, they all share some common features. Firstly, they carried out trading activities through privileged monopolies. Secondly, they exercised governmental functions. Thirdly, they acted under the control of the government that created them.

Therefore, the constitutive elements of these enterprises were: a) the grant of monopoly rights by the government, b) the exercise of governmental functions by the commercial entity, and c) the exercise of State control on the commercial entity. All these elements were in line with the commercial objectives carried out by the enterprises, on the one hand, and the public interests of the State, on the other hand.

Ultimately, these private-public entities could be seen as the forerunners of contemporary SOEs in global trade. Indeed, these trade companies encompassed a dual nature. While their primary objective was to raise profits, they were also a tool to secure public interests pursued by capital-exporting States and to expand political influence in foreign territories. After all, as noted by Mishra about leaders of the English East India Company,[55] such enterprises perceived and compared themselves to State actors pursuing State interests. This perception demonstrates the close ties between those companies and the government. Due to colonialism, this model was exported beyond Europe and thus introduced into international trade relationships with non-European countries.

The twentieth century was the second crucial moment for the evolution of public ownership in economic operators. Indeed, at that time, public enterprises with modern characteristics started to emerge. Interventionist policies were put in place, as States were expected to intervene in their economy to counteract the negative economic impacts of World War I (WWI).[56] To sustain their industrial policies, governments resorted to establishing public enterprises and used them to protect

[52] Miles (n 25) 35. See also: Jian De Vries and Ad van der Woude, *The First Modern Economy: Success, Failure, and Perseverance of the Dutch Economy, 1500-1815* (CUP, 1997) 350-408.
[53] Miles ibid. Generally, on the VOC's history and activities, see: Léonard Blussé, 'Chinese Trade to Batavia During the Days of the V.O.C.' (1979) 18 Archipel 195-213.
[54] Mulligan (n 31) 39 f.
[55] Rupali Mishra, *A Business of State: Commerce, Politics, and the Birth of the East India Company* (Harvard University Press, 2018) 7.
[56] Bognetti (n 6).

national economies from foreign influence. Usually, the State retained complete ownership of undertakings operating in critical sectors, namely national defense, primary resources extraction, and transportation. This action should not come as a surprise, given that these sectors were critical for military purposes because they were directly involved in producing military equipment and the extraction of coal and steel supply, respectively. Then, in the 1930s, the first wave of nationalization programs took place in Europe. For instance, France nationalized undertakings operating in the aircraft industry, armament factories, private airlines, and railways. This is the moment when the *Société National de Chemins De Fer* (SNCF) saw the light of day.[57] In 1933, the Italian fascist government funded the *Istituto per la Ricostruzione Industriale* (IRI), a public holding company entrusted with the task to rescue and restructure finance banks and private companies following their bankruptcy due to the Great Depression.[58] Similar policies were implemented in Spain by Dictator Francisco Franco.[59] In the same period, the Union of Soviet Socialist Republics (USSR) extensively established and used State-owned and controlled economic entities as institutions of its State socialism model,[60] to the point that they became the most utilized form of enterprise.[61]

The third historical moment worth considering for the development of State ownership in economic actors coincides with the energy crisis that hit the world economy in the 1970s. Due to inflation and price control policies that characterized that period, SOEs started to experience more losses than their private counterparts and lost the support of the general public. In this context, the so-called Washington Consensus emerged.[62] The latter, inter alia, put forward the idea that the State should refrain from intervening in the economy. Hence, deregulation and privatization of State enterprises were crucial to achieving economic growth and development. From this perspective, public ownership was an obstacle to these objectives.[63] In this context, the International Monetary Fund

[57] Emmanuel Chadeau, ‘The Rise and Decline of State-Owned Industry in Twentieth-Century France’, in Pierangelo M Toninelli, *The Rise and Fall of State-Owned Enterprise in the Western World* (CUP, 2000) 187.

[58] Franco Amatori, ‘Beyond State and Market. Italy’s Futile Search for a Third Way’, in Toninelli ibid 129 f; Pierangelo M Toninelli and Michelangelo Vasta, ‘Size, Boundaries, and Distribution of Italian State-Owned Enterprise (1939-1983)’, in Franco Amatori, Robert Millward and Pierangelo M Toninelli, *Reappraising State-Owned Enterprises: A Comparison of the UK and Italy* (Routledge, 2011) 68. For a more recent account on Italian SOEs: Stefano Clò, Marco Di Giulio, Maria Tullia Galanti, Maddalena Sorrentino, ‘Italian State-Owned Enterprises after Decades of Reforms: Still Public?’ (2016) 3 Economia Pubblica 11-49; Andrea Colli, ‘Coping with the Leviathan: Minority Shareholders in State-Owned Enterprises – Evidence From Italy’ (2012) 55(2) Business History 190-214; Federico Pernazza, ‘La nozione di impresa pubblica nel contesto transnazionale’ (2015) 2 Analisi Giuridica dell’Economia 271-301.

[59] Clifton, Comín and Fuentes (n 24) 72 f. See also: Albert Carreras, Xavier Tafunell and Eugenio Torres, ‘The Rise and Decline of Spanish State-Owned Firms’, in Toninelli (n 41) 208 f.

[60] Xueguang Zhou and Olga Suhomlinova, ‘Redistribution under State Socialism: USSR and PRC Comparison’ (2001) 18 Social Stratification and Mobility 168

[61] IMF, A Study of the Soviet Economy (IMF, 1991), 15 f.

[62] The expression ‘Washington Consensus’ was coined by John Williamson in 1990. According to the economist, the term originally encompassed ten principles that were deemed to be desirable for reform in Latin American countries. It identified a set of principles on which policy reforms were to be premised, according to international financial institutions. The ultimate aim was to achieve growth, ensure low inflation, a viable balance of payments, and income distribution in developing countries, especially in Latin America. See John Williamson, *Latin American Adjustment: How Much Has Happened* (Institute for International Economics, Washington DC, 1990). On the development of the Washington Consensus see: John Williamson, ‘The Strange History of the Washington Consensus’ (2004) 27(2) Journal of Post Keynesian Economics 195.

[63] The ten principles encompassed by the Washington Consensus were: (i) budget deficits must be manageable to be financed without resorting to inflation; (ii) redistribution of public expenditure from politically sensitive sectors to neglected ones, with higher economic returns; (iii) tax reform to enlarge the tax base and reduce marginal tax raise; (iv) financial liberalization and rate determined by market forces; (v) unified exchange rate to incentivize nontraditional exports; (vi) replacement of trade restrictions by progressive reduction of tariffs; (vii) elimination of barriers to

(IMF) has played a crucial role through its loans to help States address financial needs that have arisen because of inflation.[64] The IMF also introduced new reporting standards for governments by sponsoring many structural reforms, which included radical changes in the way governments monitor and report on SOEs.[65]

The popularity of SOEs was then negatively affected worldwide, further declining after the collapse of socialist economies in the 1990s.[66] SOEs were now perceived as a burden on public finances,[67] and governments were expected to redesign their structure and governance, starting with implementing privatization programs. The adoption of these measures is also linked with negotiations on international trade regulation that were conducted at the same time in the multilateral context of the Uruguay Round. This is when an increasing number of countries committed to opening up their markets.[68]

A second massive round of privatization programs took place between the 1980s and the 1990s, in both developed and developing economies. This event determined a shift from a complete ownership structure to more fragmented ownership patterns. The process did not follow the same pace in every country or economic sector. In some cases, States did not pursue the complete privatization of public enterprises operating in key national economic sectors and decided to preserve their ownership shares.[69] In other contexts, the government could not attract enough private capital to place all its shares on the market. This uneven development gave birth to a fragmented scenario, with various State ownership patterns in economic operators. Studies dealing with the regulation of SOEs and related entities in international trade started to appear in academic literature.[70]

Against this background, developing economies feature different patterns than those displayed in developed economies regarding the establishment, development and privatization of SOEs. Starting with the decolonization process, former colonies prioritized reducing foreign ownership in national industries to the broadest extent possible.[71] Hence, SOEs and related entities began to spread. This process involved Sub-Saharan Africa, Latin America, North Africa, and the Middle East.[72] These economies started to rely heavily on SOEs to boost industrialization, address market externalities, and more generally provide resources for the development of the country itself.[73] Hence, the rationale

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incentivizing foreign direct investments ; (viii) privatization of State enterprises; (ix) reregulation and (x) establishment of secure property rights.

[64] James M Boughton, *The IMF and the Silent Revolution: Global Finance and Development in the 1980s* (International Monetary Fund, 2000) 17 f.

[65] Musacchio and Lazzarini (n 23) 42.

[66] Mark T Berger, *The Battle for Asia: From Decolonisation to Globalisation* (Routledge, 2004) 5 f.

[67] For a recent economic perspective on this point: Ann P Bartel and Ann E Harrison, 'Ownership Versus Environment: Disentangling the Sources of Public-Sector Inefficiency' (2005) 87(1) The Review of Economics and Statistics 135-147.

[68] Mitsuo Matsushita, Thomas J Schoenbaum, Petros C Mavroidis and Michael Hahn, *The World Trade Organisation. Law, Practice and Policy* (OUP, 3rd Edition) 18.

[69] Bernardo Bortolotti and Mara Faccio, 'Government Control of Privatised Firms' (200) 22(8) The Review of Financial Studies 2907 f.

[70] Luca Rubini and Tiffany Wang, 'State-Owned Enterprises', in Aaditya Mattoo, Nadia Rocha and Michele Ruta, *Handbook of Deep Trade Agreements* (2020, World Bank), 465. The authors note that first studies specifically focused on the regulation of SOEs and related entities were conducted in the framework of the GATT and EU treaties. There is hence a fair discrepancy between the time in which State trading activities and State ownership had been first regulated and the moment in which issues related to that regulatory framework started to be addressed.

[71] Musacchio and Lazzarini (n 23) 31.

[72] Ibid.

[73] On the role of SOEs in developing economies: Jewellord Nem Singh and Geoffrey C Chen, 'State-Owned Enterprises and the Political Economy of State–State Relations in the Developing World' (2018) 39(6) Third World Quarterly 1077-

behind the use of SOEs between developed and developing economies differed. While in developed economies, SOEs were – and still are – relatively few and concentrated in strategic sectors of the economy, in developing ones, they were spread across more diversified economic sectors and used for import substitution. Then, also in developing economies, starting in the 1990s, mass privatization and reform programs were implemented.[74] The adoption of these programs has been boosted by international organizations, such as the World Bank, which adopted privatization as a requirement for the issuance of loans.[75] However, reduced in numbers, between 2004 and 2008, SOEs originating from developing economies and NMEs countries, like China, Saudi Arabia, South Africa, and Russia, were among the largest companies in terms of assets, sales, profits, and market value globally.[76] This is when they entered in the Forbes Global 2000 list. Their importance grew in the years following the global financial crisis (GFC) in 2008 when divergences in the use of SOEs in MEs and NMEs were exacerbated.

The last historical events worth considering in this analysis are the 2008 GFC mentioned above and the Covid-19 pandemic, two of the most significant crises of the present century. The GFC led States worldwide to increase their intervention in the economy. However, while Western economies struggled in the crisis, SOEs from the eastern and Asian regions, especially Arab and Chinese ones, proved well-suited to provide the necessary aid to the former to overcome such distress.[77] These rescue operations determined a movement of SOEs' resources from developing economies to developed ones.[78] Therefore, it is safe to say that the economic and financial distress in developed economies due to the GFC boosted the internationalization of SOEs. Fast forward to the health emergency caused by the outbreak of Covid-19, States all over the world were forced to increase their presence in the economy to counteract the spread of the virus and to sustain economic operators that were forced to shut down their operations.[79] These unforeseen circumstances also brought a renewed consensus toward expanding State ownership and SOEs, which became a stabilizing factor in deep crisis times, particularly for the protection of employment and social welfare.[80]

These historical events led to the emergence of three main ownership patterns.[81] The first is the full ownership pattern, where the State retains complete ownership of the economic operator, usually

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1097; D Andrew C Smith and Michael J Trebilcock, 'State-Owned Enterprises in Less Developed Countries: Privatization and Alternative Reform Strategies' (2001) 12 European Journal of Law and Economics, 217.

[74] John Nellis, 'Privatization in Developing Countries: A Summary Assessment', Working Paper Number 87 (March 2006) 15. See also: World Bank, 'Held by the Visible Hand: The Challenge of SOE Corporate Governance for Emerging Markets' (World Bank, 2006) and Bernardo Bertolotti and Enrico Perotti, 'From Government to Regulatory Governance: Privatization and the Residual Role of the State' (2007) 22(1) The World Bank Research Observer 53-66.

[75] Musacchio and Lazzarini (n 23) 42. On the role of economic institutions in the privatization process: Brune Nancy, Geoffrey Garrett and Bruce Kogut, 'The IMF and the Global Spread of Privatization', IMF Staff Working Papers, 51 (Washington: International Monetary Fund, 2004).

[76] Bremmer (n 14) 52.

[77] Nalbandian (n 18).

[78] Daniel M Shapiro and Steven Globerman, 'The International Activities and Impacts of State-owned enterprises', in Karl P Sauvant, Lisa E Sachs and Wouter P F Schmit Jongbloed (eds), *Sovereign Investment Concerns and Policy Reactions* (OUP, 2012), 99 f.

[79] Judit Ricz, 'The Anatomy of the Newly Emerging Illiberal Model of State Capitalism: A Developmental Dead End?' (2021) 44(14) International Journal of Public Administration 1253.

[80] European Bank for Reconstruction and Development, *Transition Report 2020-2021. The State Strikes Back*, (2020) 36 f.

[81] In this regard, in their book, Musacchio and Lazzarini consider the following models of State intervention in the economy: the State as an entrepreneur, in which the State retains full ownership of SOEs; the State as a majority investor, where the State retains the majority of its shares and control of partially privatized SOEs; and the State as a minority investor, where the government retains a residual equity in SOEs. See Musacchio and Lazzarini (n 23).

created by an act of the government itself.[82] The State maintains the controlling share of the enterprise, which puts it in the position to shape its decision-making process. The second is the majority ownership pattern, in which the State retains most of the shares of the SOE. Private capital is allowed to participate but only owns a minority, usually non-controlling, part of the shares.[83] In this case, the State can affect the decisions of the enterprise concerned. Third, there is the minority ownership scheme. Here the balance between public and private shareholders has reversed: the State retains only a few shares of the former SOE but still actively participates in the management of the undertaking.[84] Such ownership patterns are not mutually exclusive and can co-exist in the same economy.[85] Moreover, although the boundaries of these schemes are sufficiently wide to encompass a broad range of SOEs, several additional others do not necessarily fit within them. In this regard, a problem arises if the relationship between the State and the enterprise has a detrimental impact on international trade flow. This is the case with respect to the exercise of State control through informal means. Another finding emerging from the analysis is that SOEs can, despite negative management experiences that make them a potential burden on public expenditures,[86] be a stabilizing element from both an economic and social perspective.[87] SOEs could be a tool at the State's disposal to sustain development and innovation to ensure competitiveness in global markets. Their role in this regard could go further than counteract market externalities. They can support the development of certain initiatives when private capital is scarce because the investment is too capital-intensive and risky at the same time.[88]

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[82] OECD, Corporate Governance of State-Owned Enterprises: A Survey of OECD Countries, (OECD Publishing 2005) 33.

[83] Musacchio and Lazzarini (n 23) 81.

[84] Musacchio and Lazzarini (n 23) 197. Also: Sergio Lazzarini and Aldo Musacchio, 'Leviathan as a Minority Shareholder: A Study of Equity Purchases by the Brazilian National Development Bank (BNDES)', 1995-2003, Harvard Business School BGIE Unit Working Paper 11-073 (December 2010) 12-13.

[85] It should also be noted that there is also an aspect related to management that should be considered when the complexity of modern SOEs is addressed. That is the role assigned to private investment in SOEs. Indeed, the injection of private capital in SOEs has been conceived as an integral part of the reform of these enterprises which would help improve their management. This is, for instance, the technique adopted by Saudi Arabia and China. See Curtis J. Milhaupt and Mariana Pargendler, 'Governance Challenges of Listed State-Owned Enterprises around the World: National Experiences and a Framework for Reform' (2017) 50 Cornell International Law Journal 474.

[86] From a POE perspective, concerns may arise from the fact that it has been calculated that on average SOEs are less efficient than their private counterparts. See: IMF, 'State-Owned Enterprises: The Other Government', in Fiscal Monitor: Policies to Support People during the Covid-19 Pandemic (2020) 56. Proposed explanations for such a divergence have been identified with agency issues, meaning that heads of the SOEs lack incentives to do a good job, and the entrustment with the pursuit of social objectives that cannot be harmonized with economic ones. On this point *ex multis* see: Gerard Caprio, Jonathan L Fiechter, Robert E Litan and Micheal Pomerleano, *The Future of State-Owned Financial Institutions* (The Brookings Institute, 2004); Mary Shirley, 'Why Performance Contracts for State-Owned Enterprises Haven't Worked' Public Policy for the Private Sector 150, World Bank (1998). See also: Yair Aharoni, 'The Performance of State-Owned Enterprises' in Toninelli (n 41) 49-72; Richard Bozec, Gaétan Breton and Louise Côté, 'The Performance of State-Owned Enterprises Revisited' (2002) 18(4) 383-407; Mary M Shirley and Lixin C Xu, 'Information, Incentives, and Commitment: An Empirical Analysis of Contracts Between Government and State Enterprises' (1998) 14(2) The Journal of Law, Economics, & Organization 358-378.

[87] On this point, the World Bank recently outlined that SOEs can engage in a quick and focused crisis response and can play a crucial role in the subsequent recovery phase. Therefore, in times of crisis, SOEs should continue to undertake financial simulations, ensure service continuity, and take the steps necessary to strengthen supply chains. See World Bank, 'Building SOE Crisis Management and Resilience: Emerging Practices and Lessons Learned During the COVID-19 Crisis' (World Bank, 2021).

[88] This is the case, for example, for the development of renewable energy-related technologies. In this regard, economists suggest that the State is in the best position to assume all the risks associated with capital-intensive and high-risk investments that are generally required in innovation contexts. These are the two factors that in themselves may discourage POEs from entering a given market. See Mariana Mazzucato, 'From Market Fixing to Market-Creating: A New Framework for Innovation Policy' (2016) 23(2) Industry and Innovation 140-156; Mariana Mazzucato, *The Entrepreneurial State: Debunking Public v. Private Sector Myth* (PublicAffairs, 2015); Dani Rodrik, 'Green Industrial

However, it is generally agreed that often SOEs need to be substantially reformed in terms of management and structure to ensure transparency and avoid becoming a burden on public finances at the domestic level and an obstacle to international trade at the international level.[89]

2.2. Definitional attempts, rationale and current sectoral distribution of SOEs

Despite their growing importance in international trade in quantitative and qualitative terms, there has yet to be an agreed definition of SOEs in the current international trade legal framework. The fact that domestic jurisdictions have adopted different definitions of these entities contributes to the difficulties underpinning the establishment of a harmonized and shared international legal approach to SOEs.[90] In addition, the role of the State in the economy became more complex as a consequence of its increased participation in it.[91] The extent of State ownership in the enterprise in question, the State's voting rights percentage, and the pursuit of commercial as opposed to non-commercial goals are only a few examples of the definitional criteria employed in national jurisdictions. Adopting different approaches can result in a situation where the same entity qualifies as an SOE under one national legal system but escapes such qualification in a different national context.[92] Such fragmentation makes it particularly difficult to establish a common ground for discussions of the concept at issue and ultimately hinders the possibility of a shared understanding of it at the international level.

The lack of a definitional framework results in a series of unharmonized approaches toward SOEs among legal and economic commentators and practitioners discussing them at the international level. In this regard, it is interesting to note that older contributions arguably follow a more defined approach than recent interventions. For instance, in the 1980s, Aharoni defined SOEs based on three elements:[93] (i) State ownership; (ii) engagement in the production of goods and services for sale; and (iii) the link of sales revenues with costs. The author also adopted a straightforward approach regarding the difference between SOEs as public enterprises and privately-owned enterprises (POEs). More recently, however, definitional approaches are less consistent. For instance, the term 'SOEs' appears

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Policy' (2014) 30(3) Oxford Review of Economic Policy, 469–491. However, it is true that sometimes SOEs need to be substantially reformed in terms of management and structure in order to ensure transparency and avoid turning into a burden on public finances. Dennis A Rondinelli, 'Government Decentralization in Comparative Perspective: Theory and Practice in Developing Countries International Review of Administrative Sciences (1981) 47(2) 133. On this point see: Alexander Dyck, 'Privatization and Corporate Governance: Principles, Evidence and Future Challenges' (2001) 16(1) The World Bank Research Observer 59-84.

[89] See OECD, 'Transparency and Disclosure Practices of State-Owned Enterprises and their Owners: Implementing the OECD Guidelines on Corporate Governance of State-Owned Enterprises' (OECD Publishing, 2020).

[90] The OECD identifies three models in which State ownership can be organized at the national level. First, there is the centralized model, in which the main feature is the establishment of one body entrusted to manage all government shares in all SOEs. The second is the decentralized model. According to this approach, the management of SOEs is entrusted to several different ministries. Lastly, there is the dual model, where the management responsibility of government shares is shared between one single central ministry and the ministry of finance. See OECD, 'Ownership and Governance of State-Owned Enterprises: A Compendium of National Practices' (OECD Publishing, 2018) 23 f.

[91] Gaël Raballand and others, 'Middle East and North Africa Governance Reforms of State-Owned Enterprises (SOEs). Lessons from Four Case Studies (Egypt, Iraq, Morocco and Tunisia)' (World Bank, 2015), 12.

[92] Hans Christiansen, *Balancing Commercial and Non-Commercial Priorities of State-Owned Enterprises*, OECD Corporate Governance Working Papers No. 6, OECD Publishing (2013) 9 f.

[93] See Yair Aharoni, *The Evolution and Management of State-Owned Enterprises* (Cambridge, MA: Ballinger, 1986). See also: Murray Horn and Richard J Zeckhauser, 'The Control and Performance of State-Owned Enterprises' in Paul W MacAvoy, WT Stanbury, George Yarrow and Richard J Zeckhauser (eds) *Privatization and State-Owned Enterprises: Lessons from the United States, Great Britain, and Canada* (Kluwer Academic Publishers, 1988) 7-57.

to have been used to generally refer to one single category of entities that are varyingly related to the State, like state enterprises (SEs), SCEs, State-influenced enterprises (SIEs), SWFs, and State Trading Enterprises (STEs).[94] From another perspective, SOEs and related entities are distinct and different economic operators.[95] In this context, the relationship between SOEs and other entities is sometimes presupposed and not further clarified.[96] By contrast, some authors delve into this matter in more detail: SOEs may be considered one specific type of enterprise within the more general category of SCEs,[97] whereas other legal constructions encapsulate SOEs in the narrower category of STEs.[98] Moreover, others seem to argue that SOEs are part of a wider category, that of State-invested Enterprises (SIEs).[99] In other contexts, SOEs and other entities are treated as different categories of subjects: this is the case for local public enterprises (LPEs), defined by Wollman as 'enterprises owned by local governments', as opposed to SOEs owned by the central government.[100] Another expression used to define these entities is sometimes 'municipality-owned enterprises' (MOEs), although narrower in scope than 'LPE' and encompassing all types of local authorities.[101] The same unharmonized approach is followed with respect to the nature of these entities. Some authors qualify SOEs as public enterprises (PEs),[102] although this may clash with State practice that reveals that such qualification is far from settled.[103]

Against this fragmented background, definitional and categorization attempts have been brought about by international organizations and institutions. These definitions are usually encapsulated in soft law instruments, whose scope tends to change following the mandate carried out by the international organizations themselves and/or the objective of the studies conducted on these entities. In other words, the coverage of these definitions varies based on the specific aspect of SOEs analyzed.

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[94] See, for instance, Rubini and Wang (n 54) 463 f; Luc Bernier, 'Public Enterprises as Policy Instruments: The Importance of Public Entrepreneurship' (2014) 17 Journal of Economic Policy Reform 253-266; Hans Christiansen, 'The Size and Composition of the SOE Sector in OECD Countries', OECD Corporate Governance Working Papers, No. 5 (Paris, 2011).

[95] See for instance, Maciej Bałtowski and Piotr Kozarzewski, 'Formal and Real Ownership Structure of the Polish Economy: State-Owned versus State-Controlled Enterprises' (2016) 28 Post-Communist Economies 405–419; Maciej Bałtowski and Grzegorz Kwiatkowski, *State-Owned Enterprises in the Global Economy* (Routledge, 2022), 36 f.

[96] See for instance Andrei Panibratova and Daria Klishevich, 'Emerging Market State-Owned Multinationals: A Review and Implications for the State Capitalism Debate' [2021] Asian Business & Management (online); Shapiro and Globerman (n 62) 98; Alvaro Cuervo-Cazurra, *State-Owned Multinational: Governments in Global Business* (Palgrave MacMillan, 2017).

[97] According to Julien Chaisse, Jędrzej Górski and Dini Sejko 'the most obvious incarnation of SCEs is state-owned enterprises (SOEs)'. Chaisse, Górski and Sejko, (n 14) 4.

[98] Mavroidis and Sapir (n 17) 59.

[99] In this regard, Christiansen and Kim argue that SIEs are corporations 'in which the State is the ultimate beneficiary owner, on a consolidated basis, of at least 10% of the voting stock. Then, the authors identify two categories of SIEs: (1) SOEs, including (i) corporate entities entirely owned by the State; (ii) joint stock companies or partnerships in which the State (on a consolidated basis) owns more than 50% of the voting rights; and (iii) corporate entities in which the State has a degree of control that is equivalent to majority ownership; (2) Partially SOEs, namely corporate entities where the state controls at least 10% but less than 50% of the voting stock or enjoys an equivalent degree of control. See Hans Christiansen and Yunhee Kim, 'State-Invested Enterprises in the Global Marketplace: Implications for a Level Playing Field' OECD Corporate Governance Working Papers No. 14 (2014) 6.

[100] Hellmut Wollmann, 'Local Public Enterprises as Providers of Public Services in European Countries: Shifts and Dynamics', in Bernier, Florio and Bance (n 6) 45 f.

[101] Wollmann Ibid.

[102] See, for instance M Adil Khan, 'Reinventing Public Enterprises', in UN, 'Public Enterprises: Unresolved Challenges and New Opportunities. Publication Based on the Expert Group Meeting on Re-Inventing Public Enterprises and Their Management' (October 27–28, 2005) New York, NY, 3. Also, the author defines a PE as 'an organization established by the government under public or private law, as a legal personality which is autonomous or semi-autonomous, produces/provides goods and services on a full or partial self-financing basis, and in which the government or a public body/agency participates by way of having shares or representation in its decision-making structure.' Ibid 6.

[103] See Chapter 2 of this study.

For instance, the World Bank defined SOEs as 'government-owned or controlled commercial entities that generate all or most of their revenues from the sale of goods and services.'[104] The definition also considers minority ownership to the extent it translates into the exercise of effective control by the State. This approach is relatively narrow as it only considers selling activities. This restricted perspective is strengthened by the adjective 'commercial', which suggests a profit-oriented attitude of the entity concerned. Arguably this is confirmed by the reference to 'revenues' in the second part of the definition. Again, in the context of the World Bank and related institutions, the International Finance Corporation (IFC) defined SOEs as legal entities 'majority owned or controlled by a national or local government whether directly or indirectly.'[105] In this case, a broader perspective can be observed: no reference to activities can be found, and the focus is limited to ownership and control criteria. The reference to different levels of government is also worth noting.

In turn, the OECD follows a definition based on national qualification and State ownership criteria. Accordingly, SOEs are 'any corporate entity recognized by national law as an enterprise, and in which the state exercises ownership'.[106] In this context, the first element to note is the specific organizational form - that of a corporation. Yet, the number of companies covered by this approach is significantly reduced by the criterion of national qualification. Then, the definition expressly covers 'enterprises that are under the control of the state, either by the state being the ultimate beneficiary owner of the majority of voting shares or otherwise exercising an equivalent degree of control'. From this perspective, ownership is defined in terms of control, which corresponds to full or majority voting rights or an equivalent degree of control. Minority State ownership is considered to the extent that it results in the State possessing an actual controlling influence. The reference to 'influence', as opposed to 'control', probably suggests that enterprises without formal ties with the State might fall within the scope of the definition. On the other hand, enterprises in which the government holds less than 10% ownership shares are not included in this definitional framework. Also, statutory corporations do not qualify as SOEs unless they carry out predominantly commercial activities. Looking at Asian institutions, we encounter a similar approach. The Asian Development Bank defines SOEs as 'any entity recognized by the borrower's national law as an enterprise in which the state or government exercises direct or indirect (whole or partial) ownership or control.'[107]

Lastly, it is worth considering the definition put forward by Raballand and others in a report published in the context of the World Bank, according to which SOEs are enterprises (i) controlled by the State, (ii) enjoying legal and financial autonomy, and (iii) operating in the productive sector.[108]

So far, a precise definition and categorization of SOEs in both academia and practice has yet to emerge. On the contrary, a multitude of defining characteristics accompanies a wide range of entities that are sprouting up as a result of the adoption of diverse terminology, such as SOEs, SIEs, SCEs, SWFs, LPEs, and so forth. Against this background, it becomes relevant to reconstruct the key steps of the evolution of State ownership in economic operators. Indeed, understanding the origin of the

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[104] World Bank, *Bureaucrats in Business: The Economics and Politics of Government Ownership* (OUP, 1995) 26. Emphasis added.

[105] World Bank, 'Group Support for the Reform of State-Owned Enterprises, 2007-2018: An IEG Evaluation' (World Bank, 2018).

[106] OECD, *Guidelines on Corporate Governance of State-Owned Enterprises* (OECD Publishing, Paris, 2015) 14. This approach is also endorsed by the OECD in 2016. See OECD (n 8) 18 f. For a critical overview on the OECD Guidelines see: Mikko Rajavuori, 'Governing the Good State Shareholder: The Case of the OECD Guidelines on Corporate Governance of State-Owned Enterprises' (2018) 29 European Business Law Review 103-142.

[107] Asian Development Bank, *State-Owned Enterprises: Guidance Note on Procurement* (2018).

[108] Raballand and others (n 74) 12 f.

ties between enterprises and the State is essential to reconstruct as part of this analysis and its underlying fundamental principles.

States' decision to create SOEs is guided by various reasons, most of which are centered on their social, economic, and strategic goals. It is generally recognized that governments can legitimately establish and exploit SOEs as a tool to implement public policy objectives.[109] In this case, they do not necessarily have a profit-oriented attitude. SOEs are usually entrusted with this type of activity when POEs cannot provide essential services or provide them on the same terms of availability, accessibility, marketability, price, and quality. In this context, the sectoral distribution of SOEs shows that they safeguard key economic sectors and related national interests and sovereignty, like national defense, food supply, and infrastructure.[110] More recently, SOEs have proven to be a crucial economic stabilizing instrument in times of crisis. During the Covid-19 pandemic, for instance, SOEs have been a crucial tool for the implementation of labor policies and the protection of employment in particular.[111] However, they can also perform purely commercial activities, with or without governmental power granted to them. The OECD classified rationales for the establishment of SOEs into five categories:[112] first, the support of the national economy and the pursuit of strategic objectives; second, the maintenance of strategic enterprises under national control; third, the provision of public goods that would not otherwise be provided by the market alone; fourth, the management of natural monopolies and, fifth, the juxtaposition to insufficient or unfeasible market regulation.

Looking at their sectors of activity, according to the 2017 OECD estimates, 50% of SOEs operate in network industries, such as energy, electricity, telecommunications, and transportation.[113] Since the 1970s, the following roles for SOEs engaging in these sectors of activity where identified in the economic literature: when entrusted with the levy, SOEs act as fiscal agents; and when used as an industrial policy tool, SOEs are in charge of developing an industry where private capital is not sufficiently developed and may act as national champions enterprises.[114] Therefore, SOEs governance and organizational structures seems to change depending on their function and objectives. This may explain the different operational models of SOEs which exist. According to an IMF study, some SOEs may act as an arm of the government; others are based on a mixed public-private ownership scheme; and others carry out their activities based on purely commercial considerations.[115] The variety of institutional forms that SOEs can adopt translates into many complex ownership and control relationships with the establishing State. Such relationships ultimately shape the governance structure and objectives pursued by SOEs.[116] Therefore, the expression 'SOEs' encapsulates a wide variety of

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[109] Kowalski and others (n 2); IMF (n 70) 47; Mary M Shirley and John Nellis, Public Enterprises Reform: The Lessons of Experience (The World Bank, 1991) 16 f.

[110] See also: Holger Mühlenkamp, 'From State to Market Revisited: A Reassessment of the Empirical Evidence on the Efficiency of Public (and Privately-Owned) Enterprises' (2015) 86 Annals of Public and Cooperative Economics, 535-557.

[111] European Bank for Reconstruction and Development (n 64) 36 f.

[112] OECD, State-Owned Enterprise Governance: A Stocktaking of Government Rationales for State Ownership (OECD 2015) 11.

[113] OECD (n 9) 17. This data widely changes in the context of Chinese economy. In that context, most of SOEs (58%) operate in the finance sector, followed by 9% in the primary sector, manufacturing, transportation, electricity and gas. See: ibid. 18.

[114] Raymond Vernon, 'The International Aspects of State-Owned Enterprises (1979) 10(3) Journal of International Business Studies 10 f; IMF (n 70).

[115] IMF (n 70).

[116] Ming H Lin Cui and Jiangyong Lu, 'Varieties in State Capitalism: Outward FDI Strategies of Central and Local State-Owned Enterprises from Emerging Countries' (2014) 45 Journal of International Business Studies 982.

entities: enterprises owned by the central government but also by local public authorities; fully publicly owned enterprises; majority-publicly-owned enterprises; and minority-owned ones. It also includes entities not owned by the State but significantly controlled by it.[117]

2.3. The dual nature of SOEs: a corporate model linked to the State

SOEs encompass a dual nature. On the one hand, they are enterprises based on a corporate model; on the other hand, they enjoy a close link with the State, which frequently requires them to implement public policy and commercial objectives, often supported by the granting of sovereign powers. This ambivalent and changing qualification, public or private at times, is also reflected in the activities that SOEs perform, ranging from those typically exercised by private undertakings to activities usually falling within the competence of public authorities. This is a controversial point because SOEs do not neatly identify with POEs or public enterprises, as they share common features with both. Hence, the distinguishing line between what falls within the boundaries of the notion of 'State' and what escapes it is blurred. Consequently, it does not seem easy to determine whether they should be considered private or public. Hence, the regulation of these entities at the international law level is inevitably affected.[118]

Indeed, the difficulty in drawing a line between a public entity and a private one raises several questions from the perspective of international law, mainly in the fields of international responsibility of States and immunity.[119] This is the framework in which SOEs operate. Hence, their determination as public or private entities requires reflecting on the most fundamental aspects of the State-market relationship and on the role that the State is expected to play - or not - within the economy. The notions of 'ownership' and 'control' and their meaning, scope, and practical implications are among the fundamental elements to be considered in this regard.

Some red lines on which scholars and practitioners generally agree can guide the analysis. Firstly, the mere establishment by the State of an enterprise does not mean the latter is automatically a public entity or a State organ. Therefore, the establishing State is not directly responsible at the international level for the enterprise's conduct in breach of international law.[120] Secondly, as will be seen extensively throughout this study, the criterion of State ownership under current international legal regimes on trade is not relevant per se to qualify a particular entity as a public or private body. In other words, the determination of the public or private nature of an SOE does not seem to revolve around its ownership pattern, be it State ownership or private ownership. The underlying rationale is that State ownership does not automatically confer advantages on an economic operator, nor is it an

[117] OECD, 'Broadening the Ownership of State-Owned Enterprises: A Comparison of Governance Practices' (OECD Publishing, 2016); World Bank, 'Corporate Governance of State-Owned Enterprises: A Toolkit' (World Bank Publications, 2014).

[118] Shixue Hu addresses this issue with reference to SEs. Shixue Hu, 'Clash of Identifications: State Enterprises in International Law' (2019) (19) UC Davis Business Law Journal 171, 174–175.

[119] With reference to State responsibility, the main issue is to understand when and to what extent the conduct of SOEs is attributable to the State. See *ex multis*: Judith Schönsteiner, 'Attribution of State Responsibility for Actions or Omissions of State-Owned Enterprises in Human Rights Matters' (2019) 40(4) University of Pennsylvania Journal of International Law 895; Carlo De Stefano, 'Adel A Hamadi v Sultanate of Oman: Attributing to Sovereigns the Conduct of State-Owned Enterprises: Towards Circumvention of the Accountability of States under International Investment Law' (2017) 32(2) *ICSID Review - Foreign Investment Law Journal 267.* Considering immunity, the main issue is to understand if and to what extent immunity should be granted to SOEs and related entities by virtue of their link with the State. See: Andrew Dickinson, 'State Immunity and State-Owned Enterprises' (2009) 10 Business Law International 97.

[120] Mihaela M Barnes, *State-Owned Entities and Human Rights: The Role of International Law* (CUP, 2021) 66.

indispensable element to this end. However, one can only imagine the variety of unofficial means that could be exploited by the State as an owner in the relationship with its enterprises to receive advantages, for instance, through connections with government officials. In this regard, State ownership certainly increases the risk of State influence over the decisions and activities of the enterprise concerned.
In this context, it is argued that the intrinsic characteristics of SOEs and their increasing complexity in terms of structure, management, and types of relationships with the government suggest that the ownership criterion should come to the fore in the legal analysis and guide the evaluation of the existing international legal framework. Indeed, it is precisely State ownership that confers to these entities their peculiar characteristics and the possibility to adopt behavior that POEs typically cannot afford. In other words, it is in the element of State ownership that the difference between SOEs and POEs is rooted, reaching the very core of SOEs and POEs and impacting their management, functioning, and role in the economy. Indeed, owing to their link with the government, SOEs can enjoy the power to exert pressure on the State and influence national regulatory frameworks.[121] That said, the State by virtue of its ownership can also exert its control over the enterprise concerned. Moreover, looking at the question of liabilities, POEs generally follow market mechanisms in their decision-making processes and are ultimately accountable to their shareholders. By contrast, SOEs answer to a government subject to political and social pressure. The practice of international organizations also suggests that State ownership should be acknowledged, as they seem to qualify SOEs as public owing to the public nature of their ownership structure. In this context, disregarding the State ownership criterion means flattening the differences between fundamentally distinct subjects that, as such, deserve different regulatory basis. From this perspective, therefore, disregarding the role of ownership patterns raises more problems than it solves because it potentially hinders the development of distinct and arguably more regulatory frameworks for these subjects.

2.4. The relevance of SOEs in international trade

From a trade policy perspective, the key concern addressed in literature by academics and practitioners is not the existence of SOEs *tout court* but rather the economic and regulatory benefits that these enterprises can enjoy due to their link with the State.[122] It is not infrequent for SOEs to enjoy preferential treatment granting them a more favorable position in domestic and international markets than their private counterparts. This privilege can be found at multiple levels. On the one hand, the advantage can be legal. For instance, SOEs can be exempt from the application of rules on bankruptcy or anti-trust law; they can enjoy simplified access to procedures for the allocation of licenses or permissions; they might not have to abide by certain regulatory requirements, such as environmental regulations. On the other hand, SOEs can benefit from economic, financial, and fiscal advantages granted by governments, which often translates into subsidies or other forms of financial support. These can also include indirect forms of support, like tax exemption or the concession of unlimited government guarantees.[123] Such privileges can incentivize the adoption of economically

[121] OECD (2016) (n 3) 13.
[122] Ines Willemyns, 'Disciplines on State-Owned Enterprises in International Economic Law: Are We Moving in the Right Direction?' (2016) 19(3) Journal of International Economic Law 661 f.
[123] Sara S Balbuena, 'Concerns Related to the Internationalization of State-Owned Enterprises: Perspectives from Regulators, Government Owners and the Broader Business Community', OECD Corporate Governance Working Papers No. 19 (2016) 31 f.

unsustainable behaviors and thus challenge the competition in international markets.[124] Indeed, under favorable conditions, SOEs can operate at a loss for a considerable amount of time as they enjoy protection from the risk of bankruptcy. Alternatively, they can implement their strategies without the fear of being investigated by national competition authorities.

As private commercial operators do not usually have access to more favorable conditions, this asymmetry endangers the maintenance of a level playing field *vis à vis* SOEs. As a result, efficient POEs risk losing market shares or forcefully exiting the market, eventually causing a misallocation of resources.[125] These dynamics are ever more likely to have a global reach when SOEs and POEs are involved in cross-border activities.[126] Also, the lack of transparency that often characterizes SOEs' management, structure, and functioning can affect international trade relations between trading partners. In this context, transparency plays a crucial role in ensuring that SOEs carry out their activities based on commercial considerations, hence free from any political influence exercised by the government.[127] This is ever more crucial in light of the increasing involvement of SOEs in international markets, where the State often entrusts them to carry out their activities in foreign jurisdictions.[128] This generates concerns among governments wishing to protect their national economies from public policy objectives that foreign SOEs may pursue in their legal and economic systems.[129] This point is specifically discussed in the case of the acquisition of national strategic assets by foreign SOEs.[130] These operations are increasingly considered as a threat to the national identity or national heritage. They are also met with suspicion given the privileged access to scarce resources that are possibly granted to enterprises linked to a foreign government,[131] and the lack of disclosure of information about their governance structure or legal and economic treatment. In this regard, challenges in gathering relevant data through alternative channels is likely going to generate information asymmetries among trading partners.

Under multilateral trade regulation, it has been widely discussed how such asymmetries jeopardize the stability, fairness, and efficiency of the multilateral negotiation process, which the transparency principle wishes to protect.[132] These elements could ultimately incentivize SOEs to adopt anti-

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[124] OECD (2016) (n 3) 95.

[125] Ibid 100. See also World Bank, 'State-Owned Enterprises: Understanding their Market Effects and the Need for Competitive Neutrality' (2020), 2

[126] Kowalski (n 2) 13. See also: World Bank (n 100).

[127] OECD (2016) (n 3) 87 f.

[128] See paragraphs 1 and 2.2 above.

[129] Balbuena (n 107).

[130] A notable case in this regard is the acquisition by COSCO (a Chinese SOE) of a 51% stake in the Piraeus Port Authority. The stake was lifted in 2021 by 16%, reaching 67%. See David Glass 'Cosco Completes Increased Stake in Piraeus Port Authority', *Seatrade Maritime News*, 12 October 2021 <www.seatrade-maritime.com/ports-logistics/cosco-completes-increased-stake-piraeus-port-authority> accessed 18 February 2022. Although this case relates predominantly to the FDI sphere, the acquisition of strategic infrastructures, such as ports, can also generate concerns from the international trade perspective. Indeed, the foreign SOE that retains majority ownership of such infrastructures may be implementing foreign public policy objectives based on the instructions issued by its State. Hence, the SOE may be incentivized to discriminate between national and trading partners through its management, for instance *de facto* limiting access to the infrastructure by imposing different conditions to different trading partners.

[131] This is the context in which the adoption of the regulatory framework on FDI screening (Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 Establishing a Framework for the Screening of Foreign Direct Investments into the Union) has been adopted by the European Union. See *ex multis*: Jędrzej Górski, 'The Changing Paradigm of State-Controlled Entities Regulation: Laws, Contracts and Disputes: Introduction' (2020) 17(6) TDM 1; Kao Chu-Chung, 'The EU's FDI Screening Proposal – Can It Really Work?' (2020) 28 European Review 173.

[132] Matsushita and others (n 52) 1 f.; Terry Collins-Williams and Robert Wolfe, 'Transparency as a Trade Policy Tool: The WTO's Cloudy Windows' (2010) 9(4) World Trade Review 551-581; Robert Wolfe, 'Letting the Sun Shine in at the WTO: How Transparency Brings the Trading System to Life', WTO Economic Research and Statistics Division, (2013);

competitive behavior and distort the level playing field at the expense of foreign and national POEs. Ultimately, such dynamics would hinder the development of a type of trade policy aimed at ensuring the openness of global markets on which international trade policies have been premised since the post-WWII era.[133]

From the perspective of international trade regulation, the link between SOEs and governments is perceived mainly as a subsidy issue, especially under the World Trade Organization (WTO) legal framework.[134] According to WTO law, a subsidy is a 'financial contribution by a government or any public body'.[135] As it will be demonstrated in Chapter 3, SOEs may not only be recipients of subsidies but also providers of subsidies.[136] In this case, they may grant advantages not only to POEs but even to other SOEs in a downstream industry in the form, for example, of capital or inputs.[137] In this scenario, SOEs, acting as intermediaries, possibly constitute a tool for governments to circumvent their WTO obligations on subsidy regulation. In this context, the main issue subject to debate is whether SOEs could qualify as a 'public body' or constitute a private commercial actor instead.

Furthermore, concerns related to the ability of WTO agreements to regulate SOEs' activities have been exacerbated by the acknowledgment that SOEs have become complex entities. Such complexity may be in terms of structure or relationship with the State. As seen already, State ownership evolved in a way that SOEs are now characterized by mixed public-private ownership patterns.[138] The relationship between the entity and the State may be complex since it could involve multi-layered relationships with both centralized and decentralized public bodies. Having global trade in mind, a further layer of complexity is then added by the nature of such links, which may be formal or informal.[139] In this context, SOEs raise political concerns. On the one hand, there is the fear that a State may distort the trade flow by instructing its firms to engage in certain conduct towards States labeled as not politically sympathetic (e.g., blocking the export of a particular product). Additionally,

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Panagiotis Delimatsis, 'Transparency in the WTO's Decision-Making' (2014) 27(3) Leiden Journal of International Law 701-726; Petros C Mavroidis and Robert Wolfe, 'From Sunshine to a Common Agent: The Evolving Understanding of Transparency in the WTO' (2015) 21(2) The Brown Journal of World Affairs 122 f; On the role of transparency in trade agreements: William A Kerr, 'Trade Agreements: The Important Role of Transparency' (2008) 9(1) The East Centre Journal of International Law and Trade Policy 1-11; Petra Beslać, 'Strengthening Transparency in the Multilateral Trading System: The contribution of the WTO Accession Process', in Uri Dadush and Chiedu Osakwe (eds), *WTO Accessions and Trade Multilateralism: Case Studies and Lessons from the WTO at Twenty* (CUP, 2015) 885-906.

[133] OECD (2016) (n 3) 84.

[134] John H Jackson, 'The Impact of China's Accession on the WTO', in Deborah Z Cass, Brett G Williams and George Barker (eds), *China and the World Trading Syste: Entering the New Millennium* (CUP, 2003) 26; Julia Y Qin, 'WTO Regulation of Subsidies to State-Owned Enterprises (SOEs) – A Critical Appraisal of the China Accession Protocol' (2004) 7(4) Journal of International Economic Law 863-919; Hao Liang, Bing Ren and Sunny L Sun, 'An Anatomy of State Control in the Globalization of State-Owned Enterprises' (2015) 46(2) Journal of International Business Studies 223–240; Twein Chiang, 'Chinese State-Owned Enterprises and WTO's Subsidy Regime' (2018) 49 Georgetown Journal of International Law 845-886.

[135] Article 1.1(a)(1) of the Agreement on Subsidies and Countervailing Measures (ASCM).

[136] Ru Ding, '"Public Body" or Not: Chinese State Owned Enterprise' (2014) 48(1) Journal of World Trade 169 f.

[137] See: Yingying Wu, 'Reforming WTO Rules on State-Owned Enterprises: SOEs and Financial Advantages' (2019) 39(3) Northwestern Journal of International Law & Business 279 f.; Chad P Bown and Jennifer Hillman, 'WTO'ing a Resolution to the China Subsidy Problem' (2019) 22 Journal of International Economic Law 557-578.

[138] From a management perspective, it should be noted that mixed ownership may have important advantages. For instance, private capital can bring tighter governance and regulatory constraints applicable to publicly traded firms, boost monitoring efforts of outside investors, and ensure the reallocation of funds to pay for public debt. In this way, private ownership may be able to counteract problems usually associated with State ownership in commercial actors such as agency problems arise, management issues etc.

[139] Mark Wu, 'The "China, Inc." Challenge to Global Trade Governance' (2016) 57(2) Harvard International Law Journal 265.

a government with greater negotiating leverage may refuse to engage in trade activities if a particular political commitment in its favor is not adopted.[140]

While the potentially positive role of SOEs makes it clear that they are not an issue per se, the *sui generis* nature of these actors emerges very clearly. On the one hand, they enjoy the structure of enterprises, but on the other hand, they pursue public objectives or enjoy public prerogatives. Further uncertainty on their qualification stems from the fact that States increasingly outsource to SOEs activities traditionally carried out by public authorities. However, the ownership endowed in SOEs is public to the extent that the State - at any level - acts as owner. In this context, it is important to remember how closely contemporary society and politics are tied to property rights and their conception.[141] Eventually, they both play a crucial role in developing social and political institutions both at the national level, for the pursuit of public policies, and at the international level. In the latter context, the pursuit of such policies in global markets and foreign jurisdictions challenges the fundamental principles on which international trade regulation was premised in the aftermath of WWII. Hence, several tensions emerge in international trade relations, which stem from the divergent views on the role of the State in the economy and State ownership between economies predominantly based on free market principles and economies with a strong presence of the State in the economy, such as State capitalist countries.[142] The underlying cause of these tensions is how to strike a balance between the State's right to use the tools it deems necessary to intervene in its economy, including State ownership, and the right of other governments to scrutinize such involvement.[143] While market-based economies are based on free market principles and conceive private ownership and initiative as the foundation of market functioning and development, non-market economies and State capitalist countries use State ownership to maintain and develop political gain. In this regard, it has also been noted that the rationale underlying the two systems differs. In the words of Bremmer, while market-based economies 'argue that competition and trade generate prosperity at home but also serve the general good',[144] State capitalist countries 'use markets to build state power.'[145] Hence, according to the author, '[f]orced to choose between protection of the rights of the individual, economic productivity, and the principle of consumer choice, on the one hand, and the achievement of political goals, on the other, state capitalists will choose the latter every time. They reason that if political survival doesn't depend on this choice today, it might tomorrow.'[146]

These differences among economic models ultimately clash in the context of international trade regulation. A system that has been built on liberalism and has embedded it within its institutional

[140] Wu (n 8) 13.

[141] Harold D Clarke, Nitish Dutt and Allan Kornberg, 'The Political Economy of Attitudes toward Polity and Society in Western European Democracies' (1993) 55(4) The Journal of Politics 998.

[142] The fundamental decisions that must be made in the process of defining domestic policies have to deal with the formation of capital, how it should be formed, and whether State ownership and SOEs should be abolished. These considerations are outside the scope of this work, as the role of international law is not to answer these questions - which strictly belong to the national sphere - but rather to limit the detrimental effects in international relations that may be resulting from government interference on SOEs. On this point see: Leonardo Borlini, 'When the Leviathan Goes to the Market: A Critical Evaluation of the Rules Governing State-Owned Enterprises in Trade Agreement' (2020) 33 Leiden Journal of International Law 323. For a public policy and historical overview: Stephen K Aikins, 'Political Economy of Government Intervention in the Free Market System' (2009) 31(3) Administrative Theory & Praxis 403-408.

[143] Leonardo Borlini and Peggy Clarke, 'International Contestability of Markets and the Visible Hand. Trade Regulation of State-Owned Enterprises between Multilateral Impasse and New Free Trade Agreements' (2021) 26 Columbia Journal of European Law 89.

[144] Bremmer (n 14) 41.

[145] Ibid.

[146] Ibid.

framework, such as that of the WTO (see *infra*, §4), over time, came to include various economic models. These models are often premised on ideologies and economic theories very different from the ones originally envisaged at the time the WTO was established. State capitalist countries, with their economies heavily based on State interventionism and the use of SOEs, led government officials,[147] practitioners, and scholars to wonder whether the WTO has the legal tools to adequately address the challenges these countries and their enterprises brought about.[148] In other words, within the framework of international trade law, SOEs raise questions that inevitably involve the very foundations upon which that regulation was established.

Any study aiming to outline a conceptual framework for the notion of SOEs cannot disregard the tensions underlying the economic models underpinning the major economies in the world, namely State capitalism and liberalism as it has been embedded in the multilateral context of the WTO. The divergence revolves around the State's role in the economy and its relationship with the market. The functions to be assigned to State ownership in economic actors are ultimately influenced by how such a relationship is defined. Such tensions are at the core of each section of the analysis. With this in mind, the following discussion delineates the overall context guiding this study. To this end, the following chapter discusses first, State capitalism and its main features. Then, the embedded liberalism compromise under the context of the WTO is considered.

[147] In this regard, one may recall the joint statement issued by the US, the EU and Japan expressing concern, inter alia, on SOEs' regulation: Joint Statement on Trilateral Meeting of the Trade Ministers of the United States, Japan and the European Union (25 September 2018).

[148] See Wu (n 8); Bown and Hillman (n 121); Andrea Mastromatteo, 'WTO and SOEs: Article XVII GATT and Related Provisions of the GATT 1994' (2017) 16(4) World Trade Review, 601; Julien Chaisse, 'Untangling the Triangle: Issues for State-controlled Entities in Trade, Investment, and Competition Law' in Julien Chaisse and T-Y Lin (eds), *International Economic Law and Governance* (OUP, 2016) 233.

Chapter Two
STATE-OWNED ENTERPRISES (SOEs) AND THEIR CLASHING FRAMING UNDER THE MODELS OF STATE CAPITALISM AND EMBEDDED LIBERALISM

1. State capitalism: notion and conceptual framework

According to Bremmer,[1] the term 'State capitalism' originates in a speech given in 1896 by Wilhelm Liebknecht, one of the founders of the German Social Democracy. On that occasion, Liebknecht argued that the State not only had to seize means of production but was also expected to submit its political power to the proletariat. Based on this view, 'State capitalism' retained a negative meaning because it identified a system in which the State runs the economy and in this way substituting and becoming a new oppressing head of the working class. Building on these alleged origins, the term nowadays refers to a political and economic model that emerged in the Asian region and that has also subsequently been taken to other parts of the world, such as Europe and Latin America. There is no shared definition of State capitalism and its exact boundaries have been traced differently in the literature. For instance, State capitalism has been defined as the ownership of significant means of production by the State, including SOEs.[2]
In turn, Kurlantzick bases the definition of State capitalism on quantitative proxies.[3] According to the author, State capitalist countries are countries where the government controls more than one-third of the five-hundred largest corporations in revenue. Hence, these governments enjoy significantly more power over the corporate sector than their counterparts in countries based on a market-oriented economy, such as Western countries.[4] From this perspective, the threshold identifies the point below which market principles mostly govern the economy, albeit the State may still play a significant role in it.
According to Musacchio and Lazzarini, State capitalism is the widespread influence of the government in the economy either (i) through majority or minority ownership in enterprises or (ii) through the provision of subsidized credit and other privileges to private companies. Hence, the authors identify three links that can bring enterprises under their boundaries: majority ownership; minority ownership; and subsidies and privileges. This definition is the broadest among the ones examined here. Hence, for the purposes of this study is worthy of further consideration because it enables the research to progress in a way that covers most types of SOEs that could be problematic in international trade relations. Secondly, it touches on elements that will be considered the most throughout the analysis. Therefore, this is arguably the framework that can guide the development of the study.
Based on the above, it emerges that State capitalism is not founded and led by a set of principles and values. Rather, it consists of a set of governing techniques and practices which are implemented to

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[1] Ian Bremmer, *The End of the Free Market: Who Wins the War Between States and Corporations?* (Portfolio, 2010) 70.
[2] Martin C Spechler, Joachim Ahrens and Herman W Hoen, *State Capitalism in Eurasia* (World Scientific Publishing Company, 2017) 2. See also: Richard W Carney, *Sovereign Wealth Funds* and *State-Owned Enterprises* in *East Asia* and *Beyond* (CUP, 2018).
[3] Joshua Kurlantzick, *State Capitalism. How the Return of Statism is Transforming the World* (OUP, 2016).
[4] Kurlantzick ibid 9.

reinforce the power of the State,[5] and not to pursue welfare policies. This also explains why State capitalism displays different features depending on the context in which it operates.[6] In other words, State capitalism is not a monolithic phenomenon. Rather, the expression usually refers to a variety of State capitalist models that find their expression in different domestic frameworks and institutions. This shows how the way in which the definition of State capitalism and the related notion are constructed allows to bring certain States within its framework and to exclude others, depending on the elements that are considered. It is important to stress that the notion of State capitalism and the qualification of a State as a State capitalist country is not linked with a specific form of government. In other words, not only authoritarian governments can be based on State capitalist models. Indeed, there are several democracies that may qualify as State capitalist countries. For instance, Norway and Brazil are democracies and are generally considered to be State capitalist countries due their active involvement in the economy and mass use of SWFs and SOEs.[7]

Multiple rationales have been identified justifying the establishment of a State capitalist model. Firstly, the social rationale: the government intervenes in the economy in a diversified range of sectors to pursue public objectives, promote regional development, and to create or protect jobs.[8] The State can exercise its influence and control, on POEs and SOEs alike, in several ways, including acquisition of ownership shares or by issuing instructions to pursue domestic objectives. In a State capitalist context, POEs would generally obtain some benefits from complying with such instructions. However, their conduct may also be due to the fear of retaliation by the State.[9] Secondly, there is the political rationale. In State capitalist countries, it is not infrequent for the government to provide subsidies and other advantages in exchange for political support. This a context in which the development of cronyism is likely. Finally, we can consider the industrial rationale. From this perspective, the State intervenes in the economy to promote investment when private capital is scarce.[10] The State may also support the development of specific sectors that would not otherwise be possible.

State capitalism is continuously evolving. The 2008 GFC was a turning point in this regard. While, on the one hand, it has been argued that the global financial crisis determined the definitive departure of communism as a system to which no State resorted as a reaction to the crisis or to counteract its

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[5] Ilias Alami and Adam D Dixon, 'State Capitalism(s) Redux? Theories, Tensions, Controversies' (2020) 24(1) Competition & Change 70. See also: Mike Wright and others, 'State Capitalism in International Context: Varieties and Variations' (2021) 56 Journal of World Business 101160.

[6] Bremmer (n 1) 100 f.

[7] See: Kyunghoon Kim, 'Locating New State Capitalism' in Advanced Economies: An International Comparison of Government Ownership in Economic Entities' (2022) 28(3) Contemporary Politics 285; Musacchio and Lazzarini Aldo Musacchio and Sergio Lazzarini, *Reinventing State Capitalism. Leviathan in Business, Brazil and Beyond* (Harvard University Press, 2014) 23.

[8] Mary M Shirley and John Nellis, Public Enterprises Reform: The Lessons of Experience (The World Bank, 1991) 16 f.

[9] For instance, Bremmer takes into consideration several measures adopted by Russia in its economy. The author shows how the Russian State has regularly stepped in to stabilize consumer goods prices and save jobs, while simultaneously attempting to broaden or maintain its political consensus. Therefore, when faced with a struggling company that is forced to lay off a significant portion of its workforce, the president has not refrained from intervening, in the face of protests from local communities, by requiring the company to lower its prices in order to satisfy the local population's demand and to rehire the laid-off workers with state assistance. See Bremmer (n 1) 231. For an account of State capitalism in Russia, see also: Anders Aslund, *Russia's Crony Capitalism: The Path from Market Economy to Kleptocracy* (Yale University Press, 2019).

[10] M Adil Khan, 'Reinventing Public Enterprises', in UN, 'Public Enterprises: Unresolved Challenges and New Opportunities. Publication Based on the Expert Group Meeting on Re-Inventing Public Enterprises and Their Management' (October 27–28, 2005) New York, NY, 3.

negative effects.[11] On the other hand, it conferred State capitalism's new vigor as States traditionally against State interventionism acted in support of their economies too.[12]

More recently, scholars use the expression 'new' State capitalism[13] to identify a system that, on the one hand, embraces market mechanisms but, on the other hand, relies on market forces only up to the point they do not undermine the State's political power and support. In this case, the State actively intervenes in the market to strengthen its position and counteract situations that may weaken consensus around it. At the same time, State capitalism pursues active participation of the State in the context of globalization.[14] Scholars agree that these features make State capitalism unsustainable in the long run,[15] due to the consequences attached to the structured and continued intervention of the State in the economy. Indeed, the influence and control exercised by the State negatively affect private initiative and investment; it leads to the discrimination of the least-privileged parts of society, as the power is in the hands of the elites, which tend to implement crony practices. Moreover, considering that the economies of State capitalist countries have reached a considerable size, it is very likely that any negative spillovers at the national level will also affect the international sphere. Hence, any domestic negative externality can potentially affect global markets and trading partners.

On the other hand, State capitalism has a protectionist side.[16] Indeed, foreign investments may be discouraged by the heavy involvement of the State in economic operations whose actions may be shaped by national interests. This dynamic jeopardizes international trade and investment relations and stifles the expansion and development of the private sector, thus creating an endless vicious cycle.

1.1. SOEs as a tool of State Capitalism

In the context of State capitalism, SOEs are one of the pillar institutions through which the State intervenes in the economy to control and manage it.[17] In this context, SOEs are a valuable tool to direct market forces and influence capital allocation.[18] Through owned enterprises, a State capitalist country actively ensures that market forces are guided in a way that secures political power and support. This is done through the exploitation of SOEs as vehicles to implement national policies and foster innovation.[19] The distribution of SOEs in State capitalist economies is usually diversified: they

[11] Bremmer (n 1) 25.
[12] Ibid
[13] Ilias Alami and others, 'Geopolitics and the 'New' State Capitalism' (2022) 27(3) GEOPOLITICS 995, 1000.
[14] This is one of the objectives pursued, *inter alia*, by the Chinese Belt and Road Initiative (BRI) which aim to bring China to the center of international economic relations. See Heng Wang, 'China's Approach to the Belt and Road Initiative: Scope, Character and Sustainability' (2019) 22(1) Journal of International Economic Law 29-55.
[15] Bremmer (n 1) 324; Kurlantizck (n 3) 175 f; Régis Bismuth, 'L'internationalisation du capitalisme d'état en question. Les failles de l'encadrement juridique des risques politiques et économiques posés par les invetissements souverains étrangers (entreprises d'état et fond souverains)' (2014) 45(3) Études internationales 379-398.
[16] Ilias Alami and Adam D Dixon, 'State Capitalism(s) Redux? Theories, Tensions, Controversies' (2020) 24(1) Competition & Change 1000.
[17] Lalita Som, *State Capitalism: Why SOEs Matter and the Challenges They Face* (OUP, 2022), 5. See also: Joshua Kurlantizck (n 3) 7. However, the existence of SOEs in a given national context is not sufficient *per se* to qualify the State as a State capitalist one.
[18] Xu Qian, 'Domestic Investment Law and State Capitalism' (2023) 22 World Trade Review 133.
[19] In this regard, economists have noted how technological innovation in countries where the level of state intervention in the economy is very high - such as China - has achieved the best results in terms of technological development in sensitive areas, such as combating climate change. See Mariana Mazzucato, 'From Market Fixing to Market-Creating: A New Framework for Innovation Policy' (2016) 23(2) Industry and Innovation 140-156; Mariana Mazzucato, *The Entrepreneurial State: Debunking Public v. Private Sector Myth* (PublicAffairs, 2015); Dani Rodrik, 'Green Industrial Policy' (2014) 30(3) Oxford Review of Economic Policy, 469–491.

perform not only in strategic sectors but are generally widespread in the national economy. Also, in this context, they tend to pursue long-term objectives, which makes their presence in the economy more stable and structured.

The term 'SOEs' in State capitalist countries usually refers to different entities with an intricate web of connections underpinning their relationship with the State.[20] Despite the multifaceted forms of State capitalism, it possible to observe some recurring corporate structures when SOEs and related entities are considered. For instance, State capitalist countries make wide use of national champions. National champions are usually large enterprises controlled or otherwise linked to the State, and entrusted to pursue social objectives in the national interest.[21] Their activities benefit from government economic support, which allow them to pay above-market prices while also applying higher prices to consumers without worrying about financial risk. For this reason, they have been referred to as 'state-backed enterprises.'[22] Due to the benefits granted by the government, national champions risk jeopardizing the level playing field among economic operators. At the same time, they may also play an essential role in boosting innovation.[23]

Another category of entities particularly common in modern State capitalist countries are national oil enterprises (NOC).[24] They serve various functions related to natural resources, from their management to foster innovation around advancement of their exploitation.[25] By establishing owned or controlled NOC, States aim at balancing the pursuit of national strategic interests, on the one hand, and economic returns and national market stabilization, on the other.[26]

Lastly, SWFs should be considered. These are policy tools that governments use to invest economic surpluses in line with national strategic objectives.[27] These economic excesses can derive from cash flows, revenues, and the management of national resources.[28] Through SWFs, such surpluses are used to pursue public policies domestically and abroad.[29] Hence, SWFs can have an extensive impact on international relations.[30]

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[20] Mark Wu, 'The "China, Inc." Challenge to Global Trade Governance' (2016) 57(2) Harvard International Law Journal 265. The Author highlights the intricate layers connecting Chinese SOEs with the government. See also: Julien Chaisse, 'State Capitalism on the Ascent: Stress, Shock and Adaptation of the International Law on Foreign Investment' (2018) 27(2) Minnesota Journal of International Law 339-419.

[21] Oliver Falck, Christian Gollier and Ludger Woessmann (eds), *Industrial Policy for National Champions* (OUP, 2011); Jens Südekum, 'National Champions and Globalization' (2010) 43(1) The Canadian Journal of Economics 204.

[22] Fabian Stancke, 'National Champions and Their Impact on Trade, Policy and SDGs' in Alicia E Roberts, Stephen Hardy and Winfried Huck, *EU and CARICOM* (Routledge, 2021) 168. For a perspective on Chinese National Champions: Ming Du, 'When China's National Champions Go Global: Nothing to Fear But Fear Itself?' (2014) 48(6) Journal of World Trade 1127-1166.

[23] Lalita Som, *State Capitalism: Why SOEs Matter and the Challenges They Face* (OUP, 2022), 15.

[24] Øystein Noreng, *The Oil Business and the State: National Energy Companies and Government Ownership* (Routledge, 2022) 171; David G Victor, 'National Oil Companies and the Future of the Oil Industry' (2013) 5 Annual Review of Resource Economics 445.

[25] Kurlantzick (n 3) 8.

[26] SS Sundaresa, 'Oil and the Political Economy of State Capitalism' in (2012) 1 Procedia Economics and Finance (Special Issue on the International Conference of Applied Economics (ICOAE) Uppsala, Sweden) 383.

[27] Mark Gordon and Sebastian V Niles, 'Sovereign Wealth Fund: An Overview' in Karl P Sauvant and others, *Sovereign Investments: Concerns and Policy Reaction* (OUP, 2012) 24.

[28] Alexander James and others, 'Sovereign Wealth Funds in Theory and Practice' (2002) 14 Annual Review of Resource Economics 622.

[29] Xiaolei Sun and others, 'China's Sovereign Wealth Fund Investments in Overseas Energy: The Energy Security Perspective' (2014) 65 Energy Policy 654.

[30] Patrick DeSouza and W Michael Reisman, 'Sovereign Wealth Funds and National Security' in Karl P Sauvant and others, *Sovereign Investments: Concerns and Policy Reaction* (OUP, 2012) 286.

Based on the above, it emerges that under State capitalism, the term 'SOEs' potentially refers to various enterprises whose features change according to the national context and the objectives pursued. However, they all share a common trait: they serve the expansion of State capitalism through the pursuit of long-term economic and non-economic objectives. Hence, SOEs are a key element in the maintenance and functioning of a State capitalist model. These characteristics are ultimately projected in international markets, where SOEs likewise pursue objectives in the national interest. From this perspective, being an element common to different economic models but with varying characteristics, SOEs may bring the twentieth-century world economy to the brink of a new economic order premised on pluralism and with multiple centers of economic power.

2. Embedded Liberalism: notion, conceptual and legal framework

This section aims at providing an overview of how State ownership was conceived and regulated at the international level outside and within the establishment of the multilateral context of international trade regulation. This approach is deemed to capture how the regulation of State ownership was conceived in international bilateral and multilateral relations between States at a moment in which the GATT framework was just being established. From this perspective, the study first considers Treaties of Friendship, Commerce, and Navigation (FCNs) concluded by one of the major negotiators of the GATT/WTO, namely the US government, in the first ten years of the GATT. Secondly, the study aims to reconstruct the theoretical framework guiding the analysis of SOEs in the multilateral trade legal framework. To this end, the focus is on the regulation of the role of the State in the economy in the context of the establishment of the GATT/WTO legal system and in light of the embedded liberalism compromise on, which the system is premised.

2.1. The regulation of public ownership outside the GATT: a focus on Treaties of Friendship, Commerce, and Navigation (FCN)

Treaties of Friendship, Commerce and Navigation (FCN) are among the first forms of bilateral cooperation between States designed to promote trade and protect trade instrumentalities inspired by European and North American legal standards.[31] To this end, they introduced important principles that continue to serve as the foundation of international trade relations to this day, namely the principles of access, non-discrimination, due process, and security.[32]
FCN treaties concluded between the 1700s and the 1800s did not specifically address public enterprises.[33] The first relevant provisions regulating public ownership in commercial entities started

[31] Herman Walker Jr, 'Provisions on Companies in United States Commercial Treaties' (1956) 50(2) American Journal of International Law 373. See also: Wolfgang Alschner, 'Americanization of the BIT Universe: The influence of Friendship, Commerce and Navigation (FCN) Treaties on Modern Investment Treaty Law' (2013) 5(2) Goettingen Journal of International Law 455-486; Kenneth J Vandevelde, *U.S. International Investment Agreements* (OUP, 2009); Herman Walker Jr, 'Modern Treaties of Friendship, Commerce and Navigation' (1958) 42 Minnesota Law Review 805-824.
[32] Kenneth J Vandevelde, *Bilateral Investment Treaties: History, Policy and Interpretation* (OUP, 2010) 21.
[33] See, for example, the Treaty of Friendship, Commerce and Navigation between Austria-Hungary and the United States (signed 27August 1829, entered into force 10 February 1831); Treaty of Friendship, Commerce and Navigation between Venezuela and the United States (signed 20 January 1836, entered into force 20 June 1836); Treaty of Friendship, Commerce and Navigation between Switzerland and the United States, 25 November 1850; Treaty of Friendship,

to appear in FCN treaties concluded in the post-WWII era. Two main criteria have guided the analysis conducted to provide an overview of this legal framework. Firstly, a chronological order is followed: only FCN agreements signed from 1947 - the date signature of the GATT - to 1957 fall under the scope of this analysis. This period has been selected because this was a time in which bilateral treaties were still predominantly concluded based on a north-north scheme, while the decolonization process was in its early phases. Also, a decade coinciding with the first ten years of the multilateral legal framework is deemed an adequate time period to understand whether clauses concerning public ownership were determined by a concurrence of interests that emerged at that time or as a consequence of the establishment of the multilateral legal regime on international trade. Moreover, this period allows to generally grasp the origin of issues connected with public ownership in international trade relations and to address the key regulatory elements adopted to address those issues. The second criterion that guided the analysis is subjective: this section considers only FCN agreements concluded by the United States (US). This choice is justified considering the US has been signing FCN treaties since the 1770s [34] with countries worldwide, which gives a rather wide grasp of the phenomenon from a geographic perspective. Moreover, the American government exercised a key role in shaping international trade legal relations in the aftermath of WWII, i.e., the time-frame from which the first regulatory frameworks on public ownership emerged.

The relevant provisions in FCN treaties have been analyzed following a formal and substantive approach. From a formal point of view, FCN agreements under consideration regulate a wide range of entities linked to the State by ownership and control through a specific provision. These include monopolies, import agencies, enterprises owned or controlled by the State, and enterprises that have been granted exclusive or special privileges.[35] This was irrespective of the variety of States which

Commerce and Navigation between Argentina and the United States (signed 27 July 1853, entered into force 9 April 1855)

[34] The first treaty of Amity, Commerce and Navigation was concluded by the United States in 1778 with France. Vd. Herman Walker Jr (n 31).

[35] Cf. Treaty of Friendship, Navigation and Commerce between the United States of America and the Italian Republic (signed 2 February 1948, entered into force 26 July 1949) 79 UNTS 171, article XVIII. 1 (Italy-US FCN); Treaty of Friendship, Commerce and Navigation between Ireland and the United States of America (signed 21 January 1950, entered into force 14 September 1950) 206 UNTS 270, Art. XIV.1 (Ireland-US FCN); Amity and Economic Relations Agreement concluded between the United States of America and Ethiopia (signed 7 September 1951, entered into force 8 October 1953) UNTS206 (p 41), Article XV (US-Ethiopia FCN); Friendship, Commerce and Navigation Agreement between the United States of America and Israel (signed 23 August 1951, entered into force 3 April 1954) 219 UNTS 192, Article XVII (US-Israel FCN); Friendship, Commerce and Navigation Treaty between the United States of America and Greece (3 August 1951, entered into force 13 October 1954) 224 UNTS 300, Article XIV, para 3 (US-Greece FCN); Treaty of Friendship, Commerce and Navigation between the United States of America and Denmark (signed 1 October 1951, entered into force 30 July 1960) UNTS 421 Article XVII (US-Denmark FCN); Treaty of Friendship, Navigation and Commerce between the United States of America and Japan (signed 9 April 1953, entered into force 30 October 1953) 206 UNTS 192, Article XVII (Interestingly, this Agreement refers to 'enterprises owned or controlled *exclusively* by the Government'. This expression seems to apply only to those enterprises 100% owned or controlled by the States) (Us-Japan FCN); Treaty of Friendship, Navigation and Commerce between the United States of America and the Federal Republic of Germany (signed on 29 October 1954, entered into force 14 July 1956) 273 UNTS 4, Article XVII, para 1 (US-Germany FCN); Treaty of Friendship, Navigation and Commerce between the United States of America and the Republic of Haiti (signed 3 March 1955), Art. XVII, para 1, lett. a) (US-Haiti FCN); Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran (signed 15 August 1955, entered into force 16 June 1957) 284 UNTS 110, Article XI, para 1 (US-Iran FCN); Treaty of Friendship, Navigation and Commerce between the United States of America and Nicaragua (signed on 21 January 1956, entered into force 24 May 1958) 367 UNTS 4, Art. XVII, para 1, lett a) (US-Nicaragua FCN); Treaty of Friendship, Navigation and Commerce between the United States of America and Kingdom of the Netherlands (signed 27 March 1956, entered into force 5 December 1957) 285 UNTS 233, Art. XVII, para 1, lett.a) (US-The Netherlands FCN); Treaty of Friendship, Navigation and Commerce between the United

were the other party. None of the terms used in FCN treaties is defined, although some agreements specify the activities, in which the enterprises may be involved by referring to publicly owned or controlled commercial, manufacturing, or processing enterprises.[36]

From a substantive perspective, a careful analysis of FCN treaties reveals a comprehensive regulatory framework for public ownership. In this regard, the primary objective pursued seems to ensure the non-discrimination of private investors vis à vis foreign public enterprises. The general discussion carried out after the conclusion of the FCN treaty between the US and the Republic of China signed in 1946 also revealed the need to ensure a level playing field between POEs and publicly owned economic actors. In this regard, in a discussion within the US Committee on Foreign Relations, it was noted that:

> 'The foreign businessman in China belongs, perhaps, to the most completely alienated group of all. Beset with problems on all sides, plus increasing competition from state-owned and bureaucratic enterprises, he is becoming more pessimistic by the day.'[37]

The fear that US private investors could suffer unfair competition from foreign 'state-owned or controlled enterprises'[38] led to the adoption of a comprehensive set of provisions regulating state ownership in commercial entities.

Among the aspects of public ownership to be regulated in treaties under consideration is usually that of expropriation. By referring to 'the taking of privately owned enterprises into public ownership or the placing of such enterprises under public control', the treaties under consideration implicitly adopt a neutral approach towards the model of ownership of signatory States. However, the parties were expected to ensure the respect of the national treatment and the most-favored-nation principles when nationalization was involved.[39]

Secondly, FCN treaties generally facilitated the establishment or maintenance of a wide range of economic undertakings owned or controlled by the government and granted them special and exclusive privileges as long as they acted under 'commercial considerations'.[40] Although not defined, treaties usually specified that its contents related to price, quality, marketability, and transport.

States of America and the Republic of Korea (signed on 28 November 1956, entered into force 7 November 1957) 302 UNTS 281 (US-Korea FCN).

[36] Cfr. US-Greece FCN (n 35) Article XIV, para 2.

[37] China Weekly Review, American Publication in Shanghai, February 15, 1947, as quoted in United States Senate, Committee on Foreign Relations 'Hearing Before a Subcommittee of the Committee on Foreign Relations. Eightieth Congress, Second Session, on a Treaty of Friendship, Commerce, and Navigation between the United States of America and the Republic of China, together with a protocol thereto, signed at Nanking on November 4, 1946' (United States, Government Printing Office, 1948), 57. Emphasis added.

[38] Hearing before a subcommittee of the Committee on Foreign Relations United State Senate, Eighteenth Congress, Second Session on a Proposed Treaty of Friendship, Commerce and Navigation between the United States and the Italian Republic, April 30, 1948, p. 26.

[39] US-Israel FCN (n 35) Article VI; US-Greece FCN (n 35), Article VII, para 4; US-Denmark FCN (n 35), Article VI, para 5; US-Japan FCN (n 35), Art. VI; US-Germany FCN (n 35), Art. V, para 5; US-Nicaragua FCN (n 35), Article VI, para 5; US-Netherlands FCN (n 35), Art. VI, para 5; US-Korea FCN (n 35), Art. VI, para 5.

[40] In this regard, it is of interest to note that prior to the conclusion of the FCN with Ireland, the FCN concluded with the Italian Republic did not specify the commercial character of considerations to be taken into account. However, the activities of POEs were taken as a benchmark for the evaluation of the SOEs' conduct. Article XVIII stated '(…) the monopoly or agency shall, in making such purchases or sales of any article, be influenced solely by *considerations*, such as price, quality, marketability, transportation and terms of purchase or sale, which would *ordinarily be taken into account by a private commercial enterprise interested solely in purchasing or selling such article on the most favorable terms*.' Emphasis added. Starting from 1950, the more specific expression of 'commercial considerations' was used and POEs'

Thirdly, FCN treaties acknowledged that public ownership in economic entities could be exploited to implement restrictive practices. To counterbalance this possibility and to eliminate harmful effects on international trade, the parties agreed to enter consultations on measures implemented through public enterprises.[41]

Fourthly, FCN agreements addressed the relationship between public and private enterprises. Indeed, most of the considered FCN treaties contained provisions for regulating the level playing field between SOEs and POEs. In this regard, the parties, according to the neutrality principle, wish to ensure that rights and privileges are granted to each economic operator, irrespective of their ownership.[42] In more recent FCN treaties that are considered in this study, this regulatory concept is referred to as 'competitive equality'. Although this concept is left undefined, it is explicitly linked to a situation in which enterprises owned by the State and POEs compete.[43] Finally, FCN treaties excluded the possibility for public enterprises to invoke immunity from tax, suit, execution, or judgment.[44]

As it will be further illustrated *infra*,[45] the regulatory framework of FCN treaties closely resembles the substantive provisions of Article XVII of the GATT. On one level, this is not surprising considering the key role played by the US in the drafting process of that provision. On another, level, however, one cannot help but notice that several of the analyzed FCN treaties were concluded with States which were not yet Members of the GATT.[46] Against this background, it seems safe to assume

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conduct was no longer a benchmark. The typical provision would state '… shall make their purchases and sales involving either imports or exports affecting the commerce of the other Party solely in accordance with *commercial* considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale.' Cfr. Mentioned provisions in note 48.

[41] Cfr. US-Ireland FCN (n 35), Art. XV, para 1; US-Denmark FCN (n 35), Article XVIII, para 1; US-Japan FCN (n 35), Article XVII (Interestingly, this Agreement refers to 'enterprises owned or controlled *exclusively* by the Government'. This expression seems to be applicable only to those enterprises 100% owned or controlled by the States); US-Germany FCN (n 35), Article XVII, para 1; US-Haiti FCN (n 35), Art. XVII, para 1, lett. a); US-Iran FCN (n 35) Art. XI, para 1; US-Nicaragua FCN (n 35), Art. XVII, para 1, lett a); US-The Netherlands FCN (n 35) Art. XVII, para 1, lett.a); US-Korea FCN (n 35), Art. XVII, para 1, lett. a).

[42] For example, the FCN Treaty between Ireland and the United States at Article XV, paragraph 2 stated that 'Rights and privileges with respect to commercial, manufacturing and processing activities accorded, by the provisions of the present Treaty, to privately owned and controlled enterprises of either Party within the territories of the other Party shall extend to rights and privileges of an economic nature granted to publicly owned or controlled enterprises of such other Party, in situations in which such publicly owned or controlled enterprises operate in fact in competition with privately owned and controlled enterprises.'

[43] Cfr. The FCN treaty between the United States of America and Greece. Article XIV para 2 stated that: 'The Parties recognize that conditions of competitive equality should be maintained in situations in which publicly owned or controlled commercial, manufacturing or processing enterprises of either Party engage in competition, within the territories thereof, with privately owned and controlled enterprises of nationals and companies of the other Party'. Similar provisions can be found in the US-Denmark FCN (n 35), Article XVIII, para 2; US-Iran FCN (n 35) Art. XI, para 3; US-Nicaragua FCN (n 35) Art. XVII, para 2; US-The Netherlands FCN (n 35) Art. XVIII, para 1).

[44] The FCN treaty between the United States of America and the Italian Republic at Article XXIV, para 6 stated: 'No enterprise of either High Contracting Party which is publicly owned or controlled shall, if it engages in commercial, manufacturing, processing, shipping or other business activities within the territories of the other High Contracting Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, from suit, from execution of judgment, or from any other liability to which a privately owned and controlled enterprise is subject therein.' Similar provisions can be found also in: US-Iran FCN (n 35), Art. XV, para 3; US-Israel FCN (n 35), Art. XVIII, para 3; US-Greece FCN (n 35), Art. XIV, para 5; US-Greece FCN (n 35), Article XVIII, para 3; US-Japan FCN (n 35), Article XVIII, para 2; US-Germany FCN (n 35), Art. XVIII, para 2; US-Haiti FCN (n 35), Art. XVIII, para 2; US-Iran FCN (n 35), Art. XI, para 4; US-Nicaragua FCN (n 35), Art. XVIII, para 3; US-The Netherlands FCN (n 35), Art. XVIII, para 2; US-Korea FCN (n 35), Art. XVIII, para 3.

[45] See Chapter 2.

[46] This is the case for Ethiopia (which never became GATT member), Israel (which signed the FCN agreement in 1951 and became a GATT member in 1962), Japan (which signed the FCN treaty in 1953 and became a GATT member in

that by introducing these clauses within bilateral treaties, the US contributed to expanding the regulation of State ownership and State trading activities beyond the 1947 GATT system.

2.2. The State's role in the economy in the philosophy of the contemporary multilateral trading system

FCN bilateral agreements aside, before the two world wars, governments typically used to establish and implement unilateral trade policies.[47] Only during the two world conflicts and the end of WWII did the need to cooperate and harmonize trade policies at the international level emerge. In the interwar years, the lack of an internationally-coordinated recovery plan left States alone to counteract the economic recession and the negative impact of the war on their economies.[48] Many governments resorted to beggar-thy-neighbor,[49] isolationist, and protectionist economic policies –of which the Smoot-Hawley Tariff Act adopted in 1930 by the US is an example.[50] High economic tensions between States and widespread mistrust resulting from these practices are seen to have contributed to the outbreak of WWII.[51]

Against this backdrop, world leaders gathered at the Bretton Woods Conference in 1944 to discuss a new international economic architecture.[52] The main objectives that the envisaged multilateral trading system should pursue were to avoid another global conflict[53] and promote global economic development and welfare.[54] Establishing institutionalized cooperation in international trade relations

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1955); Iran (which never became a GATT Member); Korea (which signed the FCN Agreement in 1956 and became a GATT member in 1967).

[47] Andrea Comba, *Il Neo Liberismo Internazionale. Strutture giuridiche a dimensione mondiale* (Giuffé Editore, 1987) 8 f; Maria R Mauro, *Diritto internazionale dell'economia. Teoria e prassi delle relazioni economiche internazionali*, (Edizioni Scientifiche Italiane, 2019) 3.

[48] Matsushita and others Mitsuo Matsushita, Thomas J Schoenbaum, Petros C Mavroidis and Michael Hahn, *The World Trade Organisation. Law, Practice and Policy* (OUP, 3rd Edition) 4 f.

[49] This term identifies a set of economic and trade policies that States implement to address their national economic issues that can end up in worsening the economic situation of other countries as a side-effect. The negative spillover prompts the adoption of retaliatory and discriminatory measures by affected States. This category includes tariffs and quotas. For an historical and economic perspective on these measures, see: Thilo NH Albers, 'Currency Devaluations and Beggar-My-Neighbor Penalties: Evidence from the 1930s' (2020) 73(1) The Economic History Review 233-257. It should also be considered that States often adopted direct retaliatory trade measures and established higher tariffs to counteract unilateral measures. Douglas A Irwin, Petros C Mavroidis and Alan O Sykes, *The Genesis of the GATT* (CUP, 2008) 6.

[50] For a detailed account of the act see: Barry Eichengreen, 'The Political Economy of Smoot Hawley', National Bureau of Economic Research (1986); Kumiko Koyama, 'The Passage of the Smoot-Hawley Tariff Act: Why Did the President Sign the Bill?' (2009) 21(2) Journal of Policy History 163-186.

[51] Daniel CK Chow and Thomas J Schoenbaum, *International Trade Law: Problems, Cases, and Materials* (Wolters Kluwers, 2013) 18.

[52] As well known, the Bretton Woods conference, held in 1944, did not specifically concerned trade, but it focused on monetary and banking issues. However, informal gatherings dealing with trade aspects were held, because it was understood that the effective functioning of banking, monetary and financial institutions (namely the World Banck and the International monetary Fund) could only be ensured by a complementary institution dealing with trade-related aspects, the International Trade Organisation (ITO). Thus, the conference dealt with three major topics concerning international trade: (i) the elaboration of a draft Charter of the ITO; (ii) the creation of a far-reaching multilateral trade agreement particularly centered on the reduction of tariffs (iii) the drafting of general clauses related to tariffs obligations. See John H Jackson, *The World Trading System, Law and Policy of International Economic Relations* (MIT Press, 1997) 36 f.

[53] John H Jackson, *World Trade and the Law of GATT. A Legal Analysis of the General Agreement on Tariffs and Trade*, (Bobbs-Merrill Co., Inc.1969).

[54] See: John H Jackson, 'History of the General Agreement on Tariffs and Trade', in Rudiger Wolfrum, Peter-Tobias Stoll and Horger P Hestermeyer (eds.), *Max Planck Commentaries on World Trade Law (Vol. 5)* (Martinus Nijhoff Publishers, 2011) 3; John H Jackson, 'The "WTO" Constitution and Proposed Reforms: Seven "Mantras" Revisited' (2001) 4(1) Journal of International Economic Law 68.

between States was considered essential to achieve this outcome.[55] Accordingly, negotiations aimed at designing a far-reaching agreement focused on the reduction of tariffs among Members inspired by the non-discrimination principle, the prohibition of most quotas, and respect of national treatment between national and foreign goods behind borders.[56] This approach encapsulated the principle of free trade, particularly advocated by the US during the negotiations, by Cordell Hull, the Secretary of State at the time appointed by President Roosevelt in 1933. Hull believed that trade integration based on liberal economic principles would ensure peace, geopolitical stability, and an efficient allocation of resources.[57] At the same time, however, it was believed that free trade should not hinder national stability and welfare policies. This second approach, advocated by the UK, was inspired by Keynes' economic theories (see *infra*). As a result of these discussions, international trade regulation was premised on the concept that market forces had to be embedded within broader institutional constraints.[58] This is generally referred to as the 'embedded liberalism compromise', an expression coined by John Ruggie in 1982.[59] According to Ruggie, the core principle of the compromise was that 'unlike the economic nationalism of the 1930s, it would be multilateral in character; unlike the liberalism of the golden standard and free trade, its multilateralism would be predicated on domestic interventionism.'[60]

The economist Karl Polanyi first discussed the concept of embeddedness and how this relates to the State's role in the economy.[61] This debate was the starting point of Ruggie's work. Polanyi observed that the economy has always been embedded in society. In his view, political decisions are crucial to preserving societies from the negative consequences brought about by the disembeddedness of the market from social forces, like inflation, deflation, and unemployment. To this end, the State must play an active role in the economy to regulate market forces.

The interaction between market and social needs was also explored by John Maynard Keynes.[62] For the purpose of this study, it is important to note that Keynesian theories constituted the premises of the embedded liberalism system.[63] Keynes rejected the theories advocated by Adam Smith which, in

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[55] Comba (n 47) 15 f.

[56] Petros C Mavroidis, *Trade in Goods* (OUP, 2012) 6 f.

[57] Petros C Mavroidis, *The Regulation of International Trade, Vol. 1* (MIT Press, 2016) 3 f. See also: Douglas A Irwin, 'Trade Liberalisation: Cordell Hull and the Case for Optimism', Maurice R. Greenberg Center for Geoeconomic Studies Working Paper, Council on Foreign Relations (2008); Kenneth W Dam, 'Cordell Hull, the Reciprocal Trade Agreements Act, and the WTO', in Ernst U Petersmann and James Harrison (eds), *Reforming the World Trading System* (OUP, 2012) 83-96.

[58] John Ruggie, 'International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order' (1982) 36(2) International Organization 379, 382.

[59] This expression was coined for the first time by John Ruggie in his seminal work. See: Ruggie ibid.

[60] Ruggie (n 58) 393. As noted by Lang, Ruggie developed his work as a reaction to the hegemonic stability theory, the prevalent theory at the time. According to the hegemonic stability theory, the hegemonic economic power determines the structure of international trade. Hence, if the hegemonic power is based on liberalism, it generates a system based on open trade. The decrease of such power weakens open trade. See Andrew TF Lang, 'Reconstructing Embedded Liberalism: John Gerard Ruggie and Constructivist Approaches to the Study of the International Trade Regime' (2006) 9(1) Journal of International Economic Law 85-86.

[61] Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time, Boston* (MA: Beacon Press, 1945).

[62] John M Keynes, *The General Theory of Employment, Interest and Money* (The Royal Economic Society, 1973). See also: James Piereson, 'John Maynard Keynes and the Modern Revolution Political Economy' (2012) 49 Society 263-273.

[63] Indeed, the position adopted by the UK during ITO/GATT negotiations was inspired by Keynesian economic theories. As a reaction to the social instability brought about by the Great Depression, the British government wished to prioritize full and stable employment policies in the organization of multilateral trade relations. According to this perspective, the main goal that the UK Government wished to pursue was the development of national welfare policies. From this perspective, States had to retain sufficient power and flexibility to impose restrictions on international trade when the

a nutshell, were premised on the laissez-faire principle and the concept of the invisible hand governing the market.[64] More specifically, Keynes opposed the idea that market forces can adjust themselves and satisfy the needs of society. Therefore, he identified what he believed to be a third path, to be distinguished from the laissez-faire principle and socialism. In his view, the relationship between the market and the State is reshaped: the system is still capitalist as institutions of private property are preserved, but market forces are not left unregulated because government institutions still exist. The two elements are complementary, as market forces alone cannot guarantee economic development following social welfare. Against this background, the State is expected to play an active role in the economy to ensure that social policy objectives that reflect society's needs are met. They are embedded in the institutions of society, built to ensure the respect of individual freedom and social needs. In a way, State intervention in the national economy may occur when the individual's response to economic incentives does not correspond to collective efficiency.[65]

In the view of both economists, Polanyi and Keynes, the role of the State in the economy is not only necessary but must also be active. In the context of the emerging multilateral trading system, State intervention in the economy was allowed and desirable, as it was necessary to ensure that the liberalization of international trade would not come at the expense of national welfare and stability.

From a regulatory point of view, no treaty provision encapsulates the embedded liberalism compromise. The expression instead identifies an open-ended process on which the balance of the multilateral trading system was originally built and continues to evolve.[66] Nevertheless, traces of the principles and values underpinning the compromise can be found in several GATT/WTO legal sources. For instance, a reference to this balance can be found in the Preamble of GATT 1947. Signatories expressly recognized 'their relations in the field of trade and economic endeavor should be conducted to raise standards of living, ensure full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods.' [67]

The compromise also shaped the original architecture of the multilateral trading system, which left States considerable latitude for domestic intervention. Indeed, the GATT featured several exceptions in this regard, especially in the context of agricultural products, exempted from tariff reduction negotiations, and the protection of national interests, like public health. Hence, in practical terms, the embedded liberalism compromise took the form of a negative approach premised on the idea that the

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pursuit of free trade policies risked exacerbating national instability. Therefore, the UK encouraged its prospective trading partners to seek the same domestic stability in order to avoid a negative spillover in case of fluctuations and instability. See Andrew Lang, *World Trade Law After Neoliberalism: Reimagining the Global Economic Order* (OUP 2011) 194 f.

[64] According to the *laissez-faire* principle, economic activities carried out by economic operators in the economy should be let unconstrained from public intervention. In the context of international trade, State intervention on cross-border trade flows should be limited not to affect the allocation of resources at the international level.

[65] Jonathan Kirshner, 'Keynes and the Crisis of Liberalism' (1999) 6(3) Review of International Political Economy 315 f. This situation is undesirable from an economic standpoint as it is likely going to generate costs to be borne by consumers thus leading to an overproduction and a misallocation of resources. Ultimately, a misallocation of resources would cause different market failures.

[66] Robert Wolfe and Matthew Mendelsohn, 'Values and Interests in Attitudes toward Trade and Globalization: The Continuing Compromise of Embedded Liberalism' (2005) 38(1) Canadian Journal of Political Science 45. See also: Eric Helleneir, 'The Life and Times of Embedded Liberalism: Legacies and Innovations since Bretton Woods' (2019) 16(6) Review of International Political Economy 1112-1135; Emily Reid, 'The WTO's Purpose, Regulatory Autonomy and the Future of the Embedded Liberalism Compromise' in Gillian Moon and Lisa Toohey (eds), *The Future of International Economic Integration: The Embedded Liberalism Compromise Revisited* (CUP, 2018) 222-242.

[67] There is an ontological difference with State capitalism, where these statements are not generally found.

development of a multilateral trading system was not possible without the support of social policies ensuring domestic economic stability.[68]

2.3. The element of State ownership in the embedded liberalism under the GATT/WTO legal framework

Having considered the general background of the embedded liberalism system, this section aims to explore the element of State intervention in the economy through ownership or control to understand if ownership and control are an inherent or a contingent element of State intervention under the GATT/WTO legal framework. The ultimate question is whether the balance underlying the embedded liberalism compromise persists and whether the paradigm of the State's role in the economy has been affected. For this purpose, this section analyzes the main elements that have challenged the embedded liberalism compromise in its development and their impact on the role of the State in the economy.

2.3.1. The enlargement of the WTO membership

From a historical perspective, the first challenge to the balance of the embedded liberalism compromise has been the enlargement of the GATT/WTO membership. Indeed, the multilateral trading system, previously largely composed of MEs, came to include different economic models, such as NMEs. Due to the stronger role of the State in NMEs, the balance risked evolving strongly in favor of State interventionism at the expense of national welfare. This dynamic was further exacerbated by the fact that many new Members that acceded to the GATT after 1947 were newly-decolonized developing countries, which brought about the emergence of new demands.[69] They asked for a higher level of flexibility to intervene in their economies to a greater extent than originally envisaged under the embedded liberalism compromise. As seen above, in their view, such flexibility was vital to implement the reforms required for their development.[70] These demands were not specifically considered when the multilateral trading system was initially established.[71] Hence, developing countries' requests could not find a proper venue for their voice to be heard in that context. Then, the idea emerged to deal with trade inequalities and development with the help of the United Nations (UN) system. The process eventually led to the creation of the United Nation Conference on Trade and Development (UNCTAD), which contributed to giving voice to such demands and reflected developing countries' shared interests and needs.[72] During the first session of the UNCTAD conference in 1964, the 'Group of 77' (G77) was established.[73] The group brought together States

[68] Andrea Comba, 'Neoliberismo e globalizzazione dell'economia', in Andrea Comba (ed) *Neoliberalismo Internazionale e Global Economic Governance* (Giappichelli Editore, 2013) 19 f.
[69] Lang (n 63) 44.
[70] Governments from developing countries also brought attention to the fact that natural resources were often under control of foreign private enterprises, that they wished to nationalize in order to regain control of key sectors of the economy. They perceived their under-development as the result of structural exploitation carried out by the developed economies at their expense, rather than the result of contingent historical consequences. From this perspective, developing economies asked for a reorganization of international labor, to increase export of manufactures towards their national economies, to promote production, while also advocating for the need to change the voting rights system in international settings.
[71] Robert E Hudec, *Developing Countries in the GATT Legal System* (CUP, 2011) 51 f.
[72] Ibid.
[73] Despite the name, the group came to include 134 countries over time. Founding Members of the group included: Afghanistan, Algeria, Argentina, Bangladesh, Benin, Bolivia, Brazil, Burkina Faso, Burundi, Cambodia, Cameroon, Central African Republic, Chad, Chile, Cyprus, Colombia, Congo, Democratic Republic of Congo, Costa Rica,

that shared the same endeavor to build a voice for developing economies in the discussion concerning development in order to enable them to participate and effectively influence and contribute to the creation of an economic, financial, and trade legal system.[74] This unity among developing economies was essential to increase their bargaining power vis à vis developed economies. As a reaction to these initiatives and not to lose the participation of developing countries in the multilateral trading system,[75] contracting parties to the GATT 1947 acknowledged the inadequacy of the agreement to address developing economies' needs. Hence, during the 21st session of the contracting parties in 1964, Part IV was added to the GATT 1947.[76] This section came into force in 1965 and introduced articles binding on all GATT Members with the aim of narrowing the gap between developed and least developed economies.[77] To this end, the provisions did not, inter alia, require reciprocity for concessions granted in favor of least developed countries.[78] Moreover, developed economies were expected to reduce or eliminate barriers to products of particular export interest for developing economies;[79] to provide improved and effective market access to primary products of particular interest for developing countries; and to actively collaborate to monitor and implement trade for the purposes of economic development.[80]

Against this background, original incumbents had to rethink State interventionism vis à vis different national economic models. Arguably, these initiatives were the first step of the evolution of the embedded liberalism compromise, challenging the role of State intervention – permissible but only within defined, narrow limits - in the multilateral trading context.

2.3.2. The 1970s energy crisis and the emergence of neoliberalism

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Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, Gabon, Ghana, Guatemala, Guinea, Haiti, Honduras, India, Indonesia, Iran, Iraq, Jamaica, Jordan, Kenya, Kuwait, Laos, Lebanon, Liberia, Libya, Madagascar, Malaysia, Mali, Mauritania, Mexico, Morocco, Myanmar, Nepal, Nicaragua, Niger, Nigeria, Pakistan, Panama, Paraguay, Peru, Philippines, Rwanda, Saudi Arabia, Senegal, Sierra Leone, Somalia, South Korea, Sri Lanka, Sudan, Syria, Tanzania, Thailand, Togo, Trinidad and Tobago, Tunisia, Uganda, Uruguay, Venezuela, Vietnam, Yemen. For a detailed account on the history and organization of G77 see: Karl P Sauvant, *The Group of 77: Evolution, Structure, Organization* (Oceana, 1981). See also: Message by Mr. Rubens Ricupero Secretary-General of UNCTAD to the Special Ministerial Meeting to commemorate the 40th anniversary of the Group of 77.

[74] Interestingly, this aim still characterizes the activity of the group to this day. The group defines itself as 'the largest intergovernmental organization of developing countries in the United Nations, which provides the means for the countries of the South to articulate and promote their collective economic interests and enhance their joint negotiating capacity on all major international economic issues within the United Nations system, and promote South-South cooperation for development.' See: <https://www.g77.org/doc/> (lastly accessed 1st April 2023).

[75] Hudec (n 71). The author notes that, on the occasion of 1954 Review Session, a meeting of GATT Ministers convened in 1957 acknowledged 'the failure of the trade of less developed countries to develop as rapidly as that of developed countries, excessive short-term fluctuations in prices of primary products, and widespread resort to agricultural protection.' A study was conducted on the reason behind these poor results. The Haberler Report was then issued in 1958, highlighting that most emerging economies' export revenues fell short of what was required for their economies to develop.

[76] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT 1947]. For a detailed account on Part IV, its history and functioning see: Sidney Wells, 'The Developing Countries GATT and UNCTAD'(1969) 45(1) International Affairs (Royal Institute of International Affairs 1944-) 69 f.

[77] Article XXXV:1(a).

[78] Article XXXV:8.

[79] Article XXXVII:1:(a).

[80] Article XXXVIII:2(a)-(e).

Another challenge to the balance of the embedded liberalism compromise stemmed from the emergence of neoliberal policies, especially in the US and UK,[81] following the 1970s outbreak of the energy crisis and new ownership patterns in commercial undertakings, as illustrated above.[82] Neoliberalism is an economic theory premised on free-market, the protection of competition through antitrust policies, and outsourcing governmental functions to private undertakings.[83] These are the essential traits of the neoliberal approach that became most prevalent in the multilateral trading system.[84] This time the balance was reversed in favor of free-market policies. Free-market policies were conceived as crucial for economic development at the expense of implementing social objectives.[85]

From the standpoint of international trade, the active involvement of the State in the economy was now a barrier to market freedom and private ownership. According to Lang,[86] States began to dispute the compliance of national policies implemented by trading partners as not conforming to the principle of free trade. To do so, they implicitly used their domestic market as a comparison. More specifically, the various measures adopted by States at the national level, which clearly differed from one another, were seen as restrictive of international trade by trading partners purely on that ground. Therefore, the element of national diversity, which in the context of the embedded liberalism compromise had been preserved and defended, was now equated to a restrictive barrier to international trade. In other words, State intervention in the economy was now equated to a non-tariff barrier to trade (NTB).

2.3.3. From the Tokyo Round (1973-1979) to the WTO: the regulation on non-tariff barriers to trade (NTBs)

Once tariffs were lowered worldwide, the multilateral trading system gradually came to recognize the negative and restricting influence that domestic regulation and unharmonized standards could exert on free trade.[87]

The discussion on NTBs at the multilateral level originates in the Kennedy Round (1964-1967). However, it was not until the Tokyo Round (1973-1979) that a set of agreements ('codes') dealing with NTBs was eventually negotiated and adopted on a plurilateral basis, i.e., only Members that

[81] Nitsan Chorev, 'The Institutional Project of Neo-Liberal Globalism: The Case of the WTO' (2005) 34 Theory and Society 317-355.

[82] Lang (n 63) 224.

[83] John G Ruggie, 'Corporate Globalization and the Liberal Order: Disembedding and Reembedding Governing Norms', in Peter J Katzenstein and Jonathan Kirshner (eds), *The Downfall of the American Order: Liberalism's End?* (Cornell University Press, 2021) 3.

[84] See John Ruggie, 'Taking the Embedded Liberalism Global: The Corporate Connection', International Law and Justice Working Papers, 2003/2 9 f; Ernst U Petersmann and Arminss Steinbach, 'Neo-Liberalism, State-Capitalism and Ordo-Liberalism: "Institutional Economics" and "Constitutional Choices" in Multilevel Trade Regulation' (2021) 22(1) Journal of World Investment & Trade 1-40; Nitsan Chover and Sarah Babb, 'The Crisis of Neoliberalism and the Future of International Institutions: A Comparison of the IMF and the WTO' (2009) 38(5) Theory and Society 468; Kristen Hopewell, *Breaking the WTO: How Emerging Powers Disrupted the Neoliberal Project* (Stanford University Press, 2016) 54 f.

[85] Lang (n 63) 221 f. Also: Rawi Abdelal and John G Ruggie, 'The Principles of Embedded Liberalism: Social Legitimacy and Global Capitalism', in David Moss and John Cisternino (eds), *New Perspectives on Regulation* (Tobin Project, 2009) 161.

[86] Lang (n 63) 227.

[87] See Mavroidis (n 57) 40; Robert E Baldwin, *Non-Tariff Distortions in International Trade* (The Brookings Institution, 1970) 2.

decided to sign those agreements were bounded by their obligations.[88] Variable geometry was introduced in the multilateral trading system, as members could determine which obligations to be bound by. This GATT à la carte[89] approach was interpreted as an erosion of the embedded liberalism compromise in itself because it reflected a failure among members to converge on the standard set of values upon which the compromise was founded in the first place.[90] However, also the opposite has been noted, namely that this approach introduced the flexibility necessary for the embedded liberalism compromise to operate.[91]

During the Uruguay Round (1986-1994), the 'single undertaking approach' was introduced. As a result, unlike in the pre-WTO era, Members were no longer permitted to pick and choose the commitments to which they wished to be bound. Instead, States planning to accede or adhere to the WTO had to either accept all the obligations or not join the multilateral trading system.[92] Against this background, most of the Tokyo Round NTB agreements became 'multilateralized', i.e., they became one regulatory framework with the GATT 1994.[93] This new scenario challenged the role of the State in the economy. Indeed, while the single undertaking approach eliminated the fragmentation that characterized the previous legal architecture, it also limited Members' ability to protect their national interests. By forcing them to be bound by all WTO Agreements, Members could not 'adapt' their participation in the Organization. In other words, this sort of 'all-in-or-out' formula did not leave much leeway for non-economic considerations, such as social policy ones, which would normally guide the State's decision to join a given international treaty and not another.

In a context that forcefully guides participants toward a predetermined outcome, the balance underpinning the embedded liberalism compromise could be affected as the role of the State in the

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[88] The agreements regulating NTBs were: the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (AD) 1868 U.N.T.S. 201; the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade (SCM); the Agreement on Import Licensing Procedures (ILA); Agreement on Technical Barriers to Trade (TBT); Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade and Protocol to the Agreement (CV); Agreement on Government Procurement (GPA); Agreement on Trade in Civil Aircraft (CA); International Dairy Arrangement (IDA); International Arrangement Regarding Bovine Meat (IBM).

[89] John H Jackson, C. Bail, J. Katz, J. M. Lang, A. Porges, *Proceedings of the Annual Meeting* (American Society of International Law), APRIL 1-4, 1992, Vol. 86 (APRIL 1-4, 1992), p. 71.

[90] Lang (n 63).

[91] Meredith Kolski Lewis, 'The Embedded Liberalism Compromise in the Making of the GATT and Uruguay Round Agreements', in Gillian Moon and Lisa Toohey (eds) *The Future of International Economic Integration. The Embedded Liberalism Compromise Revisited* (CUP, 2018) 23.

[92] WTO Agreements consist in Annexes. Annex I is divided into three parts. Annex I A of GATT 1994 consists of the following agreements: Agreement on Agriculture; Agreement on the Application of Sanitary and Phytosanitary Measures; Agreement on Textiles and Clothing; Agreement on Technical Barriers to Trade; Agreement on Trade Related Investment Measures; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994; Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994; Agreement on Preshipment Inspection: Agreement on Rules of Origin; Agreement on Import Licensing Procedures; Agreement on Subsidies and Countervailing Measures; Agreement on Safeguards. Annex I B contains the General Agreement on Trade in Services (GATS) and related annexes. Annex 1C is related to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement). Annex 2 contains the Understanding on Rules and Procedures Governing Settlement of Disputes. Annex 3 is dedicated to the Trade Policy and Review Mechanism. Annex 4 contains plurilateral trade agreements, binding only on those members that specifically accepted them: Agreement on Trade in Civil Aircraft; Agreement on Government Procurement; International Dairy Agreement; International Bovine Meat Agreement.

[93] Mavroidis (n 57) 53. The single undertaking approach also had an impact on the relationship between adopted agreements. They constituted a single treaty that was required to be interpreted as a whole. See Gabrielle Marceau and Joel P Trachtman, 'The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade: A Map of the World Trade Organization Law of Domestic Regulation of Goods' (2002) 36(5) Journal of World Trade 813-814.

economy is arguably eroded. From this perspective, certain WTO Agreements have indeed limited the role of the State in the economy, whose action can be implemented to protect social needs only to a certain extent. Such erosion, however, also originates from two other elements. On the one hand, the WTO's competence expanded to new fields compared to the GATT-era. This expansion has affected the flexibility of the multilateral trading system through the introduction of new mandatory legal frameworks. These mandatory frameworks have in turn weakened the key role of diplomacy in shaping the functioning of the multilateral trading system.[94] On the other hand, additional regulatory measures in highly sensitive fields, like phytosanitary measures (SPS), agriculture, technical trade barriers, and subsidies, were implemented for all Members. As a result, the system's governance structure evolved. Expanding the subjects covered by the Agreements may have impacted Members' regulatory autonomy in corresponding fields of national jurisdictions. In this context, the establishment or use of SOEs (or the transparency over these entities) might be hindered or discouraged by their possible qualification as trade-restrictive measures.

An analysis of the key aspects of these regulations and how they operate to strike a balance between trade liberalization and domestic regulation clarifies this point. Firstly, the Agreement on Technical Barriers to Trade (TBT), also referred to as the Standards Code, should be examined.[95] The Agreement applies to technical regulations,[96] standards,[97] and conformity assessment procedures.[98] Its Preamble explicitly states that 'no country should be prevented from taking measures necessary to ensure (…) the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices'.[99] Such measures, however, should not be applied 'in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries'.[100]In this context, the TBT Agreement seeks to distinguish between measures that correspond to legitimate national regulatory autonomy and those that are hidden restrictive actions. Drawing this distinction has proven especially difficult in recent decades, with the rise of non-trade issues and intense pressures from civil society and non-state actors, mainly on climate change, public health, food security, and environmental sustainability.[101] In this regard, some have questioned the TBT's ability

[94] In a similar vein, the Dispute Settlement Understanding (DSU)'s inclusion of the negative consensus mechanism for the approval of reports issued by Panels and the Appellate Body is significant in this regard. Meredith K Lewis, 'The Lack of Dissent in WTO Dispute Settlement' (2006) 9(4) Journal of International Economic Law 895 f. See also: Joost Pawelyn, 'The Transformation of World Trade' (2005) 104(1) Michigan Law Review 25.

[95] Agreement on Technical Barriers to Trade, 1868 U.N.T.S. 120 [hereinafter TBT]. For a detailed account on the drafting of the TBT Agreement: Denise Prévost, *Balancing Trade and Health in the SPS Agreement: The Development Dimension* (Wolf Legal Publishers, 2009) 49 f. For a detailed account of the relationship between GATT, TBT and SPS Agreement see: Marceau and Trachtman (n 93).

[96] In TBT Annex 1, a technical regulation is defined as a '[d]ocument which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marketing or labeling requirements as they apply to a product, production or processing method.'

[97] In TBT Annex 1, a standard is defined as a '[d]ocument approved by a recognized body that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marketing or labeling requirements as they apply to a product, process or production method.'

[98] In TBT Annex 1, conformity assessment procedures are defined as '[a]ny procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled.' For a detailed comment on the scope of the TBT Agreement see : Arkady Kudryavtsev, 'The TBT Agreement In Context', in Tracey Epps and Michael J Trebilcock, *Research Handbook on the WTO and Technical Barriers to Trade* (Edward Elgar Publishing, 2015) 17-70.

[99] Ibid.

[100] Ibid.

[101] See Steven Bernstein and Erin Hannah, 'Non-State Global Standard Setting and the WTO: Legitimacy and the Need for Regulatory Space', (2008) 11(3) Journal of International Economic Law 575-608.

to provide a clear regulatory framework, which would allow States adopt measures to address those needs without the fear that these measures are classified as restrictive.[102]

Similar criticisms have also been raised in the context of the Agreement on Sanitary and Phytosanitary Measures (SPS).[103] While this regulatory framework acknowledges Members' ability to implement national measures to protect non-trade-related values, such as human and plant health, life, and safety,[104] it also establishes several boundaries for exercising that power. More specifically, to comply with their multilateral obligations, Members must prove that their protective measures are based on harmonized international standards or scientific evidence. Governments must therefore conduct a risk assessment.[105] The measures shall then be implemented following the proportionality principle, i.e., in the least restrictive manner necessary to protect the chosen interest.[106] Against this background, the SPS agreement raised some criticism concerning the embedded liberalism compromise. More precisely, it has been argued that this regulatory framework hinders States' ability to implement national public policies with an unreasonable high level of intrusion on the sovereignty of WTO Members.[107] However, it has been noted that the focus on scientific evidence has the advantage of anchoring State intervention in national regulation to a more definite criterion than the non-discrimination principle.[108] It has also been noted that this dynamic may harm national democracies because societies are deprived of their voice over the exploitation of national measures favoring a higher level of trade liberalization.[109] From this perspective, the balance of the embedded liberalism compromise seems to favor trade liberalization over the active role of the State in national economies to purse non-trade-related objectives. This setting could negatively affect the democratic legitimacy of the WTO in the terms that will be discussed shortly.[110]

State intervention in the economy has traditionally been hotly debated in the context of the agricultural sector. Agriculture is indeed a key sector in the economy of any country, whose volatility due to climate conditions and natural circumstances has prompted States to come to its rescue to stabilize it.[111] Domestic measures adopted for this purpose usually include subsidies, production support and restrictions, tariffs, and other barriers to imports. Ultimately, the goal is to ensure a stable and affordable supply of food, as well as to guarantee a sustainable income for farmers.[112] In this context, the GATT 1947 allowed States to intervene in the market to prevent or tackle food shortages or to sustain the agriculture sector either through the imposition of quotas or the grant of subsidies.[113]

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[102] Michael Cardwell and Fiona Smith, 'Contemporary Problems of Climate Change and the TBT Agreement: Moving Beyond Eco-Labelling', in Epps and Trebilcock (n 98) 391–424.

[103] Agreement on the Application of Sanitary and Phytosanitary Measures 1867 U.N.T.S. 493 [hereinafter SPS Agreement].

[104] Article 2(1) SPS Agreement.

[105] Article 5 SPS Agreement.

[106] Article 2:1 SPS Agreement.

[107] Jeffrey L Dunoff, 'Lotus Eaters: Reflections on the Varietals Dispute, the SPS Agreement and WTO Dispute Resolution', in George A Bermann and Petros C Mavroidis (eds), *Trade and Human Health and Safety* (CUP, 2006) 173.

[108] Robert Howse, 'Democracy, Science and Free Trade: Risk Regulation on Trial at the World Trade Organization' (2000) 98(7) Michigan Law Review 2333 f. See also: Cristophe Bonneuil and Les Levidow, 'How Does the World Trade Organization Know? The Mobilization and Staging of Scientific Expertise in GMO Trade Dispute' (2012) 42(1) Social Studies of Science 75-100.

[109] Howse ibid.

[110] See *infra* Section 4.

[111] Petros C Mavroidis, *The Regulation of International Trade. Vol. 2* (MIT Press, 2016), 2307.

[112] Michael Trebilcock and Kristen Pue, 'The Puzzle of Agricultural Exceptionalism in International Trade Policy'(2015) 18(2) Journal of International Economic Law 233 f.

[113] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT 1947], Article XI:2 and Article XVI:3.

Then, following the crisis that hit the sector in the 1980s, the Agreement on Agriculture (AoA)[114] was adopted. According to its Preamble, the Agreement sought to initiate a 'process of reform of trade in agriculture'.[115] The aim was to establish a fair and market-oriented agricultural trading system. However, a debate has arisen regarding the legal framework established by the AoA. It has been argued that this regulatory framework, which aimed to eliminate *tout court* State intervention in the agriculture sector, can be considered a form of market distortion.[116] From this perspective, the embedded liberalism compromise is disrupted: the liberalization of agricultural markets through the elimination of governmental support entails embedding liberalism in the economic development of countries rather than realizing a stable form of liberal economic development embedded in legal, social, and political constraints.[117] On the other hand, other commentators argued that the Agreement's main objective was the adjustment of agricultural markets to liberal market principles.[118] From this perspective, the role of the State in the market would be reduced to favor the development of a stable global world economy.

Finally, the evolution of subsidy regulation is worth discussing.[119] Indeed, subsidies are one of the tools that governments can exploit to implement domestic public policy objectives, such as market externalities. From an international trade perspective, however, certain types of subsidies - namely export subsidies - are likely to generate negative spillovers on the welfare of trading partners.[120] Under the GATT 1947, the approach adopted towards subsidies was rather loose.[121] While relevant provisions acknowledged that export subsidies might harm international trade, Members could make use of them prior to the fulfillment of the notification requirement.[122] The Agreement on Subsidies and Countervailing Measures (ASCM) introduced major changes. The Agreement introduced the so-called 'traffic light approach',[123] according to which three categories of subsidies were identified: subsidies contingent on export and local content (i.e., red light subsidies), explicitly prohibited;[124] 'actionable' subsidies, that can be subject to countermeasures or WTO dispute settlement actions (i.e., yellow light subsidies);[125] and 'non-actionable subsidies' (i.e., green light subsidies). The latter is the category of greatest interest for the purpose of this analysis. Green subsidies, regulated under Article

[114] Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 410. [Not reproduced in I.L.M.] [Hereinafter AoA]. For a detailed account of the adoption of the AoA see: Carsten Daugbjerg and Alan Swinbank, *Ideas, Institutions, & Trade. The WTO & The Curious Role of EU Farm Policy in Trade Liberalization* (OUP, 2009) 43 f.

[115] Ibid.

[116] Anne Orford, '*Food Sectuiry, Free Trade, and the Battle for the State'* (2015) 11(2) Journal of International Law and International Relations 54 f.

[117] Orford ibid.

[118] Robert Wolfe, *Farm Wars: The Political Economy of Agriculture and the International Trade Regime* (Palgrave Macmillan, 1998); Grace Skogstad, 'The International Trade Regime: Liberalism and Embedded Liberalism' (2015) 11(2) Journal of International Law and International Relations 147-154.

[119] Subsidy regulation under the multilateral trading system is analyzed in Chapter 3. Here it is sufficient to say that subsidies are one of the tools that governments use to implement domestic public policy objectives. From an international trade perspective, however, certain types of subsidies – namely export subsidies - are likely to generate negative spillovers on the welfare of trading partners. See Petros C Mavroidis, Patrick A Messerlin and Jasper W Wauters, *The Law and Economics of Contingent Protection in the WTO* (Edward Elgar Publishing 2008) 293.

[120] Mavroidis, Messerlin and Wauters, ibid 293 f.

[121] For a detailed account on the evolution of subsidy regulation see: Andrew Stoler, 'The Evolution of Subsidies Disciplines in GATT and the WTO' (2010) 44(4) Journal of World Trade 797–808.

[122] Article XVI.1 GATT

[123] Matsushita and others (n 48) 303 f.

[124] Article 3 ASCM.

[125] Article 5 ASCM.

8 of the ASCM, were subsidies adopted in three specifically identified areas - R&D, support to disadvantaged regions, and adaptation to new environmental requirements – and were not subject to counter-measures. The idea was that the positive effects brought about by subsidies granted in those fields outweighed their trade-distorting effects. This can be seen as an effort to reconcile public policy objectives and the development of an undistorted framework for international trade. Article 8 of the ASCM expired in 1999 and was never replaced.[126] Consequently, national measures corresponding to this category of subsidy are now considered actionable.[127] This disrupted the balance of subsidy regulation decisively in favor of an adverse approach toward subsidies.[128] Contrary to the pre-1999 framework, the objective that justifies the adoption of a subsidy is not of relevance under the current subsidy regulation.[129] Indeed, under the 'traffic lights' system, the nature of subsidies as a public policy tool seems to be disregarded. Against this backdrop, many scholars and practitioners have called for a renewed regulatory approach toward subsidies that would grant more policy space to national legislators.[130]
The above analysis shows a general lack of uncertainty as to the extent States can play an active role in the economy to protect national public policy needs without their conduct being classified as hidden protectionism. This lack of uncertainty is arguably changing the embedded liberalism compromise disproportionately in favor of the liberalization of markets, discouraging States from addressing any 'non-trade' related issue. Overall, legal uncertainty will likely disrupt the delicate balance between the multilateral character of international trade and each State's individualism underpinning the embedded liberalism compromise.

2.4. The dynamic of the embedded liberalism compromise: embedding the market or embedding the State?

The regulation of the role of the State in the economy evolved in the context of the multilateral trading system from the post-WWII era until to today. Under the GATT 1947, Members' sovereignty over market regulation was acknowledged, and governments played an active role in the market.[131] State interventionism was indeed deemed to be crucial to ensure high levels of national welfare and international stability. However, the evolution of multilateral trade regulation seems to have progressively eroded that role by embedding domestic regulation into liberalism rather than the opposite. Hence, the State seems to have been progressively deprived of its power to properly

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[126] Article 31 ASCM.
[127] This is a suboptimal solution that discourage Members' action to address major challenges of our century such as contrast to and mitigation of climate change and the economic support these processes entail. Issues arise because it is becoming increasingly difficult to draw the line between domestic regulation adopted to pursue non-trade objectives and the ones that are restrictive measures in disguise. On this point see: Ilaria Espa and Gracia M Durán, 'Renewable Energy Subsidies and WTO Law: Time to Rethink the Case for Reform Beyond Canada-Renewable Energy/Fit Program' (2018) 21(3) Journal of International Economic Law 621-653; Luca Rubini, 'Ain't Wasting Time No More: Subsidies for Renewable Energy, The SCM Agreement, Policy Space and Law Reform', (2012) 15(2) Journal of International Economic Law 525
[128] Luca Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (OUP, 2009) 58.
[129] Bernard Hoekman and Douglas Nelson, 'Rethinking International Subsidy Rules' (2020) 43 the World Economy 3111.
[130] See *ex multis*: Gary Horlick and Peggy Clarke, 'Rethinking Subsidy Disciplines for the Future: Policy Options for Reform', (2017) 20(3) Journal of International Economic Law 673-703.
[131] Ernst U Petersmann, 'Teaching International Economic Law in the 21st Century', EUI Working Papers, LAW 2021/6, 11.

intervene in even crucial sectors of the economy (e.g., agriculture, SPS, subsidies) in favor of market liberalization. The underlying assumption was probably that establishing and developing free trade required a more liberalized global approach. While this can be understood by taking into consideration that the ultimate goal of the WTO is to enhance market access through negotiating tariff reductions and other forms of protectionism,[132] arguably the balance has tilted decisively in favor of this objective at the expense of social needs.[133]

However, the progressive erosion of the State's role seems not to be accompanied by lowered attention to social policy objectives. On the contrary, there is increasing pressure for their protection, particularly prompted by the major challenges of this century. National regulatory policy space is still deemed an essential element for the stable development of a truly unconstrained global economy.[134] The State is still expected to play an active role in the economy at the national level to counteract inequalities and insecurities that globalization may exacerbate.[135] For this reason, it is believed that the embedded liberalism model, with the necessary adjustments, still has a key role to play.[136]

This point can be grasped by considering a practical example inspired by economic theories of international trade. It has been proven that the net effect of international trade on the level of employment in national markets is zero. Due to the development of international trade, jobs are both created and destroyed at the national level.[137] Jobs destruction particularly affects low-wage, unskilled jobs, whereas high-wage and specialized jobs usually increase.[138] From this perspective, the development of international trade can negatively affect the most vulnerable sectors of society in the short term. In other words, the economic and social costs in terms of employment are initially borne by the least-advantaged parts of society. The consideration that, in the long run, national wealth will eventually benefit society as a whole is irrelevant in the eyes of those who need to work to maintain their family and to provide an education for their children. Affected citizens would therefore believe that the international liberalization of trade pursued through WTO institutions is the primary

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[132] On this point, see: Simon Lester, 'What is the Economic Purpose of the GATT/WTO? Free Trade/Anti-Protectionism v. Market Access' (22 March 2023) <https://ielp.worldtradelaw.net/2023/03/what-is-the-economic-purpose-of-the-gattwto.html>.

[133] In this regard, it should also be kept in mind that social needs are more and more demanding innovative solutions to problems that have a global reach. Hence, the dimension of such needs is sometimes hardly only domestic. An example of this point could be the global movements dealing with climate change. See <https://www.weforum.org/agenda/2022/10/chart-shows-global-youth-perspectives-on-climate-change/>.

[134] Dani Rodrik, 'How to Save Globalization from Its Cheerleaders', Faculty Research Working Paper Series, Harvard University, RWP07-038, 4. The Author then supports the idea that the embedded liberalism model can be reshaped to a certain extent based on the circumstances. Similarly: Howse (n 15).

[135] From political philosophy perspective, one may even argue that this is the constitutive basis of the "social contract" between the State and its citizens as theorized in the XVII and XVIII centuries by Thomas Hobbes, John Locke, and Jean Jacques Rousseau. From this perspective, the State can *legitimately* exercise its powers on citizens and limit their freedom as long as it is able to maintain the social order and ensure the protection of individuals' rights. The citizens will therefore support the State's engagement in international trade as long as this does not affect State's capacity to protect their interests.

[136] It should be noted that not all scholars believe that the embedded liberalism compromise can still operate in a different context than the one in which it was originally established. See: Jeffrey L Dunoff, 'The Death of the Trade Regime' (1999) 10 European Journal of International law 733.

[137] Chow and Schoenbaum (n 51); Douglas A Irwin, *Free Trade Under Fire* (Princeton University Press, 2020); Bernard Hoekman and Michael M Kostecki, *The Political Economy of the World Trading System. The WTO and Beyond* (OUP, 2009) 7 f.

[138] More specifically, international trade tends to have a negative impact on jobs in industries competing with imports which do not require high levels of specialization and are therefore low wage. On the contrary, international trade tends to create jobs in high-skilled sectors, exporting their products abroad. As they require a high level of specialization, these jobs are high-wage ones. This generates a flow of resources from generally low-paying industries operating in low-skilled sectors to high-paying advanced technology industries.

cause of the detriment of their standard of living. In this context, dissatisfaction would increase, and the government would be pressured by its citizens to deviate from the multilateral trading system to protect national industries from foreign competitors. In the process, the role of the State is crucial to counteract the inequalities and negative impacts that the development of international trade can cause. In other words, preventing the State from properly engaging in its national economy may have two major consequences. On the one hand, an unjustifiable intrusion by the multilateral trading system on States' sovereign right to design their public policies means depriving them of the power to meet civil society's needs effectively. This is arguably a problem per se, as the State is the only entity at this moment in time that can effectively design and implement social policies. Indeed, societies remain essentially national. Despite the global aim of welfare enhancement of the multilateral trading system,[139] there is no global civil society claiming an increase in global welfare and no global entity is dealing with it.[140] On the other hand, limiting the State's active role in the market would jeopardize the functioning of the GATT/WTO system at the very least. Indeed, the multilateral trading system needs its members to exist, and that membership, in turn, bases its participation on national consent. In other words, without the support of the Members' population, preventing Members themselves from diverting from it and its Agreements, the WTO would lack the social support it needs to exist. From this perspective, social needs cannot be disregarded on the ground that they are non-trade-related matters, nor that States are sovereign and within the exercise of their sovereignty they can decide whether to adhere to a certain system or not independently from their citizens. Indeed, in Besson's words, 'the sovereign subjects behind international law are peoples within states and no longer states only. And those peoples organize and constrain their popular sovereignty through both the international and domestic legal orders, and hence through both the international rule of law and the domestic rule of law'.[141] From this perspective, national institutions are crucial to promote a sustainable multilateral trading system from both social and political considerations.[142] Hence, the State must be able to play an active role at the national level to preserve the existence of international trade regulation. This point is far from being a purely theoretical debate. Empirical data shows that there is a positive correlation between the effective pursuit by the State of social and welfare policies and democratic support over the engagement of the State in international trade.[143]

2.5. The embedded liberalism as a model for the functioning of SOEs

The preceding section demonstrated how the active engagement of the State in the economy is essential for supporting a balanced international trading system, while also mindful of societal demands at the national level. It is now necessary to ask what role State ownership can serve in the context of the embedded liberalism compromise.

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[139] See preamble.

[140] Hoekman and Nelson (n 129) 3117 f.

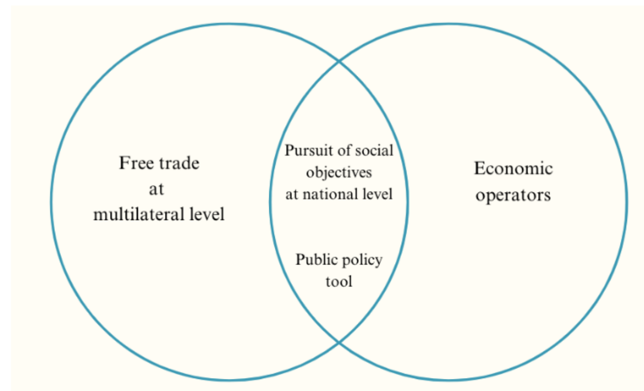
[141] Samantha Besson, 'Sovereignty, International Law and Democracy' (2011) 22(2) The European Journal of International Law 383

[142] See Rodrik (n 19).

[143] A survey conducted in 2019 by the World Public Opinion in the context of the Program for Public Consultation revealed that the majority of American respondents: a) believe that international trade entails both major costs and benefits; b) support the idea of a rules-based international trade system; c) are in favor of introducing in international trade agreements binding requirements for States on labor and environmental standards. See also Wolfe and Mendelsohn (n 66) which found a similar positive correlation between international trade and effective social policies among Canadians.

Public ownership in economic entities is an effective tool for State interventionism. Indeed, their dual nature as undertakings, on the one hand, and as a public policy tool, on the other, could contribute to the pursuit of a balance between trade and non-trade objectives. However, SOEs could also be a tricky tool. Indeed, as outlined previously in this chapter, while SOEs can positively impact national economies, it cannot be denied that if governance, performance, and regulatory issues arise, positive effects could be outweighed by negative ones. The question then becomes: how to ensure that State intervention in the economy - in the form of public ownership in commercial entities - plays a positive role in terms of social stability and increased wealth? In other words, where to draw the line between

Chart 1



what constitutes a ethical use of SOEs and what is a harmful practice for the welfare of society? From the international trade perspective, answering this question is crucial to guarantee that SOEs do not distort international trade flow on the one hand and, on the other, that they are captured under WTO Agreements if they turn into a trade-distorting tool. Indeed, ensuring that SOEs act in accordance with the embedded liberalism model would help define the legal architecture in which they operate. Hence, States exploiting them to pursue trade-related and public policy objectives could benefit from a refined legal framework in which their action is specifically regulated. This clarification, encompassing SOEs definition too, reduces legal uncertainty and the risk of State measures related to SOEs being qualified as protectionists from the WTO perspective. States would, therefore, not be discouraged from employing SOEs for non-trade-related issues, and transparency would increase. Ultimately, this would ensure a ethical use of SOEs and would avoid negative spillovers in international markets and among trading partners.

It has been argued that the embedded liberalism compromise could be used as a compass to use State ownership in the economy without impairing cooperation at the international level. As the previous section outlined, the compromise is a balancing process in the context of the multilateral trading system. It ensures that trade liberalization at the international level is pursued in light of national social policy objectives.[144] Therefore, it combines two seemingly opposed elements, namely multilateralism and national interventionism. Hence, it is crucial to grant States sufficient flexibility to pursue domestic policies and avoid protectionist measures. Being based on a balance, the

[144] Seema Sapra, *Domestic Politics and the Search for a New Social Purpose of Governance for the WTO: A Proposal for a Declaration on Domestic Consultation*, in Debra P Steger, *Redesigning the World Trade Organization for the Twenty-first Century* (The Centre for International Governance Innovation (CIFI) and Wilfrid Laurier University Press, 2010) 222 f.

embedded liberalism model has a dynamic nature. Hence, it can adjust to different historical, economic, social, and political contingencies.[145]
In other words, the embedded liberalism compromise achieves a balance between trade liberalization and national policies. Such balance is not fixed but should change accordingly to the context. This adaptability is ultimately critical to ensuring that democratic legitimacy is safeguarded, and that the multilateral trading system continues to exist and thrive.[146]
Against this background, it can be argued that the embedded liberalism compromise reflects a set of values that, at its very core, acknowledges the vital role of the active engagement of the State at the domestic level. From this perspective, SOEs reflect an equal balance. On one level, these entities encapsulate the idea that the State can legitimately play an active role in the economy through its ownership rights and, on another level, that State action is often used to pursue non-economic objectives and to counteract negative market externalities. Thus, we see a parallel between the two concepts (chart 1), which is the meeting point of recognizing the positive role of the State in the national dimension. For this reason, the embedded liberalism compromise could constitute the theoretical framework and the set of values guiding the regulation and definition of SOEs in a way that ensures a balance between the competing values at stake at both national and international levels.

3. State Capitalism and Embedded Liberalism: overlaps and divergences

Embedded liberalism and State capitalism are two economic systems that have significantly shaped the relationship between the State and the economy worldwide. On the one hand, embedded liberalism is an economic theory that aims to balance trade liberalization and social welfare policies. As a result, the State's role in the economy should be limited to ensuring market liberalization and the protection of social rights and needs. On the other hand, State capitalism is an economic system in which the State plays a prominent role in the economy through various means, including ownership of critical enterprises, industries and strategic assets. The ultimate aim is to strengthen the State's political gain and consensus. State capitalism can take many forms, from fully state-owned enterprises to mixed ownership models in which the State holds a significant stake in private companies.
The relationship between embedded liberalism and State capitalism is complex and evolving. In order to understand such relationships, it is appropriate to identify similarities and divergences. Indeed, the two systems share some common features. In both cases, the State intervenes in the economy to promote national policy objectives or to sustain the development of specific sectors or enterprises. The fundamental distinction underpinning such similarities, however, is not limited to the level of State interventionism in the economy. Rather, it is the rationale behind that interventionism. Indeed, in the context of embedded liberalism, the State intervenes in the market to save the economy in distress and on the brink of recession, or to guarantee social rights. This intervention is conceived as a temporary measure, proportional to reaching that objective. In other words, the State will continue interfering with market forces only until the economy or the rescued firm can resume independent operation. On the contrary, State intervention in the economy in a State capitalist context features the

[145] Ruggie referred to the embedded liberalism compromise to more recent evolutions in the global economy. See note 216.
[146] Wolfe and Mendelsohn (n 66).

pursuit of long-term objectives. That interaction with the market does not have a temporary character but is there to stay and help the State maintain its political power.
Another distinctive critical feature between the two systems then emerges. States embracing liberalism and a free-market economy conceive the market as a place where individuals can express their potential. By contrast, in State capitalist economies, the market is where political gain and economic leverage are shaped and reinforced. This difference is because embedded liberalism is an economic system whose functioning is based on a set of principles and values (i.e., liberalization of markets while respecting social demands and welfare strengthening). State capitalism, on the other hand, is not premised on principles. Rather, it pursues a single aim (i.e., political gain) using techniques and strategies deemed appropriate in the context in which it operates.
Against this background, State capitalism has yet to find its expression within an institutional framework, while embedded liberalism has been institutionalized. In other words, within the WTO, market forces are embedded in an institutional framework that is designed to raise overall well-being. It follows that embedded liberalism and its underpinning values have been shaping the WTO's institutions, regulatory frameworks, and procedures. That economic systems and related principles are then reflected in its Members' conduct, which are bound to abide by them under their membership to that institutionalized framework. In a way, Members' conduct is harmonized. They are guided and premised on the same principles, although only in the limited context of the WTO. From this perspective, a State capitalist country joining an institutional framework based on embedded liberalism is acceding to an institution whose functioning has been designed to pursue general welfare through the liberalization of international trade.[147] As seen already, this objective is generally not considered by a State capitalist government but has to cope with it the moment it accedes to an institutional framework that does.
In light of this, there is an underlying tension between the two systems. While under embedded liberalism, State interventionism functions to balance economic needs with social demands, in a State capitalist system, the State intervenes to secure and reinforce its own political support. In other words, the government embraces market forces as long as they function to help it stay in place by promoting national objectives in domestic and international markets. The relationship between embedded liberalism and State capitalism will likely continue to evolve in the coming years as countries will have to face global challenges that require a global response, such as climate change.
In this context, SOEs constitute a common point in the two systems that simultaneously encapsulate their main differences. Indeed, while the rationale for establishing these entities may be quite similar in both systems, other core elements differ. Divergences emerge regarding the spirit behind using SOEs in the market, especially considering the final goals pursued. In this regard, SOEs in embedded liberalism are - at least in principle - exploited to pursue the general interest, such as delivering essential goods that would not otherwise be provided or would not be provided under the same conditions by POEs. In State capitalist economies, the ultimate aim goes beyond that, i.e., it pursues political consensus. The State uses SOEs to meet public demands and counteract social dissent. It follows that the functioning of SOEs can be different. SOEs from State capitalist countries tend to operate in the market in a structured and stable manner in order to pursue long-term objectives. On the contrary, in embedded liberalism, SOEs are used in key market sectors and generally operate to stabilize the market when in distress. Lastly, divergences can be noted regarding the link

[147] Cf. The preamble of the Agreement establishing the WTO.

underpinning the relationship between the State and its SOEs, in that State capitalism makes extensive use of unofficial means. At the same time, MEs tend to regulate the establishment of SOEs more strictly.
Against this background, it is necessary to assess whether and to what extent current international trade regulation can capture and regulate these entities that could collide, to a greater or lesser extent, with free market mechanisms. It is argued here that this assessment can only begin with a major reflection on SOEs as a category. This step is necessary to identify SOEs' defining characteristics and boost an international discussion on their regulation.

4. The importance of defining SOEs from an international trade law perspective

The intricacy between the public and the private sphere surrounding SOEs qualification and the tensions between economic models that they produce prompts a deeper reflection on the notion of SOEs within the international trade legal framework, both at the multilateral level and the plurilateral and bilateral level, such as preferential trade agreements (PTAs).[148] In this regard, it has already been argued that the status of SOEs in the context of the multilateral trading system needs to be refined.[149]
From a practical perspective, the lack of a definition of SOEs generates several issues that deserve attention for the purpose of this study. Firstly, leaving SOEs undefined makes it challenging to determine their actual presence and growth in international markets. Looking at the trends observed by international organizations and institutions, we witness different numerical outcomes that derive from different definitions. Hence, given that SOEs have been expanding in quantitative terms as an objective fact, the actual impact of such growth is measured differently depending on the definition adopted. For instance, by looking once again at the estimate of SOEs' presence provided by the OECD in 2016, those projections reveal that more than 15% of the largest enterprises worldwide are SOEs, in which the State retains more than 10% ownership shares, thus disclosing a growing trend as compared to previous years.[150] Despite the rising number of SOEs, the objectivity of the OECD's assessment can be appreciated only to a certain extent. Indeed, the definition on which it based its assessment is broader than previous studies that it conducted on the same topic.[151] Secondly, leaving SOEs undefined makes dispute resolution the natural venue for defining an SOE, with all the related consequences regarding the consistency of their regulation. Due to the fragmented framework, definitional criteria would likely change on a case-by-case basis, so this option does not seem to be an optimal solution.
Moreover, the lack of precise and clear boundaries of SOEs can influence the behavior of private economic operators. They could potentially refrain from entering a given market because of the impossibility of determining the role the State plays in it and its impact on market mechanisms.[152] In

[148] It should be noted that some scholars are skeptical that SOEs raise issues that can be solved in the context of PTAs. See Americo Beviglia Zampetti and Pierre Sauvé, 'Onwards to Singapore: The International Contestability of Markets and the New Trade Agenda' (1996) 19 The World Economy 333-343.
[149] Gregory Messenger, 'The Public-Private Distinction at the World Trade Organization: Fundamental Challenges to Determining the Meaning of "Public Body' (2017) 15(1) International Journal of Constitutional Law 62 f.
[150] OECD (2016) (n 3) 21.
[151] Przemyslaw Kowalski, 'On Traits of Legitimate Internationally Present State-owned Enterprises', in Luc Bernier, Massimo Florio and Philippe Bance, *The Routledge Handbook of State-Owned Enterprises* (Routledge, 2020) 147.
[152] Minwoo Kim, 'Regulating the Visible Hands: Development of Rules on State-Owned Enterprises in Trade Agreements' (2017) 58(1) Harvard International Law Journal 254.

any case, assessments can be undertaken only to a certain extent, as there is a group of enterprises that appropriately fall into the notion of SOEs but, due to their somehow hidden relationship with the government, are not always easy to detect. This is the case with SCEs and state-influenced enterprises, especially in the context of NMEs in which the private sector is still deeply intertwined with the State through unofficial means.[153]

From a legal perspective, and in a provocative fashion, one may argue that something that is not defined does not exist in the eye of the law. It is challenging, indeed, if not altogether impossible, to regulate something that is not known. This is because a notion can only be clarified by its definition, which explains the topic around which a debate is constructed. This situation makes debate crucial for the establishment of a shared consensus about what should be regulated and what aspects deserve to be considered in that definitional context. It is not easy to establish an efficient legal framework without consensus on what needs to be regulated.[154] Hence, without definitions, there is no regulation nor shared, effective legal framework that is inspired-by legal certainty.

A definitional gap has important implications on the ability of international trade legal regimes to appropriately tackle the issues arising from all the various economic operators falling within the notion of SOEs. On the one hand, it makes it challenging to understand whether the existing legal regime on international trade applies to SOEs and, if yes, to what extent. On the other hand, it threatens the implementation of the international trade legal framework *vis à vis* State-owned entities while also impairing the development of an efficient legal framework applicable to various economic operators in the global economy. From this perspective, it is believed that to establish an effective SOE regulation at the multilateral level, the first step should be to discuss and debate the definition of these enterprises. In this way, Members would be able to clarify which enterprises are SOEs and which of their features require regulation under the WTO law.

Against this background, it is argued that mapping the definitional criteria of SOEs, as they emerge from the current treaty legal regimes on international trade applicable to them is a crucial step in several respects. At the same time, it may shed light on whether SOEs are subject to existing international trade law regimes or whether they escape these regimes. In other words, a definition would refine existing regulatory frameworks or serve as the foundation for creating new regimes. Consequently, this solution would make it possible to address the issues brought about by these enterprises in international markets. Lastly, this mapping exercise is an indispensable step to help clarify which constitutive elements of SOEs and related entities have already been agreed upon by the States which are parties in relevant international trade regulation. This group of shared constitutive criteria arguably constitutes the common denominator among different national economic models, on which a legal framework for SOEs can then be built.

[153] Bremmer (n 1) 57.

[154] Bernard Hoekman, 'Proposals for WTO Reform: A Synthesis And Assessment', in Martin Daunton, Amrita Narlikar and Robert M Stern (eds), *The Oxford Handbook on the World Trade Organisation* (OUP, 2012) 750 f.

Part II
The WTO legal framework

Chapter Three

THE NOTION AND REGULATION OF STATE-OWNED ENTERPRISES IN THE WTO LEGAL FRAMEWORK: THE GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT)

1. SOEs under the WTO legal system

SOEs have only recently been considered a WTO issue.[1] Discussions concerning these entities, and their regulation, are relatively new within the multilateral trading system. Arguably, the debate among WTO Members has been prompted by the growing number of SOEs now operating in international markets and the rising number of acceding Members with extensive and strong public sectors.[2] As previously noted, the main concern about SOEs is not their existence per se but rather all regulatory and economic benefits that could derive from their close ties with the State. From an international trade perspective, these advantages raise concerns because SOEs could potentially distort international trade flow through their conduct. However, WTO rules are ownership neutral in principle. Hence, States are free to adopt any national ownership model,[3] and WTO rules apply to all undertakings irrespective of whether their owner is a private or a public entity. In this context, WTO Agreements should ensure that SOEs act within the boundaries of the WTO system when international trade operations are involved.[4]

Applying the GATT/WTO legal framework to SOEs is not always a straightforward task. Although some provisions are deemed to apply to them, such as Article XVII GATT on State trading enterprises (STEs), WTO Agreements never directly address these entities.[5] As demonstrated already, the international trade legal framework emerging from the post-World War II (WWII) era was conceived under different economic, social, and geopolitical conditions than the ones that characterize today's global economy. The evolution of economic development and the growing interdependence among countries worldwide generated, inter alia, new forms of economic operators. It is within this context that SOEs emerged and became complex entities with unprecedented governance, functioning, and public ownership structures.[6]

Moreover, the hybrid nature of SOEs, as enterprises and government tools, challenges a system that only expressly regulates States' conduct, such as the multilateral trading one. Hence, the issues of applicability and implementation arise when States act as regulators, owners, and investors

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[1] Robert Wolfe, 'Sunshine over Shanghai: Can the WTO Illuminate the Murky World of Chinese SOEs?' (2017) 16(4) World Trade Review 715; Henry Gao and Weihuan Zhou, *Between Market Economy and State Capitalism: China's State-Owned Enterprises and the World Trading System* (CUP, 2022).

[2] Yueh-Ping Yang and Pin-Hsien Lee, 'State Capitalism, State-Owned Banks, and WTO's Subsidy Regime: Proposing an Institution Theory' (2018) 54(2) Stanford Journal of International Law 117-158.

[3] OECD, 'State-Owned Enterprises as Global Competitors. A Challenge or an Opportunity? (OECD Publishing, 2016) 83 f.

[4] Andrea Mastromatteo, 'WTO And SOEs: Article XVII And Related Provisions Of The GATT 1994' (2017) 16(4) World Trade Review 601–618.

[5] Carole Biau and others, 'Governments as Competitors in the Global Marketplace: Options for Ensuring a Level Playing Field' (E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, 2016) 10-11.

[6] Mark Wu, 'The "China, Inc." Challenge to Global Trade Governance' (2016) 57(2) Harvard International Law Journal 265.

simultaneously. Not all these activities performed in different capacities would fall under the scope of the WTO legal framework, which does not capture private operators in principle. With respect to SOEs, the distinction between public and private, as traditionally conceived, is blurred. The distinction is even more blurry due to the increasing complexity of SOEs in structure and function. Where is the boundary between the State and its SOEs? Are SOEs part of the State apparatus to the same extent as, for example, government agencies, or should they be considered private commercial entities instead? When a State intervenes in the economy through SOEs, is the latter a public entity or a private trader? And under what circumstances can the conduct of SOEs be attributed to the State for the purposes of responsibility under WTO law? These issues are arguably exacerbated under the WTO, which is an institutional framework built on the embedded liberalism model with an increasing number of members qualifying as State capitalist countries. The divergence in SOEs exploitation, functioning, and dissemination make it harder to find a common distinguishing line between public and private functions among WTO Members. In this context, a mutually agreed definition of SOEs at the multilateral level would clarify thes public or private nature of these enterprises and, therefore, their regulation under the WTO legal framework. To reach this outcome, however, WTO Members need to be incentivized to start a discussion on this question. This study aims to contribute to providing a basis for such important and necessary discussion.

With this in mind, the study maps the existing WTO provisions regulating State intervention in the economy and the relevant case law to understand whether SOEs are entirely, partially, or not covered under the multilateral legal framework. This approach facilitates defining the constitutive criteria of SOEs that are used, or could be used, under the WTO legal framework to address a State's conduct in the economy. This can be considered the starting point for a broader discussion on the constitutive criteria of SOEs and making a determination of their public or private nature.

In this context, the analysis of the notion and regulation of SOEs under the WTO legal framework aims at assessing whether existing regulation can capture SOEs' conduct or whether it would be desirable to establish a new set of multilateral rules for these entities. Being the only international organization regulating trade between states and having 164 members - covering approximately 98% of international trade -[7] the WTO can arguably provide a negotiating space with a truly global reach to discuss these issues and possibly offer new solutions based on international rules that are both binding and enforceable.[8]

Against this background, this chapter aims to bring clarity to the notion of SOE by exploring its relationship with that of State trading enterprises (STEs). From this perspective, the following sections focus on Article XVII GATT on STEs. Article XVII GATT, which requires WTO Members to ensure that STEs carry out their activities following the non-discrimination principle and commercial considerations, is typically referred to when provisions applicable to SOEs under the multilateral trading system are discussed. The underlying assumption is probably that the notion of STEs also covers that of SOEs. However, Article XVII GATT leaves STEs undefined and - while this is the sole key provision for regulating State intervention in the economy under the WTO legal system - it has not changed substantially since its GATT 1947 original version. Hence, given the increased institutional and functional complexity of SOEs, the link between these entities and the

[7] See < https://www.wto.org/english/thewto_e/thewto_e.htm > (lastly accessed on 25th January 2022).

[8] Claus-Dieter Ehlermann and Lothar Ehring, 'Is the Consensus Practice of the World Trade Organization Adequate for Making, Revising and Implementing Rules on International Trade?' (2005) 8(1) Journal of International Economic Law 51 f.

notion of STEs may not be as straightforward. Therefore, it is necessary to question whether Article XVII GATT constitutes an effective legal framework for regulating State ownership in economic entities under the WTO.
Against this background, this study investigates the dividing line between the notion of SOEs and that of STEs through the interpretation of Article XVII GATT. This approach allows the identification of what is, and what is not, a constitutive element of STEs and SOEs from the point of view of both governments and negotiators involved, for instance, in the preparatory works of the provision at stake. From this perspective, while Section 2 examines the neutrality principle according to which State intervention in the economy is regulated under the WTO, Section 3 introduces the notions of State trading and STEs to explore why they are perceived as a source of concern under the multilateral trading system. Next, the analysis focuses on the interpretation of Article XVII GATT. To this end, primary means of interpretation are considered, including the wording of the provision, accession packages as relevant context, and notifications submitted by Members as subsequent practice. Then, secondary means of interpretation are explored, including *travaux preparatoires* on Article XVII GATT and relevant GATT/WTO case law. Section 4 draws some conclusions that emerge from the interpretation of Article XVII GATT.

2. Regulating the role of the State in the economy under the WTO legal framework: the neutrality principle

Having reconstructed the theoretical background that developed around State intervention in the economy under the multilateral trading system, it is now possible to explore how WTO provisions have been shaped by it.
The analysis in Chapter 1 focused on the two elements, which form the basis of the embedded liberalism compromise. This balance did not translate into legal provisions that specifically regulate property rights at the domestic level. Hence, the pursuit of trade liberalization did not result in the normative assumption that only certain types of economies could join the multilateral trading system.[9] Indeed, the WTO legal framework does not regulate State intervention in the economy comprehensively but only within a limited set of rules. According to Mavroidis,[10] the choice not to include provisions referring to domestic ownership models was based on the assumption that only free-market economies would be Members of the multilateral trading system. From this perspective, the negotiating parties did not intend to grant equal access to the market-economies (ME) and non-market based economies (NMEs) in the multilateral trading system. Instead, there was an underlying assumption that although the system was open to different economic models in principle, only economies based on free-market principles would actually join the multilateral trading system. From a historical point of view, however, the very first drafts of the International Trade Organization (ITO) Charter show that the negotiating parties considered the existence of different economic models, and their co-existence, in a multilateral trading context.

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[9] Similarly see: Dylan Geraets, *Accession to the World Trade Organization:. A Legal Analysis* (Edward Elgar Publishing, 2018) 247.
[10] See Petros C Mavroidis and Merit E Janow, 'Free Markets, State Involvement, and the WTO: Chinese State-owned Enterprise in the Ring' (2017) 16(4) World Trade Review 571; Douglas A Irwin, Petros C Mavrodis and Alan O Sykes, *The Genesis of the GATT* (CUP, 2008)160.

Against this background, the neutrality principle is arguably a product of the embedded liberalism compromise, which ultimately inspired and shaped the GATT/WTO legal system. In light of the embedded liberalism model, however, the absence of such a regulatory framework could be seen as an effort not to hinder State intervention in the economy, but to enable and encourage it. At least when used to protect national social interests.

2.1. Neutrality principle and WTO membership: one multilateral legal framework, multiple national economic models

The neutral approach of the GATT/WTO legal system towards national economic structure and property ownership models facilitated the expansion of WTO membership. Indeed, under Article XII:1 of the WTO Agreement:[11]

> 'Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, may accede to this Agreement, on the terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto.'

Article XII does not impose any requirement regarding the economic model to be adopted by prospective Member.[12] In other words, the acceptance of a request for accession cannot be denied on the grounds that the domestic economic model of the aspiring WTO Member does not correspond to a particular one because – at least in principle - there is no benchmark to be followed in this regard.[13] With 164 Members at the time of writing, the WTO is a quasi-universal international organization. This also means that under the same umbrella of the WTO several economic models are encapsulated with substantial differences in terms of the level and types of State interventionism. These include market economies (MEs) – the economic model on which the majority of founding Members were based – and non-market economies (NMEs), inspired and premised on different principles and governing techniques.

It should be outlined from the outset that neither public ownership nor SOEs have specifically been dealt with during the negotiations to establish a multilateral trading system. Instead, since the very

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[11] WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter Marrakesh Agreement or WTO Agreement]. As known, originally, there were two ways of becoming Members of the WTO. Firstly, there was the original membership pursuant to Article XI of the WTO Agreement. In force until 1997, this provision gave original Members of the GATT 1947 the possibility to become Members of the WTO. In order to join the WTO, GATT Members were required a) to accept to be bound by all the obligations of the WTO Agreement and of the Multilateral Trade Agreements; b) to undertake commitments and make concessions for both trade in goods and in services. Almost all the original members of the GATT 1947 became members of the WTO. Yugoslavia is the only country that did not become a WTO member under Article XI. See: Peter Van den Bossche, *The Law and Policy of the World Trade Organization. Text, Cases and Materials* (CUP, 2005) 109 f.

[12] This neutral approach was also adopted in Article XXXIII of the GATT 1947, which stated that a 'government not party to this Agreement, or a government acting on behalf of a separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, may accede to this Agreement'. This provision did not substantially change with the adoption of the GATT 1994.

[13] As known, pursuant to Article XII of the WTO Agreement, WTO Membership does not include only States but also separate custom territories as long as they possess 'full autonomy in the conduct of their external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements'.

beginning of the discussion on the ITO, negotiators acknowledged that countries are based on different economic models. Such acknowledgment is contained in the US Proposal for Expansion of World Trade and Employment,[14] which was a document drafted by the US government in preparation for the International Conference on Trade and Employment, and in particular for the discussions on the ITO. Published in 1947, this document, in its relevant parts, states:

> 'The Proposals reflect awareness that we live in a world of many countries with a variety of economic systems. They seek to make it possible for those systems to meet in the market-place without conflict, thus to contribute each to the other's prosperity and welfare. In no case do they impinge upon sovereign independence, but they do recognize that measures adopted by any country may have effects abroad and they suggest for general adoption fair rules of mutual tolerance.'[15]

Thus, it can be inferred that, in the US view, the envisaged ITO was, from the very beginning, premised on the inevitable co-existence of multiple economic systems in the global economy. The organization should not have been limited to market economies but rather should recognize States' sovereign right to choose the economic model deemed appropriate for their domestic framework. The idea of a multilateral trading system embracing States built on different economic models was later maintained in the US Suggested Charter for an International Trade Organization,[16] which formed the basis of the Havana Charter.[17] The US Suggested Charter included several provisions dealing with State trading. These provisions provided a regulatory framework for state trading countries or economies based on a monopoly foreign trade regime.[18]
Moreover, the formal negotiations for the ITO, which started in October 1946 and ended in March 1948, raised two points with respect the inclusion of different economic models to be incorporated in the multilateral trading system. Firstly, the list of countries that participated in the negotiating process for the ITO Charter is worth considering further. The negotiating group included countries based on market-economy models and a restricted group of developing countries based on non-market models.[19] Secondly, the preliminary discussions carried out in the context of the formal beginning of

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[14] Proposal for Expansion of World Trade and Employment. Developed by a Technical Staff within the Government of the United States in Preparation for an International Conference on Trade and Employment and Presented for Consideration by the Peoples of the World, Department of State, November 1945, publication 2411. This document contains suggestions and reflections of the US government to set the basis for a debate on the harmonization of international trade and employment policies which would have eventually led to the creation of an International Trade Organisation. For an overall comment and analysis of the document: VW Bladen, 'The Proposal for the Expansion of World Trade and Employment' (1946) 1(2) International Journal 164-172.
[15] Ibid Section V. An International Trade Organisation 7.
[16] Suggested Charter for an International Organization of the United Nations, US Department of State, Publication no. 2598, Commercial policy Series no. 93, 1946 [hereinafter US Suggested Charter].
[17] For a detailed historical account see: Irwin, Mavroidis and Sykes (n 10) 111 f.
[18] US Suggested Charter, Section F, State Trading. This section includes Article 26 which dealt with the non-discriminatory administration of state-trading enterprises; Article 27 focused on the expansion of trade by state monopolies of individual products; Article 28 regulated the expansion of trade by complete state monopolies of import trade. A more detailed analysis of these provisions is carried out *infra*.
[19] The countries that took part to the ITO negotiations were Australia, Belgium, Brazil, Canada, Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, Luxembourg, Netherlands, New Zealand, Norway, the Union of South Africa, the USSR, the UK and the US. The Union of Soviet Socialist Republics (USSR) was invited but it did not accept the invitation. This was the result of a compromise between those governments that wanted to include only market-based countries to facilitate the negotiating process and those who, on the contrary, seek to include different economies. The decision to include NMEs at that stage was due to political reasons: to include NMEs was a way to avoid that those

the establishment of the Preparatory Committee reveal that negotiators did not perceive different economic structures as an obstacle to the development of international trade per se. For example, the French delegation stated that:

> 'France wishes to see that the organisation which we are planning here extends to the rest of the world. We cannot conceive of any future security, neither can we conceive of a prosperity for each of us without the participation of all the great economic powers: it seems to us that such a goal can be reached. There does not exist, in our opinion, any necessary connection between the form of the productive regime and the internal exchanges in one nation, on the one hand, and on her foreign economic policy, on the other. The United States may very well continue to follow the principle, the more orthodox principle, of private initiative. France and other European countries may turn towards planned economy. The USSR may uphold and maintain the Marxist ideals of collectivism without our having to refuse to be in favour of a policy of international organisation based on liberty and equality.'[20]

This brief historical overview shows that the idea that different economic models would co-exist in the multilateral trading system characterized the negotiating and development process from the outset. Although the ITO was ultimately not established,[21] its universal character, i.e., the idea that the multilateral trading system would have embraced different national economic structures, was eventually passed on to the GATT 1947.[22] This is consistent with the purpose of the GATT/WTO framework, which according to Jackson, is to be a global forum for States. From his point of view, it is not the GATT/WTO's competence to influence the sovereign right of States towards a market economy model or to impose the adoption of market economy principles. Instead, according to Jackson, the multilateral trading system should act as an 'interface' between States based on divergent

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countries originally excluded from the negotiating rounds would have not acceded to a system in the creation of which they did not play any role. Petros C Mavroidis, *The Regulation of International Trade, Vol. 1* (MIT Press, 2016) 14 ff.

[20] United Nations, Economic and Social Council, Preparatory Committee of the International Conference on Trade and Employment, Verbatim report of the Third Plenary Meeting, 17th October 1946, E/PC/T/PV/3, p. 18. Emphasis added. On the same occasion, countries like Cuba, India and Lebanon stressed the importance of establishing an international trade framework also focused on the least developing countries' needs and peculiar aspects. This has been clearly expressed by the Indian delegates, which affirmed that: 'Our problem (…) is not primarily one of the maintenance of full employment, but of a change in the character of employment, and of a greater diversification of employment, and we consider it essential that the full development of a country's resources with a view to raising standards of living and real income should be laid down as one of the primary objectives of the International Trade Organization' (See Ibid, 24). Similarly, Lebanon affirmed that: 'It is always worthwhile to repeat that the world is one. Poverty anywhere is a menace to prosperity everywhere. Fruitful economic co-operation can only be attained through the development of each for the benefit of all. In order to achieve industrialisation in the less advanced countries we must recognise that tariff protection is, in the words of the Australian delegate, the legitimate instrument of national policy. It is true that we are all interested in the expansion of world trade, but there is no inherent inconsistency between the two objectives of the expansion of world trade and the industrialisation of less developed nations' (see, Ibid, 28). These statements are worth considering because they show that the different dialectic between MEs and NMEs that developed since the very initial stages of the negotiating process.

[21] As widely known, the ITO was never established mainly because of the withdrawal of the US government from its Draft Charter, following Congress' refusal to give approval. See: Andrea Comba, 'Neoliberismo e globalizzazione dell'economia', in Andrea Comba (ed) *Neoliberalismo Internazionale e Global Economic Governance* (Giappichelli Editore, 2013) 70 f.

[22] John H Jackson, *Restructuring the GATT System* (Council on Foreign Relations Press, 1990) 81-82.

economic models, which could be a basis for dialogue to address, and possibly resolve, incompatibilities between Members with different economic models.

Today, however, the dramatic divergence between market and planned economies has weakened. Purely planned economic models are now less common. Modern NMEs often adopt mixed economic models, which function according to principles close to market principles but are characterized by an institutional framework that typically plays a pervasive role in the economy.[23] Arguably, the difference between MEs and NMEs lies in the degree of intervention of their respective economic public institutions, which is generally more intense for NMEs. The ways and means that the State seeks to play an active role in this economy inevitably influence how State ownership rights are exercised and determine the position assigned to SOEs in the economy itself.

In light of the above, adopting a limited set of provisions regulating State intervention in the economy in the GATT/WTO legal framework can be interpreted differently. According to Mavroidis and Sapir,[24] the system was originally based on an 'implicit liberal understanding',[25] in where State intervention was perceived as exceptional. According to the authors, the liberal philosophy underpinning the GATT/WTO legal framework is not explicitly mentioned in the actual WTO Agreements but emerges from several elements. It is relevant to note that most of the countries involved in the negotiating process were liberal democracies. In this context, the two key actors guiding the negotiations – i.e., the US and the UK – were based on free-market economies, and their values ultimately inspired their proposals and were then reflected in the establishment of the multilateral trading system. Finally, the GATT/WTO legal framework that was ultimately established is based on prohibiting restrictions on the amount of traded products. This element is inherently incompatible with a centrally-planned economic model.

However, a limited legal framework for State intervention in the economy may arguably be the direct consequence of the embedded liberalism compromise. From this perspective, a small group of provisions that apply to the conduct of States in the economy aims to ensure that States maintain enough flexibility and domestic policy space, while simultaneously engaging in the multilateral trading system. This approach is also consistent with the neutrality principle. Leaving them, in principle, free to determine their economic structure, the conduct of States is addressed only to the extent necessary to protect trade liberalization, i.e., to ensure that market forces primarily regulate market access and trade flow rather than a planned government measure.[26]

3. The State as a Trader under WTO Law: Article XVII GATT on State Trading Enterprises (STEs)

By dealing with STEs, Article XVII GATT brings State trading under the WTO legal system. Accordingly, WTO Members retain the power to establish and use an entity to intervene in their economy, which in the context of international trade, means to influence the terms of transactions, imports, and exports which privately-owned enterprises (POEs) would normally define. This raises a

[23] See Luyao Che, *China's State Directed-Economy and the International Order* (Springer, 2019).
[24] Petros C Mavroidis and André Sapir, *China and the WTO. Why Multilateralism Still Matters* (Princeton University Press, 2020) (Kindle version).
[25] Ibid.
[26] Kyle W Bagwell, Robert W Staiger and Petros C Mavroidis, 'It's a Question of Market Access' (2002) 96 American Journal of International Law 56 f.

series of systematic questions about the regulation of these entities in a framework, such as the GATT/WTO, based on the presumption that the regulation of trade and the conduct of business are two different activities, where trade pertains to the State and the conduct of business involves (private) economic operators.[27]

Article XVII GATT on STEs is generally considered to be the provision regulating SOEs under the GATT/WTO legal framework, probably based on the assumption that the notions of STEs and SOEs coincide. While being the sole key provision for these purposes,[28] Article XVII GATT has not changed substantially since its original version in GATT 1947.[29] Hence, the increasing institutional and functional complexity of SOEs raises doubts as to whether this provision constitutes an effective legal framework for regulating State ownership in economic entities under the multilateral trading system. This explains why the link between the notion of STEs and that of SOEs may not be as straightforward and therefore deserves further exploration.

Against this background, the following questions should be addressed: what are the constituent criteria for STEs under GATT Article XVII? And how do STEs relate to SOEs? Do the notions of STEs and SOEs coincide, or not, within the scope of this provision? To answer these questions, it is crucial to define the exact scope of Article XVII GATT. In other words, it is necessary to determine which entities qualify as STEs within the meaning of this provision.

To this end, the following sections aim to map the constitutive elements of STEs through the lens of interpretation of Article XVII GATT. WTO agreements are subject to the same principles of interpretation applicable to other international treaties.[30] Hence, GATT provisions can be studied in light of the canons of treaty interpretation as encapsulated in Articles 31 and 32 of the Vienna Convention on the Law of the Treaties (VCLT), which is generally acknowledged as reflecting customary international law.[31] Indeed, it is an established principle that the WTO Agreements can be interpreted in light of the VCLT rules of interpretation.[32] According to article 3.2 of the Dispute Settlement Understanding (DSU), the dispute settlement system of the WTO can operate its functions 'by customary rules of interpretation of public international law'. Adjudicative bodies have consistently interpreted this expression as referring to the VCLT principles of interpretation.[33] In US-Gasoline, the Appellate Body (AB) stated that:

> '[t]he general rule of interpretation [as set out in Article 31(1) of the VCLT] has attained the status of a rule of customary or general international law. As such, it forms part of the "customary rules of interpretation of public international law" which the Appellate Body has been directed, by Article 3(2) of the DSU, to apply in seeking to clarify the provisions of the General Agreement and the other "covered agreements"

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[27] Ernest-Ulrich Petersmann, 'GATT Law on State Trading Enterprises: Critical Evaluation of Article XVII and Proposals for Reform' in Thomas Cottier and Petros C Mavroidis (eds) *State Trading in the Twenty-First Century* (World Trade Forum, 1998) 71.

[28] Mavroidis and Sapir (n 24).

[29] Vincent H Smith, 'Regulating State Trading Enterprises in the World Trade Organization: An Urgent Need for Change? Evidence from 2003–2004 US – Canada Grain Dispute' (2007) 2 Review of Agricultural Economics 187.

[30] Isabel Van Damme, *Treaty Interpretation by the WTO Appellate Body* (OUP, 2009) 22.

[31] *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)* (Merit) ICJ Reports 1991, para 48.

[32] Asif H Qureshi, *Interpreting WTO Agreements. Problems and Perspective* (CUP, 2015) 3 f.

[33] For an extensive account on this point see: Matsuo Matsushita, Thomas J Schoenbaum, Petros C Mavroidis and Michael Hahn, *The World Trade Organisation. Law, Practice and Policy* (OUP, 2015) 47 f. According to Van Damme, the lack of an explicit reference to Articles 31 and 32 VCLT is due to the fact that not all signatories of the GATT were also part to the Vienna Convention. See Van Damme (n 30) 22 f.

of the Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement").'[34]

The AB then added that 'The General Agreement is not to be read in clinical isolation from public international law.'[35] This was a significant ruling that placed the WTO system under international customary law.[36] In this context, applying principles of interpretation of the VCLT is necessary to ensure a harmonious interpretation of the Agreements as a whole.[37] Under Article 31 of the VCLT, the interpretation of treaty provisions must be inspired by the principle of good faith. The interpreter can rely on the wording of the provision; the context, the object, and the purpose of the treaty; and the primary interpretive tools. Then, Article 32 deals with supplementary means of interpretation, including the subsequent agreements, and practice.

It should be noted that when WTO adjudicating bodies consider means of interpretations under Articles 31 and 32 of the VCLT, they implicitly prejudge their legal value within the system.[38] Hence, looking at the reports of the Panel and the AB, the interpreter should start from the wording of the provision.[39] The ordinary meaning of words should guide the interpretative process.[40] In this regard, dictionaries can help examine the provision but cannot be taken as dispositive sources.[41] When the meaning of the provision is still obscure, then the object and purpose can have an auxiliary function to help clarify it.[42] Subsequently, the AB has consistently referred to the context as a helpful means of interpretation to clarify the meaning of WTO Agreements provisions.[43] Moreover, the interpreter can refer to a subsequent practice that, if 'common' and 'concordant' and related to the interpretation of the WTO Agreements, can help to assess the 'objective evidence of the understanding of the parties as to the meaning of the treaty'.[44] The interpreter may also resort to supplementary means of interpretation under Article 32 of the VCLT, like preparatory works and any circumstances related to the conclusion of the Agreements.[45]

Against this background and through means of interpretation provided by Articles 31 and 32 of the VCLT, this study aims to identify the constitutive elements of STEs as perceived in the objective intentions of the parties to the GATT. This process is essential to understand the meaning of the

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[34] WTO, *US-Gasoline* (29 April 1996) WT/DS2/AB/R, page 17. Italics in the original.

[35] Ibid. See also: WTO, *Korea-Government procurement* (1 May 2000) WT/DS163/R, para 7.96; WTO, *US-Carbon Steel (India)* (8 December 2014) WT/DS436/AB/R, para 61-62.

[36] John H Jackson, 'The Case of the World Trade Organization' (2008) 84(3) International Affairs (Royal Institute of International Affairs 1944-), 446. See also: Gabrielle Marceau, 'Conflicts of Norms and Conflicts of Jurisdiction: The Relationship Between WTO Agreement and MEAS and Other Treaties' (2001) 35(6) Journal of World Trade 1081 f; Asif H Qureshi and Andreas R Ziegler, *International Economic Law* (Sweet & Maxwell, 2011).

[37] WTO, *US-Continued Zeroing* (4 February 2009) WT/DS350/AB/R, para 268.

[38] Matsushita and others (n 33) 67.

[39] WTO, *India - Patents* (19 December 1997) WT/DS50/AB/R, para 45; *US — Shrimp* (12 October 1998) WT/DS58/AB/R, para 114.

[40] WTO, *US-Softwood Lumber IV* (19 January 2004) WT/DS257/AB/R, paras 58-59; *Argentina — Footwear* (EC), (14 December 1999) WT/DS121/AB/R, para 91.

[41] WTO, *US — Offset Act (Byrd Amendment)* (16 January 2003) WT/DS217/AB/R WT/DS234/AB/R para 248; *US — Gambling* (7 April 2005) WT/DS285/AB/R, para. 164; *EC — Chicken Cuts* (12 September 2005) WT/DS269/AB/R WT/DS286/AB/R paras 175–176.

[42] US- Shrimps (12 October 1998) WT/DS58/AB/R para 114.

[43] See for example WTO, *China-Auto Parts* (15 December 2008) WT/DS339/AB/R WT/DS340/AB/R WT/DS342/AB/R, para 151. See also Sections 3.3 and 3.4 below.

[44] See WTO, *EC — Chicken Cuts* (12 September 2005) WT/DS269/AB/R WT/DS286/AB/R, para 255 and 273.

[45] See WTO, *EC — Computer Equipment* (5 June 1998) WT/DS62/AB/R WT/DS67/AB/R WT/DS68/AB/R, para 86.

notion of STEs as emerging from Article XVII GATT and its application.[46] With this objective in mind, the study of Article XVII GATT is structured as follows. Section 3.1 provides a general overview of State trading activities and STEs and their impact on international trade. Section 3.2 focuses on the wording of Article XVII GATT. Sections 3.3, 3.4 and 3.5 delve into the context of the provision and at related subsequent practice; sections 3.6 and 3.7 delves into the constitutive elements on STEs emerging from questions submitted by WTO Members, counter-notifications pursuant to Article XVII GATT and Trade Policy Reviews (TPRs); section 3.8 deals with the *travaux preparatoires*, which led to the adoption of Article XVII GATT. Lastly, section 3.9 deals with the case law related to STEs. This approach facilitates the mapping of the constitutive elements of entities that qualify as STEs and thus understanding whether, and to what extent, this notion overlaps with SOEs.

3.1. State Trading and STEs: an overview of their characteristics and impact on international trade

Historically, both MEs and NMEs countries have implemented state trading activities, although these activities often display different characteristics. Divergences mainly concern the extension of such activities and the degree of control exercised in the domestic economy. To limit our discussion to the 20th century, western States used State trading techniques during and after the two world wars to ensure price stabilization, the supply of scarce commodities, and limit inflation.[47] By contrast, State trading permeated the entire economic structure of the Soviet Union and Communist China. However, the collapse of the Soviet Union, together with the acknowledgement that State trading could constitute a tool of economic warfare,[48] contributed to the progressive unpopularity towards State trading as an economic model vis à vis ME models. This pushed GATT contracting parties to regulate State trading and STEs under the multilateral trading system.

The notion of State trading is multifaceted and challenging to define.[49] According to Kostecki, State trading is a phenomenon where 'a government or a government-backed agency determines the essential terms (including prices or quantities) on which exports and imports have to take place'.[50] In other words, State trading allows the government to actively engage in several critical decisions of its economy and hence exercise control over foreign trade.[51] This interference by the State in the economy includes determining which goods and what quantities are to be traded in the market as well as their geographical distribution.[52] As a result, States may indirectly impose quantitative restrictions on certain goods and overcome a bound tariff by setting high prices for the imported products in the

[46] Jean Marc Sorel and Valérie Boré Eveno, 'Article 31', in Olivier Corten and Pierre Klein, *The Vienna Conventions on the Law of Treaties. A Commentary. Vol. I* (OUP, 2011) 806; Oliver Dörr, 'Article 31. General Rule of Interpretation', in Oliver Dörr and Kirsten Schmalenbach (eds.), *Vienna Convention on the Law of Treaties. A Commentary* (Springer, 2018) 560.
[47] Richard I Leighton, 'An Empirical Study of State trading' (1963) 29(3) Southern Economic Journal 307.
[48] Robert L Allen, 'State Trading and Economic Warfare' (1959) 24 Law and Contemporary Problems 256. The Author defines economic warfare as a 'conscious attempt to enhance the relative economic, military, and political position of a country through foreign economic relations'. See Ibid 259.
[49] Edmond M Ianni, 'State Trading: Its Nature and International Treatment' (1983) 5(1) Northwestern Journal of International Law and Business 51.
[50] Michael M Kostecki, *State Trading in International Markets. Theory and Practice of Industrialized and Developing Countries* (The Macmillan Press, 1982) 6.
[51] Ianni (n 49) 48 f.
[52] Allen (n 48) 258 f.

market and reducing the internal demand for them.[53] The government can also influence prices and distort the terms of transactions.[54]

State trading policies can be implemented in several ways and be based on several rationales. Ownership, control, and the provision of exclusive rights are means through which the State can exercise its influence on the STE or provide it with the necessary features to impact the market.[55] In this regard, however, it should be noted from the outset that ownership is irrelevant per se. Instead, issues concerning international trade may arise when the exercise of ownership rights enables the State to actively engage in decision-making of an entrepreneurial nature.[56]

Considering the rationale behind implementing State trading activities, this can be used to pursue national policy objectives in a relatively flexible manner. These policy objectives range from the protection of domestic producers from exports to the promotion of exports, the stabilization of domestic prices, to the exercise of influence on the consumption of specific products, such as alcohol, tobacco, and pharmaceuticals and ensuring national security. Moreover, State trading activities could be used to pursue the betterment of terms of trade, the balance of payments and to implement fiscal objectives. Against this background, STEs have also been used to conduct marketing activities or have been granted the exercise of regulatory power. Thus, there is a strict correlation between the objectives that a State wishes to pursue through an STE and the structure and functioning of this entity. In other words, the policy objective determines the activity.[57]

From an international trade perspective, the focus is on State trading policies implemented through STEs. This type of enterprise is perceived as a tool to implement social policy objectives (e.g., food supply, national security, management of scarce commodities) and as a disruptive element of international trade because governments could use them to adopt restrictive measures of international trade flow. Firstly, the close link with the government allows STEs not only to enjoy privileges that typically preclude private undertakings but also to increase their bargaining power that could be used to implement measures with an effect equivalent to tariffs or subsidies.[58] In this regard, when STEs enjoy monopoly rights, they can influence prices in a way similar to a subsidy (when, for example, STEs pay for inputs at a price below market levels),[59] or to a tax (when, instead, STEs raise prices of exports above domestic levels). Furthermore, when STEs enjoy an exclusive monopoly on exporting or importing certain products, they can impose 'mark-ups' and prevent or hinder market access to foreign products.[60] Secondly, STEs may be recipients of subsidies granted by the State. This economic advantage could incentivize them to engage in anti-competitive behavior, non-transparent cross-subsidization activities, or transpose the economic benefit to national producers.[61] Thirdly, governments could exploit STEs in such a way as to discriminate between trading partners in breach of the Most Favoured Nation (MFN) and the National Treatment (NT) principles. This would be the

[53] Ibid 21.
[54] Ibid.
[55] Ianni (n 49).
[56] See Roy Baban, 'State Trading and the GATT' (1977) 11 Journal of World Trade Law 334.
[57] Background Paper of the Secretariat, Operations of State trading enterprises as they relate to international trade, G/STR/2.
[58] For an insightful economic analysis of State trading see: Don D Humprey, 'The Economic Consequences of State Trading' (1959) 24(2) Law and Contemporary Problems 276-290.
[59] Bernard Hoekman and Patrick Low, 'State Trading: Rule Making Alternatives for Entities with Exclusive Rights', in Cottier and Mavroidis (n 27) 327.
[60] Petersmann (n 27) 71.
[61] Hoekman and Low (n 59) 327 f.

case when STEs are in charge of administering import or export control systems and thus in a position to discriminate between trading partners or domestic products at the expense of foreign products in the procurement of commodities if the domestic law so allows. STEs could be instructed not to purchase a given product or buy only a limited amount of it. These actions would result in a *de facto* import ban or a *de facto* quota, ultimately jeopardizing concessions made at the multilateral level.[62] There is the risk that STEs could be a destabilizing factor in international trade and an effective tool at GATT/WTO Members' disposal to circumvent their multilateral trade obligations. Against this background, it seems possible to argue that SOEs and STEs do share some similarities. Both encapsulate a dual nature: on the one hand, they are economic operators, like private enterprises. On the other hand, they are a tool to implement public policy objectives. However, the fragmentation in structures and functions with respect to SOEs, along with the operational which differs to the context of when the regulatory framework of STEs was initially established, requires their defining line to be investigated further.

3.2. Defining and interpreting STEs under the WTO: The Wording of Article XVII GATT

According to Article 31.1 of the VCLT, the first step to be undertaken by the interpreter, who aims to understand the meaning of a treaty provision, is to start the interpretative process from the text.[63] In other words, the interpretative process should be based primarily on the wording of the provisions in view of its ordinary meaning. This means that the analysis must consider the linguistic and grammatical characteristics of the words under scrutiny.[64] In line with this perspective, we start to analyze the scope of Article XVII of the GATT as it emerges from its wording.
In its relevant parts, Article XVII of the GATT reads:

> '1(a). Each contracting party undertakes that if it establishes or maintains a State enterprise, wherever located, or grants to any enterprise, formally or in effect, exclusive or special privileges, such enterprise shall, in its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders.
>
> (b) The provisions of sub-paragraph (a) of this paragraph shall be understood to require that such enterprises shall, having due regard to the other provisions of this Agreement, make any such purchases or sales solely in accordance with commercial considerations, 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.

[62] Daniel CK Chow and Thomas J Schoenbaum, *International Trade Law. Problems, Cases, and Materials* (Wolters Kluwers, 2013) 293; William J Davey, 'Article XVII GATT: An Overview' in Cottier and Mavroidis (n 27); Mavroidis (n 19) 400.
[63] Richard Gardiner, *Treaty Interpretation* (OUP, 2015) 183 f.
[64] Dörr (n 46).

> (c) No contracting party shall prevent any enterprise (whether or not an enterprise described in subparagraph (a) of this paragraph) under its jurisdiction from acting in accordance with the principles of subparagraphs (a) and (b) of this paragraph.'[65]

A closer examination at the wording of Article XVII:1 reveals that the provision directly addresses the following types of enterprises: (i) 'State enterprises, wherever located'; and (ii) 'any enterprise' which 'formally or in effect' enjoys 'exclusive or special privileges'; (iii) 'any enterprise' under the jurisdiction of a WTO Member.[66] The provision does not define the term 'State enterprise' or any other expression. According to the Oxford English Dictionary, a State enterprise is 'a company, organization, etc., created by the State in order to carry out the commercial activity; the practice of establishing and running such enterprises'. However, such a definition hardly adds anything new compared to Article XVII of the GATT, because it seems to merely confirm the overall meaning of the expression and does not provide further details, which would allow for a greater level of precision. As it emerges from State practice *infra*, it has proven to be particularly challenging, in reality, to identify and hence capture the entities that fall under the notion of STE, despite the terms' seemingly all-encompassing nature, which might include State 'owned' and 'controlled' enterprises. The substantive requirements in Article XVII:1(a) and (b), which apply to the sales and purchase activities of STEs and the non-discrimination obligation imposed on them, also place further constraints on the application of the disputed provision.[67]

Nevertheless, Article XVII of the GATT implicitly recognizes Members' sovereign right to establish STEs in their national economy.[68] This implicit recognition aligns with the neutrality approach previously analyzed, according to which the multilateral trade legal framework does not interfere with the structure and development of the national public sector. However, as noted in the previous section, it can be assumed that the rationale behind Article XVII's regulation on STEs is ultimately to prevent Members from using STEs to circumvent their international trade obligations.[69]

Although a definition of STEs has yet to be provided, Article XVII of the GATT places several substantive obligations on Members who decide to establish and exploit this type of entity in their national economies. Firstly, they must ensure that STEs carry out their activities in accordance with the non-discrimination principle. The acts to which Article XVII of the GATT refers are purchases and sales involving either imports or exports. Secondly, such activities should be carried out in line with commercial considerations.[70] Thirdly, pursuant to article XVII:4, there is a notification requirement, according to which Members must notify their STEs to the WTO. However, this obligation does not extend to requiring Members to disclose confidential information or information that, if disclosed, would impede law enforcement or be contrary to the public interest. Against this background, Article XVII:2 of the GATT specifies that 'imports of products for immediate or ultimate

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[65] Emphasis added.

[66] Davey (n 62) 17-36. See also: Gary Horlick and Kristin Heim Mowry, 'The Treatment of Activities of State Trading Enterprises under the WTO Subsidies Rules', Cottier and Mavroidis (n 27) 97 ff.

[67] Weihuan Zhou, Henry Gao and Xue Bai, 'Building a Market Economy through WTO Inspired Reform of State-owned Enterprises in China' (2019) 68(4) International & Comparative Law Quarterly 998.

[68] Petersmann (n 27) 71.

[69] Mavroidis (n 19) 400. The anti-circumvention objective of Article XVII GATT was also confirmed by the Panels and the Appellate Body on multiple occasions. See: WTO, *Canada - Measures Relating to Exports of Wheat and Treatment of Imported Grain* (*Canada-Wheat*) (6 April 2004) WT/DS276/R, para 6.39; WTO, Ibid (30 August 2004) WT/DS276/AB/R, para 85.

[70] See generally, Petros C Mavroidis, *The General Agreement on Tariffs and Trade. A Commentary* (OUP, 2005) 278 f.

consumption in governmental use and not otherwise for resale' are excluded from the scope of application of Article XVII of the GATT. This carve-out clause is important to understand the coverage of the provision to the extent that it allows enterprises purchasing goods for governmental use to be excluded from qualifying as STEs. In other words, the activity of buying certain goods for governmental use does not constitute a typical activity of an STE.[71]

In light of the above, the wording of Article XVII of the GATT on STEs is broad and undefined. A basic reading of the provision is insufficient to understand the boundaries of the notion of STEs and their constituent elements. To define this concept, it is thus necessary to delve into the practice, and the case law developed on STEs under the WTO. More specifically, the following section investigates different elements on the notion of STEs that have emerged from the Interpretative Note Ad Article XVII of the GATT, the Understanding on the Interpretation of Article XVII of the GATT, and the 1999 Illustrative List. Then, Members' practice on STEs that have emerged from notifications and Protocols of Accession will be addressed. Then, the analysis proceeds to consider the relevant case law and, lastly, the debate that occurred in the *travaux preparatoires*, which brought about the adoption of Article XVII of the GATT.

3.3. The terms of Article XVII of the GATT in their context: instruments 'made by parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty'

Under Article 31, paragraph 1 of the VCLT a treaty may be interpreted in light of its context.[72] Hence, to clarify the meaning of treaty provisions, the interpreter has to consider the treaty in its entirety, including the title, preamble, and annexes.[73] However, Article 31, paragraph 2 of the VCLT clarifies that the interpreter delving into 'context' may need to go beyond the treaty text itself and look into other 'extrinsic documents'.[74] These documents can include 'any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty' and 'any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.'[75]

Under the WTO legal framework, the relevance of context for interpreting WTO Agreements has consistently been acknowledged by the adjudicative bodies. In *EC – Chicken Cuts*,[76] the AB stated:

> 'The concept of "context", under Article 31, is not limited to the treaty text — namely, the WTO Agreement — but may also extend to "any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty", within the meaning of Article 31(2)(a) of the Vienna Convention, and to "any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty", within the meaning of Article 31(2)(b) of the Vienna Convention.'[77]

[71] See Mavroidis (n 19) 404.
[72] Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, in force 27 January 1980, 1155 UNTS 331, Article 31.
[73] Dörr (n 46) 584.
[74] Ibid 588.
[75] Article 31.1(a) VCLT.
[76] WTO, *EC — Chicken Cuts* (12 September 2005) WT/DS269/AB/R, para 195.
[77] Ibid para 195.

The AB seems to confirm the general approach just outlined in Article 31, paragraphs 1 and 2. Consequently, under the multilateral trading system, the interpreter has to consider not only WTO Agreements but also any other agreement or instrument concluded or agreed upon under the context of the former.

In *China – Auto Parts*,[78] the AB further clarified that:

> 'The realm of context as defined in Article 31(2) is broad. "Context" includes all of the text of the treaty — in this case, the WTO Agreement — and may also extend to "any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty" and "any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty". Yet context is relevant for a treaty interpreter to the extent that it may shed light on the interpretative issue to be resolved, such as the meaning of the term or phrase at issue. Thus, for a particular provision, agreement or instrument to serve as relevant context in any given situation, it must not only fall within the scope of the formal boundaries identified in Article 31(2), it must also have some pertinence to the language being interpreted that renders it capable of helping the interpreter to determine the meaning of such language.'[79]

Against this backdrop, it seems possible to conclude that not only WTO Agreements constitute context within the meaning of Article 31, paragraph 2 of the VCLT. Indeed, agreements and other instruments concluded by contracting parties on the occasion of the conclusion of the WTO Agreements - 'in a close temporal and contextual relation' with their conclusion -[80] serve the purpose of interpreting their wording. With this in mind, the following discussion delves into the notion and regulation of STEs as they have emerged from the Interpretative Note *Ad* Article of XVII GATT,[81] the Understanding on the Interpretation of Article XVII of the GATT, and the 1999 Illustrative List. Then, Protocols of Accession and Working Party Reports are considered.[82]

3.3.1. The Interpretative Note Ad Article XVII GATT

Under WTO law, greater clarity on treaty provisions can be sought in interpretative notes. These documents encapsulate WTO Members' collective understanding of how the terms of the provision

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[78] WTO, *China – Auto Parts* (15 December 2008) WT/DS339/AB/R, para 151.

[79] Ibid para 151. Emphasis added.

[80] ILC, A/73/1, Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, Yearbook of the International Law Commission (2018) vol. II, Part Two, 28.

[81] In its interpretative process in *Korea-Alcoholic Beverages*, the AB considered *Ad* Article to Article III:2 GATT as 'context' within the meaning of Article 31 of the VCLT. See WTO, *Korea-Alcoholic Beverages* (18 January 1999) WT/DS75/AB/R WT/DS84/AB/R para 117.

[82] Julia Y Qin, 'Mind the Gap. Navigating Between the WTO Agreements and Its Accession Protocols', in Manfred Elsig, Bernard Hoekman and Joost Pauwelyn (eds), *Assessing the World Trade Organization: Fit for Purpose?* (CUP, 2017) 257. See also: Steve Charnovitz, 'Mapping the Law of WTO Accession', in Merit E Janow, Victoria Donaldson and Alan Yanovich (eds), *WTO at Ten: Governance, Dispute Settlement and Developing Countries* (Juris Publishing Inc, 2008) 855 f.

to which they refer should be interpreted. Interpretative notes are part of the treaty language,[83] and their objective is limited to clarifying the wording of treaty provisions and not modifying or replacing it.[84] From this point of view, the Interpretative Note Ad Article XVII of the GATT can shed light on the definition of STEs in two respects and helps reconstruct the boundaries of this notion.

Firstly, it clarifies that the notion of STEs comprises a defined category of entities: that is marketing boards.[85] Put differently, the interpretative note makes it explicit that marketing boards are one of the many types of entities that falls within the notion of STEs. However, only marketing boards engaging in selling and purchasing activities are covered by this provision, while those regulating private trading are outside its scope.[86]

Secondly, it clarifies what is meant by 'exclusive or special privileges' granted to STEs. More specifically, by adopting a negative interpretative approach, rights and privileges granted 'to ensure standards of quality or efficiency in the operation of external trade' or 'for the exploitation of national resources' cannot qualify as exclusive or special privileges under Article XVII of the GATT,[87] to the extent that such rights and privileges do not enable the State to exercise control over the entity concerned. In other words, the interpretative note adopts the criterion of control as the key element to identify privileged enterprises regulated under Article XVII of the GATT.

Then, in the other relevant parts, the interpretative note guides the analysis with reference to substantive and operational aspects of STEs. More specifically, STEs are not automatically prohibited from applying different prices in different markets as long as that difference is based on commercial reasons, i.e., to meet supply and demand conditions. In this regard, the relevant activities of STEs are circumscribed to 'goods', which include any goods understood as such in commercial practice but not services. This statement is important to consider, as SOEs dealing with services are excluded from the coverage of the notion of STEs. This exclusion has important consequences regarding the coverage of Article XVII of the GATT to new state-related economic operators, considering the growing number of SOEs operating, for instance, in the financial services sector.[88]

3.3.2. The Understanding on the Interpretation of Article XVII of the GATT

Under the WTO legal framework, further clarification on the meaning of the text of main provisions can be provided by 'Understandings'. These are part of the WTO treaty language[89] and consist of notes negotiated during the Uruguay Round to clarify the meaning of the provisions of the

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[83] In *Japan – Alcoholic Beverages II*, the Appellate Body, referring to Article III:2 GATT and related Ad Article, stated that they 'have equivalent legal status in that both are treaty language which was negotiated and agreed at the same time.' Cfr. *Japan – Taxes on Alcoholic Beverages* (4 October 1996) WT/DS8/AB/R WT/DS10/AB/R WT/DS11/AB/R, p. 24.

[84] Van Damme (n 30) 74 ff.

[85] Interpretative Note *ad* Article XVII GATT, paragraph 1 states that: 'The operations of Marketing Boards, which are established by contracting parties and are engaged in purchasing or selling, are subject to the provisions of sub-paragraphs (a) and (b)'. Marketing boards are government-established organizations that regulate and control sales and purchases related to a given commodity in a specific territory. The marketing board's activities are state-backed and regulated by national legislation and mainly revolve around supporting producers with the marketing of their products in the market. In particular, marketing boards are active in the agricultural sectors.

[86] Davey (n 62) 17 f.

[87] Interpretative Note *ad* Article XVII GATT, paragraph 1(a) states that: 'Governmental measures imposed to ensure standards of quality and efficiency in the operation of external trade, or privileges granted for the exploitation of national natural resources, but which do not empower the government to exercise control over the trading activities of the enterprise in question, do not constitute "exclusive or special privileges".'

[88] Cf. Chapter 1.

[89] See for example: WTO, *Chile-Price Band System* (23 September 2002) WT/DS207/AB/R, para 264-278.

Agreements to which they refer.[90] Thus, Understandings are binding on Members and, in WTO's practice, are considered to the same extent as international agreements.[91]
Regarding STEs, the Understanding on the Interpretation of Article XVII of the GATT was adopted during the Uruguay Round. An effort was made by negotiators to overcome the need for a precise definition of STEs, which was at the time perceived as an issue for the correct functioning of Article XVII of the GATT.[92] Accordingly, the Understanding provides additional elements on the notion and definition of STEs. Notably, the Understanding includes the following working definition of STEs:

> 'Governmental 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.'[93]

Thus, the working definition qualifies STEs as (i) governmental enterprises, (ii) non-governmental enterprises, and (iii) marketing boards, all entrusted with exclusive or special rights or privileges by the State and therefore able to influence the level and direction of imports and exports through their purchases or sales. According to commentators at the time, the new Understanding enhanced transparency on STEs. The definition of these entities revolved around their function rather than formal ownership.[94]
As clearly stated in point 1 of the Understanding, the working definition was introduced for notification purposes.[95] Thus, the underlying idea was to improve clarity over the definitional framework and consequently improve transparency with respect to the existence of STEs and their activities. In other words, introducing a definition for notification purposes would enhance the level of information disclosed by Members of these entities.
Compared to Article XVII of the GATT, however, the definition adopts narrow boundaries for the notion of STE compared with the term 'State enterprise' in the substantive provision. This is because the working definition, unlike the substantive provision, links STEs with the grant of special or exclusive privileges. In other words, the Understanding is narrower in scope than the substantive provision because it qualifies as STEs only those entities – either governmental or non-governmental – which enjoy exclusive rights or special privileges.[96] Consequently, those entities which do not enjoy exclusive rights or special privileges but still are subject to State control or influence are not covered by the working definition.
Arguably, the adoption of this narrow definitional approach has two consequences. Firstly, it limits the scope of application of Article XVII of the GATT. This is because the boundaries within which the working definition encapsulates the notion of STE make it under-inclusive. Even though the Understanding is explicit without prejudice to the substantive provisions of Article XVII of the GATT

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[90] Van Damme (n 30) 81.
[91] Mavroidis (n 19).
[92] WTO, Understanding on the Interpretation of Article XVII GATT, para. 1. See: Mastromatteo (n 4) 601-618. Also: Steve McCorriston and Donald MacLaren, 'Perspectives on State Trading Issue in the WTO Negotiations' (2002) 29(1) European Review of Agricultural Economics 131-154.
[93] Ibid point 1. Emphasis added.
[94] G De Prest, *GATT Articles*, in Terance P Stewart (ed), T*he GATT Uruguay Round. A Negotiating History (1986-1994),Vol. IV: The End Game (Part I)* (Kluwer, 1993) 187.
[95] WTO, Understanding on the Interpretation of Article XVII GATT preamble.
[96] Petersmann (n 27) 86 f.

– i.e., nothing prevents Members from notifying entities falling within the more comprehensive, unrestricted notion of State enterprise -,[97] the adoption of a narrow working definition makes it *de facto* possible for governments not to notify economic entities which are State-controlled, State-owned or State-influenced as long as they do not enjoy exclusive rights or special privileges. In turn, this contributes to undermining the efficiency of WTO law in effectively regulating STEs, as the operational side of Article XVII of the GATT – the notification requirement – is frustrated.[98]

Secondly, the adoption of a narrow working definition creates a legislative gap. Only those economic entities enjoying special or exclusive rights will be mandatorily notified under the WTO. Members can easily circumvent this obligation by not granting such exclusive rights or special privileges to those economic entities they do not want to notify. Against this background, the decision to notify or not to notify can be based on political and economic rather than legal considerations. From a practical standpoint, enterprises that may be fully majority or minority-owned by the State, or are controlled by it, may easily escape the WTO regulatory framework if they are not privileged.

3.3.3. The 1999 Illustrative List of the Working Party on State Trading Enterprises

During the Uruguay Round, in addition to adopting the Understanding on the Interpretation of Article XVII of the GATT, which was based on a proposal put forward by the US delegation,[99] a Working Party (WP) on State Trading Enterprises was established. According to the US delegation, it was necessary to improve clarity and transparency of the regulation of STEs under the then-emerging multilateral trade legal framework. Accordingly, the decision to establish a WP was formulated in line with the US proposal. The WP would be in charge of developing an 'illustrative list of practices associated with state trading', on the one hand.[100] On the other hand, the group would also review state trading questionnaires submitted by Members and conduct periodic comprehensive reviews of notifications.[101] Other Members welcomed the US proposal for two main reasons. Firstly, delegates admitted that there was the need to clarify the definition of STEs because 'authorities had often been confronted with uncertainty as to what to notify'.[102] Secondly, it was believed that to achieve such definitional clarity, it was necessary as a preliminary step to elaborate a 'clear definition of the activities and enterprises to be covered'.[103]

Thus, the WP was ultimately established. Given the Member-driven character of the WTO, the WP membership is open to all Members that wish to serve on it.[104] The WP holds regular meetings and reports annually to the Council for Trade in Goods.

The WP adopted the Illustrative List in 1999 based on previously submitted notifications.[105] As revealed by preparatory works,[106] in the end, the WP decided against defining STEs in the List.

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[97] WTO, Understanding on the Interpretation of Article XVII, preamble.

[98] For a detailed analysis of the impact of the working definition on submitted notifications see Section 3.5.4 *infra*.

[99] MTN.GNG/NG7/W/55, 13th October 1989, point 4.

[100] Ibid.

[101] Ibid.

[102] MTN.GNG/NG7/13, 11th August 1983, point 15.

[103] Ibid, point 16.

[104] In this context, observer governments in the General Council enjoy observer status in the WP. Cfr. Recently Report (2021) of the Working Party on State Trading Enterprises, G/L1403, G/STR/28, 6 October 2021.

[105] Working Party on State Trading Enterprises, Illustrative List of Relationships Between Governments and State Trading Enterprises and the Kinds of Activities Engaged in By These Enterprises, G/STR/4, 30 July 1999.

[106] Working Party on State Trading Enterprises, Draft Illustrative List, The Relationship Between Governments and State Trading Activities, G/STR/W/31, 17 September 1996.

Instead, the List would serve as a document to guide Members on the types of relationships between governments and enterprises that may be regarded as falling within the notion of STEs, and thus subject to be notified to the WTO.[107]As a result, the List was not binding on WTO Members. Also, since the List is non-exhaustive, other types of enterprises may qualify as STEs although they may not be included. In any case, understanding the kind of relationships between governments and enterprises and related operations that require the application of the substantive obligations of Article XVII of the GATT serve as a guide as to the entities covered by this provision.

Looking more closely at the definitional aspects of STEs included in the Illustrative List, the WP endorsed the definition of the Understanding on the Interpretation of Article XVII of the GATT.[108] This is coherent with the fact that the Illustrative List, like the Understanding, was conceived to improve clarity and promote notifications of STEs.[109] Accordingly, then, the List adopts two criteria that, if present, would make the STE notifiable. These criteria are (a) the grant of an exclusive or special right to an enterprise; and (b) the enterprise's ability to influence the level or direction of imports and exports.[110] Building on these criteria, the List further specifies the notion of STE by focusing on its relationship with the government and the types of activities that this type of entity typically carries out, which are deemed to fall under the scope of Article XVII of the GATT and therefore, would most likely need to be notified to the WTO.

Looking at the possible types of government-enterprise relationships that may indicate the presence of notifiable STEs, the Illustrative List focuses on three sets of cumulative criteria.

Firstly, the List clarifies that an enterprise could qualify as a notifiable STE if (a) it belongs to a governmental branch or (b) it is government-owned, either in whole or part. Alternatively, in case the entity does not belong to a government branch or is not State-owned, it is relevant if (c) the enterprise is entrusted with the implementation of government-mandated activities, like policies or programmes subject to legislated control; or if (d) the enterprise is established for commercial purposes.[111] Importantly, Footnote 2 of the List specifies that entities or government Ministries enjoying regulatory authority in areas relevant to international trade do not constitute an STE.

The second set of indicators, which cumulatively applies to the first set, establishes that an enterprise engaging in purchasing and selling activities qualifies as STE when it is 'specially authorized or mandated by the government' to control and/or conduct imports or exports; to distribute imports; and to control domestic production, processing, and distribution.[112]

The third set of indicators focuses on the forms of governmental support that is relevant to the qualification of STEs. These indicators are broadly identified and include both direct and indirect economic support, like budget allocations, interest rate/tax concessions, guarantees, revenue from the collection of tariffs, preferential access to foreign exchange, and any other off-budget support or assistance.[113]

Against this background, the following elements must be considered during an investigation concerning the qualification of a given entity as an STE for notification purposes. Firstly, there is the domestic constitutional system of the State. The reason for this is because only a Member's domestic

[107] G/STR/4, para 2.
[108] Illustrative List, point 5.
[109] Illustrative List, point 2.
[110] Ibid para 6.
[111] Ibid para 8.
[112] Ibid para 8(i).
[113] Ibid para 8 (ii).

organization facilitates understanding whether a given entity belongs to its apparatus. Secondly, there is the criterion of ownership. In this regard, except for the case of complete State ownership, the Illustrative List does not clarify the relevant level of government ownership to qualify an STE, which thus remains undefined. Thirdly, there is the question of the entity's separate legal personality from the State. Fourthly, the exercise of governmental functions must be considered. This criterion is relevant when the entity concerned is not part of public administration, i.e., when the enterprise is not part of the government according to the domestic constitution. Fifthly, the establishment of the enterprise for commercial purposes is considered. The sixth consideration is the government's authorization or entrustment to conduct operations related to import, export, domestic production, processing, and distribution. Seventhly, the provision of direct or indirect economic support must be considered.

Following the criteria used to determine the relationship between the government and its enterprises, the document provides a list of activities that could indicate the presence of a notifiable STE. The list of activities includes activities related to trade directly, if the STE engages in import or export activities, or indirectly. More specifically, the document refers to operations of control or conduct of imports or exports; multilateral or bilateral administration of agreed quotas, tariff quotas, or other restraint arrangements; issuance of licenses and permits for importation or exportation; determination of domestic sales prices of imports; and enforcement of statutory requirements of an agricultural marketing scheme. However, it is crucial to remember that exercising one or more of the enlisted activities by a given enterprise does not automatically qualify it as an STE.[114] Indeed, while the performance of these activities is one of the elements that can be considered to determine whether an entity constitutes an STE, it is not exclusive. Nor is the list deemed to be complete, meaning that not only enlisted activities can be carried out by an STE. Hence, a certain degree of flexibility allows the framework to encompass STEs performing a wide variety of activities.[115]

Overall, the analysis of the Illustrative List shows a relatively broad approach to the definition of STEs. This is mainly due to two factors. Firstly, the definitional criteria adopted by the WP are rather general in scope and have been largely left undefined. Secondly, the document was based mainly on previously submitted notifications, rather than on the results of a more comprehensive discussion between WTO Members on what an STE is. Then, arguably the Illustrative List falls short in clarifying the definition of STEs. However, the document is still helpful in appreciating the State practice that has developed towards these entities prior to the adoption of the List.

3.4. Further on the context of Article XVII of the GATT, subsequent agreements and other documents: Protocols of Accession, Working Party Reports and references to SOEs

Under Article XII of the Marrakesh Agreement establishing the WTO, States and separate customs territories are allowed to accede to the Agreement under the terms agreed between the aspiring Member and the WTO Members. Thus, negotiations are held between the aspiring acceding Member and incumbents forming part of the Working Party on Accession to determine the terms of accession. This process ultimately leads to the adoption of 'accession packages'. The terms of the accession, however, have to be agreed upon by all WTO Members.

[114] Ibid para 9.

[115] In light of the Interpretative Note Ad Article XVII GATT examined above, the activities to be considered in the qualification process of an enterprise only relate to goods, conceived as excluding services.

Accession packages consist of three documents: a Protocol of Accession, a Working Party Report, and a Schedule of Commitments related to goods and services. The Protocol of Accession is the document through which a State formally qualifies as a Member of the WTO. Protocols of Accession constitute an integral part of the WTO Agreement, while Working Party Reports (WPRs) encapsulate the debate between the applicant and the Members of the Working Party on the Accession. Indeed, WPRs consist of different sections that summarize the discussions between the aspiring Member and the Working Party in the negotiations and contain the commitments undertaken by the applicant in different areas pertaining to the WTO Agreements. The commitments undertaken by the Parties may coincide, elaborate or cover legal fields or subjects outside the WTO legal framework, which therefore generates WTO= or WTO+ obligations. Commitments are usually identified by the phrase 'The Working Party took note of these commitments'. A list of undertaken obligations is provided in the first paragraph of the conclusions of the WPR itself. Lastly, schedules of concessions list the commitments on market access of goods and services undertaken by the applicant concerned.

For the purposes of the study, this section focuses specifically on Protocols of Accession and WPRs since, unlike in WTO Agreements, SOEs are explicitly addressed in these documents. This is relevant to consider for the purposes of Article XVII of the GATT interpretation because such references are often encapsulated in sections dealing with STEs, SEs or State trading activities. While this suggests that Members and aspiring Members involved in WTO accessions consider the two enterprises, SOEs and STEs, as related economic operators, it also sheds light on which features of SOEs are deemed to be relevant to discuss and regulate in the context of multilateral trade regulation. However, the active role played by States in their economies that use SOEs is not dealt with directly in WTO Agreements. Therefore, despite the growing number of SOEs that are involved in accessions to the WTO, the text of multilateral agreements has remained unchanged.[116] As a result, WTO Members decided to deal with the regulation of SOEs in specific clauses of WPRs and Protocols of Accession.[117] As SOEs are not specifically addressed in the WTO Agreements, related obligations in accession packages may qualify as WTO+ obligations, provided they impose obligations on the acceding Member that are not imposed on other Members.

This section aims to reconstruct the explicit reference to SOEs in the accession packages of the 35 Members that acceded to the WTO from 1996, the year of the first accession, to 2022.[118] Indeed, being concluded after the WTO Agreements, it is not infrequent that accession packages, and WPRs more specifically, clarify and provide a shared understanding of WTO Members regarding the interpretation of a given WTO provision or term,[119] such as in this case, SOEs and related entities. In this regard, being an integral part of the WTO Agreement, Protocols of Accession constitute 'context'

[116] Mavroidis and Janow (n 10).
[117] Mavroidis and Janow (n 10).
[118] On the basis of their date of accession, acceding Members to the WTO pursuant to Article XII of the Marrakesh Agreement are: Ecuador (20/01/1996); Bulgaria (1/12/1996); Mongolia (29/01/1997); Panama (06/09/1997); Kyrgyz Republic (20/12/1998); Latvia (10/02/1999); Estonia (13/11/1999); Jordan (11/04/2000); Georgia (14/06/2000); Albania (08/09/2000); Oman (09/11/2000); Croatia (30/11/2000); Lithuania (31/05/2001); Moldova (26/07/2001); China (11/12/2001); Chinese Taipei (01/01/2001); Armenia (05/02/2003); North Macedonia (04/04/2003); Nepal (23/04/2004); Cambodia (13/10/2004); Saudi Arabia (11/12/2005); Viet Nam (11/01/2007); Tonga (27/07/2007); Ukraine (16/05/2008); Cabo Verde (23/07/2008); Montenegro (29/04/2012); Samoa (10/05/2012); Russian Federation (22/08/2012); Vanuatu (24/08/2012); Lao People's Democratic Republic (02/02/2013); Tajikistan (02/03/2013); Yemen (26/06/2014); Seychelles (24/04/2015); Kazakhstan (30/11/2015); Republic of Liberia (14/07/2016); Afghanistan (29/07/2016).
[119] Julia Y Qin, 'Mind the Gap: Navigating Between the WTO Agreement and Its Accession Protocols, Wayne State' University Law School Legal Studies Research Paper Series No. 2016-0536 (2016) 35.

within the meaning of Article 31(1) of VCLT.[120] At the same time, together with WPRs, Protocols of Accession may also qualify as a 'subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions' within the meaning of Article 31(3)(a) of VCLT. For purposes of interpretation, however, the distinction may not have practical relevance as the interpreter has to consider both 'context' and 'subsequent agreements' in the interpretative process without operating a hierarchical distinction between them.[121]

Protocols of Accession are primarily standardized documents.[122] These documents are usually two to six pages long and encapsulate standardized provisions on technical and procedural issues. In this context, WPRs are a useful instrument to interpret the content of Protocols of Accessions, as they do not only indicate the commitments of the aspiring Member but also the discussions undertaken to reach them. In light of this, the study focuses mainly on WPRs because WPRs more than Protocols of Accession facilitate reconstructing the debate that occurred among negotiators and acceding Members on SOEs and state ownership. The study is twofold. On the one hand, following a chronological order, the analysis assesses the terminology used in WPRs that are linked to SOEs. On the other hand, attention is given to commitments undertaken by acceding Members. To this end, WPRs sections on 'Economic Policies' are considered together with related sub-sections dealing with 'State ownership and privatization, state-trading entities', 'State ownership and privatization' or 'State trading practices' under 'Policies affecting trade in goods'.[123]

3.4.1. References to SOEs in Working Party Reports on the accession of Article XII Members: terminology and commitments

The terminology used in WPRs since 1995 reveals an evolution in how commercial entities, where the State is a shareholder, have been addressed. Indeed, although they directly referred to SOEs in section headings,[124] the oldest WPRs left these entities undefined. Instead, the discussion revolved around the role of the State in the economy and the implementation of privatization policies by acceding governments. In more recent WPRs, starting from the accession of the Kyrgyz Republic in 1998, the headings of sections have begun to refer to 'State ownership and privatization'.[125]

[120] Qin ibid 36.
[121] Qin ibid.
[122] With the notable exception of the Protocol of Accession of China. The negotiations that take place in cases of accession follow a procedure that has been established by the WTO Secretariat and WTO Members to avoid excessive fragmentation in the design of Accession Protocols. This ultimately resulted in the adoption of uniform texts, including standard substantive and procedural provisions, with little difference between them. Cfr. Julia Y Qin, '"WTO-Plus" Obligations and Their Implications for the World Trade Organisation Legal System. An Appraisal of the China Accession Protocol' (2003) 37(3) Journal of World Trade 488 f.
[123] The format of Working Party Reports changed over the years. This explains why the title of the sections varies. Despite this evolution, WPRs consistently contain sections dealing with economy, economic policy and foreign trade; the creation and implement of policies; trade-related aspects of intellectual property; transparency; policies affecting trade in services; free trade and customs union agreements.
[124] Cfr: WPR on the accession of Ecuador, WT/L/77 14 July 1995, para 63 ff.; WPR on the accession of Bulgaria, WT/ACC/BGR/5 20 September 1996, para 18 ff.
[125] WPR on the Accession of the Kyrgyz Republic, WT/ACC/KGZ/26, 31 July 1998, para 9; WPR on the Accession of Estonia, WT/ACC/EST/28 9 April 1999, para 16; WPR on the Accession of Latvia, WT/ACC/LVA/32, 30 September 1998, para 12; WT/ACC/ALB/51, 13 July 2000, para 20; WPR on the Accession of Croatia, WT/ACC/HRV/59, 29 June 2000, para 17; WPR on the Accession of Moldova, WT/ACC/MOL/37, 11 January 2001, para 20; WPR on the Accession of Taipei, WT/ACC/TPKM/18, 5 October 2001, para 153; WPR on the Accession of Armenia, WT/ACC/ARM/23, 26 November 2002, para 14; WPR on the Accession of North Macedonia, WT/ACC/807/27, 26 September 2002, para 30; WPR on the Accession of Nepal, WT/ACC/NPL/16, 28 August 2003, para 17; WPR on the Accession of Saudi Arabia,

Interestingly, these WPRs have devoted different sections (and thus different headings) to State ownership, on the one hand, and State trading activities or State trading entities, on the other. In other words, over time, headings of sections on State ownership have evolved in parallel to the types of entities contemplated therein. Starting with Viet Nam in 2006, headings refer to not only SOEs but also State-Controlled Enterprises (SCEs) and enterprises with exclusive or special privileges.[126] In 2007, the WPR on the Accession of Cape Verde merged the two topics, State ownership and State trading, under the same heading, 'State ownership, privatization and State trading entities' for the first time.[127] In subsequent WPRs, it is possible to find references to national definitions of SOEs, which revolve around full or majority State ownership. For instance, during the negotiations carried out for the accession of Estonia, delegates explained that under Estonian legislation, an enterprise qualified as privatized if 50% of the capital was private.[128] Similar discussions were conducted on the accession of Ukraine. Under Ukrainian domestic legislation, an SOE is an enterprise in which the State owns at least 50% of the capital. Similar qualifications characterize the legislation of Tajikistan and Kazakhstan.[129] However, generally, SOEs are treated with 'other enterprises or entities with special or exclusive privileges'.[130] The evolution in the last 15 years suggests that in the eyes of negotiators, SOEs and privileged enterprises now constitute two different groups of enterprises.
Looking at commitments undertaken by Members on SOEs and related entities in WPRs, the analysis shows an evolution in the language used in this regard. Since the initial Working Party Reports, governments usually bound themselves to apply domestic law and regulations to the 'trading activities of SOEs' and privileged entities.[131] In this regard, the Working Party Report on the Accession of Jordan is the first to invoke SOEs in a terminological context that is close to that of Article XVII of the GATT. The report stated that Jordan commits to observe Article XVII of the GATT 1994 and the related Understanding regarding State trading 'with respect to the State-owned enterprises and other enterprises and entities with special or exclusive privileges'. It added that it committs to observing

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WT/ACC/SAU/61, 1 November 2005, para 38; WPR on the Accession of Tonga, WT/ACC/TON/17, WT/MIN(05)/4, 2 December 2005, para 26.

[126] WPR on the Accession of Viet Nam, WT/ACC/VNM/48 27 October 2006, para 52. See also:

[127] WPR on the Accession of Cabo Verde, WT/ACC/CPV/30 (6 December 2007). Similarly see also: WPR on the Accession of Ukraine, WT/ACC/UKR/152, 25 January 2008, para 40; WPR on the Accession of Montenegro, para 27; WPR on the Accession of Samoa, para 27; WPR on the Accession of Vanuatu, para 20; WPR on the Accession of Tajikistan, para 37; WPR on the Accession of Lao PDR, para 29; WPR on the Accession of Yemen, para 28; WPR on the Accession of Kazakhstan, para 90; WPR on the Accession of Seychelles, para 56; WPR on the Accession of Afghanistan, para 40; WPR on the Accession of Liberia, para 39.

[128] WPR on the Accession of Estonia, WT/ACC/EST/28 (9 April 1999), para 17.

[129] WPR on the Accession of Tajikistan, WT/ACC/TJK/30 6 November 2012, para 41; WPR on the Accession of Kazakhstan, WT/ACC/KAZ/93, 23 June 2015, para 103.

[130] See for example: Report of the Working Party on the Accession of Jordan, WT/ACC/JOR/33 WT/MIN(99)/9 3 December 1999, para 161;

[131] See for example: Report of the Working Party on the Accession of Ecuador, WT/L/77 14 July 1995, para 65; Report of the Working Party on the Accession of Mongolia, WT/ACC/MNG/9, 27 June 1996, para 29; Report of the Working Party on the Accession of Panama, WT/ACC/PAN/19 20 September 1996, para 83; Report of the Working Party on the Accession of the Kyrgyz Republic, WT/ACC/KGZ/26 31 July 1998, para 113; Report of the Working Party on the Accession of Croatia, WT/ACC/HRV/59 29 June 2000, para 146; Report of the Working Party on the Accession of Lithuania, WT/ACC/LTU/52, 7 November 2000, para 135. Report of the Working Party on the Accession of Armenia, WT/ACC/ARM/23 26 November 2002, para 148; Report of the Working Party on the Accession of the Former Yugoslav Republic of Macedonia, WT/ACC/807/27, 26 September 2002, para 160; Report of the Working Party on the Accession of Cambodia, WT/ACC/KHM/21, 15 August 2003, para 149; Report of the Working Party on the Accession of Tonga, WT/ACC/TON/17, WT/MIN(05)/4, 2 December 2005, para 133; Report of the Working Party on the Accession of Samoa, WT/ACC/SAM/30, WT/MIN(11)/1, 1 November 2011, para 40; Report of the Working Party on the Accession of Vanuatu, WT/ACC/VUT/17, 11 May 2011, para 23.

'the provisions for notification, non-discrimination, and the application of commercial considerations for trade transactions'.[132] A similar provision can also be found in the Working Party Report for the Accession of Oman.[133] More recent WPRs elaborate further on the notion of commercial considerations, specifying that these include price, quality, availability, marketability, and transportation.[134]

Moreover, recent Working Party Reports reveal an acknowledgment made by governments with respect to the influence that they can, at least potentially, exercise on owned or controlled economic actors. In this regard, they commit not to influence the commercial decisions of SOEs or state-invested enterprises (SIEs) by either direct or indirect means.[135]

Finally, different types of obligations have been undertaken regarding notification requirements. These may be divided into three groups and are based on their legal basis. One set of obligations only covers Article XVII of the GATT.[136] In this case, acceding Members undertake to notify the WTO of those enterprises falling within the scope of that provision. The second set of obligations refers to both Article XVII of the GATT and its Understanding.[137] One last group of commitments refers to Article XVII of the GATT and its Understanding as well as Article VIII of the GATS dealing with Monopolies and Exclusive Service Suppliers.[138]

In light of the above, the terms of the discussion on SOEs and STEs have evolved over time in accession negotiations. Perhaps, the fact that an NME model has characterized the majority of acceding Members to the WTO has intensified the discussion over these entities and has been the grounds for the multilateral community to acknowledge their ever-growing role in the international trade context. However, a closer look at the historical development of negotiating patterns in WPRs would suggest that the key evolutions that occurred both in terms of terminology and commitments correspond to the accession to the WTO of four main Members; namely China, Viet Nam, Saudi Arabia, and Russia.[139]

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[132] Report of the Working Party on the Accession of Jordan, WT/ACC/JOR/33 WT/MIN(99)/9 3 December 1999, para 161. Emphasis added.

[133] Report of the Working Party on the Accession of Oman, WT/ACC/OMN/26 28 September 2000, para 114.

[134] Cf. Report of the Working Party on the Accession of China, para 46; Report of the Working Party on the Accession of Saudi Arabia, para 52; Report of the Working Party on the Accession of Viet Nam, para 78; Report of the Working Party on the Accession of Cape Verde, para 45; Report of the Working Party on the Accession of Ukraine, para 53; Report of the Working Party on the Accession of Montenegro, para 36; Report of the Working Party on the Accession of Samoa, para 40; Report of the Working Party on the Accession of the Russian Federation, para 99; Report of the Working Party on the Accession of Vanuatu, para 23; Report of the Working Party on the Accession of Tajikistan, para 51; Report of the Working Party on the Accession of Lao PDR, para 35; Report of the Working Party on the Accession of Yemen, para 42; Report of the Working Party on the Accession of Kazakhstan, para 142; Report of the Working Party on the Accession of Seychelles, para 2015; Report of the Working Party on the Accession of Afghanistan, para 45; Report of the Working Party on the Accession of Liberia, para 47;

[135] Report of the Working Party on the Accession of China, para 46; Report of the Working Party on the Accession of Chinese Taipei, para 151; Report of the Working Party on the Accession of Viet Nam, para 78; Report of the Working Party on the Accession of Cape Verde, para 45; Report of the Working Party on the Accession of Vanuatu, para 23; Report of the Working Party on the Accession of Lao PDR, para 35; Report of the Working Party on the Accession of Yemen, para 42; Report of the Working Party on the Accession of Liberia, para 47.

[136] Acceding Members that committed to notify enterprises falling within the scope of Article XVII GATT are Albania, Croatia, Georgia, North Macedonia, Latvia, Tonga, Vanuatu, Kyrgyz Republic, Mongolia, Panama, Saudi Arabia.

[137] Acceding Members that committed to notify enterprises falling within the scope of Article XVII GATT and of its Understanding are: Montenegro, Russian Federation, Cabo Verde, Yemen.

[138] Acceding Members that committed to notify enterprises falling within the scope of Article XVII GATT, its Understanding and Article VIII GATS are Bulgaria, Cambodia, Estonia, Jordan, Moldova and Oman.

[139] Similarly see: Dimitar Bratanov, 'Disciplining State Trading Enterprises: Lessons from WTO Accession Negotiations', in Uri Dadush and Chiedu Osakwe (eds), *WTO Accessions and Trade Multilateralism: Case Studies and Lessons from the WTO at Twenty*, (CUP, 2015) 764-794.

Although at the time of these countries' accession the phenomenon of SOEs was not new to WTO Members, these four countries shared novel prominent features that urged negotiators to address the exercise of State ownership over economic entities in a more thorough and precise manner. Firstly, they were all based on an NME model. This entailed a high degree of involvement of the State in major economic activities at the domestic level; the massive use of SOEs, especially in strategic economic sectors; the presence of different institutional and informal links between SOEs and central and local government authorities. Secondly, due to the relevant size of their domestic economies, the accession of these countries to the WTO would have had a more significant impact on international trade than previous accessions of smaller countries. In other words, before their accession, there was no need to precisely and thoroughly address State intervention and SOEs at the multilateral level.[140] Against this backdrop, analyzing the accession packages of China, Viet Nam, Russia, and Saudi Arabia is required in order to unravel and explore the critical points in the evolution of SOEs and the constitutive elements of SOEs.

a) The accession package of China: first steps towards a more refined legal approach for SOEs

China acceded to the WTO in 2001 after 15 years of negotiations.[141] China's Protocol of Accession and related WPR are arguably among the most elaborate accession packages in the multilateral trading system. Indeed, when it comes to the accession of NMEs countries to the WTO, the features of China's economic model represented a novelty compared to the countries that preceded it. Firstly, the size of China's economy was in no way negligible.[142] Secondly, public ownership retained access to industries and economic projects.[143] This turned SOEs into the 'backbone' of China's economic structure.[144] These cumulative elements urged Members to negotiate and in particular pay attention to the terms of accession concerning State ownership. Indeed, the high economic impact that the accession of China to the WTO could have on multilateral trade was concerning for some WTO Members. Thus, the Chinese accession package shows how a particularly complex model of State ownership has been dealt with in the WTO context.
The WPR on the accession of China is an 180-page document, divided into eight sections and nine annexes. The study concentrates on the section dealing with 'State-owned and State-Invested

[140] Mavroidis and Sapir (n 24).
[141] For a thorough analysis on China's accession to the WTO see: David Blumental, ' "Reform" or "Opening"? Reform of China's State-Owned Enterprises and WTO Accession – The Dilemma of Applying GATT to Marketing Economies', (1998) 16(2) UCLA Pacific Basin Law Journal 198-262; Pitman B Potter, 'The Legal Implications of China's Accession to the WTO' (2001) 167 The China Quarterly 592-609; John H Jackson, 'The Impact of China's accession on the WTO', in Deborah Z Cass, Brett G Williams, George Barker (eds*), China and the World Trading System: Entering the New Millenium* (CUP, 2003) 19-30; Julia Y Qin, 'WTO Regulation of Subsidies to State-Owned Enterprises (SOEs) – A Critical Appraisal of the China Accession Protocol' (2004) 7(4) Journal of International Economic Law 863-919; Claustre Bajona and Chu Tianshu, 'China's WTO Accession and Its Effect on State-Owned Enterprises', East–West Center Working Papers, No. 70, April, 2004; Pi Levy, 'The Treatment of Chinese SOEs in China's WTO Protocol of Accession' (2017) 16(4) World Trade Review 635-665. On the role of SOEs in the Chinese economy: Michele Imbruno, 'China and WTO Liberalization: Imports, Tariffs and Non-Tariffs Barriers', (2016) 38 China Economic Review, 222-237; Karen Jingrong Lin, Xiaoyan Lu, Jungsheng Zhang and Ying Zheng, 'State-Owned Enterprises in China: A Review of 40 years of Research and Practice' (2020) 13(1) China Journal of Accounting Research 31-55.
[142] Mavroidis and Sapir (n 24).
[143] Zhous, Gao and Bai (n 67) 982; Liwen Lin, 'A Network Anatomy of Chinese State-owned Enterprises' (2017) 16(4) World Trade Review 583-600.
[144] Ligang Song, 'State-Owned Enterprise Reform in China: Past, Present and Prospect', in Ross Garnaut, Ligang Song and Cai Fang, *China's 40 Years of Reform and Development* (ANU Press, 2018) 345 f.

Enterprises'. Even though the section is only seven paragraphs long, the key role played by SOEs in the Chinese economy clearly emerges from the discussions carried out between incumbents and the aspiring Members. It was also clear that SOEs were considered somewhat incompatible with the WTO multilateral trading system.[145] The WPR provides the tool to reconstruct the debate between negotiators in this regard.

Initially the discussion revolved around substantive aspects concerning the functioning and regulation of SOEs. As for the first aspect, Chinese negotiators highlighted that SOEs operated according to market economy principles. Looking at the regulatory framework, negotiators used a vocabulary closely related to Article XVII of the GATT. More specifically, they stressed that SOEs' 'purchases and sales should be based solely on commercial considerations, without any government influence or application of discriminatory measures'.[146] Thus, WTO Members expressed their concern about the influence exercised by the State on the economy, which could hinder the capacity of SOEs to conduct their operations based on commercial principles.[147] Against this background, the Chinese government, in paragraph 46, undertook the following commitments:

> 'China would ensure that all state-owned and state-invested enterprises would make purchases and sales based solely on commercial considerations, e.g., price, quality, marketability and availability and that the enterprises of other WTO Members would have an adequate opportunity to compete for sales to and purchases from these enterprises on non-discriminatory terms and conditions. In addition, the Government of China would not influence, directly or indirectly, commercial decisions on the part of state-owned or state-invested enterprises, including on the quantity, value or country of origin of any goods purchased or sold, except in a manner consistent with the WTO Agreement. The Working Party took note of these commitments.'[148]

Several observations can be made regarding these commitments.

Firstly, the language of paragraph 46 resembles that of Article XVII of the GATT. While, on the one hand, this may confirm the valuable role of accession packages for the interpretation of this provision, on the other hand, it has been argued that the formulation of paragraph 46 extends the regulation on STEs provided for by Article XVII of the GATT to include all SOEs existing and operating in the Chinese economy.[149] This view suggests that negotiators intended to apply a regulatory framework initially conceived for a different category of enterprises, namely STEs, to another group of entities, SOEs, and were probably applying a rough analogy between the two categories.

Secondly, several terms used in Article XVII of the GATT seem to be specified by negotiators in paragraph 46, as the text elaborates on the types of entities covered by the Protocol. Indeed, the report acknowledges the existence of more than one kind of State-led entity. More specifically, there is a direct reference to SOEs, which is also accompanied by a reference to State-invested enterprises (SIEs).[150] However, the accession package does not define these two enterprises. Due to the lack of

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[145] Cf. Report of the Working Party on the Accession of China, para 44. See Wolfe (n 1) 713-732.
[146] Ibid para 44.
[147] WTO, Report of the Working Party on the Accession of China, WT/ACC/CHN/49, para. 44-46.
[148] Ibid para 46.
[149] Julia Y Qin, 'WTO Regulation of Subsidies to State-Owned Enterprises (SOEs): A Critical Appraisal of the China Accession Protocol', (2004) 7(4) Journal of International Economic Law 884.
[150] Ibid section 6.

a common understanding among negotiators, the difference between the two may not be as straightforward. According to the OECD, the term 'SIE' refers to enterprises where the State retains a minimum threshold of 10% of the voting stock.[151] Against this background, the term 'SOE' may identify enterprises where the (Chinese) State maintains at least 50% of the shares. Therefore, China's accession package covers two kinds of entities: State majority-owned enterprises and enterprises in which the State retains minority ownership. Regarding both SOEs and SIEs, the State exercises a meaningful influence over their activities and decisions. However, the Protocol does not impose any obligation on the Chinese government to privatize these entities. This conforms with the ownership neutrality principle underpinning the multilateral trading system, which remains indifferent to the choice of ownership pattern made by the government.

Secondly, the WPR acknowledges the different types of State influence that may characterize the relationship between the government and its SOEs. Specifically, China's influence on SOEs and SIEs is addressed in terms of direct and indirect influence.[152] In other words, it is acknowledged that the State may influence SOEs' activities directly. However, direct or indirect means of State influence are not explicitly identified and indirect means to exercise such influence warrants particular attention. The WPR clarifies that that they concern the quantity, value, or country of origin of any goods purchased or sold. In this regard, it is interesting to note that the provisions contained in paragraph 46 of the WPR on China's accession to the WTO would be replicated in subsequent accession packages.[153]

The Protocol of Accession of China includes 17 sections dedicated to substantive provisions, nine annexes, and 143 paragraphs.[154] A direct reference to SOEs can be found in Section 10.2 of the Protocol, which states that:

> 'For purposes of applying Articles 1.2 and 2 of the SCM Agreement, subsidies provided to state-owned enterprises will be viewed as specific if, inter alia, state-owned enterprises are the predominant recipients of such subsidies or state-owned enterprises receive disproportionately large amounts of such subsidies.'[155]

Section 10.2 of the Protocol states that a subsidy is specific when (i) Chinese SOEs are predominant recipients of the financial attribution or (ii) when SOEs receive disproportionately large amounts of the subsidy. It has been argued that the legal construction of this Section departs from the ownership neutrality principle,[156] which characterizes the requirement of specificity of subsidies under Article 2

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[151] Hans Christiansen and Yunhee Kim, 'State-Invested Enterprises in the Global Marketplace: Implications for a Level Playing Field', OECD Corporate Governance Working Papers No. 14 (2014) 6.

[152] Ibid point 46.

[153] Report of the Working Party on the Accession of China, para 46; Report of the Working Party on the Accession of Chinese Taipei, para 151; Report of the Working Party on the Accession of Viet Nam, para 78; Report of the Working Party on the Accession of Cape Verde, para 45; Report of the Working Party on the Accession of Vanuatu, para 23; Report of the Working Party on the Accession of Lao PDR, para 35; Report of the Working Party on the Accession of Yemen, para 42; Report of the Working Party on the Accession of Liberia, para 47.

[154] Protocol on the Accession of The People's Republic of China, WT/L/432, 23 November 2001; Working Party Report on the Accession of China, WT/ACC/CHN/49, 10 October 2001. For a detailed analysis of the Protocol of China see: P.I. Levy (n 141) 635-653; James J Nedumpara and Archana Subramanian, 'China's Long March to Market Economy Status: An Analysis of China's WTO Protocol of Accession and Member Practices', in James J Nedumpara and Weihuan Zhou (eds), *Non-Market Economies in the Global Trading System* (Springer, 2018) 13 f.

[155] Working Party Report on the Accession of China, *Ibid.*, emphasis added.

[156] Qin (n 141) 891 f.

ASCM.[157] The reason for this is because the Protocol adopts State ownership as a definitional criterion of the subsidy recipient. By using State ownership as a defining element, this approach arguably shows the tensions that could arise between the regulation of State ownership and the neutrality principle underlying the WTO Agreements.[158]
Overall, the language used in the Chinese WPR and the Protocol of Accession shows a more evolved approach toward State ownership in commercial entities and provides a better understanding of SOEs' function than in GATT 1994. Also, the references to SOEs and SIEs, i.e., two distinct entities with different institutional forms and purposes, can be considered a new development that differs from the broad terminology used in Article XVII of the GATT. Moreover, recognizing the multi-faceted types of influence that the State may exercise on State-owned entities is also progressing in the same direction. However, the analysis also shows the tensions that could arise between the regulation of State ownership and the neutrality principle that underpins the multilateral trade system.

b) The accession package of Viet Nam: ownership and control

Viet Nam acceded to the WTO in 2007, following 12 years of negotiations. Due to the preferential treatment the State has given these entities, SOEs have traditionally grown to be a pillar of the Vietnamese economy.[159] In this context, the Vietnamese government started implementing various legislative reforms in preparation for its accession to the WTO. For instance, in 2005, the first Vietnamese Competition Law was adopted, and, more importantly, SOE reform was undertaken. These elements emerge from the WPR, which, on the one hand, contains a section discussing the competitive framework of Viet Nam and, on the other hand, has a heading on 'Enterprises that are State-owned or -controlled, or with special or exclusive privileges'.[160] After disclosing that 'Viet Nam was shifting from a system of central planning to a market-based economy', this section provides the domestic definition of SOEs qualified as enterprises in which the State owns more than 50% of the shares.[161] Overall, the discussion on SOEs and related entities seems to have been focused on reforming the equitization of SOEs that had been undertaken by the Vietnamese government. Specifically, WTO Members were worried about the ability of the State to influence the functioning and the decision-making of enterprises where the State retained minority ownership.[162] This is interesting, as it is acknowledged to a certain extent that the State does not need to maintain full or majority ownership to be able to influence its commercial actors. In other words, as a minority shareholder, the State has several tools at its disposal to exercise its authority on an enterprise, such

[157] As known, pursuant to Article 2 ASCM, a subsidy granted to an enterprise or to an industry or to a group of enterprises or industries is specific when (i) it is accessible only to certain enterprises; (ii) it is granted in the absence of objective criteria or conditions spelled out in an official document governing the eligibility and the amount of the subsidy; (iii) it is part of a subsidy programme accessible to a limited number of certain enterprises, is predominantly used by certain enterprises, grants disproportionately large amounts of subsidy to certain enterprises and the granting authority can give the subsidy with discretion. Regarding this last element, it should also be considered the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as the length of time during which the subsidy programme has been in operation. Then, pursuant to Article 2.2 subsidies which are limited to certain enterprises located within a designated geographical region are also specific.
[158] Qin (n 141).
[159] Tuanh Vu-Thanh, 'Does WTO Accession Help Domestic Reform? The Political Economy of SOE Reform Backsliding in Vietnam' (2017) 16(1) World Trade Review 90 f.
[160] Report of the Working Party on the Accession of Viet Nam, WT/ACC/VNM/48, 27 October 2006, para 52.
[161] Ibid para 52.
[162] Ibid para 57.

as, for example, the right to appoint members of the Board of Directors or by exercising a blocking minority through voting rights.
The Vietnamese government's commitments concerning SOEs and related entities are contained in paragraph 78 of the WPR. It states:

> 'The representative of Viet Nam confirmed that Viet Nam would ensure that all enterprises that were State-owned or State-controlled, including equitized enterprises in which the State had control, and enterprises with special or exclusive privileges, would make purchases, not for governmental use, and sales in international trade, based solely on commercial considerations, e.g., price, quality, marketability, and availability, and that the enterprises of other WTO Members would have an adequate opportunity in accordance with customary business practice to compete for participation in sales to and purchases from these enterprises on non-discriminatory terms and conditions. In addition, the Government of Viet Nam would not influence, directly or indirectly, commercial decisions on the part of enterprises that are State-owned, State-controlled, or that have special and exclusive privileges, including decisions on the quantity, value or country of origin of any goods purchased or sold, except in a manner consistent with the WTO Agreement and the rights accorded to non-governmental enterprise owners or shareholders. The Working Party took note of these commitments.'[163]

This paragraph elaborates on the notion of SOEs and SCEs as it explicitly includes the notion of control as a constitutive element of these entities. In the same vein, the wording suggests that SOEs and SCEs are different categories of entities from enterprises that enjoy special or exclusive privileges. However, the paragraph also contains several elements, which replicate the content of Article XVII of the GATT. Similarly to what has been observed in the case of the Chinese WPR, it could arguably be concluded that the set of regulations of Article XVII of the GATT dealing with STEs has been expanded and now applies to other entities than was originally envisaged when the provision was first drafted.

c) The accession package of Saudi Arabia: widening the range of covered State-owned economic entities under the WTO legal framework

Saudi Arabia acceded to the WTO in 2005 after 12 years of negotiations. Before that, the Saudi government started implementing important privatization programmes[164] which are comprehensively discussed in the WPR. This Report lists enterprises that qualify as SOEs, SCEs, or enterprises with exclusive rights or special privileges.[165] Thus, while on the one hand, this proves the impact of the more elaborate approach adopted following China's accession, none of the mentioned entities is

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[163] Ibid para 78, emphasis added.
[164] M A Ramady, 'Reforms and Economic Planning', in *The Saudi Arabian Economy. Policies, Achievements and Challenges*, (Springer, 2010) 15 f. On the accession of Saudi Arabia to the WTO see also: MA Ramady and Mourad Mansour, 'The Impact of Saudi Arabias's WTO Accession on Selected Economic Sectors and Domestic Economic Reforms' (2006) 2(3) World Review of Entrepreneurship Management and Sustainable Development 189-199; Steffen Hertog, 'Two-Level Negotiations in a Fragmented System: Saudi Arabia's WTO Accession' (2008) 15(4) Review of International Political Economy 650-679.
[165] Report of the Working Party on accession of the Kingdom of Saudi Arabia, WT/L/627, para 38.

defined, nor is there a criterion for distinguishing between them. However, for each enterprise, the WPR offers information concerning the ownership structure, the sector of activity, and the functioning.

A few elements can be made in this regard. Firstly, the ownership patterns suggest that SOEs, SCEs, and privileged entities are at least majority-owned by the State. Disclosed patterns range from a minimum of 50% of State ownership to 64,60 % and 70%. Also, a wholly State ownership pattern can be identified. Secondly, the report shows that most SOEs, which at the time were undergoing a privatization program, were exploited in strategic sectors of the Saudi economy, e.g., in telecommunications, aviation, railways, water distribution, banking.[166] The discussion discloses the existence of fully government-owned undertakings, especially in the petrochemical industry.[167] Thirdly, for most of these enterprises, the relationship with the Government entails the latter having the right to appoint the majority or the totality of members of Boards of Directors. However, it is specified that enterprises adopt their decisions based on commercial considerations.

The obligations undertaken by Saudi Arabia regarding SOEs and related entities are encapsulated in paragraph 52 of WPR, which states that:

> 'The representative of Saudi Arabia confirmed that, from the date of accession, enterprises that are state-owned or -controlled, and enterprises with special or exclusive privileges, as defined in paragraph 44, would make purchases of goods and services, which are not for government use, and sales in international trade in accordance with commercial considerations, including price, quality, availability, marketability and transportation, and would afford enterprises of WTO Members adequate opportunity, in conformity with customary practice, to compete for such purchases or sales. He also confirmed that Saudi Arabia would notify enterprises falling within the scope of Article XVII upon accession to the WTO. With respect to privatisation, the representative of Saudi Arabia confirmed that from the date of accession, Saudi Arabia would provide WTO Members with annual reports on the status of privatisation in the Kingdom. The Working Party took note of these commitments.'

It can be argued that like the Chinese WPR, this paragraph resembles the wording of Article XVII of the GATT. Consequently, in this case too, it is possible to conclude that Saudi Arabia's WPR applies to SOEs and related entities a set of rules that were originally conceived for application to STEs, which appears to be flattening the notions at issue.

As for the Protocol of Accession, it does not bring additional elements to the analysis because it merely refers to the WPR.[168]

d) The accession package of Russia: a further inclusive development

The Russian Federation acceded to the WTO in 2012 following 18 years of negotiations.[169] Due to the critical role played by State trading activities in the Russian domestic economy, also in this case,

166 Ibid para 38.
167 Ibid para 44 f.
168 Accession of the Kingdom of Saudi Arabia, WT/L/627 11 November 2005.
169 WTO, Report of the Working Party on accession of the Russian Federation to the World Trade Organisation, WT/ACC/RUS/70 WT/MIN (11)/2, 17 November 2011. On the accession process: Peter Naray, *Main Issues of the*

negotiations comprehensively addressed SOEs and related entities. In this regard, the Russian report contains a heading on 'Privatization and Enterprises that are State-Owned or -Controlled, Enterprises with Special or Exclusive Privilege'. Again, no definition or distinguishing criteria concerning these expressions was provided. Notwithstanding this absence, negotiations on privatization address additional types of enterprises that had not been addressed in previous accessions. For example, the WPR specifically addressed State Unitary Enterprises (SUEs).

On the one hand, SUEs can take the form of joint-stock companies (JSCs). On the other hand, they are qualified as enterprises of strategic importance when exploited in the manufacture of products 'for ensuring the defensive capability and security of the State, protecting the morals, health, rights and lawful interests of citizens of the Russian Federation.'[170] This definition is rather broad, but it confirms that these companies are exploited in strategic sectors of the national economy. The WPR also provided information on the functioning of SUEs, which qualify as commercial organizations 'acting in the same way as other commercial organizations, except for transactions aimed at the disposition of the property of the SUE (sales, lease, transfer as bond security, giving of credits, etc.), where the approval of the property owner was required by law.'[171] From a systematic point of view, the fact that this type of entity is discussed in this section may suggest that SUEs are a sub-typology of SOEs for the Russian government.

The accession package subsequently provided details on the ownership patterns of governmental ownership on commercial actors. Negotiators stated that 'the specific percentage of state-ownership of shares in a public joint-stock company was not stipulated and currently the percentage of state-ownership varied from 100 per cent to 34 per cent'.[172] Thus, the qualification of not only complete and majority ownership structures are considered, but also minority State ownership is relevant to qualify an enterprise as an SOE or an SCE. Arguably, the information provided is vague and insufficient to distinguish between the two enterprises based on this criterion.

Paragraph 99 WPR contains the commitments undertaken by the Russian government in this regard. It states:

> 'The representative of the Russian Federation confirmed that the Russian Federation had State-owned and State-controlled enterprises that operated in the commercial sphere. The Russian Federation also had enterprises with exclusive or special privileges with regard to conducting commercial activity. He further confirmed that from the date of accession of the Russian Federation to the WTO, such enterprises, when engaged in commercial activity, would make purchases that were not intended for governmental use and sales in international trade in a manner consistent with applicable provisions of the WTO Agreement. He confirmed, in particular, that such enterprises would make such purchases and sales in accordance with commercial considerations, including price, quality, availability, marketability, and transportation, and would afford enterprises of other WTO

Russian WTO Accession Process, in Peter Naray, *Russia and the World Trade Organization* (Palgrave Macmillan, 2001) 97-145; Maxim Medvedkov and Dmitry Lyakishev, 'The 2012 WTO Accession of Russia: Negotiating Experience – Challenges, Opportunities and Post-Accession Approaches', in Dadush and Osakwe (n 139) 528-544; Ehsan Rasoulinezhad, 'A New Evidence from the Effects of Russia's WTO Accession on Foreign Trade' (2018) 8 Eurasian Economic Review 73-92.

[170] Ibid para 64.

[171] Ibid para 74.

[172] Ibid para 64.

> Members adequate opportunity in conformity with customary business practice, to compete for participation in such purchases or sales. He also confirmed that within the scope of the services commitments of the Russian Federation, including the limitations set out in its Schedule of Specific Commitments on Services, the rights and obligations of the Russian Federation under the GATS, and the regulatory measures of the Russian Federation covered by the WTO Agreement, including pricing regulations, and without prejudice to such commitments, rights, obligations, and measures that are consistent with these commitments, rights, and obligations, the Russian Federation would ensure that such enterprises would act following the provisions set-out in this paragraph. He also confirmed that, upon accession, the Russian Federation would notify enterprises falling within the scope of the Understanding on Article XVII of the GATT 1994. The Working Party took note of these commitments.'

The first lines of the quoted passage contain more straightforward language than usually used in WTO documents dealing with these entities. Moreover, the use of 'also' with respect to privileged enterprises suggests that SOEs, SCEs, and enterprises that have been granted exclusive rights or special privileges constitute, indeed, three different entities. Overall, the wording used in paragraph 99 resembles Article XVII of the GATT, thus probably flattening the distinction between notions of SOEs and STEs.

As for the Accession Protocol, this does not bring additional elements to the analysis because it merely refers to the WPR.[173]

3.4.2. Final remarks

The analysis of WPRs focused on the debate between representatives of acceding countries and WTO Members on State ownership, SOEs, STEs, and related entities. The accession of countries based on different economic models has allowed the WTO Members to deepen their understanding of State intervention in the economy and, more specifically, of State-owned economic entities within the multilateral system of trade rules. In this regard, the following preliminary conclusions may be drawn.

Firstly, the terminology used in accession negotiations has evolved over time. This evolution is, first of all, reflected in the language used in negotiations. As demonstrated already, WPRs make explicit reference not only to STEs but also to SOEs, SIEs, SCEs, and SUEs. Although no definition is provided for these entities, the fact that they are listed individually suggests that they correspond to different economic operators, each with its own institutional form and strategic objectives. In other words, the formal difference in their name corresponds to a substantial difference in their structure and function. However, negotiators left these expressions undefined. Against this background, two tools may help reconstruct the definition of these expressions. These are the Oxford English Dictionary (OED) and State practice.

As for the expression SOE, the emphasis is on the word 'owned'. According to the OED, 'owned' means that something is 'held as one own's property' or is a synonym of 'possessed'. State practice appears to favor defining an enterprise as an SOE when a) the State retains 100% ownership of the enterprise considered; or b) the State retains more than 50% of its shares. Nevertheless, the mere fact

[173] Accession of the Russian Federation, WT/MIN(11)/24 WT/L/839, 17 December 2011.

that the State retains ownership rights does not in itself mean that it influences the management and business decisions of the owned enterprise. This is the case if the State acts like a private investor and aims to make a profit to increase its revenues.
With respect to SIEs, the adjective 'invested' has to be carefully examined. According to the OED, 'invested' means 'that it has been invested in an asset or assets (such as property, stocks, bonds, etc.) to earn income or profit overtime'. It is safe to say that an enterprise is an SIE when public funds from the government have been used to finance its asset or assets. State practice helps develop this notion further. On the one hand, State practice reveals that, in this context, the notion of State is understood in its broadest meaning as both central government and local authorities are relevant. Following this line of argument, the difference between an SOE and an SIE lies in the level of State ownership in the undertaking concerned. While this corresponds to a majority share in SOEs, SIEs are characterized by a minority State ownership pattern.
Against this background, the expression SCE does not refer to ownership or investment. According to the OED, 'controlled' means 'held in check; restrained; subjected to direction and regulation; carefully governed'. Therefore, an enterprise is an SCE when the State conducts and manages its activities. Ownership is not considered in this expression. As for State practice, the language used in negotiations refers to SOEs and SCEs as two, if not opposed, at least different entities. Thus, while SOEs encompass all enterprises, where the State retains full or majority ownership, at the other end of the spectrum SCEs include those undertakings, where such ownership is non-existent and leaves space for the control and direction of the government on the activities of the concerned undertaking. However, the State can exercise its control over an enterprise even without retaining ownership shares, as in the case of a fully privatized SOE operating in a strategic sector of the economy. Indeed, the State would be able to direct the conduct of the enterprise, even in the event privatization, in a way that undermines international trade flow, to the same extent as a non-tariff barrier. Against this background, it can be argued that the notion of 'influence' is the common denominator between the notions of 'control' and 'ownership'. Indeed, these notions become legally relevant for international trade law when they are exercised by the State in order to shape the behavior of an economic operator in a way that contravenes the process of liberalization of international trade as conceived under WTO Agreements.
Finally, in SUEs, emphasis is placed on the word 'unitary'. According to the OED, unitary means 'of the nature of a unit, indivisible'. Thus, this expression appears to refer to enterprises that are a unit of the State, or an entity that cannot be separated from it. Such unity does not necessarily entail that the entity belongs to the State or is a State organ. However, it could encompass enterprises that are subject to the most intense control of the State; for example, a situation in which its decision-making process entirely depends on the State's will and objective. This is supported by State practice, which does not recognize SUEs as having any ownership rights on their assets.
The reference to these several types of enterprises specifies and widens the range of the entities covered by the WTO legal system. Indeed, Protocols of Accessions and State practice acknowledge and shed light on the diverse relationships that can link the State to certain economic operators. Thus, they contribute to specifying the vague expressions and words that characterizes Article XVII of the GATT.
Overall, WPRs reveal a more complex approach toward regulating State ownership, SOEs, and related entities. However, this also shows that tensions may arise regarding the neutral approach of the WTO towards ownership. This has been the case in China's accession. Ultimately, such tensions

tend to apply Article XVII of the GATT when it involves both STEs and SOEs, which remains the only provision explicitly dealing with the State as a trade under multilateral trade rules. This entails an equation of the notions at issue that can in turn flatten the differences between SOEs and STEs. If the two concepts coincide, this approach does not raise any problems because the same entities deserve the same treatment. If, on the other hand, SOEs and STEs do not coincide or only partially overlap, then this approach risks regulating different entities in the same way. Thus, as not all SOEs would be captured under that regulatory framework, states can circumnavigate their multilateral obligations.

One could interpret the evolution in WPRs and Protocols of Accession on the regulation of SOEs and related entities as a sign of the growing understanding of this phenomenon in the multilateral trade community. Such evolution is arguably closely intertwined with the universal character that the WTO developed over time. WTO membership came to include countries with different legal and economic backgrounds.[174] Indeed, by incorporating market-based systems, former NMEs, along with developed and developing countries, the multilateral trading system was confronted with legal systems and economies in which the role of SOEs was prominent and, in any case, considerably more pervasive than that assigned to them in market economies or original GATT/WTO incumbents. Moreover, this evolution has been boosted by the accession of countries with considerably big economies that are heavily supported by SOEs, such as China, Viet Nam, Saudi Arabia, and Russia. The presence of these two aspects combined – a high number of SOEs operating in the context of some of the biggest economies in the world - was a significant novelty and a cause of concern for WTO Members. Before this moment, NMEs aspiring to accede to the WTO were relatively small and could have only a limited impact on international trade. Thus, State intervention and SOEs did not have to be specifically addressed.[175] Ultimately, the accession of these countries pushed the evolution of SOE regulation in subsequent negotiations for other acceding countries,[176] while also providing a glimpse into the multifaceted nature of the phenomenon of SOEs.

3.5. Looking at subsequent practice in the application of the treaty: notifications on STEs submitted by Members under Article XVII of the GATT

The above analysis shows that the wording and the context of Article XVII of the GATT reveal a fragmented scenario when it comes to interpreting the term 'STE'. Therefore, the boundaries of the notion arguably need to be further refined in order to assess which entities fall under its scope and which ones are excluded.

To fully and correctly grasp the contribution by subsequent practice regarding the definition of STEs by recourse to the interpretation of Article XVII of the GATT, it is useful to elaborate on the role of subsequent practice in the international treaty norms on interpretation and to identify whether notifications qualify as such. If the meaning of a term is still unclear despite the analysis of the wording and relevant context, the interpreter may also resort to subsequent practice. The latter is expressly mentioned in Article 31.3(b) of the VCLT, which refers to 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'.[177]

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[174] Mavroidis and Janow (n 10) 571.
[175] Mavroidis and Janow (n 10).
[176] Bratanov (n 139)) 764-794.
[177] Article 31.3(b) VCLT, emphasis added.

Subsequent practice is a means of interpretation of treaty provisions to the same extent as the ordinary meaning and the objective and scope of the treaty concerned.[178] Indeed, it is an authentic means of interpretation that 'consists of conduct in the application of a treaty, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty'.[179] The conduct that may constitute subsequent practice is not tied to any formal requirements. Therefore, it may consist of acts or omissions.[180] Moreover, 'subsequent practice' is any conduct performed after the conclusion of the treaty.[181] In any case, acts or omissions must be 'in the application of the treaty'. The relevant conduct is the one that conforms to a treaty obligation to which the parties are bound.[182] In other words, treaty application typically involves some degree of interpretation. Lastly, the term 'agreement' under Article 31.3(b) of the VCLT does not refer to any specific degree of formality.[183] Rather, it can be reflected in distinct acts that, when combined, reveal a shared understanding of the provision by the parties.[184] If there is a conflict, the agreement cannot be envisaged. However, a different application of the same provisions by the parties does not automatically rule out their agreement and shared understanding.[185] Indeed, there is a 'common understanding' when the parties develop that understanding independently of one another but are collectively aware of a shared understanding.[186] Against this backdrop, WTO adjudicating bodies acknowledge the relevance of subsequent practice under Article 31.3(b) of the VCLT for the interpretation of WTO Agreements Treaty provisions. More specifically, the AB specified that subsequent practice, in order to be relevant for interpretation, has to be 'a 'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties regarding its interpretation.'[187] The conduct of a single member does not constitute subsequent practice. In EC – Computer Equipment, the AB explained that: 'The purpose of treaty interpretation is to establish the common intention of the parties to the treaty. To establish this intention, the prior practice of only one of the parties may be relevant, but it is clearly of more limited value than the practice of all parties.'[188] This means that under multilateral treaties, such as the WTO Agreements,

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[178] Irina Buga, *Modification of Treaties by Subsequent Practice* (OUP, 2018) 21f. International tribunals refer to State practice in their interpretative efforts relating to applicable provisions. See Anthony Aust, *Modern Treaty Law and Practice* (CUP, 2013) 215.

[179] Draft Conclusion 4, ILC Draft conclusions on subsequent agreement and subsequent practice in relation to the interpretation of treaties (2018).

[180] Oliver Dörr, 'Article 31. General Rule of Interpretations' in Dörr and Schmalenbach (n 46) 595 f.

[181] It should be noted that this also includes conducts adopted before the entry into force of the agreement. See Commentary to Conclusion 4, para 2.

[182] A/73/10, Commentary to Conclusion 6, para 7. By acting in conformity with the treaty obligations, States apply the treaty. The application of a treaty necessarily implies a certain degree of interpretation of its provisions. While the application of a treaty has to do with the conduct of the State, its interpretation is a cognitive operation that makes explicit how a certain term is conceived for the purposes of its application. Although different, application and interpretation are deeply intertwined. Ibid, para 3.

[183] Ibid, Commentary to Conclusion 10, para 7.

[184] A/73/10, Commentary to Conclusion 4, para 10. In this regard, the Commentary specifies that the difference between 'agreement' as conceived under Article 31.3(a) lies in the fact that in this last provision, the agreement discloses in itself the common understanding of the Parties to the treaty, whereas under paragraph (b) that understanding has to be extrapolated from.

[185] Ibid, Commentary to Conclusion 10, para 4.

[186] Ibid, para 8.

[187] *Japan — Alcoholic Beverages II*, (1 November 1996) WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, page 12.

[188] WTO, *EC — Computer Equipment* (5 June 1998) WT/DS62/AB/R WT/DS67/AB/R WT/DS68/AB/R para 93.

a given conduct must be carried out by more than one member to be able to identify a pattern.[189] Hence, a single unilateral act would arguably be considered insufficient by the AB as a relevant means of interpretation. However, multiple unilateral acts by a group of WTO Members may be pertinent in shedding light on the parties' intention to interpret a given provision.

Against this backdrop, it is argued that STEs notifications constitute relevant subsequent practice within the meaning of Article 31.3(b) of the VCLT as long as they display a 'concordant, common and consistent' sequence of acts or pronouncements. As such, they may be used to shed light on the constitutive elements of STEs as conceived by WTO Members. Indeed, all WTO Members must notify entities falling within the working definition of STEs pursuant to the Understanding on the Interpretation of Article XVII of the GATT. The notification requirement applies to all Members irrespective of whether they established any STEs.[190] They are submitted individually by Members to the WP on STEs in the form of a questionnaire.[191] In the document, Members are expected to disclose the most relevant characteristics of the notified STE, i.e., the legal basis for its establishment, the structure, the functioning, and the main fields of activity. STEs notifications are therefore submitted as part of the application to the Treaty. These elements taken together qualify STEs notifications as documents adopted by WTO Members in relation to the application of the treaty. This is because notification are adopted to comply with an obligation of the GATT. While applying the Agreement, WTO Members inevitably provide their interpretation of what is to be included in the notion of STEs. Notifications, therefore, contain a more or less detailed description of the constitutive characteristics and functioning of notified enterprises. Hence, they arguably reflect the meaning attributed to the term 'STE' by notifying members in the application of Article XVII of the GATT. At the same time, these documents are available to all the other contracting parties that can easily access their content, allowing the formation of a common understanding of the notion. Although submitted questionnaires are often entirely missing, provide incomplete information, or are not submitted regularly,[192] there is still a critical number of incumbents that regularly implement

[189] It is not required, however, that all Members engage in the same conduct for it to be relevant for interpretative purposes. See also: WTO, *EC — Chicken Cuts* (12 September 2005) WT/DS269/AB/R, para 259.

[190] WTO, 'Technical Cooperation Handbook on Notification Requirements' (revised 4 April 2021) State Trade Enterprises section.

[191] Working Party on State Trading Enterprises, Questionnaire on State Trading, G/STR/3/Rev.1, 14 November 2003. The current applicable *questionnaire* is composed of the following parts: I. Enumeration of State Trading Enterprises - A. Identification of state trading enterprises, B. Description of products affected; II. Reason and Purpose – A. Reason or purpose for establishing and/or maintaining state trading enterprise; B. Summary of legal basis for granting the relevant exclusive or special rights or privileges, including legal provisions and summary of statutory or constitutional powers; III. Description of the functioning of the State trading enterprise – A. Summary statement providing overview of operations of the state trading enterprise; B. Specification of exclusive or special rights or privileges enjoyed by the state trading enterprise; C. Type of entities other than the state trading enterprise that are allowed to engage in importation/exportation and conditions for participation; D. How import/export levels are established by the state trading enterprise; E. How export prices are determined; F. How the resale prices of imported products are determined; G. Whether long-term contracts are negotiated by the state trading enterprise. Whether the state trading enterprise is used to fulfil contractual obligations entered into by the government; H. Brief description of market structure; IV. Statistical Information; V. Reason why no foreign trade has taken place; VI. Additional information (as appropriate).

[192] Cf. Document G/STR/27, Status of Notifications Submitted by WTO Members Under Article XVII:4(a) of The GATT 1994 And Paragraph 1 of The Understanding on The Interpretation of Article XVII of The GATT 1994.

A practical example concerning incomplete information could be the relatively recent notification submitted by the Government of Mali in which it is simply stated that: 'Since the 1990s, the Republic of Mali has been engaged in a vast reform programme involving the State's withdrawal from production and marketing activities. Accordingly, existing State companies and enterprises were privatized. However, the *Société Nationale des Tabacs et Allumettes du Mali* (SONATAM SA) has the exclusive right to import cigarettes in the Republic of Mali'. No further information is provided on the entities mentioned in the notification. Cfr: G/STR/N/17/MLI 9 May 2018. A second example of an incomplete

notification requirements on STEs. Arguably, this number is consistent enough to make it possible to investigate whether an established pattern as to what constitutes an STE exists, or not, in the practice of WTO Members.

To this end, the following sections show the findings related to the analysis of more than 900 documents, encompassing all STEs notifications submitted to the WTO and related documents. More specifically, the study first deals with constitutive elements of STEs emerging from notifications submitted by Members under Article XVII:4(a) of the GATT and to the Understanding on the Interpretation of Article XVII of the GATT. Then, following a complementary approach the analysis focuses on documents related to STEs notification, including questions submitted by Members under Article XVII:4(c) of the GATT and Trade Policy Reviews, with specific reference to the parts dealing with activities related to State trading and SOEs. For the purpose of this study, particular attention has been given to the terminological criteria and substantive elements related to notified enterprises. In this context, the study aims to assess whether and how the term SOEs has been referred to by notifying members and if, and to what extent, it has been placed in relation to the notion of STE. Subsequently, the study focuses on substantive aspects of notified entities, namely ownership and control patterns, sectors of activity, and the grant of exclusive rights and special privileges.

3.5.1. The 'E' in STEs: The terminology used in STEs notifications

Based on the personal research conducted on STEs notifications submitted by Members according to Article XVII:4 of the GATT and the Understanding on the Interpretation of Article XVII of the GATT, it seems that the terminology used by governments to name notified enterprises, which admittedly, in their view, constitute STE varies greatly. These terminological differences, arguably the result of the lack of an agreed definition of STE, do not hinder the interpretative value of notifications as subsequent practice because they do not reflect a conflict between Members. Rather, they highlight differences in the application of the same provision. That said, it is important to note that the term SOE is rarely found in submitted notifications.

The expressions used in submitted notifications can be divided into two groups. The first group includes those expressions that emphasize the entity's public character. The terms used refer to entities that are part of the State's apparatus. These are often referred to as 'public enterprise',[193] 'governmental agency',[194] and 'State agency'.[195] The link between the notified entity and the government is particularly evident when the latter notifies its ministries, as in the case of Japan. The Japanese government notified the government itself as an STE, referring specifically to the Ministries

questionnaire to be considered is the notification submitted by Poland in 1995. In document G/STR/N/1/POL, 5 October 1995, in which the Polish government notified the Agricultural market Agency (AMA) it is stated that the notified entity 'is a public agency, which has some features of a state trading entity within the meaning of the GATT Article XVII'. No further explanation is provided concerning, for example, in which respect the notify entity is an STE under the mentioned provisions and on the reasons why it does not coincide with it completely. For an insightful perspective on notifications and transparency see: Leonardo Borlini, 'A Crisis Looming in the Dark: Some Remarks on the Reform Proposals on Notifications and Transparency', in QUIL-Zoom out 63 (2019) Bocconi Legal Studies Research Papers No. 3525423, 83-111.

[193] Tunisia on Tunisian Refining Industries Corporation, G/STR/N/1/TUN, G/STR/N/3/TUN, G/STR/N/4/TUN, G/STR/N/5/TUN, G/STR/N/6/TUN, G/STR/N/7/TUN G/STR/N/8/TUN, G/STR/N/8/TUN/Rev.1, G/STR/N/9/TUN G/STR/N/10/TUN, G/STR/N/11/TUN, G/STR/N/12/TUN G/STR/N/13/TUN, G/STR/N/14/TUN, G/STR/N/15/TUN G/STR/N/16/TUN.

[194] Indonesia on Perum BULOG. Cfr. WTO, G/STR/N/18/IDN, Section II.B.

[195] Slovak Republic on the State Fund for Market Regulation, G/STR/N/1/SVK, G/STR/N/2/SVK, G/STR/N/3/SVK.

of Health, Labour and Welfare and the Ministry of Agriculture, Forestry and Fisheries.[196] Similarly, the Republic of Korea recently notified the Ministry of Agriculture, Food and Rural Affairs as an STE.[197] Thailand defined its notified Public Warehouse Organization (PWO) as a 'State enterprise attached to the Ministry of Commerce'.[198] Notified entities are thus part of the State in the stricter meaning.

Sometimes a new element is introduced, like in the case of Brazil's notifications. These notifications qualified the Companhia Nacional de Abastecimento (Conab) as a 'public federal enterprise of private law',[199] thus providing clarification over the applicable domestic law to the entity concerned. The same can be said for Mexico's notification of Pétroleos Mexicanos, which was qualified as a 'State production enterprise that is wholly owned by the Federal Government'.[200] Here, the identification of the activity in which the entity is involved is straightforward. One more example is provided by the notification of the West Bengal Essential Commodities Supply Corporation (WBECSC), defined by the Indian government as 'a state level Public Sector Undertaking that is fully owned by the Government'.[201]

By contrast, the second group of notifications identifies STEs as entities that do not belong to the State. In these cases, States refer to notified enterprises as 'non-state public entity',[202] 'non-state public entity with its own assets, operational and administrative autonomy',[203] 'former non-departmental government agency transformed into a State-Owned Enterprise',[204] or 'non-administrative public establishment'.[205] In these cases, state practice tends to stress that the notified enterprise, although qualifiable as a State-trading entity, is a non-state organ. These expressions convey the idea that the State, although owner and regulator at the same time with reference to the disclosed entity, does not interfere with its activities, management, and decision-making process. It could be argued that the aim is to minimize somehow the relationship between the government and the economic operators, over which the government retains a certain degree of control. However, a closer look at the corporate structure may reveal that such involvement is often present.

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[196] See, G/STR/N/18/JPN, 15 September 2020, Part 2, Section I, point A, and Part 3, Section I, point A. In this regard, it is interesting to note that the footnote 2 of the Understanding on the Interpretation of Article XVII GATT states that entities or government Ministries enjoying regulatory authority in areas relevant to international trade do not constitute an STE. See also G/STR/N/7/JPN, 6 August 2001, notification submitted by the government of Japan to notify, *inter alia*, its Food Agency.

[197] G/STR/N/18/KOR, 12 October 2020.

[198] G/STR/N/17/THA, 19 July 2021.

[199] Brasil on Companhia Nacional de Abastecimento (Conab – National Company for Food Supply). Cfr. WTO, G/STR/N/18/BRA, Section II.B.

[200] Mexico on Petróleos Mexicanos (PEMEX), G/STR/N/16/MEX.

[201] G/STR/N/15/IND, 8 November 2018.

[202] Costa Rica on Costa Rican Coffee Institute (Instituto del Café de Costa Rica, ICAFE), G/STR/N/1/CRI, G/STR/N/2/CRI G/STR/N/3/CRI, G/STR/N/4/CRI, G/STR/N/5/CRI G/STR/N/6/CRI G/STR/N/7/CRI, G/STR/N/8/CRI, G/STR/N/9/CRI, G/STR/N/10/CRI G/STR/N/11/CRI, G/STR/N/12/CRI G/STR/N/13/CRI, G/STR/N/14/CRI G/STR/N/15/CRI, G/STR/N/16/CRI, G/STR/N/17/CRI.

[203] Costa Rica on National Rice Growers Corporation (Corporación Arrocera Nacional, CONARROZ), G/STR/N/5/CRI G/STR/N/6/CRI G/STR/N/7/CRI, G/STR/N/8/CRI, G/STR/N/9/CRI, G/STR/N/10/CRI G/STR/N/11/CRI, G/STR/N/12/CRI G/STR/N/13/CRI, G/STR/N/14/CRI G/STR/N/15/CRI, G/STR/N/16/CRI, G/STR/N/17/CRI

[204] Indonesia on Perum BULOG. Cfr. WTO, G/STR/N/18/IDN, Section II.B.

[205] Tunisia on National Edible Oils Board (ONH), G/STR/N/1/TUN, G/STR/N/3/TUN G/STR/N/4/TUN G/STR/N/5/TUN G/STR/N/6/TUN, G/STR/N/7/TUN G/STR/N/8/TUN, G/STR/N/8/TUN/Rev.1 G/STR/N/9/TUN G/STR/N/10/TUN , G/STR/N/11/TUN, G/STR/N/12/TUN, G/STR/N/13/TUN, G/STR/N/14/TUN, G/STR/N/15/TUN G/STR/N/16/TUN

In this regard, it is interesting to consider the notifications submitted by Costa Rica on the Agro-Industrial Sugar Cane League (Liga Agrícola Industrial de la Caña de Azúcar, hereinafter 'LAICA'). The government of Costa Rica defined LAICA as 'a non-State public entity, with its own legal personality'.[206] However, closer scrutiny of the submitted notification shows that LAICA's structure comprises the Marketing and the Corporate divisions. The latter is managed by a Board of Directors of eight members. Among these are the Minister of Agriculture and Livestock and the Minister of the Economy, Industry and Trade. Under these circumstances, it seems difficult to deny the existence of a meaningful connection between the State and the corporation.
The last group of notifications includes expressions based on different constitutive criteria. These include the definition of an entity as a 'voluntary, non-profit aid organization'.[207] Here the focus appears to be the social end of the activities carried out by the concerned enterprise. By contrast, it is also possible to find STEs qualified as 'industrial and commercial public establishment',[208] where the emphasis is on the commercial character of their activities, as 'public federal enterprise of private law', as 'quasi-government entity',[209] or 'non-administrative public establishment'.[210]

a) The term 'SOE' in STEs notifications

The research conducted on the terminology of STEs notifications reveals that the term SOE is only found in these documents on a few occasions. Indeed, governments rarely use the term SOE directly to identify a notified entity under Article XVII of the GATT. More specifically, the study of submitted notifications showed that only five Members meaningfully used the term 'SOE' and related expressions:[211] the European Union (EU), Indonesia, Mexico, Trinidad and Tobago, and Vietnam. In numbers, this corresponds to 4% of total WTO membership. Their submitted documents will be examined now.

i) The European Union[212]

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[206] WTO, G/STR/N/16/CRI; G/STR/N/17/CRI; G/STR/N/18/CRI.
[207] This is the qualification that Turkey used for the Turkish Red Crescent (TRCS). Cfr. WTO, G/STR/N/15/TUR G/STR/N/16/TUR, Section II.
[208] Tunisia on Tunisian Central Pharmacy (PCT), G/STR/N/1/TUN, G/STR/N/3/TUN G/STR/N/4/TUN G/STR/N/5/TUN G/STR/N/6/TUN, G/STR/N/7/TUN G/STR/N/8/TUN, G/STR/N/8/TUN/Rev.1 G/STR/N/9/TUN G/STR/N/10/TUN , G/STR/N/11/TUN, G/STR/N/12/TUN, G/STR/N/13/TUN, G/STR/N/14/TUN, G/STR/N/15/TUN G/STR/N/16/TUN
[209] United States on United States Enrichment Corporation. WTO, G/STR/N/1/USA, 19.
[210] Tunisia on National Edible Oils Board (ONH). Cfr. WTO, G/STR/N/15/TUN/Suppl.1; G/STR/N/15/TUN; G/STR/N/11/TUN; G/STR/N/12/TUN; G/STR/N/13/TUN; G/STR/N/14/TUN; G/STR/N/7/TUN; G/STR/N/8/TUN; G/STR/N/3/TUN; G/STR/N/4/TUN; G/STR/N/5/TUN; G/STR/N/6/TUN; G/STR/N/1/TUN/Add.; G/STR/N/1/TUN/Corr.1.
[211] The term is also found in the notification submitted in 2007 by the government of Chinese Taipei. In notifying the Taiwan Tobacco and Liquor Corporation, the government qualified it as a 'State-owned enterprise' not enjoying any exclusive or special rights. The enterprise was eventually privatized. Cfr. G/STR/N/11/TPKM, 7 February 2007. Similarly, the government of Ecuador used the term SOE to identify the National Warehousing Unit (UNA EP) in charge of supporting domestic marketing of agricultural staples for food sovereignty purposes the management of temporary warehousing, and transport and marketing of the harvest. No information is provided on the ownership pattern of UNA EP, and it does not enjoy exclusive rights or privileges. Cfr.G/STR/N/16/ECU, 6 July 2018, Section III point A. Lastly, the government of Norway in 1999 notified Arcus AS operating in the alcohol sector. The entity was defined as a "State-owned company". For a detailed analysis on Norway's notifications see section 5.3.5.
[212] As known, the EU is a WTO Member along with EU Member States, which are also WTO Members in their own right. Provided that the EU has full and exclusive competence in the area of common commercial policy, it acts as a single actor under the WTO, where it is officially represented by the Commission. In this capacity, the EU submits STEs

In its notification practice under Article XVII of the GATT, the EU identified as SOEs two Finnish undertakings operating in the alcohol beverages sector: Systembolaget AB and Alko Inc.[213] A few observations can be made in this regard. Firstly, it is important to note that the notifications qualify Systembolaget AB and Alko Inc. not only as SOEs but as 'State-owned limited company' (SOLC).[214] This expression is arguably more specific than the term 'SOEs'. This is because it provides information on the legal structure adopted by the entities, although the amount of State ownership or liability remains undefined. Secondly, both the disclosed enterprises enjoy exclusive monopoly rights. Indeed, Systembolaget AB is a SOLC enjoying a retail monopoly for alcoholic beverages and non-beverage alcoholic preparations. For its part, Alko Inc., under the Finnish Alcohol Act, enjoys a monopoly right for the retail and sale of alcoholic beverages containing over 5.5% alcohol. The notifications also provide information on the reasons that justify the grant of such privileges to the notified entities. For Systembolaget AB, the monopoly rights are justified by public policy reasons as 'alcohol-related problems are reduced if alcohol is sold in the absence of a profit motive'.[215] In other words, the conferral of a privilege, in this case, is justified with the protection of a non-trade value, i.e., public health. Similarly, Alko, Inc. is entrusted with the task of reducing alcohol consumption and the risks connected with it.

ii) Indonesia

In its notification practice under Article XVII:4(a) of the GATT, the government of Indonesia consistently notified an enterprise operating in the food sector, Perum BULOG. This entity is defined as 'a former non-departmental government agency transformed into a State-Owned Enterprise'.[216] In this case, the entity being notified used to be part of the State apparatus. However, this does not seem to be the case anymore when the notification is submitted. In the previous notification, Perum BULOG was defined as a governmental agency. Thus, the government of Indonesia seems to qualify as STEs entities related to it with varying degrees of intensity, from closer to broader ties with the central State. Interestingly, Perum BULOG is also referred to as an STE.[217] Therefore, it can be inferred that the government of Indonesia considers the two terms, SOE and STE, as synonyms.
Moreover, the notified enterprise enjoys the special right to 'undertake the government mandate to import/export and distribute rice, maintain national public stock for the price stabilization programme and food security purposes.'[218] A few interesting elements emerge from this statement. Firstly, the word 'mandate' implies that the State exercises its control over the activity of the concerned entity. In other words, the State appears to determine the conditions to be applied to import, export, and distribution of rice. Secondly, the decision to grant a privilege to the undertaking is strictly linked to a public policy objective, i.e., price stabilization and price security purposes.

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notifications on behalf of its Members. It also promotes EU Members States' interests before the WTO Dispute Settlement Body.

[213] These are not the only entities notified by the EU pursuant to Article XVII:4(a) GATT. However, these appear to be the only ones that were identified with the term SOE.

[214] WTO, G/STR/N/13/EU; G/STR/N/14/EU; G/STR/N/15/EU; G/STR/N/16/EU; G/STR/N/17/EU; G/STR/N/18/EU.

[215] See WTO, G/STR/N/13/EU; G/STR/N/14/EU, Section II, point A.

[216] WTO, G/STR/N/18/IDN. In previous notification, Perum BULOG was indeed defined as a governmental agency.

[217] WTO, G/STR/N/18/IDN, Section I, point A.

[218] Ibid, Section III, point B.

iii) Mexico

In its latest notification submitted in 2016, the government of Mexico notified the Federal Electricity Commission (CFE) and Petróleos Mexicanos (PEMEX). CFE operates in the energy sector and is entrusted with the provision, transmission, and distribution of electricity 'on behalf and by order of the Mexican State'. It is also responsible for generating, transmitting, distributing, and marketing electricity. Its primary purpose is to create value and profit for the State. PEMEX operates in the oil sector and is in charge of maximizing the State's oil revenues and national development. The Mexican delegation uses two expressions to identify the two entities at issue: 'State production enterprise' and 'State-owned production enterprise'. Like Perum BULOG, the Indonesian notified entity, this case also seems to suggest that the two expressions are considered equivalents or synonyms by the notifying Member. However, the Mexican delegation arguably provided more details in the following respects. Firstly, the notification includes information on the notified enterprises' ownership patterns, specifying that the government wholly owns CFE and PEMEX. Secondly, the expressions used explicitly specify the type of activity undertaken by the two entities. Thirdly, they both enjoy exclusive or special rights. More specifically, CFE maintains control over the national electricity system on behalf of the State, while PEMEX enjoys exploration, development, and exploitation of hydrocarbon.

iv) Trinidad and Tobago

In 1998, Trinidad and Tobago notified the National Petroleum Marketing Company Limited (NPMC) and defined it as a 'state-owned private company' (SOPC).[219] This expression, which simultaneously refers to a public and private form of ownership of the company, is puzzling. Looking at the description of the functioning of the enterprise, it is possible to note that many activities were stated to be carried out in competition with other undertakings. Therefore, one can speculate that the reference to the private nature of the company refers to the type of law applicable to it, i.e., private domestic law. However, the criterion of State ownership is not further specified.

At the time of the notification, this enterprise enjoyed a monopoly on wholesaling automotive fuels. This right was removed the following year, and the enterprise should have been notified again. Adopting such a restrictive approach by the government of Trinidad and Tobago is in line with the Understanding on the Interpretation of Article XVII of the GATT. However, in the opening line of its notifications, the government of Trinidad and Tobago stated that it submitted it 'pursuant to Article XVII:4(a) of the GATT 1994 and paragraph 1 of the Understanding on the Interpretation of Article XVII'.[220] Therefore, if the company still existed and was owned by the government, Trinidad and Tobago was expected to notify it, as the substantive provisions of Article XVII of the GATT still apply.

v) Viet Nam

[219] WTO, G/STR/N/4/TTO.
[220] Ibid., emphasis added.

In its submitted notification in 2016,[221] the government of Viet Nam disclosed the existence, among other STEs, of XUNHASABA, an enterprise operating in the media sector. In its definition, the Vietnamese government qualified XUNHASABA as a 'State Owned Enterprise under the Ministry of Culture, Sport and Tourism', which is 100% owned by the State.[222] This case shows that the term SOEs is associated with a complete State ownership pattern. Although another enterprise was notified in the same document,[223] this expression is only used for XUNHASABA. Moreover, ownership seems to be paired with the State's control or influence, as the enterprise acts under the Ministry of Culture, Sport and Tourism.

As for the field of operativity, the notified entity is entrusted with the import and export of international newspapers, periodicals, and journals for which it enjoys an exclusive right to engage in such operations.

b) Relevant constitutive elements of STEs emerging from the terminology used in submitted notifications

The previous section analyzed the terminology in submitted notifications concerning entities that qualified as notifiable STEs by WTO Members. In this regard, the study first adopted a broad perspective by considering in general terms the language used in submitted notifications to identify entities that Members deemed to be notifiable under article XVII:4(a) of the GATT. Then, following a narrower approach, the study investigated those notifications, where Members defined notified entities with expressions related and close to that of 'SOEs'. The study suggests that the terminology used is not consistent across documents. In other words, there is no standard practice of notified entities. The wide range of expressions used in notifications arguably mirrors the controversy that characterizes the notion of STEs.

Against this background, however, the second group of analyzed notifications (i.e. those containing expressions close to that of 'SOE') shows some consistent elements. Firstly, the documents disclose a constant presence of special or exclusive rights or privileges enjoyed by the entities concerned. In the case of the EU, the notified enterprises enjoy exclusive monopoly rights concerning the retail and sale of the goods. Such privileges, in the case of Indonesia, are related to import, export, and distribution. Then, in the case of the enterprise notified by Trinidad and Tobago, a monopoly right linked to wholesaling operations was disclosed. Secondly, the conferral of such exclusive rights and privileges is justified by social policy reasons. This is the case for, at least, the EU and Indonesia, while Trinidad and Tobago did not provide information. Thirdly, the study suggests that ownership is not a necessary criterion for identifying or defining SOEs.

3.5.2. The 'S' in STEs: State ownership and control

[221] G/STR/N/15/VNM G/STR/N/16/VNM, 20 April 2016, this is the only notification submitted by Viet Nam since its accession in 2007.

[222] Ibid., section 2.3, point A.

[223] The second enterprise notified by the Vietnamese government is the Tobacco Corporation of Vietnam (VINATABA), which enjoys an exclusive right to import cigarettes and cigars in Viet Nam. For this entity, no information on ownership is provided. Cf. Ibid.

Having surveyed submitted notifications through the criterion of terminology, the study now investigates substantive elements related to STEs. The aim is to understand whether a common and concordant practice can be identified.

Having considered the main fields of activity, goods, and privileges regarding STEs, the analysis now focuses on the relationship that Members have disclosed about the notified entities concerned. In this regard, the terminology used in notifications provides a first glimpse into how Members perceive the relationship between STEs and their State. The extension of such a link is rather broad, as it includes both Ministries (as seen, for example, in notifications submitted by Japan or by the Republic of Korea) and dislocated entities, like public enterprises. Against this backdrop, further clarification on the constitutive elements of such relationship, i.e., which characteristics of the State-enterprise link are relevant for an STE, can be achieved by adopting a narrower approach.

On a general note, the study confirms that, in most cases, notifications provide little to no information on the ownership pattern of notified entities. While one may argue that this finding is related to the grant of exclusive or special privileges to the enterprises, ownership patterns still constitute a relevant element that should be disclosed to trading partners for the sake of transparency of international trade relations. Notwithstanding, it is possible to map a few interesting features to specify the boundaries of the relationship between STEs and the notifying State concerning the question of ownership.

Firstly, in some cases, the level of ownership retained by the Members in the notified STE is specified**.** Mostly, specification is provided when the State maintains total ownership of the notified entity. For instance, this is the case of the Petróleos Mexicanos (PEMEX), where the Mexican government stated that the enterprise is 'wholly owned by the Federal Government'.[224] Similarly, the government of Viet Nam concerning XUNHASABA stated that this is a '100% state owned enterprise'.[225] The US government referring to the United States Enrichment Corporation (USEC) also specified that it was a 'wholly owned government corporation'.

The government of Chile also provides further detail on the element of ownership. By notifying Comercializadora de Trigo S.A. (COTRISA), it disclosed that this is a joint stock company in which the State has a majority interest'.[226] Arguably, these examples show that both full and majority ownership are relevant for notifying Members. However, in most recent notifications, the reference to ownership, although present, is often left undetermined. For instance, in its more recent notifications, the US government prefers to use rather vague expressions like 'government-owned' without providing further details on the ownership pattern characterizing the notified entity.[227]

Secondly, some notifications refer to the control or influence exercised by the State on the notified entity. More specifically, some documents do not provide any information on ownership but disclose that the notified entity carries out its activities on behalf of the notifying government. For example, this is the case of Padiberas Nasional Berhad (BERNAS), a Malaysian STE that 'performs non-commercial activities on behalf of the Government of Malaysia'.[228] In other cases, the element of

[224] G/STR/N/16/MEX, 8 December 2016, Section II, point A.

[225] G/STR/N/15/VNM, G/STR/N/16/VNM, 20 April 2016, Section 2, p. 6.

[226] G/STR/N/18/CHL, 18 November 2020. See also: G/STR/N/16/MEX 8 December 2016, notification submitted by the government of Mexico to notify, inter alia, the Federal Electricity Commission (CFE) "wholly owned by the Federal Government".

[227] G/STR/N/18/USA ,15 June 2020. See also: G/STR/N/18/CAN, 6 July 2020, notification submitted by Canada concerning the Canadian Dairy Board (CDC) defined as a government-owned corporation without further specifications.

[228] G/STR/N/17/MYS G/STR/N/18/MYS, 15 October 2021. See also: G/STR/N/7/BHR G/STR/N/10/BHR G/STR/N/11/BHR G/STR/N/12/BHR G/STR/N/13/BHR 17 October 2011, submitted by the Kingdom of Bahrain in

indeterminacy about ownership patterns is paired up with specifications on the functioning of the entity and how the State influences it. For example, the US government stated that USEC is 'a government-owned and operated entity within the U.S. Department of Agriculture (USDA)'. It also disclosed that the central government manages its activities.[229] Similarly, the government of Afghanistan qualified Da Afghanistan Brishna Shirkat (DABS) as a government-owned enterprise that carries out its activities under the approval of the Ministries of Finance, Economy, Rural Development, Energy and Water.[230]

Thirdly, sometimes ownership and control are combined. In this regard, one may consider the Federal Electricity Commission (FEC) notified by Mexico, in which the State retains (complete) ownership 'and control of the national electricity system and the public service of electricity transmission and distribution', which are considered to be strategic sectors.[231]

Lastly, the withdrawal of the State from an enterprise formerly notified as STE is considered an element that would lift a WTO Member from its notification obligations. In this regard, we may consider a recent notification submitted by the government of Togo. In its relevant part, the document reads: 'The Government of Togo and other legal persons under public law have withdrawn from State enterprises. Consequently, Togo does not have any State trading enterprises within the meaning of the working definition contained in paragraph 1 of the above-mentioned Understanding'.[232] However, it should be kept in mind that the mere withdrawal of the State from the enterprise would not be sufficient to release a WTO Member from its obligation to notify the privatized entity if the latter, although a POE, still enjoys exclusive or special privileges.

3.5.3. The 'T' in STEs: sectors of activity, goods, and privileges of notified STEs

The study first focuses on the fields in which notified STEs operate, on affected goods, and the operations conducted. In this regard, the analysis confirms what has been already noted in the literature: these enterprises are usually exploited in essential and strategic sectors of domestic

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which it is stated that although in Bahrain state trading activities ended in 2001, 'The Kingdom of Bahrain currently grants Bahrain Livestock Company the right to purchase livestock on the behalf of the government'.

[229] G/STR/N/18/USA ,15 June 2020. See also: G/STR/N/18/CAN, 6 July 2020.

[230] G/STR/N/16/AFG, 9 August 2016; G/STR/N/1/ISR/Rev.1 26 September 1996, notification submitted by the government of Israel to notify, inter alia, AGREXCO Ltd., defined as a partially-government-owned company.

[231] G/STR/N/16/MEX 8 December 2016, notification submitted by the government of Mexico to notify, inter alia, the Federal Electricity Commission (CFE).

[232] G/STR/N/16/TGO, 9 March 2017. See also: G/STR/N/11/TPKM, 7 February 2007, notification submitted by the government of Chinese Taipei.

economies. These specifically include the sectors of energy,[233] agriculture,[234] food,[235] media,[236] mines,[237] and health.[238] As for products affected by the operation of STEs, these seem to relate

[233] See for example: G/STR/N/16/AFG, 9 August 2016, notification submitted by the Afghan government to notify the enterprise Da Afghanistan Brishna Shirkat (DABS) operating all public electricity transmission and distribution lines; G/STR/N/1/BRA, 21 March 1996, notification submitted by the Brazilian government to notify ITAIPU Binacional to explore hydroelectric resources of the Paraná river; G/STR/N/1/MAR, 21 March 1996, notification submitted by the Moroccan government to notify, among other STEs, the National Electricity Board; G/STR/N/1/POL, 5 October 1995, notification submitted by the Polish government to notify the Polish Power Grid Company (PPGC) entrusted to dispatch electric power within the national power system; G/STR/N/18/USA, 15 June 2020, notification submitted by the American government to notify the Power Marketing Administrations (PMAs) entrusted to market wholesale electricity generated at hydroelectric dams.

[234] See for example: G/STR/N/11/BRB G/STR/N/12/BRB, 11 March 2013, notification submitted by the government of Barbados to notify Barbados Agricultural Development and Marketing Corporation established to ensure the development of the local agricultural sector; G/STR/N/18/BRA, 2 November 2020, notification submitted by the Brazilian government to notify Companhia Nacional de Abastecimento (Conab – National Company for Food Supply) established to provide intelligence on agriculture and livestock and to participate in the formulation and execution of public policies; G/STR/N/18/CHL, 18 November 2020, notification submitted by the government of Chile to notify Comercializadora de Trigo S.A. (COTRISA), that acts as an agent in the marketing of grain (notified since 1995); CANADA; G/STR/N/1/CYP 17 October 1995, notification submitted by Cyprus to notify, inter alia, the Cyprus Grain Commission, the Cyprus Milk Industry Organization, the Cyprus Potato Marketing Board, Cyprus Carrot and Beetroot Marketing Board, Cyprus Olive Products Marketing Board; G/STR/N/16/ECU, 6 July 2018, notification submitted by the government of Ecuador to notify the National Warehousing Unit, responsible for the temporary warehousing and domestic marketing of agricultural products.

[235] See for example: G/STR/N/17/ISR G/STR/N/18/ISR, 25 January 2021, notification submitted by the government of Israel to notify, inter alia, the Egg and Poultry Board (the Board); G/STR/N/15/TUN G/STR/N/16/TUN, 8 June 2016, submitted notification by the government of Tunisia to notify, *inter alia*, the Tunisian Trade Board (OCT).

[236] See for example: G/STR/N/15/VNM G/STR/N/16/VNM 20 April 2016, notification submitted by the government of Viet Nam to notify XUNHASABA entrusted with the import and export of journals, periodicals and newspapers.

[237] See for example: G/STR/N/1/BRA, 21 March 1996, notification submitted by the Brazilian government to notify Companhia Vale do Rio, engaging in exploitation, trade, transport and export of iron-ore from Itabira mines; G/STR/N/9/JOR 28 July 2003, notification submitted by the government of Jordan to notify, inter alia, the Jordan Phospate Mines Co. Ltds; G/STR/N/16/MAR 20 April 2016, notification submitted by the government of Morocco to notify the Office Chérifien des Phospates (Moroccan Phosphates Board).

[238] See for example: G/STR/N/3/TUN, G/STR/N/4/TUN, G/STR/N/5/TUN, G/STR/N/6/TUN, 18 February 2002, notification submitted by the government of Tunisia to notify, inter alia, the Pasteur Institute of Tunis.

prominently to cereals and wheat,[239] oil,[240] rice,[241] sugar,[242] meat,[243] fish,[244] fruits,[245] textiles,[246] and dairy.[247] Sensitive goods from a social policy perspective are also covered, like tobacco,[248] alcohol,[249] minerals and chemical elements,[250] and medicines.[251]

[239] See for example: notification submitted by the Australian government to notify the Australian Wheat Board; G/STR/N/18/CHN 12 November 2021, notification submitted by the government of China to notify COFCO Corporation, Jilin Grain Group Imp.&Exp. Co., Ltd., HeiLongjiang Beidahuang Agriculture Group Corporation, Beijing Oriental Desheng Imp.&Exp. Co., Ltd;

[240] See for example: G/STR/N/18/CHN 12 November 2021, notification submitted by the government of China to notify SINOCHEM Group, China International United Petroleum and Chemicals Co., Ltd, China National United Oil Corporation, Zhu Hai Zhen Rong Company, China National Offshore Oil Corporation; G/STR/N/18/CRI, 21 April 2021, notification submitted by the government of Costa Rica to notify, *inter alia*, The Costa Rican Petroleum Refining Company (Refinadora Costarricense de Petróleo S.A., RECOPE); G/STR/N/9/JOR 28 July 2003, notification submitted by the government of Jordan to notify, inter alia, the Jordan Petroleum Refinery Co. Ltd.; G/STR/N/15/TUN G/STR/N/16/TUN, 8 June 2016, submitted notification by the government of Tunisia to notify, *inter alia*, the Tunisian Petroleum Enterprise (ETAP).

[241] See for example: notification submitted by the Australian government to notify the Rice Marketing Board for the State of New South Wales; G/STR/N/18/CRI, 21 April 2021, notification submitted by the government of Costa Rica to notify, *inter alia*, the National Rice Growers Corporation (Corporación Arrocera Nacional, CONARROZ); G/STR/N/17/MYS G/STR/N/18/MYS, 15 October 2021, notification submitted by the government of Malaysia to notify the Padiberas Nasional Berhad.

[242] See for example: G/STR/N/18/CHN 12 November 2021, notification submitted by the government of China to notify COFCO Corporation, China National Sugar and Alcohol Group Corporation, China Commercial Foreign Trade Corporation; G/STR/N/18/CRI, 21 April 2021, notification submitted by the government of Costa Rica to notify, *inter alia*, the Agro-Industrial Sugar Cane League (Liga Agrícola Industrial de la Caña de Azúcar, LAICA);

[243] See for example: G/STR/N/8/MUS 2 August 2002, notification submitted by the government of Mauritius to notify, inter alia, the Mauritius Meat Authority; G/STR/N/6/NAM, 24 July 2000, notification submitted by the government of Namibia to notify, inter alia, the Meat Board of Namibia.

[244] See for example: G/STR/N/18/CAN, 6 July 2020, notification submitted by the Canadian government to notify, *inter alia*, the Freshwater Fish Marketing Corporation; G/STR/N/18/KOR 12 October 2020, notification submitted by the government of the Republic of Korea to notify, *inter alia*, the Korea Agro-fisheries & Food Trade Corporation.

[245] See for example: G/STR/N/18/NZL, 2 July 2020, notification submitted by the government of New Zealand to notify Zespri Group Limited.

[246] See for example: G/STR/N/18/CHN, 12 November 2021, notification submitted by the government of China to notify, *inter alia*, Chinatex Corporation, Beijing Jiu Da Textiles Group Cooperation, Tianjin Textiles Industry Supply and Marketing Cooperation, Shanghai Textiles Raw Materials Cooperation, China National Cotton Group Corporation; G/STR/N/18/EU, 6 July 2020, notification submitted by the European Union to notify, inter alia, the British Wool Marketing Board (BWMB);

[247] See for example: G/STR/N/18/CAN, 6 July 2020, notification submitted by the Canadian government to notify the Canadian Dairy Commission (CDC). This entity has been notified since 1995.

[248] See for example: G/STR/N/13/CPV, 17 January 2014, notification submitted by the government of Cabo Verde to notify Sociedade Caboverdiana de Tabacos, S.A. enjoying exclusive import and wholesale marketing rights for tobacco and tobacco derivatives; G/STR/N/18/CHN 12 November 2021, notification submitted by the government of China to notify the China Tobacco International Inc.; G/STR/N/18/JPN, 15 September 2020, notification submitted by the government of Japan to notify, *inter alia*, the Japan Tobacco Inc.

[249] See for example: G/STR/N/18/CAN, 6 July 2020, notification submitted by the Canadian government to notify, *inter alia*, the Provincial and Territorial Liquor Control Authorities; G/STR/N/16/COL, 1 June 2017, notification submitted by the government of Colombia to notify the Fábrica de Licores y Alcoholes de Antioquia, Aguardiente Nariño, Unidad de Licores del Meta, the Industria Licorera de Boyacá, Industria Licorera de Caldas, Empresas de Licores de Cundinamarca, Industria de Licores del Valle del Cauca, Industria Licorera del Cauca, Fábrica de Licores del Tolima; G/STR/N/18/CHE/Rev.1 21 December 2020, notification submitted by the government of Switzerland to notify the Swiss Alcohol Board.

[250] See for example: G/STR/N/18/CHN 12 November 2021, notification submitted by the government of China to notify, inter alia, MOFCOM Circular Shang Mao Han, China National Coal Group Corporation, China Minmetals Corporation, Shanxi Coal Imp.&Exp. Group Co., Ltd., Shenhua Group Corporation Ltd., Aluminum Corporation of China Ltd; G/STR/N/16/IND G/STR/N/17/IND, 3 October 2019, notification submitted by the government of India to notify, *inter alia*

[251] For example see: G/STR/N/15/TUN G/STR/N/16/TUN, 8 June 2016, notification submitted by the government of Tunisia to notify the Tunisian Central Pharmacy, in charge of the regular provision of medicines, vaccines and pharmaceuticals.

Secondly, the study considers the types of operations carried out by STEs. In this regard, notifications confirm that STEs are in charge of trade-related activities: export, import, purchase, sales, and marketing.[252] Moreover, STEs are often granted exclusive or special privileges.[253] These appear to include mainly monopoly rights,[254] wholesale marketing rights,[255] exclusive rights of retail distribution,[256] and tax revenue collection.[257]

The justifications for granting such exclusive rights and privileges vary and may be divided into three groups. The first group deals with national security reasons. In this case, privileges are conferred on STEs to protect strategic sectors of the national economy or to ensure a stable and secure supply of essential goods and services at accessible costs, and also through the incentive of local production.[258] A second group deals with social objectives that governments want to achieve through STEs. These include, for example, the support of the development of rural areas,[259] the implementation of public policies,[260] the establishment of social support mechanisms,[261] and the protection of public health.[262] A third group justifies privileged enterprises based on market regulation to deal with possible market externalities. This is the case of STEs entrusted with ensuring market stabilization,[263] or the

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[252] See for example: G/STR/N/11/BRB G/STR/N/12/BRB, 11 March 2013, notification submitted by the government of Barbados to notify Barbados Agricultural Development and Marketing Corporation; G/STR/N/14/CAN, 6 July 2012, notification submitted by the government of Canada to notify*, inter alia,* the Canadian Wheat Board.

[253] However, in some cases governments notified enterprises solely based on full ownership and in the absence of exclusive or special privileges. See for example G/STR/N/13/JAM, G/STR/N/14/JAM G/STR/N/15/JAM, G/STR/N/16/JAM 17 August 2016 the notification submitted by the government of Jamaica to notify Jamaica commodity Trading Company Ltd., wholly owned by the Jamaican government.

[254] See for example: G/STR/N/11/BRB G/STR/N/12/BRB, 11 March 2013, notification submitted by the government of Barbados to notify Barbados Agricultural Development and Marketing Corporation enjoying the exclusive rights to import the commodities falling under its purview; G/STR/N/1/BRA, 21 March 1996, notification submitted by the Brazilian government to notify Florestas Rio Doce S.A., also engaging in export activities; G/STR/N/16/COL, 1 June 2017, notification submitted by the government of Colombia to notify the Fábrica de Licores y Alcoholes de Antioquia, Aguardiente Nariño, Unidad de Licores del Meta, the Industria Licorera de Boyacá, Industria Licorera de Caldas, Empresas de Licores de Cundinamarca, Industria de Licores del Valle del Cauca, Industria Licorera del Cauca, Fábrica de Licores del Tolima; G/STR/N/18/CRI, 21 April 2021, notification submitted by the government of Costa Rica to notify, *inter alia*, The Costa Rican Petroleum Refining Company (Refinadora Costarricense de Petróleo S.A., RECOPE); G/STR/N/18/EU, 6 July 2020, notification submitted by the European Union to notify, inter alia, the British Wool Marketing Board (BWMB); G/STR/N/18/JPN, 15 September 2020, notification submitted by the government of Japan to notify the Japan Tobacco Inc.;

[255] See for example: G/STR/N/13/CPV, 17 January 2014, notification submitted by the government of Cabo Verde to notify Sociedade Caboverdiana de Tabacos, S.A.; G/STR/N/18/CAN, 6 July 2020, notification submitted by the Canadian government to notify the Freshwater Fish Marketing Corporation, established in 1969 for the purpose of trading in and marketing freshwater fish and fish products and by-products.

[256] See for example: G/STR/N/16/ISL G/STR/N/17/ISL, 29 January 2018, notification submitted by the government of Iceland to notify the State Alcohol and Tobacco Monopoly.

[257] See for example: G/STR/N/13/CPV, 17 January 2014, notification submitted by the government of Cabo Verde to notify Sociedade Caboverdiana de Tabacos, S.A.; G/STR/N/9/JOR 28 July 2003, notification submitted by the government of Jordan to notify, inter alia, the Jordan Petroleum Refinery Co. Ltd.

[258] For example, foods, electricity, education. See: G/STR/N/16/AFG, 9 August 2016, notification submitted by the Afghan government to notify the enterprise Da Afghanistan Brishna Shirkat (DABS); G/STR/N/4/DMA G/STR/N/5/DMA G/STR/N/6/DMA 15 February 2001, notification submitted by the government of Dominica; G/STR/N/1/POL 5 October 1995, notification submitted by the government of Poland to notify*, inter alia*, the Polish Power Grid Company entrusted to ensure the continuous supply of energy and a reliable service.

[259] For a recent example see: G/STR/N/16/BRB 17 April 2018.

[260] For a recent example see: G/STR/N/18/BRA 2 November 2020.

[261] See for example: G/STR/N/4/BHR/Rev.1 G/STR/N/5/BHR/Rev.1 G/STR/N/6/BHR/Rev.1 27 February 2001; G/STR/N/18/CAN 6 July 2020.

[262] See for example: G/STR/N/17/CAN 13 July 2018.

[263] See for example: G/STR/N/1/CZE 12 September 1995.

development of competitive markets.[264] One last group deals with the rise of revenue and the maximization of returns for the State.[265]

3.5.4. *Final remarks: the impact of the Understanding on the Interpretation of Article XVII of the GATT on submitted notifications*

The study suggests that most enterprises qualified by Members as STEs and disclosed in notifications are entrusted with exclusive or special rights. This tendency is arguably linked to the narrow approach adopted within the working definition of the Understanding on the Interpretation of Article XVII of the GATT discussed in the previous section. Although, as mentioned already, the working definition does not per se preclude Members from notifying STEs following the substantive provisions of Article XVII of the GATT, submitted notifications show that governments rarely notify entities not falling within the Understanding's narrower definition. Conversely, enterprises falling within the broader "State enterprise" notion of Article XVII of the GATT are neglected.

This is confirmed on both the formal level of terminology and substance. Focusing on the terminology used by Members to declare the absence of STEs, it is possible to note that 60 WTO Members affirmed that they did 'not maintain any state trading enterprises in accordance with the working definition contained in Paragraph 1 of the Understanding on the Interpretation of Article XVII,[266] thus adopting the narrow approach of the Understanding as a legal basis for their notification. Then, the study showed that seven Members stated that they did 'not maintain any state trading enterprises in accordance with the working definition contained in Article XVII:4(a) of the GATT 1994 and paragraph 1 of the Understanding on the Interpretation of Article XVII',[267] thus adopting a double legal basis for their notification. Just one Member referred to Article XVII of the GATT in its notification.

From a substantive perspective, it is possible to consider specific notifications submitted by WTO Members. Submissions from the Norwegian government are a model practical example. Since 1998, Norway has notified Arcus Produkter AS, an enterprise enjoying an exclusive right to produce spirituous beverages.[268] Subsequently, in 2010, the Norwegian government stated that the previously notified enterprise, Arcus Produkter AS, 'no longer holds any exclusive rights or privileges, and thus no longer is a State-Trading Enterprise'.[269] The terminology discloses a direct connection between the grant of special or exclusive rights to the enterprise and its qualification as an STE. Indeed, the link is so close that no STE is envisaged in the absence of such special or exclusive rights.

This approach undermines the applicability of substantive provisions of Article XVII of the GATT. Indeed, the expression 'State enterprise' does not explicitly exclude from its scope unprivileged

[264] See for example: G/STR/N/16/COL 1 June 2017

[265] See for example: G/STR/N/16/COL, 1 June 2017, notification submitted by the government of Colombia where the government explains that the revenue obtained from the exercise of the alcoholic beverages monopoly granted to its STEs is primarily exploited for the health and education services.

[266] These are: Albania, Argentina, Armenia, Botswana, Brazil, Bulgaria, Burundi, Cambodia, Chad, Croatia, Cyprus, Egypt, El Salvador, Estonia, EU, Georgia, Guatemala, Guinea, Haiti, Honduras, Hong Kong, Hungary, Kenya, Kuwait, Kyrgyz Republic, Lao, Latvia, Macao, Malawi, Mali, Moldova, Montenegro, Nicaragua, Nigeria, North Macedonia, Norway, Panama, Peru, Poland, Qatar, Romania, Samoa, Saudi Arabia, Senegal, Seychelles, Singapore, Slovak Republic, Slovenia, South Africa, Suriname, Togo, Tonga, Uganda, United Arab Emirates, Vanuatu, Zambia, Zimbabwe.

[267] These are: Bolivia, Burkina Faso, Ecuador, Ghana, Mongolia, Pakistan, Paraguay.

[268] G/STRN/N/3/NOR, Section I.B.

[269] G/STR/N/8/NOR; G/STR/N/9/NOR; G/STR/N/10/NOR; G/STR/N/11/NOR; G/STR/N/12/NOR; G/STR/N/13/NOR. Emphasis added.

entities. In other words, although the approach adopted by the Norwegian government is perfectly consistent with the Understanding of Article XVII of the GATT and with the WTO regulatory framework of STEs in general, it arguably incentivizes the adoption of non-transparent conduct by WTO Members. A contracting party that does not wish to notify a given entity or to justify its existence before trading partners can simply not confer special or exclusive privileges to it but still exercise - undetected - its control through unofficial means. Moreover, from a broader perspective, the narrow approach followed by the Understanding of Article XVII of the GATT incentivizes the withholding of information by Members. Notifications submitted by Namibia are a clear example of how the working definition's narrow approach negatively affects both the principle of transparency - that the notification requirement tries to ensure - and the adoption of virtuous practices by Members. In 2000, the government of Namibia notified the Namibian Agronomic Board, entrusted with the issuance of licenses to processors of controlled products and of permits for the import and export of controlled products, as well as the conduction of quality controls of grain, seed, and processed products. In the document, Namibia stated, 'We do, however, not consider that the Namibian Agronomic Board falls squarely within the working definition of state trading enterprises (…). In the interests of transparency, however, we hereby submit the above information.'[270] Contrarily, in subsequent notifications, Namibia followed a narrower approach and stated that it did not maintain any STEs 'within the meaning of Article XVII:4(a) and Paragraph 1 of the Understanding on the Interpretation of Article XVII of the GATT 1994'.[271]
The analysis, thus, reveals the pitfalls behind the working definition provided by the Understanding on the Interpretation of Article XVII. While, on the one hand, the effort to provide a more precise definition of STEs is to be welcomed, on the other hand, the adoption of a clear-cut but restrictive definition runs the risk of being under-inclusive. Thus, the core purpose of notification commitments aimed precisely at ensuring the functioning of Article XVII of the GATT in the regulation and monitoring of STEs following the transparency principle is frustrated. Finally it is worth remembering that this system encourages the creation of information asymmetries among trading partners, which threatens multilateral negotiations in the long-run.

3.6. Constitutive elements of STEs emerging from questions submitted by Members and counter-notifications

According to paragraph 4 of the Understanding on the Interpretation of Article XVII of the GATT:

> 'Any Member which has reason to believe that another Member has not adequately met its notification obligation may raise the matter with the Member concerned. If the matter is not satisfactorily resolved it may make a counter-notification to the Council for Trade in Goods for consideration by the working party set up under paragraph 5, simultaneously informing the Member concerned.'[272]

To increase transparency in notifications concerning STEs, the Understanding envisages two possibilities at the disposal of WTO Members to ensure that such a result is achieved. On the one hand, Members can ask for more information from another Member deemed not to have complied

[270] G/STR/N/6/NAM, Section III.A. Emphasis added.
[271] G/STR/N/7/NAM G/STR/N/8/NAM G/STR/N/9/NAM.
[272] Ibid para 4.

with its obligation to notify its State trading activities. On the other hand, if the discussion is insufficient, then Members may resort to counter-notifications, i.e., they can submit a notification in place of the Member whose conduct is in breach of Article XVII:4 of the GATT. As will be shown in the following sections, only three counter-notifications have been submitted up until now. This may be because the self-investigation to be conducted may be hindered by several factors. Firstly, investigating authorities need access to information that is not always easily accessible or available. Secondly, the investigation process is often time-consuming. Indeed, this operation could be costly and unavailable to countries that lack the necessary resources to undertake it. Thirdly, to launch an investigation successfully, it is essential to have personnel equipped with a specific set of competences and skills, which not all countries have readily available.

Against this background, the study scrutinized more than 60 documents that were submitted by Members under paragraph 4 of the Understanding. These correspond to questions posed by WTO Members to other Members, in order to either obtain more information or a clarification on notified entities, or to request an explanation regarding missing notifications.[273] Not infrequently, questions were left unanswered or were not made publicly available.[274] Notwithstanding this, the analysis of questions, replies, and counter-notifications provides valuable insights into the notion of STEs and how this entity can relate to SOEs in a complementary way with the ones that emerged from notifications analyzed in the previous section. The methodology followed resembles the methodology used for notifications: first of all, the terminology is considered, and then the study delves into details concerning the functioning, the relationship with the State, and the ownership patterns emerging from each set of documents.

3.6.1. Investigating questions, replies, and counter-notifications: the terminology

The analysis of the terminology used in questions and replies submitted by WTO Members under paragraph 4 of the Understanding reveals a range of different expressions that are used to qualify notified enterprises. These include, for example, 'public limited company',[275] or 'semi-Government Organization'.[276] In this respect, then, arguably, the lack of harmonization concerning the definition of STEs persists in questions and replies.

Going a bit further than terminology, however, clarifications presented by WTO Members provide valuable insights into the entities and related characteristics that are considered – or not – to fall within the notion of STE. For the sake of clarity, it is possible to divide the documents into three groups: questions, replies, and counter-notifications.

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[273] See for example: G/STR/Q1/BRA/7 17 October 2011. The document contains the following question posed by Australia to Brazil: 'Brazil has not submitted a notification to the Working Party on State Trading Enterprises since 1997. Can Brazil indicate when it intends to submit a notification to the Working Party?'. No answer has been provided so far. See also: G/STR/Q1/CHN/1, 17 October 2011. The document contains the following question posed by Australia to China: 'China has not submitted a notification to the Working Party on State Trading Enterprises since 2003. Can China indicate when it intends to submit a notification to the Working Party?'.

[274] See for example: G/STR/Q1/BRA/5, 3 April 1998, questions posed by Australia for Brazil; G/STR/Q1/BRA/6, 8 April 1998, question posed by Canada to Brazil; G/STR/Q1/CAN/9, 22 September 2015, questions posed by the European Union to Canada; G/STR/Q1/CHN/10, 29 April 2021, questions posed by Australia to China; G/STR/Q1/SAU/1, 18 May 2018, questions posed by the European Union to Saudi Arabia.

[275] G/STR/Q1/CHL/5, 5 August 1996, replies of Chile to questions posed by Canada on COTRISA; G/STR/Q1/CYP/1 12 August 1996, replies of Cyprus to questions posed by Canada and the US on the Cyprus Grain Commission.

[276] G/STR/Q1/CYP/1, 12 August 1996.

3.6.2. Beyond terminology: relevant substantive elements emerging from questions

The first group deals with questions posed by WTO Members to other Members considered not to have submitted sufficient or sufficiently clear information on their STEs. For these reasons, the analysis of questions and replies helps to clarify the notion of STEs.

Here, it is interesting to consider the question posed by the European Union to the government of India. In the relevant document, the EU formulated the following statement:

> 'According to the available information, TASMAC functions under the administrative control of the Prohibition and Excise Department of Tamil Nadu, which is a branch of the Ministry for Electricity, Prohibition and Excise of the Government of Tamil Nadu. In a Notice Inviting offers for registration of Imported Foreign Liquor brands for sale to TASMAC, the Government of Tamil Nadu clearly defines TASMAC as a 'Government of Tamil Nadu undertaking' and states that: "Tamil Nadu State Marketing Corporation Limited is a Company wholly owned by the State of Tamil Nadu having the exclusive privilege of conducting wholesale and retail trade in Indian Made Foreign Spirits (IMFS) and Beer in the whole State. It is also dealing in Imported Foreign Liquor (IFL) brands." Therefore, in the EU's view, TASMAC should be considered as a governmental entity.'[277]

Thus, the position taken by the EU about the Indian enterprise TASMAC suggests that an enterprise qualifies as an STE when it operates under the administrative control of the central government; it enjoys exclusive or special privileges; the State fully owns it, and the State qualifies it as a governmental authority at the national level.

Similarly, the question posed by the government of New Zealand to Switzerland on the Swiss Cheese Union (SCU) provides further insights into the notion. While explaining why SCU, in its opinion, should be notified, New Zealand disclosed the constitutive elements of an STE to be considered. The question reads: 'New Zealand believes that the Union is notifiable since it implements an obligatory delivery scheme for Switzerland's main cheese varieties, it relies on a guaranteed commission regardless of the actual terms of sales, and its losses are covered by the Confederation's dairy account. It also administers export subsidies for these cheese varieties and administers several bilateral agreements affecting exports.' [278] Thus, according to this view, an entity qualifies as an STE when entrusted with the obligation to implement public policy objectives and is granted an economic benefit that allows it to operate without risks. The latter is a crucial element to consider in international trade. An entity that enjoys this advantage can use it outside of commercial considerations and disrupt international trade flow.

3.6.3. Relevant substantive elements emerging from replies

The second group of analyzed documents includes replies from WTO Members to questions posed by other governments, from which a few interesting elements emerge. In this regard, replies suggest that State practice regarding the definition of STE mainly follows two approaches: narrow and broad.

[277] G/STR/Q1/IND/13 12 September 2016.
[278] G/STR/Q1/CHE/5, 16 September 1996.

Regarding the narrow approach, it is relevant to consider the Pakistani government's reply to questions posed by the US delegation.[279] Questioned about the Trading Corporation of Pakistan Limited (TCP), the government explained that the entity did not constitute an STE within the meaning of Article XVII of the GATT. This is because TCP was 'a private limited company', although it was wholly owned by the government that carried out its trading activities without enjoying special or exclusive rights. Thus, the Pakistani government appears to focus on the grant of exclusive or special privileges, rather than on the complete State ownership pattern of the undertaking. One may argue, however, that a fully government-owned enterprise may fall under the broader notion of State enterprise under Article XVII of the GATT.

The government of New Zealand follows a broad reasoning in its reply to questions posed by Chile on Zespri. The reply stated that 'New Zealand takes a broad interpretation of the definition of state trading enterprise (STE)'.[280] Thus, although Zespri is neither a marketing board nor a government-owned enterprise, it was notified because of 'its automatic, but not exclusive, right to export kiwifruit'. This clarification shows that the stance adopted by the New Zealand government concerning constitutive elements of STEs is rather broad. However, this broad approach is arguably to be welcomed from the point of view of transparency.

Moreover, replies also clarify the functioning of the entities concerned and their relationship with the State. In this regard, it emerges that STEs can operate under the control of the central branch of the government, like ministries,[281] or they are tied to the government, which can then, for example, appoint members of the internal committees of the entity concerned.[282]

Finally, replies reflect the impact of the Understanding on the Interpretation of Article XVII of the GATT on the notion of STE. More specifically, governments tend to justify the lack of notification of a given entity based on the working definition provided by the Understanding. For example, Egypt stated that 'ALCOTEXA has not been notified under Article XVII:4 of the GATT 1994 or under the Understanding on the Interpretation thereof because it is not a state trading enterprise within the meaning of the Understanding'.[283]

Similarly, the government of Israel explained that the Israel Cotton Production and Marketing Board remained unnotified because it was a private enterprise and did not enjoy any special rights or privileges. However, looking closer at its characteristics, the Board is the *de facto* sole exporter of cotton. Although a legislative act has not granted such privilege, it still falls under the scope of Article XVII:1 of the GATT, which does not necessarily require a formal act to grant special or exclusive rights. Moreover, it is worth emphasizing that private entities also qualify as State enterprises as long as they enjoy special or exclusive privileges.

Another example of the influence exercised by the working definition can be found in Japan's reply to questions posed by the US delegation. Referring to the Japan Raw Silk, the Japanese government explained that since the enterprise was been given exclusive or special rights and privileges, it was not subject to state trading regulation.[284] This approach was confirmed by the one adopted towards the Salt Industry Centre of Japan that, on the contrary, was notified because '[b]y virtue of its exclusive right to distribute imported salt for common use until 31 March 2002, the Government of

[279] G/STR/Q1/PAK/4, 31 July 1997.
[280] G/STR/Q1/NZL/21, 24 October 2018, replies of New Zealand to questions posed by Chile.
[281] G/STR/Q1/THA/1, 5 July 1996, replies of Thailand to questions posed by Japan, Canada and the US.
[282] G/STR/Q1/EGY/2, 24 May 2005, replies of Egypt to questions posed by the US.
[283] G/STR/Q1/EGY/2, 24 May 2005, replies of Egypt to questions posed by the US.
[284] G/STR/Q1/JPN/1, 1 July 1996, replies of Japan to questions posed by the US.

Japan considers that the Salt Industry Centre of Japan is a state trading enterprise under GATT Article XVII'.[285]

A similar approach was adopted in the dialogue that occurred between the US and Turkey over Etibank and Türkiye Tas¸kömürü Kurumu. Indeed, the focus was put on special and exclusive privileges in the question submitted by the US, which asked Turkey to explain why the mentioned entities were not notified provided that 'We understand that these entities "enjoy special or exclusive rights or privileges" in the meaning of the Understanding on the Interpretation of Article XVII of the GATT 1994'.[286] In its reply, the Turkish government adopted a complementary approach and stated that: 'Etibank and Türkiye Tas¸kömürü Kurumu (Turkish Hard Coal Enterprise) do not "enjoy special or exclusive rights or privileges" in the exercise of which they influence through their purchases or sales the level or direction of imports or exports'. Since no special right or privilege was granted, Turkey;s notification did not include these enterprises.

3.6.4. Relevant substantive elements emerging from counter-notifications

The study showed that three counter-notifications had been submitted under paragraph 4 of the Understanding on the Interpretation of Article XVII of the GATT. These have all been presented by the US. In two cases, counter-notifications were filed against China. In one case, the submission was made concerning Viet Nam.

Looking at the counter-notification against China, the US counter-notified a list of 153 enterprises that, from its perspective, constituted STEs 'under paragraph 1 of the Understanding' that should have been notified by the Chinese government. More specifically, the list had been drawn up based on, on the one hand, the public information available on each notified company and, on the other hand, the qualification as STEs made either by the entity itself or by the Chinese government.[287] The US submitted the counter-notification by following the STE's questionnaire for each enterprise. However, there was little information provided beyond the sector of activity of the entity concerned (counter-notified STEs seem to operate mainly in the sectors of oil, wine, sugar, chemicals, and food). Thus, the Chinese government was required to provide additional information. In response to the counter-notification submitted by the US, in October 2015, China submitted a notification on STEs concerning the period 2003-2014. The information provided in that document was deemed insufficient by the US, which then presented another set of questions. China justified the lack of information on the confidential nature of such information.

Consequently, the US government initiated its own investigation that eventually led to the submission of a second counter-notification against China containing a list of seven entities that qualified as STEs.[288] Also, in this case, the US relied on publicly available information to qualify enlisted entities as STEs, but no substantive information was provided. The government of China does not seem to have replied to this counter-notification so far.

Concerning Viet Nam, the US noted that in its first notification after accession, Viet Nam notified two STEs. However, at least 15 Vietnamese entities were qualified as such by the Vietnamese government when accession was discussed. Thus, the US sought additional information on this

[285] G/STR/Q1/JPN/4, 12 May 1998, replies of Japan to questions posed by Canada.
[286] G/STR/Q1/TUR/1, 1 November 1996, questions posed by the US to Turkey.
[287] G/C/W/701 G/STR/Q1/CHN/2, 14 August 2014, counter-notification of the STEs of China by the US.
[288] G/C/W/749 G/STR/Q1/CHN/9, 13 December 2017.

discrepancy. Viet Nam justified the discrepancy by stating that those entities previously identified as STEs operated under market economy principles; thus, their notification was no longer required. Deeming this explanation insufficient, the US conducted independent research, which eventually led to the counter-notification of eight Vietnamese STEs that the government of Viet Nam should have notified. Similarly to the counter-notifications previously analyzed, the US relied on publicly available information to qualify enlisted entities as STEs. Besides information concerning their fields of operativity (counter-notified STEs appear to be exploited in the sectors of food, oil, jewelry, and aviation), little to no information was provided on substantive aspects. In 2018, the government of Viet Nam replied to the US counter-notification. The government insisted on justifying the lack of notification of the entities initially identified as STEs in the report of the Working Party on its Accession based on the fact that these entities operate under market conditions and that they did not enjoy any exclusive or special privileges to conduct their import and export activities.[289] Also, regarding those enterprises identified as STEs by the US government but not originally included in the Accession Report, the government of Viet Nam insisted on the lack of any exclusive or special privileges for these enterprises to import and export goods subject to the state trading. Therefore, based on WTO rules, these enterprises were not considered state trading enterprises, and 'Viet Nam is not obliged to notify them to the WTO'.[290] It is interesting to note, however, that based on the information provided by the government, half of these entities are fully owned by the State.[291] Against this backdrop, one may argue that although they do not enjoy special or exclusive privileges, they could fall within the notion of State enterprise within the meaning of Article XVII of the GATT.

3.7. Emerging constitutive elements of STEs in Trade Policy Reviews (TPR)

National trade policies adopted by WTO Members are subject to a surveillance mechanism under the WTO: the Trade Policy Review Mechanism (TPRM). This mechanism was established under the Uruguay Round with the aim 'to contribute to improved adherence by all Members to rules, disciplines, and commitments made under the Multilateral Trade Agreements and, where applicable, the Plurilateral Trade Agreements, and hence to the smoother functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, the trade policies and practices of Members'.[292] Therefore, the TPRM assesses the adherence of domestic trade policies to the WTO legal framework and WTO Members' compliance with their obligations.[293]
The body entrusted to carry out the TPR is the WTO General Council in its capacity as the Trade Policy Review Body (TPRB). All WTO Members are subject to the TPRM, although the frequency

[289] G/C/W/755 G/STR/Q1/VNM/5, 31 August 2018.
[290] Ibid.
[291] More specifically, in document G/C/W/755 G/STR/Q1/VNM/5, 31 August 2018, the government of Viet Nam disclosed the following information. Vinafood I is qualified as 'one-member limited liability company with 100% of the charter capital invested by the Government of Viet Nam'. Similarly, Vinafood II is defined as a 100% state-owned company, which is organized in the form of a one-member limited liability company. Moreover, also TKV is 'a one-member limited liability company with 100% charter capital invested by the Government of Viet Nam'.
[292] Annex 3, Marrakesh Agreement, para A(i).
[293] Matsushita (n 33) 19. See also: Richard Blackhurst, 'Strengthening GATT Surveillance of Trade-related Policies' in Meinhard Gilf and Ernst-Ulrich Petersmann (eds) *The New GATT Round of Multilateral Trade Negotiations: Legal and Economic Aspects* (Wolters Kluwer, 1988); Petros C Mavroidis, 'Surveillance Schemes: The GATT's New Trade Policy Review Mechanism' (1992) 13(2) Michigan Journal of International Law 374; Asif H Qureshi, 'The New GATT Trade Policy Review Mechanism: An Exercise in Transparency or "Enforcement"?' [1990] Journal of World Trade 142.

of the review changes for each Member in accordance with its share of world trade.[294] The review is conducted based on a policy statement submitted by the Member concerned and a report drafted by the economists in the TPR Division. At the end of the review, the Secretariat prepares a report. The Secretariat drafts its report with the Member's participation but bears the sole responsibility for the facts given and views expressed. The report consists of chapters delving into a detailed analysis of national policies and practices undertaken by the reviewed Member. The report of the Secretariat is published following the review meeting, together with the policy statement of the Member concerned and the concluding remarks adopted by the Chair of the TPR body.

Against this background, for the purposes of this inquiry, a study has been conducted on 136 Secretariat Reports to investigate the notion of STE in the light of the section of the reports dealing with State trading practices. Like the previous sections, the study focuses on formal and substantive aspects emerging from the documents under analysis.

3.7.1. The terminology used in TPR mechanisms

Before delving into details on the terminology used in the analyzed reports, a few general remarks should be made. First of all, Secretariat Reports acknowledge little to no compliance concerning notification obligations on STEs, both in quantitative and qualitative terms. For instance, Reports note that the Member under review did not submit any notification on STEs. Yet, State trading activities are found to be carried out in the country.[295] Alternatively, Secretariat Reports shed light on the fact that although no STE has been disclosed by the Member to the WTO, the government's level of involvement in the national economy is considerable.[296] In general, then, it seems possible to argue

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[294] The first four Members with the largest shares of world trade (currently the European Union, The US, Japan and China) are subject to review every three years. The next 16 are reviewed every five and all the other Members every seven years. See: WTO document WT/L/1014. Also: < https://www.wto.org/english/tratop_e/tpr_e/tp_int_e.htm >.

[295] Cfr. Report of the Secretariat for TPR of the Kingdrom of Bahrein, WT/TPR/S/74, 11 September 2000. Paragraph 63 reads: Bahrain has not notified any state-trading activities to the WTO Council for Trade in Goods under Article XVII and paragraph 1 of the Understanding. Nevertheless, imports of wheat (and, until recently, rice and sugar) are carried out only by the Bahrain Import-Export Company".

[296] Cfr. Report of the Secretariat for TPR of Armenia, WT/TPR/S/228, 2 March 2010. Paragraph 18 ff. read: Armenia notified the WTO that it does not maintain any state-trading enterprise in accordance with the provisions of the GATT Article XVII and the Understanding on the Interpretation of Article XVII. At the end of 2009, state participation in the economy was limited to 400 companies fully or partially owned by the State; Report of the Secretariat for TPR of Central Africa, WT/TPR/S/183, 7 May 2007, paragraph 64 ff read: 'The Central African Republic has not notified the WTO of any State-trading enterprises within the meaning of Article XVII of the GATT. Nevertheless, there are the following *de facto* or *de jure* monopolies'. The report of the Secretariat for TPR of Bangladesh, WT/TPR/S/68, 3 April 2000, para 19 reads: 'State intervention in the Bangladesh economy continues to be pervasive, with state-owned enterprises accounting for one fifth of manufacturing output, most of the services provided by utilities, and a large share of bank assets'; Report of the Secretariat for the TPR of Egypt, WT/TPR/S/55, 18 May 1999. Paragraph 54 ff. read: 'According to a WTO notification made in September 1998, Egypt does not have any state trading enterprises as defined under Paragraph 1 of the GATT 1994 (State Trading Enterprises). Nevertheless, the public sector continues to play an important role, notably in imports of petroleum products, through the Egyptian General Petroleum Corporation (EGPC), and imports of cereals, through the General Authority for Supply Commodities'. Similar statements are also found in the following Reports of the Secretariat: Report of the Secretariat for TPR of Benin, WT/TPR/S/27, 6 August 1997, para 79 f.; Report of the Secretariat for the TPR of Brazil, WT/TPR/S/283, 17 May 2013, Para 3.229 reads: 'As at August 2012, Brazil had issued no updates or new notifications under these provisions. In the context of the Working Party on State Trading Enterprises, Brazil received a question from a WTO Member concerning its overdue notifications but had not yet responded as at the time of writing'; Report of the Secretariat for the TPR of Cambodia, WT/TPR/S/364, 17 October 2017; Report of the Secretariat for the TPR of Chad, WT/TPR/S/174,11 December 2006; Report of the Secretariat for the TPR of Kuwait, WT/TPR/S/258, 4 January 2012; report of the Secretariat for the TPR of Kyrzyg Republic, WT/TPR/S/288, 1 October 2013.

that there is a discrepancy between what is being notified and the actual role of the State in the national economy, including through State trading practices.[297] Sometimes, Reports also denounce the lack of clarity of disclosed information, the difficulty in accessing information related to State trading activities, or issues surrounding the granting of exclusive or special rights.[298]

Against this background, the analysis of the terminology used in TPR Reports reveals that this is the category of documents in which the term 'SOEs' is used most often. However, a closer inspection at how the Secretariat uses this expression reveals that such increased use of this terminology does not necessarily lead to a better understanding of the notion. Indeed, Reports seem to conflate the notions of SOEs and STEs. For instance, this is the case when the Secretariat notes that a given WTO Member did not notify any STE. And yet, it denounces that many SOEs operate in the national economy. In this regard, one may consider the Report of the Secretariat referring to the TPR of Suriname, in which it is stated that: 'Suriname notified that it does not maintain any state enterprises in accordance with Article XVII:4(a) of the GATT 1994 and Paragraph 1 of the Understanding on the Interpretation of Article XVII. However, it continues to maintain a large number of partially or fully state-owned entities in most strategic sectors of the economy.'[299] The word 'however' links the two sentences, thus putting the first part on STEs notifications in relation to the second part concerning SOEs. On other occasions, although the section's heading refers to STEs and SOEs, the content refers only to SOEs.[300]

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[297] See for example the Report of the Secretariat for the TPR of Bolivia: WT/TPR/S/363 26 September 2017. Paragraph 3.127 reads: Since 2006, the State's function has changed in Bolivia. The Government regards the State as having not only a governing role but also a role in production. It is therefore considered that State enterprises must contribute towards the country's economic and social development". However, no correspondence in submitted notification can be found. Similarly, Report of the Secretariat for the TPR of Botswana. WT/TPR/S/35, 1 April 1998, paragraph 37 reads: SOEs in Botswana account for about 10% of GDP, while their share in total employment is less than 6%. However, their shares in total investment and external debt exceed 20%". However, only one notification has been submitted by Botswana on STEs since 1997. Similarly see: Report of the Secretariat for the TPR of Burkina Faso: WT/TPR/S/46, 23 September 1998; Report of the Secretariat for the TPR of Burundi: WT/TPR/G/271, 17 October 2012; Report of the Secretariat for the TPR of Cameroon, WT/TPR/G/285 24 June 2013. Paragraph 5.17 reads: 'Development of the hydroelectricity supply entails a high degree of State involvement in investment in key infrastructure (e.g., hydroelectric dams, transmission lines, network interconnection lines). A State-owned company has accordingly been established to oversee the major hydroelectric projects'. However, no entity has been notified in this regard. Cfr. The Report of the Secretariat for the TPR of Hong Kong, WT/TPR/S/173, 8 November 2006; The Report of the Secretariat for the TPR of the Democratic Republic of Congo, WT/TPR/S/169, 23 August 2006; The Report of the Secretariat for the TPR of Djibouti, WT/TPR/S/305, 17 September 2014; The Report of the Secretariat for the TPR of the European Union, WT/TPR/S/214, 2 March 2009; Report of the Secretariat for the TPR of Fiji, WT/TPR/S/330 19 January 2016; Report of the Secretariat for the TPR of Gabon, WT/TPR/S/188, 27 August 2007; The Report of the Secretariat for the TPR of Ghana, WT/TPR/S/81, 29 January 2001 (here the report notes that the Ghana enterprise COCOBOD enjoys a monopoly right over the export of cocoa beans grown in Ghana. Yet, no notification has been submitted by the government to the WTO regarding any enterprise enjoying exclusive or special rights); the Report of the Secretariat for the TPR of Guinea, WT/TPR/S/153, 14 September 2005; The Report of the Secretariat for the TPR of Honduras, WT/TPR/S/336, 24 March 2016; The Report of the Secretariat for the TPR of the Republic of Korea, WT/TPR/S/204, 3 September 2008; Report of the Secretariat for the TPR of Burkina Faso, WT/TPR/S/236/BFA, 30 August 2010; Report of the Secretariat for the TPR of Mauritania, WT/TPR/S/371, 24 April 2018;

[298] Cfr. Report of the Secretariat for the TPR of Myanmar, WT/TPR/S/293, 21 January 2014; Report of the Secretariat for the TPR of Canada, WT/TPR/S/246, 4 May 2011, para 177.

[299] Report of the Secretariat for the TPR of Suriname, WT/TPR/S/282, 22 April 2013, para 3.3.5. Emphasis added. Similarly, the Report of the Secretariat for the TPR of Suriname, WT/TPR/S/135, 14 June 2004, para 128; Report of the Secretariat for the TPR of Belize, WT/TPR/S/353 20 March 2017, para 3.3.3; Report of the Secretariat for the TPR of Cambodia, WT/TPR/S/364, 17 October 2017, para 3.104; Report of the Secretariat for the TPR of Chad, WT/TPR/S/174,11 December 2006.

[300] See for example: Report of the Secretariat of the TPR of Saudi Arabia, WT/TPR/S/256, 14 December 2011.

Arguably, there are two possible ways to interpret these approaches. Firstly, according to the Secretariat, the notions of SOE and STE are synonyms. Secondly, it could provide evidence that Article XVII of the GATT, originally conceived to deal with STEs, has limited application regarding SOEs. This could also be explained by looking at State practice, which, on the one hand, rarely qualifies notified entities as SOEs. On the other hand, while the Secretariat makes reference to SOEs, often no submitted notification can be found by the Member concerned.[301] On this point, it is worth looking at the view of the government of Samoa in the report of its TPR, which read: 'The authorities state that none of state-owned enterprises (SOEs) trading in goods are state trading enterprises under the meaning of the Understanding on the Interpretation of Article XVII of the GATT 1994'.
Nevertheless, reports arguably contribute to clarifying the boundaries of the notion of SOEs by shedding light on several aspects of domestic laws. On the one hand, reports illustrate a series of expressions used to address SOEs-related entities at the national level. For example, this is the case for government-linked corporations (GLCs),[302] a term used to identify and characterize mainly enterprises from Singapore; government trading entities (GTEs) are employed with reference to Australian entities.[303] Interestingly, in the Secretariat's Report for the TPR of China, State-controlled enterprises (SCEs) were addressed.[304] SCEs were defined as entities in which the State or another SOE either retains a majority ownership over total shares or a controlling influence over management and activities. On the other hand, reports contain definitions of SOEs provided by national laws. For example, the Secretariat's Report relating to the TPR of Argentina showed that under domestic law, SOEs are entities owned by the State, in which private capital is not allowed and their activities are conducted under the supervision of a ministry or a secretariat of the State.[305] When an Argentinian enterprise is owned and controlled by more than a public authority at both central and decentralized levels, the entity is referred to as an 'interstate' enterprise.[306] No reference is made to the grant of exclusive or special privileges. Thus, the Argentinian government adopts control and whole State ownership as constitutive elements of SOEs. It is also interesting to consider the Secretariat's Report for the TPR of Chinese Taipei. In this document, reference was made to Chinese Taipei's legislation, according to which 'a government-owned enterprise is a company that retains *de jure* monopoly rights and at least 50% of its shares are owned by the government'.[307] Thus, the focus is on majority ownership and privileges as cumulative constitutive elements of a government-owned enterprise. In contrast, the government of Sri Lanka focuses on ownership, which is the basis for categorizing public enterprises. More specifically, the government requires full ownership or majority ownership paired up with a controlling power of the State over the entity.[308]

3.7.2. Substantive criteria: ownership and control; the sector of activity and the grant of exclusive rights and special privileges

Next, the study scrutinizes the Secretariat's Reports through the lens of substantive criteria.

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[301] See for example: Report of the Secretariat for the TPR of Angola, WT/TPR/G/321 18 August 2015; Report of the Secretariat for the TPR of Argentina, WT/TPR/S/277, 13 February 2013.
[302] Report of the Secretariat for the TPR of Singapore, WT/TPR/S/413, 28 July 2021.
[303] Report of the Secretariat for the TPR of Australia, WT/TPR/S/104, 26 August 2002, para 94.
[304] Report of the Secretariat for the TPR of China, foot note 32, WT/TPR/S/300, 27 May 2014.
[305] Report of the Secretariat for the TPR of Argentina, WT/TPR/S/277, 13 February 2013, para 194.
[306] Ibid.
[307] Report of the Secretariat for the TPR of Chinese Taipei, WT/TPR/S/232, 31 May 2010.
[308] Report of the Secretariat for the TPR of Sri Lanka, WT/TPR/S/237/Rev.1, 30 November 2010.

The first criterion considered is that of ownership. Reports frequently refer to ownership patterns of entities under scrutiny or concerning the role played by the State in the economy. In the majority of cases, the level of ownership considered by the Secretariat to constitute an SOE is a majority or complete ownership.[309] It is also acknowledged that public ownership may be used to benefit social policy implementation.[310] However, reports also refer to the criterion of control. In this regard, the Secretariat notes the presence of State control over enterprises which can be paired up with the criterion of ownership (which risks blurring the line between the notions of ownership and control),[311] or it could take the form of a strong link with the central or local authority, like ministries or municipalities.[312]

The second substantive criterion is that of the sector of activity. In this regard, the study confirmed the findings already carried out for notifications of STEs submitted by WTO Members. Thus, STEs and SOEs are found to be carrying out their activities in strategic sectors of the national economy. These sectors include oil,[313] water,[314] mines,[315] food,[316] energy,[317] and health and education.[318]

The third substantive criterion is related to the grant of exclusive rights and privileges. In this regard, the analysis of reports confirms that entities qualifiable as STEs or SOEs often enjoy benefits, mainly

[309] Report of the Secretariat for the TPR of Armenia, WT/TPR/S/379, 25 September 2018, para 3.130; Report of the Secretariat for the TPR of Cameroon, WT/TPR/S/187, 27 August 2008; Report of the Secretariat for the TPR of Canada, WT/TPR/S/246, 4 May 2011, para 177 and 179; Report of the Secretariat for the TPR of the Southern African Custom Union, WT/TPR/S/324, Annex 1, para 3.3.3; Kuwait, WT/TPR/S/258, 4 January 2012, para 95; Report of the Secretariat for the TPR of the Republic of Moldova, WT/TPR/S/323, 14 September 2015, para 3.102; Report of the Secretariat for the TPR of Panama, WT/TPR/S/186 13 August 2007, para 246 ff. However, there is at least one case dated 2010 in which the criterion of ownership seems to be considered disjunctively from the qualification of an entity as an STE or as an SOE: cfr. Report of the Secretariat for the TPR of Albania, WT/TPR/S/229, 24 March 2010, para 23: 'As at January 2010, the *State had a share of 50% or more in 50 companies and statutory bodies*; the most important is the oil company Abpetrol'. Yet, the Secretariat states that: 'Albania does not maintain any state trading enterprises within the meaning of Article XVII of the GATT 1994'. Emphasis added.

[310] For example: Report of the Secretariat for the TPR of Brazil, WT/TPR/S/212, 2 February 2009, para 265.

[311] See Report of the Secretariat for the TPR of Brazil, WT/TPR/S/212, 2 February 2009, para 265; Report of the Secretariat for the TPR of the Russian Federation, WT/TPR/S/345 24 August 2016, para 3.151; Report of the Secretariat for the TPR of Sri Lanka, WT/TPR/S/237, 29 September 2010, para 190.

[312] See for example: Report of the Secretariat for the TPR or Indonesia, in which it is noticed that SOEs are directly controlled by the Ministry of Finance. Cfr. Para 3.117, WT/TPR/S/278, 6 March 2013; Report of the Secretariat for the TPR of the Republic of Korea, WT/TPR/S/204, 3 September 2008, para 71; Report of the Secretariat for the TPR of Mauritania, WT/TPR/S/250, 24 August 2011, para 83.

[313] For example: Report of the Secretariat for the TPR of Albania, WT/TPR/S/229, 24 March 2010, para 23; Report of the Secretariat for the TPR of Angola, WT/TPR/S/321 18 August 2015, para 3.65; Report of the Secretariat for the TPR of Bolivia, WT/TPR/G/363 26 September 2017, para 2.4.2.

[314] For example: Report of the Secretariat for the TPR of Albania, WT/TPR/S/337 23 March 2016, para 3.125.

[315] For example: Report of the Secretariat for the TPR of Southern African Custom Union, WT/TPR/S/324, Annex 1, para 3.3.3; Report of the Secretariat for the TPR of Tanzania, WT/TPR/S/171, 20 September 2006, Annex 2, para167.

[316] For example: Report of the Secretariat for the TPR of Antigua and Barbuda, WT/TPR/S/85/ATG, 7 May 2001, para 108; Report of the Secretariat for the TPR of Central Africa, WT/TPR/S/183, 7 May 2007, para 64; Report of the Secretariat for the TPR of Barbados, WT/TPR/S/101 10 June 2002, para 125; Report of the Secretariat for the TPR of Indonesia, WT/TPR/S/184, 23 May 2007, para 39.

[317] For example: Report of the Secretariat for the TPR of Argentina, WT/TPR/S/176, 8 January 2007, para 250; Report of the Secretariat for the TPR of Burundi, WT/TPR/S/113, 5 March 2003, para 96; Report of the Secretariat for the TPR of Cabo Verde, WT/TPR/S/322, 1 September 2015, para 3.98; Report of the Secretariat for the TPR of Kyrgyz Republic, WT/TPR/S/170, 4 September 2006, para 64; Report of the Secretariat for the TPR of Paraguay, WT/TPR/S/360, 2 August 2017, para 3.3.6.

[318] For example: Report of the Secretariat for the TPR of Armenia, WT/TPR/S/228 2 March 2010, para 19; Report of the Secretariat for the TPR of Brazil, WT/TPR/S/358, 12 June 2017, 3.3.5; Report of the Secretariat for the TPR of Southern African Custom Union, WT/TPR/S/324, Annex 5, para 3.3.3; Report of the Secretariat for the TPR of Togo, WT/TPR/S/166, 29 May 2006, para 74; Report of the Secretariat for the TPR of Belize, WT/TPR/S/134 14 June 2004,

in the form of monopoly rights or tax incentives.[319] Also in this case, these privileges are justified based on the implementation of social objectives.[320]

3.8. The *travaux preparatoires* of Article XVII of the GATT

The previous section showed how ownership, control, and the grant of exclusive or special rights are relevant constitutive elements of STEs that have emerged from State practice of counter-notifications and TPRs. More specifically, counter-notifications demonstrated that when little to no information is available concerning an enterprise, self-qualification or the qualification made by the government itself can be a relevant element in an investigation procedure. Ultimately, however, the findings confirmed that when defining the notion of STEs, State practice is somewhat fragmented. Thus, it seems appropriate to resort to other supplementary means of interpretation according to Article 32 of VCLT so that the boundaries of the notion of STEs can be defined.
The following sections investigate the preparatory works of Article XVII of the GATT to reconstruct the notion of STEs as it emerged and subsequently developed. To this end, the study first considers negotiations undertaken in the aftermath of WWII. After examining the proposals put forward by the US government between 1945 and 1946, the analysis focuses on negotiations and related drafts adopted following the London Conference, the New York Conference, the Geneva Conference, and the Havana Conference. Then, the study examines the notion at issue in negotiations undertaken during the Uruguay Round.

3.8.1. The pre-GATT era

STEs have been perceived as a disruptive element in international trade since the beginning of the negotiations that led to the establishment of the multilateral trading system. Within that framework, the UK and the US expressed the need to regulate State trading entities, thus playing a significant role in developing the current legal framework.[321] On the one hand, the need to regulate STEs had been expressed by the UK because it did not want to completely eradicate the possibility for the State to engage in the economy actively. In this regard, it was recognized that STEs played a major role in the agriculture sector in the post-WWII era. On the other hand, the debate focused on the need to regulate the conduct of these entities because being so tightly tied to the State, this might have constituted an incentive for the latter to circumnavigate its obligations.
Initially, the discussion on the regulation of STEs was boosted by the US, which in 1945 presented its Proposals for the Expansion of World Trade and Employment that were precisely intended to form

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[319] See for example: Report of the Secretariat for the TPR of Angola, WT/TPR/S/321, 18 August 2015, para 3.65; Report of the Secretariat for the TPR of Angola, WT/TPR/S/85/ATG, 7 May 2001; Report of the Secretariat for the TPR of Argentina, WT/TPR/S/277, 13 February 2013, para 196; Report of the Secretariat for the TPR of Central Africa, WT/TPR/S/183, 7 May 2007; Report of the Secretariat for the TPR of Burkina Faso, WT/TPR/S/236/BFA, 30 August 2010; Report of the Secretariat for the TPR of Ghana, WT/TPR/S/81, 29 January 2001, para 84; Report of the Secretariat for the TPR of Mauritania, WT/TPR/S/250, 24 August 2011, para 83; Report of the Secretariat for the TPR of Oman, WT/TPR/S/295, 18 March 2013, para 3.4.5; Report of the Secretariat for the TPR of Qatar, WT/TPR/S/408, 9 February 2021, para 3.3.5; Report of the Secretariat for the TPR of Solomon Island, WT/TPR/S/349, 8 November 2016, para 3.83; Report of the Secretariat for the TPR of Tajikistan, WT/TPR/S/399, 18 March 2020, para 3.3.5.1.
[320] Report of the Secretariat for the TPR of Brazil, WT/TPR/S/212, 2 February 2009, para 265.
[321] Mavroidis (n 19) 399 ff.

the basis for multilateral trade negotiations.[322] In this document, the US affirmed that trade was not only a tool that governments could use to exchange goods but also a means to improve the welfare of the people if States were willing to cooperate to make trade free from restrictions. According to the US, the restrictions which 'kept trade small' were: (i) restrictions imposed by governments; (ii) restrictions imposed by private combines and cartels; (iii) fear of disorder in the markets for certain primary commodities; and (iv) irregularity, and fear of irregularity, in production and employment.[323] Against this background, State trading activities were conceived as a potential barrier to trade.[324]
The US Proposals were followed in 1946 by the US Suggested Charter for the establishment of the ITO. This document revised the former Proposals following intense negotiations carried out by the US and the UK and would guide subsequent negotiations.[325] Indeed, in 1946, the UK channeled its influence at the London Conference, where the London Draft was adopted.[326] In turn, this document would constitute the basis for adopting the first draft version of the GATT in the following New York Conference. Three provisions dealing with STEs were drafted in the London Draft: Article 31, dealing with substantive obligations of STEs, required to act in accordance with commercial considerations; Article 32, dealing with state monopolies of individual products; Article 33, regulating complete state monopolies of import trade.[327] Article 31 is the most important provision for this study as it introduced a definition of STEs based on the notion of control. In other words, an enterprise qualified as an STE not only if it was a State entity but also if the State exercised effective control over it. Thus, in these early drafting stages, the notion of control was conceived as a constitutive element of STEs.
Article 31 was eventually incorporated in the New York GATT draft adopted at the end of the New York Conference. Rather than concentrate on defining STEs, the discussions on that occasion focused on the conduct and obligations of these entities. In particular, the US insisted on the need to ensure that the conduct of STEs should be based on commercial considerations. It has been noted that the adoption of the criterion of commercial considerations as a benchmark for assessing the conduct of STEs was then incorporated in the Interpretative Note Ad Article XVII of the GATT, which has been analyzed already.[328]
The definition of STEs was subsequently discussed in 1947 during the Geneva Conference. On that occasion, the debate revolved around the need to define these entities. Some delegations considered it unnecessary to define STEs, as 'a State enterprise or any other enterprise which "imports, exports…" must adhere to the rule of non-discrimination.'[329] Others, on the contrary, stressed the importance of a definition of STEs. According to the US, which was the leading proponent for establishing a definition it was 'absolutely essential to providing some rules indicating how state traders should discharge their obligations'.[330] This view was also adopted by South Africa, which

[322] Proposals for Expansion of World Trade and Employment, Developed by a Technical Staff within the Government of the United States in Preparation for an International Conference on Trade and Employment and Presented for Consideration by the Peoples of the World, U.S. Department of State, November 1945. See also: Mastromatteo (n 4) 602.
[323] Ibid 2.
[324] Ibid 17.
[325] Irwin, Mavroidis and Sykes (n 10) 104.
[326] E/PC/T/33. See: Irwin, Mavroidis and Sykes (n 10) 159.
[327] United Nations, Economic and Social Council, E/PC/T/C.6/W.22, 27th January 1994.
[328] Irwin, Mavroidis and Sykes (n 10) 160.
[329] United Nations, Economic and Social Council, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/W/239, 10th July 1947, note 62.
[330] Ibid note 5.

stated that 'a definition is necessary to distinguish the two groups of enterprises; those which may act for non-commercial reasons, and those which would normally act for commercial reasons.'[331]
Among those who believed defining STEs was necessary, relevant definitional criteria were put forward. Here. the positions expressed by WTO Members could be summarized as follows. On a general note, it was decided to remove any reference to the control principle. However, other criteria were put forward instead. The first group focused on domestic law: in this view, an enterprise would qualify as an STE only when defined as such under the domestic legal framework.[332] Another group stressed the importance of the majority State ownership criterion. Consequently, an enterprise would qualify as an STE when the government owned more than 50% of its capital.[333] A third group took a more practical position by underlining the need to ensure that STEs acted based on commercial considerations rather than political reasons.[334] The ratio behind this was well expressed by South Africa, according to which non-commercial considerations influence States' actions. Thus, the obligation to follow commercial considerations had to be stated explicitly for STEs.[335] Others stressed the need to ensure that both STEs and private enterprises would enjoy the same legal treatment. The French delegation further elaborated on this principle, stressing that a private enterprise should not be subject to STEs obligations solely because it conducted operations as a part of a governmental production program.[336]
Ultimately, at the Havana Conference, it was agreed that STE did not require a definition. Rather, the term was 'generally understood' to include 'inter alia any agency of the government that engages in purchasing and selling.'[337] The fact that most original incumbents who took part in the negotiations were based on a market economy model probably played a crucial role in adopting this decision.[338] These discussions highlighted 'the difficulties of drafting provisions with respect to state trading enterprise in view of the limited experience of members of the committee in these matters.'[339] At the same time, the discussions show how negotiators acknowledged that regulating this phenomenon effectively with the input of States with more expertise in state trading and related enterprises was desirable.

3.8.2. *The pre-WTO era*

The controversy surrounding the definition of STEs re-emerged during the negotiations in the Uruguay Round. Indeed, dissatisfaction over the lack of a definition of these entities arose in the intense discussions that emerged about the establishment of the WTO. In this regard, delegations expressed difficulty in elaborating a definition of STEs. Particularly, 'reference was made to a lack of conceptual clarity with respect to the definition of state trading enterprises.'[340] Thus, it was

[331] Ibid note 63.
[332] Ibid note 59 f.
[333] Ibid note 59.
[334] Ibid note 28 f.
[335] Ibid note 38.
[336] Ibid note 55.
[337] Havana Report, Doc. No. ICITO/1/8, point 114.
[338] Mavroidis ans Sapir (n 26).
[339] United Nations, Economic and Social Council, Preparatory Committee of the International Conference on Trade and Employment, E/PC/T/C.11/37 (31 October 1946), 3.
[340] Proposal for Review and Background Information on Certain GATT Articles, MTN.GNG//NG7/W/2, 6 May 1987, point 5.

acknowledged that defining these entities was necessary to regulate their activities.[341] During the Uruguay Round, negotiators stated that:

> 'It would be very difficult to reach agreement on the interpretation of the disciplines applying to state trading enterprises in the absence of a clear definition of the activities and enterprises to be covered; it would therefore seem necessary to make such a definition.'[342]

In a similar vein, the US government highlighted that there was 'no clear idea among GATT members of what constitutes a state trading enterprise for purposes of Article XVII, nor what obligations governments must accept for these enterprises'[343] and that 'many countries simply do not consider their state-run or state-aided corporations to be covered by Article XVII'[344] which inevitably had a negative impact on compliance with notification requirements. Delegations presented and discussed potential definitions.

In this context, the European Community (EC) delegation took a different approach. Its proposal did not focus on the definition of STEs, because STEs were considered to be an evolving phenomenon and part of the economic reforms being undertaken by members in domestic economies.[345] Rather, it proposed that the notion of STE should incorporate all governmental and non-governmental entities – thus enterprises in both the public and private sectors – that enjoy the power to make purchases or sales involving import or exports or are able to influence the level or direction of imports or exports.[346] Finally, the EC delegation specified that the term 'government' had to be understood in its broadest meaning, encompassing 'all levels of government, whether national/federal, regional or local.'[347]

Against this background, incumbents seemed to agree on the 'evolving' nature of the concept of STEs. Thus, it was decided to focus on the activities carried out by these enterprises rather than on their ownership pattern.[348] In other words, State ownership alone was not adopted as a constitutive element of STEs, because it did not confer in itself special powers or privileges on any enterprise'. Attention should be given to the environment in which the enterprise operates and its activities. From this perspective, it was suggested to define STEs as 'governmental bodies' with 'the power to make purchases or sales involving imports or exports or which by means of public policy instruments are otherwise able to influence the level or direction of imports or exports'.[349] On the one hand, this wording is similar to the working definition ultimately adopted by the Illustrative List. On the other hand, some elements were not confirmed in the final language of Article XVII of the GATT. Firstly, it is the qualification of STEs as 'governmental bodies', which reflects more explicitly the link between the entity and the establishing State. Secondly, there is reference to public policy

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[341] Negotiating Group on GATT Articles, Note on Meeting of 6,7 and 8 December 1989, MTN.GNG/NG7/14, 23 January 1990, para 23

[342] Ibid para 22.

[343] U.S. Department of Commerce, Uruguay Round Update, 1998, 6.

[344] U.S. Calls for New Rules in Article XVII Covering Role of State-Trading Agencies, 5, International Trade Rep. (BNA), 1998, 795..

[345] Communication from the European Communities, MTN.GNG/NG7/W/52, 18 August 1989, point A.

[346] Ibid.

[347] Ibid.

[348] Ibid para 24.

[349] Ibid Point A.

instruments, which arguably suggests that delegates acknowledged STEs as enterprises that governments could exploit for purposes other than trade.

A second suggestion defined STEs in a relatively comprehensive manner to include enterprises established by the government that possess or are vested with 'exclusive or special foreign trade privileges' and that are entitled to administer 'public policy measures' through which they 'influence the level, conditions or direction of imports or exports.'[350] The proposal also included 'other entities' which have been granted exclusive or special privileges and entities 'making imports or exports on command of government in order to secure the fulfillment of its international obligations or for State policy.' Arguably, the terminology refers more closely to the relationship between the State and the enterprises and emphasizes the latter's role in pursuing social policies.

The exclusion of the state ownership requirement caused delegations to primarily focus on the operational aspects of STEs above all else. Arguably, this prevented the achievement of a definition of STEs with precise boundaries. Indeed, the focus on the activities carried out resulted in the determination that firms operating without receiving subsidies or privileges should be treated equally to private firms.[351] Ultimately, the wording of Article XVII of the GATT did not change substantially in the Uruguay Round.

3.8.3. Final remarks on the preparatory work of Article XVII of the GATT

The previous section analyzed the preparatory works of Article XVII of the GATT before the adoption of the GATT 1947 and the establishment of the WTO in 1995. The debate conducted on both occasions did not lead to the adoption of a definition of STEs. Nevertheless, a closer look at the debate allows reconstructing which elements were at least considered for the definition of STEs.

During the preparatory work for the 1947 GATT, discussions for the regulation of STEs first focused on the control criterion. In this view, an enterprise that the State controlled qualified as a STE. No definition of control was provided. This notwithstanding, the focus on control makes the notion of STEs rather broad as it allowed the inclusion of not only State entities, i.e., bodies part of the public apparatus by a constitutional organization, but also entities controlled by the State. As noted already, this criterion was abandoned in subsequent negotiations.

Next the ownership criterion emerged, although it was treated differently in the pre-GATT and pre-WTO eras. During the first round of discussions, incumbents focused on the ownership criterion, specifically majority ownership. However, this was not included in the wording of Article XVII of the GATT. This notwithstanding, State ownership was discussed again during the Uruguay Round. However, it was not adopted as a constitutive criterion of STEs as it was not considered an element capable per se of conferring advantages on the enterprises to which it referred.

Against this background, the recurring element considered relevant by negotiators to define STEs on both occasions was the type of activities of the enterprises. More specifically, delegates agreed that entities falling under the notion of STEs were those enjoying exclusive or special privileges, which were ultimately able to influence exports and imports.

[350] Uruguay Round, Group of Negotiations on Goods, Negotiating Group on GATT Articles, note on Meeting 27-28 February and 1 March 1990, 19 March 1990, MTN.GNG/NG7/15, para 11.

[351] Ibid.

3.9. Relevant case law on Article XVII of the GATT

Having explored the notion of STEs and related constitutive elements emerging from the preparatory work of Article XVII of the GATT, this section aims to investigate the notion of STEs that emerged from GATT/WTO disputes. In this view, the analysis is divided into two parts. The first section considers whether and how adjudicating bodies dealt with the definition of STEs. The second section reconstructs the scope of STEs' substantive obligations.

3.9.1. Defining STEs in case law

The definition of STEs has never been investigated explicitly in GATT/WTO dispute settlement. However, some entities have come under the scrutiny of adjudicating bodies, which, after carefully considering their relevant characteristics, qualified as STEs within the meaning of Article XVII of the GATT. Looking at case law may thus sheds light on what features are deemed constituent elements of STEs by adjudicating bodies.

The Panel scrutinized the Livestock Products Marketing Organization (LPMO) in *Korea-Various Measures on Beef*.[352] This undertaking was established in 1988 to administer beef imports and had been previously notified by the Korean government as an STE. By subjecting LPMO to the discipline of Article XVII of the GATT, the Panel acknowledged that an enterprise granted a monopoly right over the import and distribution of a specific product constitutes an STE.[353]

In *Canada-Wheat*,[354] the Panel explicitly qualified the Canadian Wheat Board (CWB) as an STE.[355] The Board enjoyed several exclusive rights, including the exclusive right to purchase western Canadian wheat for export and domestic human consumption and the exclusive right to sell western Canadian wheat for export and domestic human consumption. It also enjoyed government guarantees with reference to financial operations, borrowing, credit sales to foreign buyers, and initial payments to farmers.[356]

3.9.2. Outlining substantive obligations concerning STEs through Article XVII of the GATT's case law

As mentioned already, rulings on Article XVII of the GATT focus primarily on substantive requirements and operational aspects of STEs in international trade rather than on their definition. In this regard, the analysis of case law is relevant to explore the possibility of specifying the wording of Article XVII of the GATT. This in turn makes it possible to understand whether some SOEs are covered under WTO regulation on STEs.

3.9.3. The non-discrimination principle

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[352] WTO, Report of the Panel, *Korea – Measures Affecting Imports of Fresh, Chilled, or Frozen Beef*, (31 July 2000) WT/DS161/R WT/DS169/R.
[353] Ibid para 15.
[354] WTO, *Canada-Measures Relating to Exports of Wheat and Treatment of Imported Grain* (6 April 2004) WT/DS276/R.
[355] Ibid para 4.564.
[356] Ibid para 4.77.

One issue that adjudicating bodies have dealt with is the non-discrimination principle. Pursuant to Article XVII:1(a) of the GATT, STEs have to carry out their purchases and sales, involving either import of exports, 'in a manner consistent with the general principles of non-discriminatory treatment.'[357] Under the WTO legal framework, the non-discrimination principle splits into the MFN and the NT principles.[358] Thus, the debate has been proceeded on the precise scope of obligations imposed on STEs, i.e., whether their conduct must conform to the MFN principle alone or whether they must also observe the NT principle. Case law has not been consistent on this point.

This issue was first addressed by adjudicating bodies in the GATT. In *Canada-FIRA*,[359] the Panel explicitly embraced the view expressed by the government of Canada in that case and stated that only the MFN principle fell within the scope of Article XVII:1(a) of the GATT.[360] However, this approach has been diluted as the adjudicative body did not take a definitive stance on whether the non-discrimination principle also included NT obligations. Indeed, the Panel affirmed that it was:

> 'not necessary to decide in this particular case whether the general reference to the principles of non-discriminatory treatment referred to in Article XVII:1 also comprises the national treatment principle since it had already found the purchase undertakings at issue to be inconsistent with Article III:4 which implements the national treatment principle specifically in respect of purchase requirements.'[361]

In the WTO era, the issue of the perimeter to be attributed to the principle of non-discrimination concerning STEs came up again in Korea-Various Measures on Beef.[362] In this case, the Panel did not take a definitive stance on the content of the non-discrimination principle. However, it specified that STEs acting as importers and distributors of a given product shall observe both the MFN and the NT principles.

Then, the matter was taken up in *Canada-Wheat*.[363] Again, the Panel ruled that the non-discrimination principle under Article XVII of the GATT included the MFN.[364] However, 'since resolving this particular issue would not affect our disposition of the United States' claim,'[365] the adjudicating bodies did not adopt a definitive position regarding the exact content of the non-discrimination principle set out in Article XVII of the GATT.

Overall, GATT/WTO panels and AB avoided deciding whether the principle of non-discrimination with respect to STEs includes the principle of NT in addition to the MFN. This was partly because the Members' interests could be protected without necessarily resolving this particular issue.[366]

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[357] For an extensive analysis on this concept under WTO law: Julia Qin, 'Defining non-discrimination under the Law of the World Trade Organization' (2005) 23(2) Boston University International Law Journal 215-298

[358] Matsushita and others (n 33) 246.

[359] Report of the Panel, *Canada – Administration of the Foreign Investment Review Act* (7 February 1984) L/5504-30S/140. In this case, the US complained about the Administration of the Canadian Foreign Investment Review Act which required foreign investors to prefer in their purchase Canadian goods over imported goods. According to the US government, the Canadian act was inconsistent with Article XVII:1(c) GATT.

[360] Ibid para 5.16.

[361] Ibid.

[362] WTO, *Korea – Measures Affecting Imports of Fresh, Chilled, or Frozen Beef*, (31 July 2000) WT/DS161/R; WT/DS169/R para. 756 f.

[363] WTO, *Canada-Measures Relating to Exports of Wheat and Treatment of Imported Grain* (27 September 2004) WT/DS276/R, para. 4.516 f.

[364] Ibid 6.48.

[365] Ibid 6.50.

[366] Mastromatteo (n 4) 609

3.9.4. The requirement of commercial considerations

The second element explored by WTO case law is the substantial obligation corresponding to 'commercial considerations' according to which STEs must operate. Under Article XVII:1(b) of the GATT, STEs are required to make their purchases or sales 'in accordance with commercial considerations', which include 'price, quality, availability, marketability, transportation and other conditions of purchase or sale'.
The problem posed by the interpretation of this rule concerns the relationship between the notion of commercial considerations and the principle of non-discrimination. This entails analyzing the link between Article XVII:1, subparagraph (a) and subparagraph (b). In other words, it should be understood whether the element of commercial considerations is an independent obligation - meaning that it is an obligation on Members to ensure that STEs act under commercial considerations and, in addition, under the non-discrimination principle - or the former is a mere illustration of latter.[367]
In the GATT era, the matter was explored in the Belgian Family Allowance case.[368] On this occasion, the GATT Panel specified that the non-discrimination principle and the commercial considerations requirement corresponded to two different sets of obligations of STEs. It stated:

> 'As regards the exception contained in paragraph 2 of Article XVII, it would appear that it referred only to the principle set forth in paragraph 1 of that Article, i.e., the obligation to make purchases in accordance with commercial considerations and did not extend to matters dealt with in Article III.'[369]

In other words, an STE would be required to carry out its activities in accordance with commercial considerations independent from the obligation to act in accordance with the non-discrimination principle.
Subsequently, in *Canada-FIRA*,[370] the Panel investigated the relationship between Article XVII:1 of the GATT, subparagraph (a) and subparagraph (b) and seemingly followed a different approach. The adjudicative body stated that while subparagraph (a) requires STEs 'to act in a manner consistent with the general principles of non-discriminatory treatment', paragraph (b) states that STEs shall make their purchases and sales in accordance with commercial considerations. In the Panel's view, these paragraphs did not set out independent sets of obligations. Rather, subparagraph (b) specified the general obligations contained in subparagraph (a). In this regard, it stated:

> 'The fact that sub-paragraph (b) does not establish a separate general obligation to allow enterprises to act in accordance with commercial considerations, but merely defines the obligations set out in the preceding sub-paragraph, is made clear through the introductory words "The provisions of sub-paragraph (a) of the paragraph shall be understood to require ...". For these reasons, the Panel considers that the commercial considerations criterion becomes relevant only after it has been determined that the governmental action

[367] Mavroidis (n 19) 406 ff.
[368] *Belgian Family Allowances (Allocations Familiales)* (7 November 1952) G/32 - 1S/59.
[369] Ibid para 4.
[370] *Canada – Administration of the Foreign Investment Review Act* (7 February 1984) L/5504-30S/140.

> at issue falls within the scope of the general principles of non-discriminatory treatment prescribed by the General Agreement.'[371]

From this perspective, the assessment that an STE is operating under commercial considerations is inextricably linked to the scope of the non-discrimination principle.
In the WTO era, this point was explored by the Panel and the AB in *Canada-Wheat*.[372] On that occasion, the Panel firstly focused on the notion of commercial considerations stating that these are considerations about commerce and trade or considerations 'which involve regarding purchases or sales as mere matters of business.'[373] It rejected the idea put forward by the US that the obligation to act in accordance with 'commercial considerations' entailed an obligation on STEs to carry out their activities as private commercial actors. In the Panel's view, 'the requirement that STEs make purchases or sales solely in accordance with commercial considerations must imply that they should seek to purchase or sell on terms which are economically advantageous for themselves.'[374] In other words, it acknowledged that STEs' can exploit their privileges as long as commercial considerations justify that conduct. Moreover, the Panel explained the meaning to be attributed to the expression 'solely in accordance with commercial considerations' *ex* Article XVII:1(b) of the GATT. In this regard, it stated:

> 'The preceding paragraphs lead us to the view that if an STE is directed to make, or does make, purchases or sales on the basis of such considerations as the nationality of potential buyers or sellers, the policies pursued by their governments, or the national (economic or political) interest of the Member maintaining the STE, it would not be acting solely in accordance with commercial considerations.'[375]

In other words, the Panel identified several elements that, if followed by the STE in its decisions concerning its buying and selling operations, would prevent it from acting solely based on commercial considerations. Therefore, for an STE to operate in accordance with Article XVIII of the GATT, it must leave out of its evaluations the nationality of the purchasers, governmental policies, and the national interest of the establishing state.
Subsequently, the AB upheld the Panel's findings concerning the relationship between the non-discrimination principle and the requirement of commercial considerations. The AB confirmed that the expression 'commercial considerations' does not establish an autonomous obligation; rather, it constitutes an illustration of the non-discrimination principle that STEs are expected to comply with.[376] In this regard, the AB stated:

> 'it [is] abundantly clear that the remainder of subparagraph (b) is dependent upon the content of subparagraph (a), and operates to clarify the scope of the requirement not to discriminate in subparagraph (a). We note, particularly, the words "shall be understood". Elsewhere in the GATT 1994, and throughout the covered agreements, these words are

[371] Ibid para 5.16.
[372] Ibid.
[373] Ibid para 6.86.
[374] Ibid para 6.87.
[375] Ibid para 6.88.
[376] *Canada — Wheat Exports and Grain Imports*, par. 145.

> used, together with the verb "to mean", to define the scope or to clarify the meaning of the term that precedes it. In our view, the words "shall be understood" serve the same purpose when used with the verb "to require", that is, to define the scope of or clarify the requirement in the preceding provision.'[377]

Thus, it is made clear that obligations under paragraph (b) are only relevant when the governmental measure considered falls under the scope of paragraph (a), i.e., is regulated by the principle of non-discrimination. Moreover, the AB also affirmed that, like private undertakings, STEs can use their advantages to gain economic benefits.[378] In this regard, STEs may lawfully charge different sale prices in different markets for the same product, provided commercial reasons justify this. For example, this would be the case when prices reflect the relationship between demand and supply in a given market. In other words, an STE would act in accordance with commercial considerations to the extent it carries out its activities in a non-discriminatory manner. As noted by Mavroidis, the AB definitively clarified the relationship between the non-discrimination principle and the commercial considerations requirement, but it did not explain the rationale behind its decision.[379] Ultimately, this would allow the adoption by STEs of measures that comply with the non-discrimination principle but are not justified by commercial considerations. Consequently, such actions would not fall under the scrutiny of Article XVII:1(b) of the GATT if they do not discriminate between like products, although not justified from a commercial considerations point of view. For example, this would be the case of a consumption tax applied on like-products based on their destination of final use. In such a case, a higher tax would be applied to goods destined for final consumption, and a lower tax would be applied to goods destined for industrial use. Applying such a tax would be discriminatory to the extent that it applies differently to like-products based on their final use. Although it resonates with commercial considerations, according to the AB interpretation, such a measure would breach Article XVII of the GATT.

3.9.5. The requirement to provide 'adequate opportunity'

Under Article XVII:1(b) of the GATT, STEs 'shall afford the enterprises of the other contracting parties an adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales'.

In *Canada-Wheat*, the US complained that the Canadian Wheat Board did not offer other enterprises an adequate opportunity to compete either as a buyer or producer in relevant transactions, in breach of Article XVII:1(b) of the GATT. Both Panel and the AB rejected the US interpretation. In its report, the AB clarified that 'adequate opportunity' should be referred to those purchases and sales where (i) one of the parties involved is an STE and (ii) the transaction involves imports or exports from the Members establishing the STE. In this kind of transaction, the requirement to afford an 'adequate opportunity' consists of the possibility for other enterprises to become the STEs' counterparts, not the chance to replace the STE as a participant in the transaction.[380] Against this backdrop, the precise

[377] Ibid para 89.
[378] Ibid par. 149.
[379] Mavroidis (n 19) 409.
[380] *Canada — Wheat Exports and Grain Imports*, para. 157

boundaries of the obligation at issue are left undefined given that the meaning of 'adequate' or 'compete' are yet to be specified.[381]

3.9.6. Final remarks on the constitutive elements of STEs emerging from the analysis of relevant case law

The analysis conducted in the previous sections shows that a certain level of uncertainty persists in the case law regarding the types of enterprises covered by Article XVII of the GATT and their constituent elements. On the one hand, adjudicative bodies tend to qualify a given entity as an STE when it enjoys exclusive or special rights, validating State practice emerging from notifications. On the other hand, elements, like the degree of control or the ownership percentage needed to constitute an STE that were considered in GATT negotiations or Protocols of Accession, have never been addressed in the merits of the case. The analysis of case law confirms the interpretation to be given to the notion of STE in the context of article XVII of the GATT adds little to what has already been observed in practice about the definition of STEs.
Also, case law is arguably unable to specify any further the substantive content of Article XVII of the GATT. Indeed, the substantive content of the non-discrimination principle set out in Article XVII:1 of the GATT is far from being defined. On the one hand, there is a general understanding that it includes at least the MFN principle.[382] On the other hand, however, it consists of the NT principle if STEs play more roles at the same time - i.e., importer and distributor. As for the substantive obligation underlying commercial consideration, according to all adjudicative bodies, this is a mere illustration of the non-discriminatory principle. Thus, STEs are allowed to implement public policy objectives as long as they do not act in a discriminatory manner, even if STEs may use their privileges in abusive ways and incentivize the adoption of disruptive behavior by Members toward tariff negotiations.[383] This conclusion can have significant practical consequences since it risks incentivizing the adoption of those disruptive behaviors of STEs that the multilateral trading system seeks to avoid. Indeed, the AB's findings seem to establish a presumption: an STE that carries out its activities in accordance with the principle of non-discrimination is presumed to be also acting in compliance with commercial considerations. However, from this perspective, conduct which is not discriminatory but irrational from a commercial point of view does not fall within the scope of Article XVII and can escape judicial scrutiny.

4. Starting to emerge from the haziness of SOEs regulation under WTO law: drawing conclusions from the interpretation of Article XVII of the GATT

The analysis conducted in the previous sections sheds light on the definitional aspects of SOEs through the lens of interpretation of Article XVII of the GATT. In particular, the study focused on the notion of STEs and identified its constitutive elements, with the aim to understand whether the notions of SOEs and STEs coincide and, if yes, to what extent. In this regard, the point of departure is that the term STEs was intentionally left undefined by Members who participated in GATT's negotiations. This decision was determined by two main factors, which are closely intertwined. Firstly, the multilateral trading system was designed with a market-based economy in mind.

[381] Mavroidis (n 19) 410.
[382] Matsushita and others (n 33) 246.
[383] Mavroidis (n 19) 409.

Secondly, incumbents had minimal knowledge of State trading activities. Thus, it was deemed impossible to regulate something not sufficiently known by those who were supposed to regulate it. Despite this definitional gap, however, discussions among governments clearly show that, since its very origins, the objective of Article XVII of the GATT was limited to addressing trading activities carried out by enterprises that are in various ways linked to the State.

Against this backdrop, the study mapped the constituent elements of STEs that emerged through each lens of interpretation. More specifically, the defining features identified are as follows: (1) control; (2) the grant of exclusive or special privileges; (3) the level of integration within the State apparatus; (4) State ownership; and (5) national qualification. This is simply a list of the elements that the study was able to identify. In other words, these elements are not all to be found at all the levels of interpretation, nor should they be considered mutually exclusive. Table 1 summarizes how these elements are distributed across the levels of interpretation of Article XVII of the GATT.

Table 1 – Summary of constitutive elements of STEs emerging from the interpretation of Article XVII GATT

Means of Interpretation	Constitutive element(s)
Wording of Article XVII GATT	• The level of integration within the State apparatus; • The grant of exclusive or special privileges.
Interpretative Note Ad Article XVII GATT	• The grant of exclusive or special privileges (equated to control).
Understanding on the Interpretation of Article XVII GATT	• The grant of exclusive or special privileges; • Involvement in imports and exports.
1999 Illustrative List	• The grant of exclusive or special privileges; • Involvement in imports and exports.

STEs notifications	- The level of integration within the State apparatus; - State ownership (complete, majority or minority State ownership); - The grant of exclusive or special privileges; - Involvement in imports and exports.
Counter-notifications	- Control; - The grant of exclusive or special privileges; - State ownership; - National qualification.
Trade Policy Review	- State ownership (total or majority ownership); - The grant of exclusive or special privileges; - Control.
Preparatory Works	- Control (eliminated) - The grant of exclusive or special privileges; - National qualification; - Involvement in imports and exports.

As shown in Table 1, the interpretative analysis of Article XVII of the GATT suggests that the only constitutive element underlying all levels of interpretation is granting the enterprise of exclusive or special rights by the State. Thus, it seems possible to conclude that privileged enterprises constitute STEs under the WTO legal framework. Reference to this criterion was made during GATT negotiations. Nevertheless, its adoption by the Working Definition turned it into a constitutive element of STEs with considerable influence on State practice on notifications. This aligns with the rationale of Article XVII of the GATT, which was initially adopted to prevent Members from circumnavigating their obligations through STEs. As far as substantive commitments are concerned, the analysis of case law related to Article XVII of the GATT reveals that much still needs to be defined. However, it seems settled that STEs must act in accordance with the non-discrimination principle and that this obligation also encompasses the requirement of commercial considerations. The content of this principle, although generally considered to correspond to the MFN, is still to be

fully defined. Against this background, the only conduct of STEs scrutinized is the one in breach of the non-discrimination principle, which also represents the only limitation on STEs when it comes to the exploitation of their privileges.

It is now possible to apply the findings on the notion of STEs to the notion of SOEs. In this regard, the main point that guides the analysis is the relationship between these two types of enterprises and the State. Under Article XVII of the GATT, the grant of exclusive or special privileges to a given enterprise is the element that is able to capture economic operators under the notion of STE. This is the characteristic that allows a State to be considered a trader. Looking at SOEs, while they can enjoy special and exclusive rights (for example, when granted a monopoly right over purchasing or selling a given good or service), this is not their only feature. As seen already, the term SOEs encapsulates a variety of enterprises with different institutional structures, ownership, and control models and, ultimately, a wide range of links with the State. This results from the alternate implementation by governments of nationalization and privatization policies over time.[384] This is also a consequence of entrusting economic actors different types of activities, including those typically associated with the government. Overall, this has two implications: on the one hand, the dividing line between public and private entities has become increasingly blurred; on the other hand, the activities that SOEs perform go beyond monopoly rights over imports or exports. In other words, the notion of STE is narrower than that of SOE, as it is nowadays generally referred to in the context of international trade. More specifically, the notion of STE is not sufficiently broad to seize a wider variety of entities than the ones strictly envisaged in GATT/WTO's negotiations. This finding is primarily based on analyzing the connection shared with the State, rather narrowly identified for STEs and much broader for SOEs. Hence, while an STE may constitute a (specific type of) SOE, the opposite is not always true.

Moreover, the uncertainties highlighted by Article XVII of the GATT case law concerning the substantive obligations of STEs risk jeopardizing the power of the WTO legal framework to regulate SOEs' conduct. This is mainly because the functioning of SOEs does not correspond to a single and definite pattern, which is likely to escape an indeterminate legal framework. The range of activities performed by SOEs is not limited to trading ones but can still affect the international trade flow.

Against this backdrop, the application of Article XVII of the GATT to SOEs by way of extensive interpretation is arguably insufficient to tackle the entire spectrum of these entities, and their operations in international markets, as this provision reflects a reality that simply no longer exists. Thus, it could be argued that Article XVII of the GATT was, in fact, not conceived to regulate complex entities, like contemporary SOEs.[385]

Against this background, the longer it takes to update the legal framework so that it is in line with the current global economy, the more the gap between entities covered and those left unregulated is destined to widen. This conclusion is further confirmed by the other constituent elements of STEs emerging from State practice and discussions among negotiators. These are namely the criteria of ownership and control. The decision not to define STEs – and the related choice not to include these criteria in the wording of Article XVII of the GATT - threw these constitutive elements out the window. However, they periodically keep coming in through the backdoor of either the WTO itself or of the external legal framework of preferential trade agreements (PTAs).[386] Under the WTO, the notion of control has been consistently considered first in pre-WTO negotiations, then in the

[384] See chapter 1 of this thesis.
[385] This interpretation has been confirmed by a WTO official interviewed for this study.
[386] See chapter 5 of this thesis.

Interpretative Note *Ad* Article XVII of the GATT, and, most importantly, in Protocols of Accession. The latter reveals a significant evolution regarding the terminology used to identify economic operators linked with the State and reflects, if not a better knowledge of these entities in international trade, at least an acknowledgment that they cannot all be encapsulated within the notion of STE. In the context of accession negotiations, references made by negotiators to ownership and control specify the content of Article XVII of the GATT. Arguably, this is an attempt to update the WTO regulation on State-led economic operators in the multilateral trade legal system. While this regulatory attempt may be laudable, it is not sustainable in the long-run. Being an integral part of WTO Agreements, Accession Protocols are not only binding for the acceding Member but can also be invoked in dispute settlement proceedings by other Members as 'covered agreements' under the DSU. In this context, Accession Protocols may introduce obligations not included in the original Agreements (i.e., WTO+ obligations).

Regarding obligations on SOEs and related entities, these rules are tailored to each economic model of the WTO Member concerned. The result is a fragmented legal framework, which is troublesome in several respects: first of all, there is a group of rules on SOEs that are imposed only on a specific group of acceded Members but that, at the same time, can be invoked by all other Members before adjudicative bodies. Secondly, a regulatory framework introduced on the occasion of accessions is intrinsically contingent in nature as it specifically aims at addressing the accession of a given Member to the organization. Thirdly, a fragmented and contingent legal framework arguably undermines the general principle of legal certainty, leaves Members ample room for circumventing their WTO obligations, and thus incentivizes governments to adopt deceptive behavior in breach of the transparency principle.[387]

Against this background, PTAs increasingly contain provisions directly addressing SOEs by regulating those elements left out of the WTO legal system. Further space is dedicated to these issues in Chapter 5. For now, suffices it to say that these agreements often define SOEs.[388] For instance, Chapter 17 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) is relevant.[389] By adopting both the ownership and the control criteria, it defines SOE as enterprises in which the State either (i) directly owns more than 50% of the stock of the enterprise; or (ii) controls the enterprise through the ownership of more than 50% of its voting rights, or (iii) has the right to appoint the majority of the members on the executive board or any other decision-making body. Similar solutions have also been adopted by the EU in the Agreements concluded with Japan,[390] and, more recently, with Viet Nam.[391]

Thus, contrarily to what may be concluded from the sole analysis of case law, where defining criteria of STEs have never been addressed in the merits of the case, the overall interpretation of Article XVII

[387] Mavroidis and Sapir argue that Protocols of Accession should not impose on acceding Members the adoption of a particular organization of their national economy nor pose obligations pertaining to areas not covered by WTO agreements. In this scenario, it therefore seems inevitable that the issue will at some point have to be addressed at the multilateral level, with a discussion on the agreements. Mavroidis and Sapir (n 24) 104.

[388] Luca Rubini and Tiffany Wang, 'State-owned enterprises', in Aaditya Mattoo, Nadia Rocha, Michele Ruta, *Handbook of Deep Trade Agreements* (2020, World Bank), 465 f. For analysis between WTO and PTAs from the point of view of policy professionals see: Silke Trommer, 'The WTO in an Era of Preferential Trade Agreements: Thick and Thin Institutions in Global Trade Governance' (2017) 16(3) World Trade Review 501-526.

[389] For a critical analysis of regulation of SOEs in the CPTPP see: Weihuan Zhou, 'Rethinking the (CP)TPP as a model for regulation of Chinese State-owned enterprise' (2021) Journal of International Economic Law jgab030.

[390] EU-Japan Economic Partnership Agreement.

[391] EU-Vietnam Trade Agreement.

of the GATT suggests that Members do need STEs to be defined and the State ownership and control criteria to be specified. This is also confirmed by the ongoing discussions on these points that are developing in PTAs, hence outside of the WTO institutional framework, a circumstance that must be addressed. Indeed, this tendency may reveal governments' perception of the WTO legal framework as too static and ineffective when it comes to regulating the actors operating in the current global economy. In other words, the deepening of Members' knowledge of SOEs has not been accompanied by a progressive establishment of a comprehensive legal solution at the multilateral level – as it probably should have, considering WTO Members are now in a different position vis à vis State intervention in the economy than they were in the post-WWII era. While addressing these issues in Protocols of Accessions undoubtedly was a necessary step to undertake, as it allowed Members to expand their knowledge on the subject, overcoming this scattered system appears timely and necessary for the reasons outlined above. It is hardly surprising that States started to look for a refined legal solution in the smaller - but probably more effective - dimensions of regional and bilateral agreements rather than multilateral ones.

Chapter Four

THE NOTION OF STATE-OWNED ENTERPRISES (SOEs) AND OTHER WTO AGREEMENTS: THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES (ASCM), THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS), THE GOVERNMENT PROCUREMENT AGREEMENT (GPA), AND THE AGREEMENT ON AGRICULTURE (AOA)

1. Introduction

Having considered the notion of SOEs in the context of the multilateral regulation on State trading emerging from the GATT, the study now explores the constitutive criteria of SOEs emerging from other regulatory frameworks within the WTO, namely subsidy regulation, trade in services, government procurement, and agriculture. As is well-known, each of these subject matters is core to a specific treaty instrument: while trade in services is addressed through a multilateral self-standing agreement, and subsidy regulations and agriculture are attached to the GATT, government procurement only applies to plurilateral regulation.[1] Notwithstanding the formal differences between the treaty instruments and the institutional settings, these regulated subject matters are worth selection and categorization for the purposes of this study for a number of reasons.

On the one hand, the field related to subsidy is the context where the challenges brought about by SOEs in international trade are most evident and concerning for trading partners. On the other hand, SOEs have traditionally operated or are incrementally increasing their activities in international markets that are related to services, government procurement and agriculture activities, and therefore play a crucial role in these sectors. Their importance in international trade in this regard has grown with the expansion of their activities in international markets. SOEs increasingly provide essential services, often to fulfill a public goal.[2] They are also key players in international government procurement procedures, where they can potentially stimulate the circulation of technology or innovative solutions. Finally, SOEs have been exploited in agriculture to protect national production and to ensure food accessibility and national supply. Therefore, their analysis offers important insights and hints as to constitutive elements used to define economic actors linked to the State and whose conduct falls under the scope of international trade regulation. The constitutive elements of these actors could be used to identify and help determine the boundaries of the notion of SOEs at the same time.

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[1] For interpretation purposes, it should be kept in mind that, pursuant to Article II:3 of the WTO Agreement, plurilateral agreements (such as the GPA) and associated legal instruments contained in Annex 4 to the WTO Agreement are part of the WTO covered agreements for the Members who accepted them. See Isabel Van Damme, *Treaty Interpretation by the WTO Appellate Body* (OUP, 2009) 76.

[2] Maddalena Sorrentino, 'State-Owned Enterprises and the Public Mission' in Luc Bernier, Massimo Florio and Philippe Banche, *The Routledge Handbook of State-Owned Enterprises* (Routledge, 2020) 73 f. See also: S Stephenson and Gary Clyde Hufbauer, 'Services and State-Owned Enterprises' in Pierre Sauvé and Martin Roy, *Research Handbook on Trade in Services* (Edward Elgar Publishing, 2016) 299-330.

From this perspective, the study first focuses on the Agreement on Subsidies and Countervailing Measures (ASCM).[3] Starting with the notion of 'public body' regulated in Article 1.1 of the ASCM, the study aims to reconstruct the definitional approaches under that legal framework that could apply to SOEs. Then, the General Agreement on Trade in Services (GATS) is considered,[4] which offers interesting insights and hints regarding the constitutive elements of economic operators that fall under its scope. In this context, the investigation aims to map the relevant definitional elements of economic operators regulated in this instrument and assess whether and to what extent they could apply to SOEs. Next, the study considers the Government Procurement Agreement (GPA).[5] As it will be seen, the latter is a plurilateral agreement, only binding on signatories that agreed to join its regulatory framework. In this case, the focus is on the entities to which each Party to the agreement commits to apply the GPA. Lastly, the Agreement on Agriculture (AoA)[6] offers important clarifications regarding the notion of 'governmental agency' and its boundaries.

2. Exploring the notion of SOEs under the Agreement of Subsidies and Countervailing Measures (ASCM)

A study on the notion of SOEs under the WTO legal system benefits from the examination of the second main legal framework regulating State intervention in the economy: the rules on subsidies as encapsulated in the ASCM.

As seen already, SOEs are primarily perceived as a 'subsidy issue' under the legal framework of the WTO.[7] It has also been argued that the determination of whether SOEs constitute a 'public body' for the ASCM purposes is a playground to challenge and measure the ability of the WTO to deal with State capitalism.[8] These conceptions partially derive from the accession of China to the multilateral

[3] Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 410 [hereinafter AoA].

[4] General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 UNTS 183, 33 ILM. 1167 (1994) [hereinafter GATS].

[5] Revised Agreement on Government Procurement, Mar. 30, 2012, Marrakesh Agreement Establishing the World Trade Organization, Annex 4(b), 1915 UNTS 103 [hereinafter GPA].

[6] Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 410 [hereinafter AoA].

[7] Julia Y Qin, 'WTO Regulation of Subsidies to State-Owned Enterprises (SOEs): A Critical Appraisal of the China Accession Protocol' (2004) 7(4) Journal of International Economic Law 864; Weinian Wu, 'Industrial Subsidies, State-Owned Enterprises and Market Distortions: Problems, Proposals and a Path Forward' (Institute for International Trade, University of Adelaide, December 2019).

[8] Dukgeon Ahn, 'Why Reform is Needed: WTO "Public Body" Jurisprudence' (2021) 12(3) Global Policy 61. See also: Yueh-Ping Yang and Pin-Hsien Lee, 'State Capitalism, State-Owned Banks, and WTO's Subsidy Regime: Proposing an Institution Theory' (2018) 54 Stanford Journal of International Law 130; Mark Wu, 'The China Inc. Challenge to Global Trade Governance' (2016) 57(2) Harvard International Law Journal 301-305. The regulation of SOEs, non-market-oriented economies and related policies under the WTO have also been addressed in the context of the trilateral meetings held between the US, the EU and Japan since 2018. A joint statement issued in 2019 took into consideration the growing importance of State enterprises and industrial subsidies. See Ines Willemyns and Jan Wouters, 'EU-Japan Cooperation in International Trade Governance: QUAD to JEEPA', in Eiji Ogawa and others (eds), *Japan, the European Union and Global Governance* (Edward Elgar Publishing, 2021) 134-135. See also: Dukgeun Ahn and Jieun Lee, 'Countervailing Duties against China: Opening a Pandora's Box in the WTO System?' (2011) 14(2) Journal of International Economic Law 289-331; Tegan Brink, 'What Is a 'Public Body' for the Purpose of Determining a Subsidy after the Appellate Body Ruling in US – AD/CVD?' (2011) 6(6) Global Trade and Customs Journal 313-315.

trading system in 2001 and the increase of State capitalism within and outside the WTO.[9] After these events, the original incumbents realized that SOEs could be not only recipients but also providers of subsidies. In other words, SOEs and related entities could play multiple roles within the market. This situation was only partially envisaged during the Uruguay Round negotiations on subsidies. That is, governments were able to exploit them as proxies to provide various subsidies to both downstream and upstream industries and implement public policies well beyond State trading.[10]

Against this background, the following discussion explores the boundaries of the notion of SOEs emerging from WTO subsidy regulation. As explored below, the definition of subsidy within the meaning of Article 1 of the ASCM envisages three types of subsidy providers: the government, 'any public body,' and private bodies entrusted or directed by the government to carry out governmental functions. In this context, the analysis investigates the conditions under which an SOE falls under the category of 'public body' or that of 'private' entities. From a legal perspective, this determination is crucial in establishing the scope of the legal regime applicable to SOEs under the multilateral subsidy regulation. Indeed, depending on the qualification given to the SOE concerned, the intensity of the scrutiny on their conduct under the ASCM changes, along with the remedies available to WTO Members and the standard of proof required to this end. Indeed, under Article of the 1 ASCM, WTO Members are allowed to resort to unilateral or multilateral remedies to counteract the negative impact of subsidies provided to a public entity or by it to other economic operators. Arguably, these are the reasons why it has never been explicitly acknowledged that State ownership makes an enterprise public and, therefore, a public body for the purposes of subsidy regulation. If a private entity is involved, there is a presumption that its conduct cannot be attributed to the government unless 'entrustment' or 'direction' of the State on that conduct is proven, and a governmental function is performed.

Against this background, the analysis aims to assess the constitutive elements emerging from WTO regulation on subsidies that would qualify an SOE as a public or private body. To this end, the study is structured as follows. Firstly, following a brief overview of subsidy regulation under the WTO, the notion of 'public body' is considered in the context of the wording of Article 1 of the ASCM. Secondly, the study reviews relevant case law in this regard. This step is important because, within the dispute settlement mechanism, WTO Members and adjudicating bodies have proposed several definitions of 'public body' and private entities. Thirdly, the constitutive elements emerging from those discussions and decisions are scrutinized.

2.1. Subsidy regulation under the multilateral trading system: a brief overview

It is reasonable for States to resort to adopting subsidies for various reasons.[11] This tendency has recently increased due to the financial crises that hit the world in the last few decades and, more

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[9] For a detailed analysis of the issues brought about by China in the multilateral trading system: Petros C Mavroidis and André Sapir, *China and the WTO: Why Multilateralism Still Matters* (Princeton University Press, 2021). See also: Ming Du, 'China's State Capitalism and World Trade Law' (2014) 63(2) The International and Comparative Law Quarterly 409-448.

[10] Petros C Mavroidis and André Sapir, 'China and the WTO: Towards a Better Fit', Working Paper, Issue 6 (Bruegel, 2019) 7-9.

[11] Petros C Mavroidis, *The Regulation of International Trade. Volume 2* (The MIT Press, 2016) 728.

recently, the Covid-19 pandemic.[12] Indeed, at the national level, subsidies have traditionally been considered a legitimate tool for States to pursue public policy objectives, including industrial development, technological innovation, and environmental objectives.[13] However, from an international trade viewpoint, subsidies can potentially harm trading partners and their economies due to their possible negative spillovers. The latter may be related to the distortion of international trade flow, the diversion of formerly competitive domestic products and producers out of the market,[14] the triggering of subsidies wars with other trading partners in a scenario where everyone subsidizes its exporters to equip them with a competitive advantage.[15] Hence, there is a need to regulate subsidies under the multilateral trading system.[16]

Originally, the GATT contained a loose subsidy regulation, primarily encapsulated in two provisions. Under Article III:8(b) of the GATT, Members were allowed to provide subsidies in favor of national producers;[17] then, according to Article XVI of the GATT, Members were also required to notify granted or maintained subsidies, which allowed other Members to adopt countervailing duties (CVDs) in the case where subsidization caused adverse effects that needed to be counteracted. Apart from this legal framework, the GATT did not define what a subsidy was. This definitional gap was due to divergent ideas, perspectives, and political views about subsidies. In particular, it was recognized that finding an agreed definition of the phenomenon under the multilateral legal framework on international trade was neither feasible nor useful,[18] since the lack of a definition served no practical consequences for the application of Article XVI of the GATT.[19]

Against this background, experts from a Working Party on Anti-Dumping and Countervailing Duties stated that 'a large majority of experts considered that [the term 'subsidy'] covered only subsidies granted by the government or by semi-governmental bodies,'[20] while three other experts 'considered

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[12] Erica Bosio and Arturo Herrera Gutierrez, 'The Increasing Role of Government' (World Bank, 3 November 2022) <https://blogs.worldbank.org/governance/increasing-role-government>.

[13] IMF, OECD, World Bank, and WTO, *Subsidies, Trade, and International Cooperation*, 2022/01, 7.

[14] John H Jackson, *The Jurisprudence of GATT & the WTO: Insights on Treaty Law and Economic Relations* (CUP, 2000) 90 f. From an economic perspective, it is worth noting that different types of subsidies are linked to different effects and that the effects also depend on the size of the subsidizing country. More specifically, export subsidies have proven to have a negative effect on the subsidizing country, as they tend to over-stimulate national production in a way that outgrows national consumption. From the perspective of international trade partners, the effects of subsidized trade may vary depending on the size of the subsidizing country: if this is small enough not to impact world prices, some displacement effect may occur with reference to exports of the subsidized product from other countries, but the overall welfare will not be affected. However, another effect in the export market is the depression of the price of the product. See Petros C Mavroidis, Patrick A Messerlin and Jasper M Wauters, *The Law and Economics of Contingent Protection in the WTO* (Edward Elgar Publishing, 2008) 294.

[15] Kyle Bagwell and Robert W Staiger, *The Economics of the World Trading System* (Massachusetts Institute of Technology, 2002) 180.

[16] Mavroidis (n 11).

[17] The wording of Article III:8(b) of the GATT stated: '(b) The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.' For a detailed analysis of subsidy regulation under the GATT: John W Evans, 'Subsidies and Countervailing Duties in the GATT' (1977) 3 The Maryland Journal of International Law, 211-245.

[18] In this regard, it is interesting to note the statement of a Panel on Subsidies on this matter in a 1961 report: 'The Panel considered that it was neither necessary nor feasible to seek an agreed interpretation of what constituted a subsidy. It would probably be impossible to arrive at a definition which would at the same time include all measures that fall within an intended meaning of the term in Article XVI without including others not so intended.' (L/1442-Add.1-2, 21 November 1961).

[19] Ibid.

[20] GATT, BISD, 9th Supp., paragraph 12, p. 192 (1961).

that the word should be interpreted in a wider sense and felt that it covered all subsidies, whatever their character and whatever their origin, including also subsidies granted by private bodies.' Furthermore, the group agreed that the term subsidy covered not only 'actual payments, but also measures having an equivalent effect.'[21] It can be noted that the notion of subsidy under the GATT was mainly revolved around two relatively straightforward elements, namely (i) a clear and direct transfer of economic resources; (ii) State involvement in the grant of subsidies when third parties were involved.[22] Therefore, the idea that States could somehow use other entities to avoid their subsidy obligations was already present at these very early stages.

Subsequently, the increased use of subsidies after the establishment of the GATT led to the need to find a definition for these measures. Discussions in this direction were carried out starting with the Tokyo Round;[23] and the ASCM was ultimately adopted. Under this Agreement, three categories of subsidies were initially identified and regulated based on their potential to distort trade: prohibited, actionable and non-actionable subsidies.[24] Export subsidies or local content ones have been outright unlawful and prohibited under the WTO legal system. In contrast, actionable subsidies are domestic subsidies that harm the interests of another WTO Member. Only subsidies falling within these categories could be considered prohibited or actionable,[25] and other Members can resort to CVDs.[26] In line with the principles on which the WTO legal system is premised, the ASCM encapsulates the principle that the market sources can ensure the best allocation of resources in international markets. State intervention in the economy is limited to counteract negative externalities that impede such an outcome.[27]

In this context, for the first time, the ASCM introduces a definition of subsidy. In its relevant parts, Article 1 of the ASCM ('definition of a subsidy') states that:

> '1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:
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> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as 'government'), i.e. where:

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[21] Ibid. See also: Luca Rubini, *The Definition of Subsidy and State Aid* (OUP, 2009) 105-106.

[22] Ibid 107.

[23] For a detailed review of negotiations on this point see: Dominic Coppens, *WTO Disciplines on Subsidies and Countervailing Measures* (CUP, 2014) 21 f; Roberto Rios Herran and Pietro Poretti, 'Article 8 ASCM', in Peter-Tobias Stoll, Rüdiger Wolfrum and Michael Koebele (eds), *WTO, Trade Remedies* (Brill, 2006) 2; John Croome, *Reshaping the World Trading System. A History of the Uruguay Round* (1998) 263 f; Gerald M Meier, 'The Tokyo Round of Multilateral Trade Negotiations and the Developing Countries' (1980) 2 Cornell International Law Journal 248 f.

[24] This system is usually referred to as 'the traffic light approach,' in which prohibited subsidies are the red light; the yellow one are actionable subsidies; lastly, the green light are admissible subsidies.

[25] As noted by Mavroidis, the use of the term 'prohibition' is rather strong and explicit considering that the multilateral trading system commonly used terminology avoids clear-cut restraining language.

[26] CVDs correspond to the unilateral procedure, which Members may resort to as a consequence of the adoption of actionable or prohibited subsidies by another Member. The detailed regulation of CVDs is contained in Part V of the ASCM. However, pursuant to Articles 5 and 7 of the ASCM, Members may also resort to multilateral procedures which differ depending on whether the subsidy is actionable or prohibited. In the first case, if an actionable subsidy is successfully challenged in WTO dispute settlement proceedings, then the subsidy shall be withdrawn and the adverse effects removed. For prohibited subsidies, the procedure requires the subsidizing Member to withdraw the subsidy without delay. See Mavroidis, Messerlin and Wauters (n 14) 298.

[27] Rubini (n 21) 25 f. For an economic analysis see: Mariana Mazzuccato, 'From Market Fixing to Market-Creating: A New Framework for Innovation Policy' (2016) 23(3) Industry an Innovation 140-156; Mariana Mazzuccato, *The Entrepreneurial State: Debunking Public v Private Sector Myth* (Public Affairs, 2015); Mavroidis, Messerlin and Wauters ibid 295.

(i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);
(iii) a government provides goods or services other than general infrastructure, or purchases goods;
(iv) 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 illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments; or

(a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994

and

(b) a benefit is thereby conferred.'[28]

Therefore, a subsidy constitutes a financial contribution that confers a benefit to its recipient. The language of Article 1 of the ASCM explicitly envisages three categories of subsidy providers: the government, 'any public bodies,' and entrusted or directed private entities.
Against this background, SOEs enter the spotlight in two respects. Firstly, it is necessary to consider that SOEs can be recipients of subsidies. This is the case when they receive subsidies from the government. SOEs may be subsidized to direct the production toward certain materials over others, boost the development of a specific industry, and guide the action of central banks.[29] The actual characteristics of such exploitation heavily depend on the structure of the domestic economy. The ASCM does not provide a specific legal framework for SOEs. Therefore, the general discipline of ASCM and the relevant GATT rules apply.[30]
Secondly, SOEs are worth considering in their capacity as subsidy providers. SOEs can distort the international trade flow of goods and services and the level playing field across economic operators by providing various advantages to upstream and downstream industries and other SOEs or private enterprises.[31] Based on the ASCM, this entails the determination of whether they constitute public bodies. From a legal perspective, this qualification has significant consequences. Indeed, if SOEs constitute public bodies, then they follow under the notion of 'State' and are subject to the same obligations as States when conferring a benefit through a financial contribution. Thus, they are subject to higher scrutiny by other WTO Members, which can impose countervailing measures or anti-dumping duties in response to their actions.[32] In other words, provided the qualification of a foreign

[28] Article 1 of the ASCM, emphasis added.
[29] Ahn (n 8) 61.
[30] Although this is not specifically the object of the analysis, for the sake of completeness it is important to mention that one of the main issues that have arisen under this legal framework has to do with the determination of the benefit conferred in the context of SOEs privatization. More specifically, the question revolves around how to determine whether, following the privatization, the benefit still exists and to what extent. See: Qin (n 7) 866.
[31] Yingying Wu, 'Reforming WTO Rules on State-Owned Enterprises: SOEs and Financial Advantages' (2019) 39 Northwestern Journal of International Law & Business 275-308.
[32] Ru Ding, 'Public Body' or Not: Chinese State-Owned Enterprise' (2014) 48(1) Journal of World Trade 169.

SOE as a public body, other WTO Members can resort directly to multilateral or unilateral remedies as if they were responding to the actions of other Members.[33] In contrast, if SOEs are not qualifiable as public bodies, they are considered private entities, hence falling outside the notion of 'State.' In this case, there is a presumption that they do not provide subsidies on behalf of the government unless direction or entrustment can be proven. Hence, other WTO Members may only be able to resort to multilateral or unilateral remedies if entrustment or direction from the State is established.

2.2. SOEs as public or private bodies: reconstructing the notion of 'public body' under the wording of Article 1 of the ASCM

The wording of Article 1 of the ASCM does not define the term 'public body' or elaborate on its relationship with the 'government.' Compared with the previous discussion in this study, the expression 'public body' seems potentially broader than the term 'State enterprise' ex Article XVII of the GATT, which is anchored in the coverage of economic operators. Indeed, the term public body is likely to encompass not only public agencies and institutions, but also State-led and State-owned enterprises under certain conditions.[34]

Looking at the preparatory works of this provision, the expression did not even appear in the first iteration, which only took into consideration subsidies in terms of payments, practices, and provisions by the government.[35] The term was used for the first time in the second revision of the text,[36] preserved in the third,[37] and lastly maintained in the final and current version of the ASCM. In general, the preparatory work on Article 1 of the ASCM does not provide specific insights on why the expression 'public body' was introduced. However, the introduction of this notion can be explained by looking at the historical context in which ASCM negotiations took place. Indeed, when multilateral

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[33] It should be noted that Members may not resort to both multilateral and unilateral remedies simultaneously. In this regard, footnote 35 to the ASCM states that 'however, with regard to the effects of a particular subsidy in the domestic market of the importing Member, only one form of relief (either a countervailing duty, if the requirements of Part V are met, or a countermeasure under Articles 4 or 7) shall be available.'

[34] This finding is based on the analysis of national qualifications given to the term 'public body' in national administrative guidelines. See for instance the Classification of Public Bodies provided by the British Cabinet Office (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/519571/Classification-of-Public_Bodies-Guidance-for-Departments.pdf);

[35] Cf. Report by the Chairman to the GNG, Status of Work in the Negotiating Group, MTN.GNG/NG10/W/38,18 July1990. In this document, definitions were dealt with in Article 3 and read as follows:

'If:

(a) there is a financial contribution, such as where:

(i) government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers or liabilities (e.g. loan guarantees) in such a way as to confer a benefit on certain enterprises; (ii) government revenue that is otherwise due, foregone or not collected (e.g. fiscal incentives such as tax credits) in such a way as to confer a benefit on certain enterprises;

(iii) government provides goods or services in such a way as to confer a benefit on certain enterprises; (iv) 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 illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments, in such a way as to confer a benefit on certain enterprises; or (b) there is any form of income or price support in the sense of Article XVI of the General Agreement; and (c) any benefit resulting therefrom is in law or in fact conferred on certain enterprises, such benefit may constitute an actionable subsidy.

[36] Group of Negotiations on Goods (GATT), Negotiating Group on Subsidies and Countervailing Measures, MTN/GNG/NG10/W/38/Rev. 2, 2 November 1990, 2.

[37] Group of Negotiations on Goods (GATT), Negotiating Group on Subsidies and Countervailing Measures, MTN/GNG/NG10/W/38/Rev 6 November 1990. See also: Group of Negotiations on Goods (GATT), Negotiating Group on Subsidies and Countervailing Measures, MTN/GNG/NGIO/23, 7 November 1990.

rules on subsidies were being established, State enterprises were common to the economies of several WTO Members, especially those from Eastern countries. These were also the times when privatization programs were being implemented. Privatization led to a fragmented scene regarding the ownership structure of these enterprises.[38] Many economic operators formerly owned by the State were privatized. In this regard, the expression 'public body' was aimed at capturing these hybrid economic operators, which had the form of a private enterprise but were still linked to the State.[39] The ASCM, however, does not have a preamble explaining the role that negotiators had in mind to assign to the term at issue. On this point, former members of the Negotiating Group on Subsidies and Countervailing Duties explained that once a common definition of subsidies was reached, Members agreed that a financial contribution granted by a government could amount to a subsidy.[40] But such a contribution could also derive from an entity different from the government, namely 'any other public body' to the extent the government could exploit it to this effect.[41]

Under the WTO legal framework, a similar concept to 'public body' is that of 'public entity.' This is defined in paragraph 5(c)(i) of the GATS Annex on Financial Services as:

> 'a government, a central bank, or a monetary authority of a Member, or an entity owned or controlled by a Member, that is principally engaged in carrying out governmental functions or activities for governmental purposes, not including an entity principally engaged in supplying financial services on commercial terms.'

Therefore, for the purposes of financial services under the WTO legal system, the definition of 'public entity' revolves around (i) State ownership, (ii) State control, or (iii) the exercise of public functions. Consequently, the definition does not include entities that provide financial services in commercial terms. However, it is unclear what type of impact, if any, this notion could have in the field of subsidies. In this regard, the Panel in Korea - Commercial Vessels questioned the relevance of the GATS definition of 'public entity' for the ASCM.[42] In the opinion of the Panel, using the commercial character of its activities to qualify an entity as a private or public body introduced elements related to the component of 'benefit' in the analysis, which resulted in an undue conflation of the two notions. Following on from this, it can be said that the legal architecture of the ASCM envisages three types of subsidy providers and they can be divided into two categories: on the one hand, there are public entities, which are governments and 'any public bodies.' On the other hand, private entities are private economic operators that come under the scrutiny of the ASCM when their conduct is somehow linked to or determined by the government. Such a legal approach arguably reflects the rationale pursued by the ASCM. This rationale is twofold: Firstly, there is an anti-circumvention aim. Indeed, Article 1 of the ASCM seeks to prevent States from using third party entities, such as public bodies or private entities, to provide otherwise unlawful or actionable subsidies. Secondly, there is a systematic objective, namely to prevent the qualification of an entity as a public body or as an 'entrusted' or

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[38] See chapter 1.
[39] Robert Howse, 'Making the WTO (Not So) Great Again' The Case Against Responding to the Trump Trade Agenda Through Reform of WTO Rules on Subsidies and State Enterprises (2020) 23 Journal of International Economic Law, 386.
[40] Michel Cartland, Gérard Depayre and Jan Woznowski, 'Is Something Going Wrong in the WTO Dispute Settlement?' (2012) 46(5) Journal of World Trade 1002.
[41] Ibid.
[42] WTO, *Korea - Measures Affecting Trade in Commercial Vessels* (11 April 2005) WT/DS273/R, para 7.47.

'directed' private entity from being so loose that it facilitates the adoption of protectionist measures by other WTO Members.

2.3. The constitutive criteria of a 'public body' emerging from WTO case law on subsidies and their relevance for the notion of SOEs

Given that there is no definition of 'public body' within the wording of Article 1 of the ASCM, an analysis of the relevant jurisprudence of the WTO is necessary in order to reconstruct the notion.
In dispute settlement proceedings, both WTO Members and WTO adjudicating bodies have put forward definitions of the notion of public bodies. Therefore, the case law can provide essential insights and hints on the constitutive elements and core characteristics of a public body. Then, its difference from what constitutes a private body is explored.
To this end, this section looks at two sets of criteria. On the one hand, the focus is on substantive criteria that are used, or that can be used, to determine whether a certain entity is a public body, as defined in the relevant WTO jurisprudence. On the other hand, evidentiary standard requirements are considered because they clarify the elements necessary to assess the pieces of evidence deemed necessary to conclude that an entity is, in fact, a public body.[43]

2.3.1. Korea - Measures Affecting Trade in Commercial Vessels*: about the relevance of State control*

The 'public body' issue was first discussed by the Panel in *Korea – Measures Affecting Trade in Commercial Vessels*.[44] In this case, the European Communities (EC) requested consultations with Korea on certain subsidies granted by the latter to its shipbuilding industry that were considered inconsistent with the ASCM legal framework. Specifically, subsidies were granted in the form of debt forgiveness, special taxation treatment, pre-shipment loans, and advance payment refund guarantees provided by the Export Bank of Korea (KEXIM), a State-owned entity. These advantages were used for the production of commercial vessels for international trade.
The EC argued that the qualification of KEXIM as a public body revolved around two elements. Firstly, the ownership criterion: according to this approach, KEXIM was a public body because it was majority owned by the Korean government and directly and indirectly owned by the Bank of Korea and the Korea Development Bank for the remaining share.[45] Secondly, there was the public policy criterion. From this perspective, the implementation by KEXIM of public policy objectives made it act in the country's interest as 'an official export credit agency providing comprehensive export credit and project finance to support Korean exporters and investors' together with the development of the national economy.[46] Owing to this position, KEXIM also enjoyed facilitated access to State resources. Moreover, according to the EC, the fact that KEXIM could issue unlimited guarantees proved the government's influence and control over it. Then, the EC also considered the self-perception of KEXIM as 'a special governmental financial institution,' 'agent of the Government,' 'special government financial institution under the guardian authority of the Ministry

[43] This is opposed to the evidentiary standard as identified in the relevant WTO case law. See WTO, *US – Carbon Steel (India)* (8 December 2014) WT/DS436/AB/R, para 4.37.
[44] WTO, *Korea - Measures Affecting Trade in Commercial Vessels* (n 42).
[45] Ibid para 7.32 - 7.33.
[46] Ibid para 7.34.

of Finance and Economy', and 'Government institution that supports the Government's policies on international trade and overseas investment.'[47]

The Korean government argued that KEXIM was not a public body because it conducted business in a manner equivalent to that of a private operator.[48] According to Korea, an entity is a public body if it acts 'in an official capacity or is engaged in governmental functions.'[49] Therefore, according to Korea, a public body should be defined as an entity 'acting in an official capacity on behalf of the people as a whole; as a public prosecutor.'[50]

The Panel found that the transactions constituted 'financial contributions' in the sense of Article 1 of the ASCM. Concerning the qualification of an entity as a public body it clarified that this matter should be treated separately from the matter of whether the entity acts in accordance with commercial considerations.[51] Otherwise, there was a risk of confusing the element of 'public body' with that of 'benefit,' which would ultimately blur the line between the categories of public and private.[52] Consequently, the qualification of an entity within these two categories would change depending on the type of activity exercised.[53] Then, the Panel stated that an entity constituted a 'public body' if the government controlled it.[54] In its view, it was the element of control that allowed the conduct of the entity to be attributed to the State, thus subjecting it to the application of Article 1.1(a)1 of the ASCM. Then, the Panel disregarded the implementation of public policies as a constitutive element of a public body.[55]

2.3.2. United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*: from State control to governmental authority*

Subsequently, the issue of 'public body' qualification came up again in *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*,[56] generally considered the seminal case on the matter.[57] The case originated with China's request for consultation regarding certain anti-dumping and CVDs imposed by the US under certain final determinations made by USDOC regarding Chinese SOEs, qualified as public bodies within the meaning of Article 1 of the ASCM. According to China, these measures were inconsistent with WTO agreements. Once the Panel for this case was established, several other WTO Members reserved their third party rights. In this case, the conclusions reached by the USDOC were different from the traditional approach adopted by this body with respect to NMEs. Since the 1980s, the USDOCs, in the context of investigations conducted within market economies not based on a market-driven model, used not to find subsidies.[58] It was deemed that the State involvement in the economy in non-market ones was so intense that to

[47] Ibid para 7.34.
[48] Ibid para 7.37.
[49] Ibid para 7.37.
[50] Ibid para 7.37.
[51] Ibid para 7.50.
[52] Ibid para 7.50.
[53] Ibid para 7.45.
[54] Ibid para 7.50.
[55] Ibid para 7.55.
[56] WTO, *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (22 October 2010) WT/DS379/R; WTO, *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (11 March 2011) WT/DS379/AB/R.
[57] Ding (n 32) 170.
[58] Ahn (n 8) 62.

find a subsidy would have meant finding a government subsidizing itself.[59] In this context, the USDOC qualified Chinese SOEs and State-owned Central Banks (SOCBs) as public bodies because the Chinese government retained some degree of ownership. Therefore, this case confirms the tension around the relationship between MEs and NMEs in the WTO, which focusses, inter alia,[60] on the notion of 'public body' and its crucial role for the functioning of the WTO as an interplay surface.

Against this background, China challenged the qualification of its SOEs and State-owned bank as public bodies.[61] More specifically, China argued that such a qualification could not be made without proof that entity was vested with and exercised governmental authority. From this perspective, the State ownership of the entity only showed the existence of State control, but it did not determine the public nature of SOEs.[62] Thus, in the view of China, what distinguished the conduct of private and public bodies was not their ownership structure, but rather the source and the nature of the authority that the entity possessed and exercised. This point is interesting because, by following this reasoning, the Chinese government argued that the nature of SOEs should be presumptively considered prima facie private.[63] Therefore, according to this approach, these entities would fall by default into the category of private entities. Their conduct could not be attributed to the Chinese government unless the US could prove that the Chinese government entrusted or directed them. Ultimately, the parties disagreed about the relationship to be attributed to the terms 'government,' on the one hand, and 'any public body,' on the other hand. Indeed, while for China the two terms shared a functional equivalence,[64] for the US they were two alternative and disjointed elements, also encompassing a wide variety of entities.[65]

In its decision, the Panel reaffirmed the control criterion as a constitutive element of the 'public body' notion. Given that the object and purpose of the Agreement have an anti-circumvention nature, which means that it cannot be interpreted to allow States not to apply subsidy regulation to entire categories of entities,[66] in the Panel's view, the control criterion was the one that best served this purpose because it was capable of capturing a wider variety of entities than the governmental authority approach.[67]

China appealed these findings. Before delving into the details of AB's decision, it is interesting to look at the definitions put forward by third parties in the appeal proceedings. It is possible to divide these statements into two groups, those who agreed with the findings of the Panel and those who disagreed with them. Starting with the first group, Argentina stated that it agreed with the Panel's

[59] Thomas J Prusa and Edmund Vermulst, 'United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China: Passing the Buck on Pass-Through' (2013) 12(2) World Trade Review 197–234. See also: Mostafa Beshkar and Adam S Chilton, 'Revisiting Procedure and Precedent in WTO: An Analysis of US-Countervailing Duties and Anti-Dumping Measures (China)' (2016) 15(2) World Trade Review 375-395.

[60] The case also revolved around other substantive issues. These included the determination of whether the loans provided by the Chinese State-owned Commercial Banks were specific; whether the USDOC could refuse to use domestic prices as a benchmark for the calculation of benefits conferred by concerned enterprises; whether the implementation of a 'double remedy', i.e., both ADs and CVDs to offset one subsidy is consistent with WTO law. Cf. Report of the Appellate body, ibid., para. 139-199.

[61] WTO, *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (22 October 2010) WT/DS379/R, para 8.3.

[62] Ibid para 8.5.

[63] Ibid para 8.4.

[64] Ibid para 8.11.

[65] Ibid para 8.20.

[66] Ibid para 8.76.

[67] Ibid para 8.94.

interpretation of the term 'public body' because it meant 'any government-controlled entity'.[68] Australia also shared the Panel's findings based on control. It specified that 'such control may be determined principally, but not solely, on majority ownership'.[69] Canada followed a similar position. It submitted that 'the Panel was correct in finding that an entity controlled by a government is a 'public body,' and it specified that 'a government may exercise such control through whole or majority ownership'.[70] For its part, the EU, while agreeing with the findings of the Panel, asked if the AB could specify that ownership and control criteria were 'not necessarily dispositive of this matter in all cases.'[71] The Japanese government also belonged to this group. However, while agreeing with the Panel's definition, it specified that 'an entity is a "public body" regardless of the acts it performs if the entity is, by its nature, controlled by the government.'[72] In this context, Mexico specified that the term 'public body' had to be interpreted in a broad sense because 'a subsidy is deemed to exist where a body controlled by the government provides a financial contribution that confers a benefit.'[73] Finally, Turkey agreed with the Panel and specified that 'ownership is the main, but not necessarily the exclusive, indicator of control.'[74] The analysis of these legal definitions shows how WTO Members tended to base the definition of 'public body' on the criterion of State control. Thus, this is the common denominator. However, the approaches diverge regarding the role played by the criterion of State ownership and how this relates to that of control. In particular, according to some definitions, the criterion of ownership reflects control: the two notions are conflated in that State ownership is proof of State control. In other legal reconstructions, however, the two appear unconnected; in other words, the presence of State ownership does not necessarily determine State control over the entity. Now looking at the Members who disagreed with the conclusions of the Panel. Brazil, by stating that the Panel 'impermissibly expands the scope of subsidy disciplines beyond what WTO Members agreed to in the SCM Agreement', believed that a 'public body' was 'an entity vested with the authority to, in the regular course of its activities, perform functions and exercise attributions that are typical of a government'.[75] In other words, according to the Brazilian government, State control was only one factor that could potentially determine the public nature of the company, but, just as State ownership, it is not determinative in this regard.[76] Similarly, India submitted that 'the degree of government ownership is not, in itself, sufficient to consider an entity to be a public body, but that

[68] WTO, *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (11 March 2011) WT/DS379/AB/R para. 234. Argentina then explained that it found the Panel's definition to be corresponding to the object and purpose of the ASCM, as opposed to the definition provided by China which would give Members too much leeway to circumvent their WTO obligations on subsidies. This is because enterprises that are fully owned by the government but that do not exercise governmental functions would be considered 'private', escape ASCM regulation and blur the dividing line between the concepts of public and private itself.
[69] Ibid para 236.
[70] Ibid para 243.
[71] Ibid para 246. With reference to China's definition, the EU stated that it considered it overly rigid in that it posed 'public body' and 'government' on the same footing, thus precluding investigating authorities from taking into consideration the totality of elements of the entity concerned. Therefore, 'a whole category of government-controlled entities' was placed outside the scope of the ASCM. Ibid para. 248.
[72] Ibid para 256.
[73] Ibid para 261.
[74] Ibid para 268. Turkey contended China's definition was based on a governmental function due to its undefined character, which differed across political realities.
[75] Ibid para 240.
[76] Ibid para 241. Interestingly, Brazil believed that a definition based on control would be over-inclusive in that it would automatically capture any company whose shares were majority owned by a government. Hence, Brazil argued that in this context even everyday transactions would be qualified as financial contribution.

the exercise of governmental authority and power is also necessary.'[77] The government of Norway, for its part, stated that the dividing line between what was private and what was public did not rely on State control or ownership. Rather, there was a functional delimitation based on the exercise of governmental functions.[78] Similarly, Saudi Arabia defined 'public body' based on the criteria of (i) the exercise of government authority over the entity concerned and (ii) the performance of functions of governmental nature.[79]

Against this background, the AB rejected the Panel's qualification as a 'public body' based on control. Instead, the adjudicative body noted that Article 1.1(a)1 of the ASCM combines two notions of 'government': a narrow notion and a wider one, which included the notion of public body itself.[80] Then, the AB noted that the wording of Article 1.1(a)(1) of the ASCM operates a juxtaposition of these two concepts of government, and it concluded that 'government' and 'public body' share a 'certain degree of commonality or overlap in their essential characteristics.'[81] Next, the AB assessed the elements that an entity should have in common with the government in order to qualify as a public body and thus part of the government in the collective sense.[82] To this end, the AB, by looking at the meaning of the term 'government', stated that its essence coincides with the 'effective power to regulate, control, or supervise individuals, or otherwise restrain their conduct, through the exercise of lawful authority.'[83] Consequently, the AB concluded that (i) the exercise of governmental functions and (ii) being vested with it are common features that the government and a public body share. Based on this reasoning, the AB defined a public body as an entity that 'possesses, exercises or is vested with governmental authority.'[84] It further stated that the lack of an express delegation of authority does not hinder the possibility of qualifying an entity as a public body. In this regard, the adjudicative body clarified that the investigation must take into account the 'core features' of the entity concerned, which can differ according to the national system concerned. Consequently, different types of evidence may be needed to conclude that a given entity is a public body. From this perspective, the AB specified that the control exercised by the entity concerned over a private body could prove that the former is vested with governmental authority.

2.3.3. Canada - Certain Measures Affecting the Renewable Energy Sector*: clarifying the link between the State and its public bodies*

A Panel ruled again on the qualification of an entity as a public body in *Canada - Certain Measures Affecting the Renewable Energy Sector*.[85] At the heart of the dispute were certain feed-in tariff (FIT) measures containing local content requirements adopted by the Canadian province of Ontario.

[77] Ibid para 254.
[78] Ibid para 262. According to the Norwegian government, ownership was not sufficient to qualify an entity as a public body. Rather, the qualification should be based on other elements, like the exercise of governmental functions. Cf. ibid., para 263.
[79] Ibid para 265. Specifically, Saudi Arabia submitted that 'a public body is an entity acting under government authority that also performs functions of a governmental character.' According to Saudi Arabia, 'public body' and 'government' are functionally equivalent for the purposes of the ASCM. Hence, they share the same core elements.
[80] Ibid para 286 - 288.
[81] Ibid para 288.
[82] Ibid para 290.
[83] Ibid para 290.
[84] Ibid para 317.
[85] WTO, Report of the Panel, *Canada - Certain Measures Affecting the Renewable Energy Sector* (19 December 2012) WT/DS412/R WT/DS426/R.

According to Japan, these measures amounted to the provision of subsidies, affected the treatment of imported products, and were inconsistent with the Agreement on Trade-Related Investment Measures (TRIMs).[86]

Focusing on the FIT program, the following discussion examines the context in which the government of Ontario purchased electricity, which was then injected into the Ontario electricity grid system and sold to consumers by electricity transmission and distribution service providers, including Hydro One. For the purposes of this analysis, it is interesting to consider how the Panel qualified Hydro One and attributed its conduct to the government of Ontario. The Panel looked at the entity's ownership structure. It noted that Hydro One was a fully-owned company by the Government of Ontario,[87] and therefore qualified as an agent of the government at the national level. According to the Government of Ontario, a governmental agency was defined as 'a provincial government organization: [i] which is established by the government, but is not part of a ministry; [ii] which is accountable to the government; [iii] to which the government appoints the majority of the appointees; and [iv] to which the government has assigned or delegated authority and responsibility, or which otherwise has statutory authority and responsibility to perform a public function or service.'[88] The Panel concluded that it was especially the last point of the definition that qualified the Hydro One as a 'public body' within the meaning of Article 1.1(a)(1) of the ASCM.[89] Then, the Panel specified this finding by focusing on the notion of 'meaningful control' that Ontario exercised on the entity. In particular, the adjudicating body took many elements as evidence of such control, namely (i) Hydro One had a statutory obligation to operate generation facilities and distribution systems and distribute electricity to the communities identified by the government; (ii) the power of the Ontario government to define the 'conditions and restrictions' according to which Hydro One must carry out its activities; (iii) the power of the Ontario government to prescribe mandatory provisions to be contained in Hydro One incorporation articles on 'the issuance of one or more classes of special shares to be issued to the Minister' and governing 'constraints on the issue, transfer, and ownership, including joint ownership, of voting securities of the corporation';[90] (iv) the Hydro One's duty to report annually to the Minister.[91] In the appeal, the Parties did not dispute the qualification of Hydro One, and the AB only recalled the findings of the Panel when was deemed appropriate.[92]

2.3.4. United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*: ownership alone is not sufficient to qualify an entity as a public body*

In 2012, India brought a dispute against the US concerning the imposition of CVDs on hot rolled carbon steel flat products imported from India.[93] In this case, India challenged the determination made by the USDOC on the National Mineral Development Corporation (NMDC) qualified as a public

[86] Ibid para 3.1(a)-(c).
[87] Ibid para 7.147.
[88] Ibid para 7.234.
[89] Ibid.
[90] Ibid para 7.235.
[91] Ibid.
[92] WTO, *Canada - Certain Measures Affecting the Renewable Energy Generation Sector* (6 May 2013) WT/DS412/AB/R WT/DS426/AB/R.
[93] WTO, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, (14 July 2014) WT/DS436/R; *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India* (8 December 2014) WT/DS436/AB/R.

body. The US agency mainly based its qualification on the 98% ownership of the entity by the Indian government.[94] In other words, the US seemed to derive the exercise of government functions from quasi-full State ownership but without substantiating this nexus. Thus, according to India, the US government did not consider the constitutive elements of a public body, namely (i) the performance of governmental functions, (ii) the ability to entrust or direct a private body, and (iii) the exercise of governmental power or authority. In this context, the third party participants, who intervened in the proceeding, presented divergent definitions of a public body, some based on control,[95] and others reiterating the AB's approach in *US – Anti-Dumping and Countervailing Duties (China)*.[96]

In its findings,[97] the Panel acknowledged that an entity is a public body if it exercises governmental authority. In this context, it specified that control is relevant to prove governmental authority if it is 'meaningful'.[98] Ultimately, it was the existence of meaningful control that could determine the public nature of an entity. However, ownership alone was not sufficient to demonstrate such control. However, the Panel found that government ownership could become relevant to prove meaningful control if combined with other factors.[99] According to the Panel, one of these additional elements was the government's involvement in the appointment of an entity's directors.[100]

India appealed the decision. The AB reversed the Panel's findings related to the qualification of the NMDC as a public body.[101] The adjudicating body, while upholding the Panel's findings that the power to appoint or nominate directors is more than a corollary of shareholding and that the

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[94] WTO, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, (14 July 2014) WT/DS436/R, para 7.67.

[95] More specifically, Australia referred to the AB's decision in *US – Anti-Dumping and Countervailing Duties (China)*. It explained that it considered the elements identified by the adjudicative body, namely that an entity that possesses, exercises or is vested with governmental authority, as alternative and not cumulative. However, it further specified that 'Australia further submits that one relevant criterion for examining a "public body" under Article 1.1(a)(1) of the SCM Agreement should be to what extent the government controls the entity' (para. 7.74). Similarly, Canada reiterated that 'the appropriate interpretation of the term "public body" is that it is an entity controlled by the government. According to Canada, such an interpretation is consistent with the context of Article 1.1(a)(1) and the object and purpose of the SCM Agreement' (para. 7.75).

[96] China and Saudi Arabia reiterated that a public body is an entity that possesses, exercises or is vested with governmental authority (paras. 7.76 and 7.78). The EU called on the need to 'unconditionally' accept the AB's definition in *US – Anti-Dumping and Countervailing Duties (China)* as 'it is now part of the acquis of the WTO dispute settlement system.' Therefore, unless cogent reasons justify a different conclusion, 'the same legal question will be resolved in the same way in a subsequent case' (para 7.77).

[97] In this case, Australia, Canada and China intervened as third parties in the proceedings. Ibid Annex D. In this context, Australia argued that the public body definition delineated by the AB identify three separate - not cumulative - criteria and related tests to determine whether an entity is a public body. Then, Australia stated that '[it] would not support a view that an entity must be vested with governmental authority in order to be regarded as a 'public body.' This is because Australia considered that public bodies have government authority (without having to be vested with it). Australia is concerned to ensure that a focus on the idea of entities being vested with government authority is not used to artificially transpose the test for 'entrustment or direction' onto the definition of "public body."' Annex D-1, para. 10. Then, it reiterated the importance of the element of State control for such an investigation. In sum, in Australia's view, the investigation on the qualification of an entity as a public body involved a range of elements, often beyond the formal structure of the entity. These may include relevant statutes or other legal instruments; the degree of separation and independence of an entity from a government, including the appointment of Directors; the contribution that an entity makes to the pursuit of government policies or interests. Canada also reiterated the centrality of the criterion of control in a 'public body' investigation. Cf. Annex D-3, para. 2. For its part, China expressed its adherence to the definition provided by the AB and criticized the US's deviating approach in this regard. Cf. Annex D-5, para 5 seq.

[98] Ibid para 7.80.

[99] Ibid para 7.81.

[100] Ibid para 7.85. According to the Panel the power of appointment showed a closer relationship between the entity and the government than it would be provided by simple State ownership.

[101] WTO, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India* (8 December 2014) WT/DS436/AB/R, para. 4.47.

consideration of the element of control was correct,[102] it concluded that the Panel should have explored the control exercised by the government of India over NMDC. In this regard, the Panel should have carefully assessed whether the USDOC's determination of NMDC as a public body was properly established. Looking at the US assessment, the AB agreed with the USDOC that a public body could be 'an entity controlled by the government' to the extent that the government used the former resources as its own.[103] However, in the AB's view, the USDOC failed to consider factors other than ownership, such as the relationship between the Indian government and the NMDC in the light of the national context or the extent of the meaningful control exercised by the State on the entity.[104]

2.3.5. United States - Countervailing Measures on Certain Pipe and Tube Products*: about the chain of State control as a possible foundation for the 'public body' qualification*

In March 2017, Turkey instituted proceedings against the US regarding CVDs adopted by the US on certain pipe and tube products from Turkey.[105] In this case, the USDOC qualified two Turkish enterprises, Erdemir and its 92% owned subsidiary Isdemir, as public bodies, although the government of Turkey did not enjoy direct ownership over either of them. Nevertheless, according to USDOC, the Turkish government exercised 'meaningful control' over these two entities. It based its conclusion on the fact that the Turkish government held a controlling shareholding in a pension fund – OYAK -, which in turn retained majority ownership of Erdemir.[106] Then, Isdemir was also State-controlled by virtue of majority ownership share that Erdemir retained in it. Hence, the question was whether it was possible to qualify an enterprise as a public body in light of a chain of government control that linked the government and one or more enterprises.
The Panel did not reject that it is possible to qualify an entity as a public body based on a chain of governmental control.[107] However, it reaffirmed that such qualification is inextricably linked to the governmental character of the entity, which, again, revolves around the performance of governmental functions.[108] Therefore, the Panel rejected the USDOC qualification of Esdemir and Isdemir as a public body, indirectly affirming that State ownership alone does not equal the exercise of meaningful control. According to the adjudicative body, all the evidence brought by USDOC was only 'indicia' of government control. Therefore, it had not been proven that Esdemir and Isdemir possessed, exercised or were vested with governmental authority.[109]

2.3.6. United States - Countervailing Duty Measures on Certain Products from China*: focusing on the entity, its core characteristics and relationship with the State*

[102] Ibid paras 4.38 and 4.45.
[103] Ibid para 4.19.
[104] Ibid para 4.54.
[105] WTO, *United States - Countervailing Measures on Certain Pipe and Tube Products*, (18 December 2018) WT/DS523/R.
[106] Ibid para 7.6.
[107] Ibid para 7.20.
[108] Ibid.
[109] Ibid para 7.49.

The ‘public body’ issue was dealt with again following the institution of proceedings by China against the US in August 2012.[110] The case concerned the imposition of 17 CVDs by the US on certain products from China, such as solar panels, wind towers, thermal paper, coated paper, tow-behind lawn groomers, kitchen shelving, steel sinks, citric acid, magnesia carbon bricks, pressure pipes, line pipes, seamless pipes, steel cylinders, drill pipes, oil country tubular goods, wire strands, and aluminum extrusions. In its investigation, the USDOC found that certain Chinese SOEs were ‘public bodies’ within the meaning of Article 1.1(a)(1) of the ASCM. This qualification was based on the USDOC’s rebuttable presumption, according to which an SOE constitutes a public body when majority-owned by the government. The Panel found that this presumption was inconsistent with the ASCM.[111]

Subsequently, in 2019, the AB ruled again on the ‘public body’ issue,[112] reiterating that the definition of an entity as a public body revolves around the notion of governmental authority. In this regard, the AB importantly clarified that the point of the investigation was not that the conduct supposedly conferring a financial contribution was logically related to an identified ‘governmental function.’[113] Instead, the relevant investigation revolved around the entity involved in that conduct, its main characteristics, and its relationship with the government.[114] From this perspective, the conduct was only one of the various pieces of evidence that could prove that the entity had the fundamental characteristics and functions that would make it a public body, i.e., was vested, possessed, or exercised governmental authority, especially ‘when it points to a “sustained and systematic practice.”’[115] Based on this view, even a private entity could constitute a public body if it is proven that it enjoys a sufficient degree of connection with the government, namely that it is entrusted or directed by it. No formal act of delegation must be required to this end. Indeed, an entity may nevertheless qualify as a public body if its relevant characteristics are functional to assess its *de facto* exercise of governmental functions. In this context, while State ownership could be relevant, it is not per se sufficient to establish that an entity is a public body.[116]

2.4. The constitutive elements of an SOE as a public body: rationalizing definitional approaches

Notwithstanding the challenges in qualifying an SOE as a ‘public body,’ the overall analysis makes it possible to identify the concepts and notions that could guide this process. Bearing in mind that these are the elements that determine the notion of ‘SOE’ falling within the extended boundaries of the notion of the ‘State’ under WTO law on subsidies, it is appropriate to stress that the inquiry revolves around the link, be it explicit or implicit, between the government and the enterprise. The

[110] WTO, *United States — Countervailing Duty Measures on Certain Products from China* (14 July 2014) WT/DS437/R; *United States — Countervailing Duty Measures on Certain Products from China* (18 December 2014) WT/DS437/AB/RW.

[111] *United States — Countervailing Duty Measures on Certain Products from China* (14 July 2014) WT/DS437/R, para 7.128.

[112] WTO, *United States - Countervailing Duty Measures on Certain Products from China. Recourse to Article 21.5 of the DSU by China* (16 July 2019) WT/DS437/AB/RW.

[113] Ibid, para 5100. In so doing, the AB embraced the US perspective on this issue. Indeed, while China affirmed the qualification of an entity as a public body depended on whether its conduct is a governmental function, the US stated that such qualification revolves around the identity of the entity concerned and on its relationship with the government rather than on its conduct. See Ibid para 5.99.

[114] Ibid.

[115] Ibid para 5.101.

[116] Ibid.

related analysis must: (i) be based on a case-by-case approach; (ii) have regard to the core characteristics and functions of the SOE, (iii) taking into account the legal and economic environment prevailing in the establishing State. In this respect, the analysis of the relevant case law on the qualification of an entity as a public body shows that three criteria are predominantly followed: (i) State control; (ii) governmental function; and (iii) governmental authority. In this context, the study also identified other elements that parties and the adjudicating bodies identified. The most relevant in quantitative terms is the reference to State ownership,[117] which is articulated in the form of majority and full ownership. Despite this straightforward distinction, the impression is that there are diametrically opposed views on this term. To some extent, these divergences are rooted in the different economic models pursued in domestic economies and the different roles assigned to State intervention.

In addition, other elements have emerged from the analysis, such as the implementation of public policies together with other features, that investigating authorities are required to consider. These include the State's activities that can influence more or less intensively the decision-making process of the entity. These include the government's appointment of boards of directors; the delegation of certain powers to the entity coming from a central or dislocated level of the government; and the entity's ability to access State resources to conduct its operations.

When the link between the State and the SOE is explicit, the latter's qualification as a public entity is particularly straightforward. In fact, State control or delegation for the performance of a public function are easily found in the statute of the enterprise or its founding law. On the contrary, when the link is implicit, the qualification criteria to be taken into account are: (i) the exercise of governmental functions; (ii) the exercise of meaningful control; and (iii) majority or full State ownership (although, as seen before, the ownership criterion is not relevant per se). From a practical perspective, this reasoning can involve evaluating the scope and content of governmental policies relating to strategic sectors and should not rely exclusively on one criterion alone.

The following discussion provides a detailed account of each identified constituent criteria and related issues. The analysis is conducted in light of the objective and purpose of the ASCM as delineated by the AB. Indeed, although the Agreement does not have a preamble specifying its objective and purpose, in US - Softwood Lumber IV,[118] the adjudicating body affirmed that the ASCM aims to 'strengthen and improve GATT disciplines relating to the use of both subsidies and countervailing measures, while, recognizing at the same time, the right of Members to impose such measures under certain conditions' and 'to impose multilateral disciplines on trade-distorting subsidization.'[119] Therefore, the ASCM aims to balance the State's ability, on the one hand, to implement public policies (through subsidies) and, on the other hand, to protect the national economy and related economic actors from the negative consequences of subsidies provided to foreign producers and products (through CVDs). From the perspective of the 'public body,' 'the question of whether a particular entity can be considered a public body in the [ASCM] context has simply to do with

[117] It will be recalled that the State ownership criterion was used by the EC in *Korea - Measures Affecting Trade in Commercial Vessels;* in *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* it was referred to by the US, together with other third participants; it came up again in *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India, US - Countervailing Measures on Certain Pipe and Tube Products* and *United States - Countervailing Duty Measures on Certain Products from China.*

[118] WTO, *United States - Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada* (29 January 2004) WT/DS257/AB/R.

[119] Ibid para 64.

whether the entity can be used as a conduit for providing a subsidy.'[120] Therefore, the qualification of an SOE as a public body must be carried out along these lines. In other words, governments should avoid using SOEs as a proxy to provide unlawful subsidies and justify the adoption of CVDs.

2.4.1. The criterion of State control

The definition of a public body focused on 'control' supports the fact that a state-controlled entity is a public body. Thus, an SOE would be a public body and have a public character when controlled by the government. There are divergent views on the degree of control needed and how this relates to the ownership criterion. These views can be summarized as follows.

According to one perspective, majority or full State ownership alone is sufficient to establish control. In line with this view, the link between the SOE and the State is relatively straightforward, but no specification is provided with reference to the intensity of the relevant control. State ownership suffices to ipso facto establish a link of control between the enterprise and the State. It derives from a link intense enough to make the former fall within the category of public subjects. From an evidentiary standard standpoint, it is sufficient to prove that State ownership exists to establish that an SOE is a State-controlled entity and a public body. In other words, State ownership is deemed sufficient to prove the presence of State control.

A second view emerging from adjudicating bodies sees majority or full State ownership as necessary but not as a sufficient element to prove control. In line with this perspective, elements other than ownership are required for State control to be proven, such as the State's exploitation of the SOE's resources as its own; the appointment of members of the SOE's board of directors; involvement of the State in the activity and decision of the SOEs, whether required by the enterprise's statute or not. In this context, State ownership would not suffice to prove State control if not accompanied by other relevant circumstances. Therefore, the evidentiary standard is higher than in the former approach, because it is not sufficient to prove State ownership for the entity to fall within the boundaries of the 'State.'

It has been argued that a definition of 'public body' based on control, although probably more objective than others,[121] risks being over-inclusive.[122] This is especially true when State ownership equals State control. Indeed, SOEs without links to the government other than ownership would also be captured. From an international trade perspective, this means that the majority of SOEs would qualify as public bodies anyway, and all their transactions would be subject to possible countervailing duties by other WTO Members. In this case, the balance would tip in favor of CVDs, with the result that other Members might implement protectionist measures disguised as lawful reactions to other Members' subsidies (because the conduct of SOEs that are public bodies is attributable to their establishing Members). In short, this represents the main risk associated with the conflation of ownership and control. Against this backdrop, the second approach, which substantiates control with other elements, seems to be more balanced.

However, conflict is close at hand due to the different conceptions of State intervention in the economy across WTO Members. Regarding MEs, it is conceivable that the State retains ownership

[120] Cartland, Depayre and Woznowski (n 40) 1000.

[121] Joost Pauwelyn, 'Treaty Interpretation of Activism? Comment on the AB Report on United States - ADs and CVDs on Certain Products from China' (2013) 12(2) World Trade Review 236.

[122] Ding (n 32) 176; Yang and Lee (n 8) 130.

rights in an enterprise and behaves like any other shareholder, seeking the economic benefit from the return on its investment for the benefit of the society as a whole. In contrast, it seems more difficult to imagine a capitalist State behaving like any other investor because of the different premises on which its active role in the economy is based.[123] Therefore, in this context, state control over an SOE is very likely to transform from a potential to an actual circumstance.

Against this background and building on Mavroidis and Sapir's proposal to introduce a majority ownership presumption in the context of multilateral subsidy regulation to determine whether an entity is a public body,[124] it is argued that the criterion of State ownership in the context of the 'public body' issue should be based on a dual standard encapsulated in a rebuttable presumption, that is State ownership implies the presence of a public body. This is because, in order for a legal framework to be effective, different situations prompt different legal outcomes. Hence, if the investigation of the environment in which the entity operates reveals a State capitalist context, it seems reasonable, due to the intrinsic characteristics, which are the basis of system operations, that State ownership equals control in an SOE. The automatic conflation of State ownership and State control is arguably justified by the very functioning of State capitalist economies and NMEs in general, where the State, in its owner capacity, is likely to exercise its rights to influence the decision-making process of its enterprises. Instead, if the entity operates in an environment based on market forces, State ownership should be accompanied by other factual elements in order to establish State control. In this case, the link between the State as an owner and its exercise of control on owned entities is less straightforward. However, these situations should be seen as only the opposite ends of a spectrum. Many other situations that do not fall neatly into either of these economic models can be envisaged. Hence, WTO Members can rebut the presumption in order for the factual aspects of their economic system to be appropriately considered under the WTO legal framework.

2.4.2. The criterion of governmental function

The second main criterion considered for a definition of 'public body' is related to that of a governmental function. Accordingly, a public body is an entity performing functions of a governmental nature. Members with a high degree of State involvement in the economy, especially China and India, have endorsed this approach.[125] Sometimes, this criterion is coupled with the exercise of governmental authority: in this case, governmental authority is deemed to exist when a governmental function is actually performed. The main criticism of this approach is the uncertainty about what amounts to governmental function. This, in turn, requires understanding what is meant by 'governmental.' In contemporary times, this has become even harder assess due to the increasing tendency of States to outsource activities traditionally considered to be theirs.

Those who advocate this approach do so on the basis of the wording of Article 1 of the ASCM, which refers to 'a government or any public body.' Based on textual proximity, the two terms are considered

[123] As the reader may recall, Chapter 1 highlighted that State capitalist countries act in the economy in pursuit of political gain, whereas in market economies the State intervenes on a temporary basis to counteract negative externalities.

[124] Petros C Mavroidis and André Sapir, *China and the WTO. While Multilateralism Still Matter* (Princeton University Press, kindle version, 2021).

[125] See WTO, Report of the Panel, *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China,* (22 October 2010) WT/DS379/R para. 8.11 f. It is recalled that similar views have also been expressed by Brazil, India, Norway, Saudi Arabia. It is interesting to note that these are all to a certain extent considered State capitalist countries. See also: WTO, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India* (14 July 2014) WT/DS436/R, para 7.70.

functionally equivalent rather than as two different entities.[126] This link between the two terms is also confirmed by the fact that the distinction is not used in any other provision of the Agreement. Moreover, the textual reference in parentheses refers to both government and public bodies under the same term 'government.' Consequently, as consistently referred to by the AB, 'government' and 'public body' share core characteristics: they exercise governmental functions. This approach is considered tautological and undefined because the Agreement does not specify governmental functions. No guidance is provided by the activities listed in the Agreement, which include the production of goods or services. However, some clarifications in this regard have been provided by the AB, which referred to the collection of taxes or the power to regulate, control, or supervise individuals, or otherwise restrain their conduct as an example of governmental functions.[127] Ultimately, however, this determination depends on what is considered 'governmental' in the domestic context of the WTO Member concerned.[128] This makes the qualification of SOEs as public bodies even more complex and unstable because it is unclear whether it would suffice for a government to submit that a certain activity does not qualify as a governmental function at the national level.[129] Indeed, on the one hand, some functions are not only performed by the government. On the other hand, it is a rather wide category that encompasses all transactions carried out by SOEs.[130] Overall, the use of the governmental function criteria appears more balanced with reference to the rationale of the ASCM. However, the evidentiary standard is higher than the one required for the control criterion,[131] which is also due to the unclear scope of application of this approach. Indeed, an investigating authority should duly consider not only the characteristics of the entity concerned but also the context in which it operates.[132] By raising the evidentiary standard, it is possible to avoid the indiscriminate adoption of CVDs and, therefore, protectionist measures by other WTO Members. However, at the same time, there is the risk of reducing the range of SOEs captured under the subsidy regulation, thus leaving Members with more opportunities for circumvention.

2.4.3. The criterion of governmental authority

According to the criterion of governmental authority, an SOE is a public body when it possesses, exercises, or is vested with such authority. The approach embraces both the elements of 'control' and 'governmental function.'[133] The criterion of governmental authority triggers a shift in the analysis of

[126] See *US — Anti-Dumping and Countervailing Duties (China)* (11 March 2011) WT/DS379/AB/R para 24; para 265.
[127] Ibid para. 296.
[128] Ibid.
[129] It is argued that there is a parallel to be drawn with the notion of services of general economic interests (SGEIs) under EU law. As explained in Chapter 3, there is no agreed definition of SGEIs within the EU Agreement. Thus, it is up to the Member States to determine which services constitute SGEIs in the light of their national system. The EU Commission retains the power to correct the qualification when States incur an assessment error. Here lies the main difference with the WTO, i.e., the lack of an internal organ that would be able to make an assessment of the qualification made by WTO Members on the nature of certain functions. Moreover, there is a lack of case law on what is 'governmental,' which instead exists under EU law. The intrinsic differences between the two systems are known. However, it can be argued that the WTO could learn from the EU institutions in accordance with its 'member-driven' nature.
[130] Ding (n 32) 177.
[131] Ibid.
[132] Indeed, this approach has already been followed by the WTO adjudicative bodies in the context of the determination of what constitutes a governmental measure under the GATT. For that determination, both the Panel and the AB considered the characteristics of the State in the context in which the conduct under consideration was embedded. Cf. WTO, *Japan - Measures Affecting Consumer Photographic Film and Paper* (31 March 1998) WT/DS44/R.
[133] Ding (n 32) 179.

the 'public body' issue. The investigation goes from the ownership structure of the SOEs towards determining whether the entity concerned has the power to exercise governmental authority as an arm of the government.[134] Governmental authority can take the form of an explicit delegation of governmental power by the State to the entity (for example, the statute of the SOE vests it with governmental authority). However, even if express delegation is absent,[135] an SOE could still constitute a public body if other elements are present. One is the exercise of 'meaningful control' by the State over the SOE, which is deemed to prove the performance of governmental functions and, therefore, the governmental authority.[136] However, this cannot be reduced to a series of formal links which would not be sufficient to find a public body.[137] Therefore, not only must the State potentially possess control over the entity, but it is also required to actually exercise it.[138] In practical terms, this would translate into the State's involvement in the daily life of the enterprise and influence over its decisions.[139] In any case, the exercise of meaningful control alone is insufficient to qualify an SOE as a public body just like the State majority ownership.[140] In other words, control and ownership are just circumstantial pieces of evidence that need to be accompanied by other evidence. Another criterion in this regard could be the *de facto* performance of governmental functions by SOEs.
However, a certain degree of uncertainty persists regarding the terms 'possess,' 'exercise,' and 'vested.' The AB did not specify the boundaries of these notions, or the evidentiary standards linked to them. These have been interpreted by WTO Members as disjunctive, as opposed to cumulative. However, it has been noted that the AB was inconsistent in some of its statements, thus generating confusion on how the criteria should be considered.[141] From the evidentiary standard perspective, this approach is a conflation of elements encompassing State control and governmental function. Thus, the threshold is very high and burdensome. Indeed, the investigating authority should prove not only that the State owns and controls the SOE but also that the latter performs functions of governmental character in light of the relevant national context.
The governmental authority approach has sparked critical debates among scholars and legal practitioners.[142] Firstly, the AB has been accused of legal activism in the context of the ASCM.[143] More specifically, the adjudicating body has been criticized for having created from scratch a preamble to the Agreement that the original incumbents never negotiated. On this point, the AB clarified the object and scope of multilateral subsidy regulation beyond the will of contracting parties,

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[134] Weihuan Zhou, Henru Gao and Xue Bai, 'Building a Market Economy Through WTO-Inspired Reform of State-Owned Enterprises' (2019) 68(4) International and Comparative law Quarterly, 1018.
[135] The AB explained that the focus should be on whether the entity is vested with governmental authority rather than how it has been vested. See WTO, *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (11 March 2011) WT/DS379/AB/R para. 318.
[136] Ibid.
[137] Ibid.
[138] WTO, Report of the Appellate Body, *US - Carbon Steel (India)*, (8 December 2014) WT/DS436/AB/R, para. 4.37.
[139] Wu (n 31) 283.
[140] WTO, *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (11 March 2011) WT/DS379/AB/R para. 318
[141] Cartland, Depayre and Woznowski note that the AB referred to an entity that is 'vested with and exercises and "exercises or is vested with" governmental authority, thus generating doubt as to the disjunctive or cumulative nature of these requirements.' See: Cartland, Depayre and Woznowski (n 40)1005 seq.
[142] See *ex multis*: Pauwelyn (n 121) 235-241; Howse (n 39) 385.
[143] Cartland, Depayre and Woznowski (n 40) 989. It should be noted that the issue of the judicial activism of the AB is not limited to Article 1 of the ASCM. For a wider perspective see: Peter Van den Bossche, 'The Demise of the WTO Appellate Body: Lessons for Governance of International Adjudication?' WTI Working Paper No. 2/2021; Amrita Bahri, ''Appellate Body Held Hostage': Is Judicial Activism at Fair Trial? (2019) 53(2) Journal of World Trade 293.

which, due to divergent views, never clarified this point. In particular, regarding the 'public body issue', the judicial activism of the AB is reflected in the terminology employed. In this context, the adjudicating body has used a language different from that in the ASCM without providing a justification for such use or any definition for it.[144] According to Cartland and his co-authors,[145] when the AB states that the notion of 'public body' shares some similarities with that of 'government', it disregards the wording of Article 1 of the ASCM by not considering the expression 'any' before 'public body' which would suggest that the two do not coincide.

It has been noted that, by embracing the 'governmental authority' test, the AB adopted a subjective evidentiary standard.[146] This approach hence runs the risk of not being effective in protecting the rationale of Article 1 of the ASCM. Indeed, suppose the aim is to avoid SOEs being used as proxies to provide unlawful subsidies. In such a case, the grant of subsidies does not necessarily need the possession of governmental authority (the government may even only control the entity). Instead, the focus should be on the prices of the transactions carried out by the SOE concerned. Only if that price is proven to be a non-market price could there be a presumption that the SOE is indeed in pursuit of public policy purposes and thus exercising governmental authority.[147] This reasoning is in line with the fact that the term 'public body' is used in the context of the 'financial contribution.' Indeed, the ASCM finds, or does not find, a public policy purpose, which also determines its applicability, or not, based on whether a government financial contribution confers a benefit. Therefore, the focus of the Agreement is not on the existence of the financial contribution. This is a neutral event per se. Rather, the focus is on the distance of the benefit conferred from an economic rationale, which can signal the pursuit of public rather than commercial purposes. Against this background, it has been argued that the decision of the AB, which requires an investigation authority to assess the SOE's expression of governmental authority before the presence of benefit, 'not only is (…) circular, but it is fundamentally illogical.'[148]

Lastly, the AB's decision fails to clarify the scope of application of the 'governmental authority' approach. Consequently, governments could easily avoid the official conferral of governmental authority to an entity by exploiting informal means (for example, a phone call).[149] This uncertainty ultimately exacerbates the difficulty of gathering information on SOEs, including their operational structure and activities, and therefore makes the evidentiary standard particularly burdensome.[150] Based on the 'governmental authority' approach, then, an investigating authority wishing to qualify an SOE as a public body would be required to prove: (i) the delegation of governmental authority on the SOE; (ii) the actual exercise of meaningful control by the State on the SOE in its everyday management; and (iii) the performance of functions of governmental nature by the SOE.

[144] Cartland, Depayre and Woznowski (n 40) 1006. It is worth noting that some scholars believe this general statement to be correct. See: Rubini (n 21) 114; Qin (n 7) 865.

[145] Cartland, Depayre and Woznowski (n 40) 1004.

[146] Pauwelyn (n 121) 236. On a different note, it has been argued that the "governmental authority" approach provides for a flexible test that takes into account the difficulties related to the plurality of governance structures within the WTO membership. See Gregory Messenger, 'The Public–Private Distinction at the World Trade Organization: Fundamental Challenges to Determining the Meaning of "Public Body"' (2017) 15(1) *International Journal of Constitutional Law* 66.

[147] Cartland, Depayre and Woznowski (n 40) 1007; Pauwelyn (n 121) 237.

[148] Cartland, Depayre and Woznowski (n 40) 1006.

[149] Pauwelyn (n 121).

[150] As specified by the AB, the burden of proof is on the investigating authorities. Cf. WTO, Report of the Appellate Body, para. 352. See also: Zhou, Gao and Bai (n 134) 1018.

2.5. SOEs as 'private bodies'

Having delineated the boundaries of the notion of a public body and how it can build on the notion of SOE, it is now possible to investigate how it can relate to that of 'private body' and under which conditions it may fall within its scope. Carrying out such analysis ultimately means assessing whether SOEs, if deemed to be private entities, can fall under the scrutiny of Article 1.1(a)(iv) of the ASCM. Based on the wording of this provision, this could be possible under the following three conditions. The SOEs are (i) private bodies, (ii) entrusted or directed by the State, and (iii) exercise functions that are normally exercised by the government.

Looking at the first condition, it is important to assess the relationship between the notion of 'private body' as opposed to 'public body.' Analyzed case law regarding the notion of 'public body' makes it possible to reconstruct some standpoints about the relationship between the two concepts. Indeed, as illustrated in the previous sections, the AB identified two notions of government: a narrow one, that encompasses central and local authorities, and a broader one, which includes public bodies.[151] Now, if an entity does not belong to the 'government' in either of the two senses, then it is a private body. As the AB puts it, '[t]he meaning of the term "private body" may help illuminate the essential characteristics of public bodies, because the term "private body" describes something that is not "a government or any public body."'[152] It is not possible for an entity to belong to one or other category at the same time.[153] Thus, it seems safe to say that the ASCM envisages a binary system based on two categories: the private and the public.

Taking into account the second requirement, it is worth recalling that the WTO legal system only targets States. Hence, any financial aid granted by private entities with their own resources are not scrutinized in principle under the ASCM, unless they are entrusted or directed by the government to do so. Therefore, 'entrustment' and 'direction' are the criteria needed to assess whether a private body can be linked to the State. In other words, they are the requirements that must be met to attribute the conduct of the private entity to the State. For a more detailed analysis of these criteria reference can be made to Chapter 4 of this thesis dealing with SOEs and attribution. Here, it suffices to say that WTO case law links the notion of 'entrustment' with the conferral of responsibility on the private entity and 'direction' to the authority exercised by the State over the same entity.[154] According to the AB, the term 'direction' does not refer to 'mere policy pronouncements' nor to 'mere encouragement,'[155] as other Members cannot adopt CVDs 'whenever a government is merely exercising its regulatory powers.'[156] Rather, 'direction' involves a form of command, although it is unclear which standard applies to it.[157] It is worth noting that the relevant elements emerging from the case law to identify 'entrustment' and 'direction' include majority State ownership and the non-commercial nature of the investment carried out by the private entity.[158] The refusal to provide

[151] WTO, *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (11 March 2011) WT/DS379/AB/R para. 286-288.

[152] WTO, Report of the Appellate Body, United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China (11 March 2011) WT/DS379/AB/R para. 291.

[153] See *Korea - Measures Affecting Trade in Commercial Vessels*, (7 March 2015) WT/DS273/R, para. 7.45.

[154] WTO, *United States - Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea* (27 June 2005) WT/DS296/AB/R para. 113.

[155] Ibid para 114.

[156] Ibid para 115.

[157] Rubini (n 21) 115.

[158] WTO, *European Communities - Countervailing Measures on Dynamic Random Access Memory Chips from Korea,* (17 June 2005) WT/DS299/R, paras. 7.129 f. With reference to the element of commercial unreasonableness of the

information requested by an investigating authority or the former status of the State agency of the body can also be relevant.[159] In this context, State ownership is linked to the presumption that the State as owner can influence the activities and related decisions of the entity. However, it is still circumstantial and cannot prove entrustment or direction alone. In any case, the AB clarified that 'entrustment' and 'direction' cannot be assimilated nor limited to 'delegation' or 'command.'[160] The means through which a government can confer responsibility to a private entity are diverse and not limited to delegation and command.[161]

The last requirement introduces a benchmark of 'normality.' In other words, for the conduct of a private entity to be attributed to the State, the function with which this entity is entrusted must be one that is normally performed by the government.[162] This requirement is arguably in line with the anti-circumvention rationale of Article 1 of the ASCM. At the same time, however, the aim is to avoid an excessive expansion of that rationale, which would otherwise be unduly over-inclusive. In this context, the investigation revolves around what is deemed a 'normal' governmental function. This point again brings into question the scope of government intervention in the economy, a topic that, as seen already, is widely debated among WTO Members.[163] In any case, the above-examined case law makes it clear that the investigation should revolve around the entity itself, and not its conduct.[164] Hence, the private body has to intrinsically display its 'governmental' features.

When discussing paragraph (iv), Rubini explains that the expression 'practices normally followed by governments' should be assigned a specific meaning, based on the views of the 1987 Group of Experts in the Uruguay Round negotiations and the Panel's findings in *US – Export Restraints*, which correspond to the exercise of the powers for taxation and expenditure.[165] This narrow approach is justified by the aim to exclude complex forms of regulatory intervention on the market from the scope of paragraph (iv). In other words, the drafters wished to exclude that any form of entrustment to private bodies, which very frequently involved some degree of redistribution falling within the scope of the provision.[166] Regarding this approach, Rubini warns against the risk of a too restrictive stance that focuses only on the measures of 'financial assistance' and disregards equally immediate forms of support.[167] This perspective inevitably narrows down the number and types of State-led entities that would fall under its scope.

Rubini also discusses the meaning of 'differ' and 'in no real sense' that paragraph (iv) connects to 'practices normally followed by governments' examined above. He suggests that the two expressions

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investment, it can be noted that this is similar to the evaluation on price that should be done under the investigation of the qualification of a public body seen *supra*.

[159] Ibid.

[160] WTO,*United States - Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea* (27 June 2005) WT/DS296/AB/R para. 118.

[161] Ibid.

[162] Rubini (n 21) 117; Arie Reich, 'Privately Subsidized Recycling Schemes and their Potential Harm to the Environment of Developing Countries: Does International Trade Law Have a Solution?', Bar Ilan University Public Law Working Paper No 2–5, (2004) 11 f.

[163] Reich, ibid 12.

[164] WTO, *United States - Measures Treating Export Restraints as Subsidies* (29 June 2001) WT/DS194/R, para 8.53; *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS)* (27 June 2005) WT/DS296/AB/R; WTO, *Korea - Commercial Vessels* (7 March 2005) WT/DS/R, para 7.32.

[165] Rubini (n 21) 118.

[166] Robert Howse as cited by Rubini. See Robert Howse, 'Post-Hearing Submission to the International Trade Commission: World Trade Law and Renewable Energy: The Case of Non-Tariff Measures', Renewable Energy and International Law Project (2005) 22.

[167] Rubini (n 21) 119.

could be interpreted as referring, on the one hand, to an equivalence in effects between the practice exercised by the entity concerned and the one that the government usually performs; and, on the other hand, to an equivalence in nature. Although the equivalence in effects risks is too broad, the second approach is deemed too narrow.[168] It still is left undefined, however, how strong such link must be.
Circling back to SOEs, according to the AB, SOEs qualify as private bodies unless entrusted or directed by the State to provide a subsidy.[169] Indeed, looking at the term 'private', the AB noted that it includes 'of a service, business, etc: provided or owned by an individual rather than the state or a public body' and 'of a person: not holding public office or an official position.'[170] However, the AB concluded that an entity owned by the State is still 'private' when entrustment or direction is absent. Hence, the difference between public and private bodies encompasses the notions of authority and control.[171] In other words, the scope of Article 1 of the ASCM as constructed by the AB goes from private entities to the government. In principle, SOEs belong to the first category. If they possess or are vested with governmental authority, they belong to the public category.
Based on this perspective and what has emerged from this study, it can be argued that the qualification of SOEs as public or private entities does not rely on their ownership structure. Indeed, it is consistently reiterated in the most recent case law that State ownership in itself is insufficient to prove that an SOE is public in nature for applying subsidy regulation. Therefore, State ownership alone is insufficient to qualify an SOE as a public body. This against logic assessment arguably lies, once again, in the diversity of the State's role in the economy assigned by each WTO Member within its national governance. Indeed, considering the neoliberal principles that have inspired the multilateral legal system in the first place, it seems safe to say that the case envisaged in paragraph (iv) of Article 1 was regarded as exceptional when it was originally drafted. That is, ASCM negotiators may have envisioned as exceptional the possibility that a WTO Member would use a private entity to implement subsidy measures amounting to governmental functions. One may argue that the weak role assigned to State ownership derives from the neutrality principle underpinning WTO law. However, in the context of the 'public body issue,' that principle aims to ensure that there is no difference in applying subsidy regulation based on ownership structures provided that the envisaged requirements are met. Besides, the wording of Article 1 of the ASCM itself calls for investigating the boundaries of the notion of 'government' and related public entities. These types of assessment inevitably consider the ownership patterns of economic operators.
Moreover, one cannot help but notice that entities that Members do not qualify as public bodies in the multilateral context belong to the public sphere at the national level. However, its public nature is strongly opposed in the multilateral context of subsidies. In this context, the challenge is to ensure that the neutrality principle is not used as a veil to avoid scrutinizing and circumventing multilateral obligations. In this context, the hybrid nature of SOEs required the AB to apply an overall binary system (public-private) to a category of entities without clear boundaries. This combination arguably fuels the divergent views among WTO Members as to the role that should be assigned to State ownership in the public/private evaluation.[172]

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[168] Rubini (n 21) 119.
[169] WTO, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, (11 March 2011) WT/DS/AB/R, para. 292.
[170] Ibid.
[171] Ibid.
[172] In addition to the US view on this point, it is interesting to note, for example, that Brazil (traditionally included among the 'State capitalist countries') stated that 'ownership is an inherently unstable criterion, especially for a publicly traded

2.6. Final remarks: redefining the role of State ownership

The qualification of an SOE as a public or private entity under the ASCM is of particular practical significance. Indeed, if SOEs are considered to be public bodies, then their conduct will always be attributable to the State, with all the consequences in terms of remedies available for other WTO Members. If it is determined that SOEs are private bodies, their conduct is subject to ASCM regulation only when there is governmental involvement, that is, when their conduct is based on entrustment or direction by the State.

The wording of Article 1 of the ASCM does not define 'public body' nor 'private body.' Therefore, the two notions have been reconstructed through the case law, taken as a reference point to identify a distinguishing line between the two notions. Despite the limited guidance on critical aspects of the investigation, some standpoints have been identified. These points make it possible to illustrate how the two notions currently work and are balanced under the WTO legal framework on subsidies. Firstly, the criteria used to determine if SOEs constitute public bodies, and hence fall within the boundaries of the notion of 'State' are (i) State control, (ii) the exercise of governmental functions, or (iii) the possession of governmental authority. As demonstrated already, in practical terms, the criterion of governmental authority possession can include the other two. However, the weight to be assigned to each of the identified elements is not pre-determined within the analysis of the qualification of an SOE, and it may vary depending on the circumstances of each case. A clarification of these aspects by adjudicating bodies would, therefore, be crucial to better define the notion of SOEs. Such judicial clarification would provide increased legal certainty, which usually corresponds to more predictable behavior of the actors involved. In the case of SOEs, such clarification would probably also determine a more straightforward qualification of these entities and solve the issue of their public or private qualification. Secondly, the criteria to determine whether a private entity can be scrutinized under the ASCM are, on the one hand, the presence of entrustment or direction by the State and, on the other hand, the equivalence, in terms of nature and effects, of the exercised activity to one that the State would normally exercise.

Thus, State ownership alone, be it majority or full ownership, has no value in determining the public or private nature of an SOE under the ASCM. This is a shared characteristic of other fields of the multilateral trading system beyond the ASCM itself: we saw it in the GATT, and we will see it in the GATS and within the plurilateral context of the GPA. They all have in common an anti-circumvention rationale, since they aim to prevent WTO Members from using proxies to circumvent their WTO obligations. In other words, it is possible to argue that, in the examined agreements, ownership has no particular value in determining the public or private character of an entity if it is not accompanied by other elements that confirm the assessment of one qualification or another. The justification for this approach might be that the WTO tends to look at the factual, rather than the formal, situation.

On the basis of this analysis, it is observed that the difference between the public or private nature of an entity in the WTO, and in the ASCM in particular, lies in two elements: on the one hand, that of the qualification of the entity as public or private. In this regard, if the entity is not explicitly public,

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company and should thus not be the sole criterion for distinguishing a 'public body' from a private body.' The EU endorses a more complex approach as it considers a high level of government ownership is a very relevant, potentially determinant, factor, depending on the level of cooperation from the responding parties and evidence on the record. Cf. WTO, WTO, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, (11 March 2011) WT/DS/AB/R, paras 242 and 247.

it should be presumptively private; on the other hand, there is the type of activity exercised. In this context, based on the clarification put forward by the adjudicating bodies, it is possible to conclude that the element of the type of activity is examined only after the assessment of the nature of the entity. Indeed, it is the identity of the entity concerned that carries most of the weight in any evaluation. However, it is unclear what criteria should be considered and the related required evidentiary standard to examine the conduct of an entity whose public or private qualification is a priori not evident. In this context, even when State ownership enjoys circumstantial value, it is unclear to what extent it is worthy of consideration.

Against this background, it is argued that the AB is correct when it affirms that context must be taken into account to determine if an SOE is a public or private body. This is the most appropriate approach. In other words, each national economic, legal, and social context should be duly considered. However, a balance should be found between the need to acknowledge this diversity, on the one hand, and the need to establish a regulatory framework based on the principles of legal certainty, efficiency, and effectivity, on the other. Arguably, such a balance can be reached by adopting a two-step approach. The first step is to find a common denominator to flatten the differences between national systems and simplify the analysis when SOEs and related entities are involved. The second step considers national differences, but only if, and when, Members deem it necessary. State ownership would transform to be the key criterion in this process. In practical terms, this study suggests that a presumption that sees an equivalence between State ownership and the public nature of the entity owned by the State should be adopted. In line with this perspective, an enterprise that is minority, majority, or fully owned by the State is presumptively public for subsidy regulation. Once the presence of State ownership has been assessed, this approach would only eventually focus on the potential influence that the State as owner exercises or could exercise on the SOE. Indeed, while no consideration of specific characteristics of each Member is included at first, the ownership presumption should be rebuttable, leaving Members wide leverage to prove that SOEs are not public entities under their specific national context because their ownership does not influence their operations. From a procedural perspective, this means there is a shift in the burden of proof from the complainant to the respondent. It is argued that this approach would allow the WTO legal system to truly act as an 'interface' between different national economic models because it is broad enough to capture various SOEs within its scope, regardless of the national environment. At the same time, however, national differences, which today are perhaps stronger than when Jackson originally formulated the interface concept, can be discussed and are not entirely disregarded. This makes it possible to address any tensions that those divergences naturally bring into the multilateral system.

It is possible to argue that this approach runs the risk of being over-inclusive. However, such over-inclusiveness is only apparent because it is diluted by the possibility for States to claim the specific features of their national systems. In other words, WTO Members retain the option to prove that State ownership does not affect SOEs' trade-related activities or their decision-making process. Considering the growth in the number of Members relying on important public sectors, often linked to non-market-based economies, it seems inappropriate that State ownership in economic entities keeps being considered an exceptional element or policy instrument. Subsidy regulation and, more generally, multilateral legal frameworks dealing with the State as a trader need to adapt to the new composition of WTO membership, which has profoundly changed since the GATT was first established. However, at the same time, national divergences deserve their space in this equation, if only to preserve enough leeway for governments to meet the national public and social needs.

3. Exploring the notion of SOEs under the General Agreement on Trade in Services (GATS)

Within the WTO legal framework, the GATS deals with the regulation of international trade in services. Inspired by transparency and predictability principles,[173] the agreement aims to liberalize trade in services at the multilateral level, in addition to the multilateral rules of trade in goods pre-existing the WTO agreement.[174] Ensuring the respect of principles, on which the liberalization process is based, was and remains crucial in the context of a dynamic, politically-sensitive, and increasingly expanding sector for development at national and international levels such as that of services.[175] By gradually detaching from goods, services became a field worthy of a regulatory framework of their own.[176] Services are essential for the production of goods, and the determination of final prices of produced goods. Their importance also lies in providing input for other services. In this regard, one might consider, for instance, transportation services, distribution services or logistics needed for international trade to take place. These examples also show the intrinsic characteristic of services, which affects their national and international regulation: services are invisible, non-quantifiable, and usually cannot be stored. Hence, States aiming to protect national services and service suppliers tend to resort to non-tariff barriers and behind-the-border measures, including, for instance, discriminatory licensing procedures or requesting different market access requirements for national and foreign service suppliers. This also explains why the main rules of the GATS are similar to GATT rules, but their structures differ. Apart from transparency, no cross-border rules exist on non-discrimination and market access, which by contrast are envisaged in general provisions although commitments to them are on an opt-in basis in Members' schedules of specific concessions.

The GATS does not define the notion of 'service.' However, the GAT sets down four modes of supply for international trade in services,[177] namely cross-border trade,[178] consumption abroad,[179] commercial presence,[180] and presence of natural persons.[181] In this context, the Agreement identifies

[173] Panagiotis Delimatsis, *International Trade in Services and Domestic Regulations: Necessity, Transparency, and Regulatory Diversity* (OUP, 2007) 28. See also: Juan A Marchetti and Petros C Mavroidis, 'The Genesis of the GATS (General Agreement on Trade in Services)' (2011) 22(3) The European Journal of International Law 689-721; Nellie Munin, *Legal Guide to GATS* (Wolters Kluwer, 2010), 59; Paolo Picone and Aldo Ligustro, *Diritto dell'Organizzazione Mondiale del Commercio* (CEDAM, 2002) 380; Maria Chiara Malaguti, 'Restrictive Business Practices in International Trade and the Role of the World Trade Organization' (1998) 32(3) Journal of World Trade 125. For a detailed account on GATS negotiations see: Christine Fuch, 'GATS Negotiating History' in Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle (eds), *WTO—Trade in Services* (Koninklijke Brill NV, 2008) 1.

[174] Claudio Dordi, 'L'accordo generale sul commercio dei servizi', in Gabriella Venturini (ed) *L'Organizzazione Mondiale del Commercio* (Giuffré Editore, 2015) 151.

[175] Mitsuo Matsushita, Thomas J Schoenbaum, Petros C Mavroidis and Michael Hahn, *The World Trade Organization. Law, Practice and Policy* (OUP, 2015) 556 f.

[176] Mavroidis, *The Regulation of International Trade. Volume 3* (MIT Press, 2020), 35.

[177] Article 1.3 of the GATS (Definition of Services Trade and Modes of Supply).

[178] In this case, the GATS covers services supplied from the territory of one Member into the territory of any other Member. Ibid, lit (a).

[179] This mode of supply covers services supplied in the territory of one Member to the service consumer of any other Member. Ibid lit (b).

[180] This mode of supply covers service supplied by a service supplier of one Member, through commercial presence, in the territory of any other Member. Ibid lit (c).

[181] This mode of supply covers services supplied by a service supplier of one Member, through the presence of natural persons of a Member in the territory of any other Member. Ibid lit (d).

two groups of commitments, which bind the WTO Members.[182] On the one hand, there are general commitments. These apply to every signatory in every service sector. This is the case for Article II of the GATS, which imposes the respect of the most-favored-nation rule (MFN) on all services and service suppliers. On the other hand, WTO Members are subject to specific commitments determined through a positive and negative approach. Firstly, WTO Members list the sectors they wish to liberalize (positive approach). Then, WTO Members are free to indicate if they intend to limit or impose any conditions as to market access and national treatment within the listed sectors (negative approach).[183] Looking at the active conduct of the State in the economy, the Agreement addresses States' behavior when it concerns the establishment of a monopoly (Article VIII of the GATS). As seen *infra*, monopolies are worthy of regulatory attention when there is active involvement of the State in their establishment, as opposed to a mere tolerance for a natural monopoly. On the other hand, services supplied in the exercise of governmental authority are outside the scope of the GATS. Hence, the application of GATS is excluded when these services are concerned.

Against this background, SOEs constitute a tool other than tariff barriers through which WTO Members can protect national services of strategic interest (for example, energy supply or postal services). Indeed, the service sector is probably the one sector, in which the establishment or maintenance of SOEs for public policy purposes is most visible. SOEs figure prominently in international trade in services or, if not directly engaged in the provision of services, can affect the international flow of services. As demonstrated in Chapter 1, they are often entrusted by governments to provide services at the national level as well as in cross-border activities. More specifically, SOEs are used by governments to supply a specific type of service, namely public services. In this context, SOEs usually act as a vehicle for the State to pursue public policy objectives by ensuring the provision of essential services that would not be provided, or at least not on the same terms, by market forces alone. In this scenario, SOEs typically carry out their activities in a monopoly situation without facing competition from other economic operators.[184] An SOE that supplies a (public) service in a monopoly position may raise several issues. From a trade policy perspective, an SOE in this situation enjoys enough leverage to discriminate between domestic and foreign firms as well as across segmented markets.[185] This could be the case for SOEs that operate both in monopoly and competitive markets along with private economic operators. In this case, by moving costs away from competitive activities and transferring them to monopoly ones, SOEs are able to price below costs and sustain the related losses long enough to run efficient private competitors out of the market and prevent access to new competitors.[186]

From an international trade law perspective, ownership per se is not an issue for the liberalization of trade in services. Rather, the ties between SOEs and related entities and their government are under scrutiny if they affect international trade in services and its liberalization process.

With respect to the GATS, the Agreement pursues 'negative integration,' which is understood as a process that aims towards the gradual elimination of barriers to trade.[187] The liberalization process,

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[182] Matsushita and others (n 175) 557 f.
[183] Articles XXVII and XVI of the GATS.
[184] OECD, SOEs and the principle of competitive neutrality, DAF/COMP(2009)37, 20 September 2010, 9.
[185] OECD, 'State owned enterprises and the principles of competitive neutrality' DAF/COMP(2009)37 (2010), 13.
[186] OECD, 'State owned enterprises and the principles of competitive neutrality' DAF/COMP(2009)37 (2010), 41. Also, the opposite can happen: an SOE could exploit the profits made in markets open to competition and use those resources to sustain their monopolistic ones, with similar distorting effects.
[187] Mavroidis (n 11) 171.

however, does not impose the adoption of a harmonized approach among trading partners and does not aim at shaping their domestic structures.[188]

Against this backdrop, the GATS does not specifically deal with SOEs nor does it provide for their definition. However, the Agreement adopts a sufficiently broad approach to encompass SOEs and it deals with notions that are useful to explore the boundaries of the concept under analysis. More specifically, by dealing with the definition and regulation of 'service supplier,' 'monopoly supplier,' 'exclusive service supplier,' and 'public entity,' the Agreement provides important insights and hints that are used, or could be used, to define SOEs under the regulation of trade in services. In this context, focusing on the commercial presence of the service provider in the territory of any other Member,[189] SOEs may engage in international trade in services by providing a given service through this mode of supply. In practical terms, this type of provision implies that, on the one hand, an SOE can supply a service in the territory of another Member. This could be a concern if the enterprise pursues the public policy agenda of its establishing State abroad; on the other hand, the commercial presence itself could take the form of ownership of existing SOEs from foreign juridical or natural persons.[190] Hence, the advantages deriving from monopoly positions to SOEs disrupt the resilience of international trade law in the long run. This is particularly the case of SOEs entrusted with the supply of services requiring grids or networks. In this situation, SOEs could end up monopolizing these infrastructures because, unlike most private economic operators, they possess the necessary technical specialization, and technological and financial resources to access the related markets, run the service and potentially impede access to the grid or networks from other operators.

With this in mind, the study takes into consideration the definitions of economic operators regulated under the GATS, with the aim to identify and map their constitutive elements. The findings of the research suggest that the GATS introduces additional details concerning the notion of SOEs that have not been fully elaborated in the context of other multilateral agreements.

3.1. Relevant notion under the GATS: emerging constitutive criteria

Definitions of economic operators falling under the scope of the GATS can be found in Article XXVIII of the GATS dealing with definitions used under the Agreement itself. Together with the AoA, the GATS is one of the two multilateral agreements featuring a provision specifically dedicated to definitions for the purposes of the Agreement itself.[191] Indeed, its opening Article XXVII of the GATS specifies that definitions are 'for the purposes of this Agreement.' This expression has been interpreted as suggesting that the definitions listed only apply in the GATS context.[192] This narrow approach is supported by the adjudicating bodies. In *Korea - Commercial Vessels*, when dealing with the 'public body' issue in the context of subsidy regulation, the Panel stated that 'we question the relevance of the GATS Annex on Financial Services to an interpretation of Article 1.1(a)(1) of the

[188] Ibid.

[189] Article 1.3(c) of the GATS.

[190] Adattya Mattoo, 'Dealing with Monopolies and State Enterprises: WTO Rules for Goods and Services', in Petros C Mavroidis and Thomas Cottier, State Trading in the Twenty-First Century (The World Trade Forum, 1998) 43-44.

[191] Clemens Feinäugle, 'Article XXVIII GATS', in Wolfrum, Stoll and Feinäugle (eds) (n 173) 542. In the AoA, the list of definitions is provided by Article 1.

[192] Feinäugle ibid.

SCM Agreement.'[193] However, even embracing the idea that the definitions set out in Article XXVIII of the GATS only apply to this Agreement, it must be kept in mind that the WTO Agreement is a 'Single Undertaking.' This means that WTO Members cannot decide which provisions they wish to apply, but rather that 'all WTO obligations are generally cumulative and Members must comply with all of them simultaneously.'[194] Therefore, a study that aims at reconstructing a notion within the multilateral trading system must include all the different legal perspectives characterizing its boundaries, as they all regulate governments' behavior simultaneously.

3.1.1. The notion of 'Member' under the GATS: the central government, dislocated authorities and non-governmental bodies exercising delegated powers

Before starting to analyze the types of economic operators covered by the GATS, it is important to define what is not an economic operator. This is a crucial step to understanding if and to what extent the notion of SOEs falls within the boundaries of the notion of State in the context of service trade regulation. Under the GATS, this analysis necessarily means distinguishing between what is and what is not a Member. The aim is to determine where the notion of State begins and where it ends under service regulation. Indeed, as mentioned already, the GATS aims at regulating the behavior of Members that could affect trade in services. Therefore, it is important to assess the dividing line between what is a Member and entities falling out of its boundaries. Once such boundaries are assessed, it is possible to understand the nature of the link, if any, between the entity and the government.
According to Article I:3(a) GATS:

> '3. For the purposes of this Agreement:
> (a) "measures by Members" means measures taken by:
> (i) central, regional or local governments and authorities; and
> (ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities.'

The GATs is only concerned with the measures adopted by its Members, or that can be attributed to them.[195] The GATS adopts a wide definition of what is a 'Member' that falls under its scope. Indeed, the notion extends to the point of including the central government and decentralized levels of government. Interestingly for the purposes of this study, however, is that the provision also refers to 'non-governmental bodies,' which fall under the notion of 'Member' if they exercise powers delegated to them by either central or decentralized government authorities. Hence, an entity that does not belong to the State's structure is equally considered as a 'Member' if the element of delegation can be proven. By virtue of Article XVIII.1(a) of the GATS, a delegation can take any form, including

[193] WTO, *Korea - Measures Affecting Trade in Commercial Vessels* (11 April 2005) WT/DS273/R, para 7.47.
[194] WTO, *Korea – Definite Safeguard Measure on Imports of Certain Dairy Products*,(21 June 1999) WT/DS98/R, para 7.38.
[195] Mavroidis (n 11) 192.

law, regulation, rule, procedure, decision, or administrative action.[196] In this regard, Mavroidis illustrates that an act of entrustment may regard public authority or directions to adopt a specific behavior. While in the exercise of public authority, the entity would enjoy a certain level of discretion, in the case of directions, its actions would be limited to the conduct assigned to it.[197] The 'non-governmental bodies' category usually encompasses several different bodies, such as professional associations and business groups.[198] Hence, SOEs and groups of SOEs linked to each other through a vertical or horizontal chain of ownership or control may fall under the boundaries of the notion of 'Member' if a delegation of power can be envisaged. Additional details on the boundaries of the notion of 'Member' can be found in Article 1:3(a) of the GATS, which defines the scope of the Agreement. More specifically, this provision adopts three constitutive elements to identify when an entity that is not formally part of the State can be considered to fall within its boundaries: (i) the entity does not belong to the structure of the State; (ii) there is an act of delegation by the government (any level of it) to the entity that entitles the non-governmental body to exercise a power; and (iii) the exercise of the delegated power. In this regard, it is worth noting, on the one hand, that the provision does not envisage the possibility of *de facto* delegation. In other words, a formal act is required. On the other hand, the word 'power' is not specified. Hence, it is left undetermined whether the type of power that can be delegated has to be governmental in nature. However, in light of what has been observed with reference to Article 1 of the ASCM, a systematic interpretation would probably suggest considering a government-type power as the most appropriate and logical option to follow.[199]
The GATS contemplates three categories of subjects that fall under the notion of 'Member.' First of all, central government. Secondly, dislocated authorities of the government. Thirdly, non-governmental bodies exercising delegated powers. Therefore, a non-governmental body that did not receive an explicit and formal act of delegation to exercise a certain power does not fall under the scope of the GATS. With respect to SOEs, to the extent that they are considered prima facie private entities, they are included within the boundaries of the notion of State if they are formally delegated to exercise a (governmental) power. In other words, the act of delegation and the exercise of power that is the object of that delegation are the imputability principles that link the SOE engaging in trade in services and the State.

3.1.2. The notion of 'service supplier': the ownership criterion

Having considered the boundaries of the notion of 'Member' under the GATS, it is now possible to look at other entities and, more specifically, at economic operators that fall under its scope. For our purposes, the first relevant notion is that of 'service supplier.' This is defined as 'any person that supplies a service.' Pursuant to Article XVIII (j) of the GATS, a 'person' is 'either a natural person

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[196] Munin (n 173) 68 f. The author notes that the GATT does not contain an express reference to non-governmental bodies attributing the conduct of entities not formally part of the government to Members. In this regard, one may look at Article XXIV:12 of the GATT on territorial application, frontier traffic, custom unions and free trade areas which refers to 'authorities.' The author argues that the expression is undetermined compared to the one used in GATS as it leaves unclear whether it encompasses only official authorities or whether also non-governmental authorities enjoying a delegation of governmental powers could be included.
[197] Mavroidis (n 11) 193.
[198] Mavroidis (n 11) 192.
[199] Similarly Diana Zacharias, 'Article I GATS', in Wolfrum, Stoll and Feinäugle (eds) (n 173) 56.

or a juridical person.' In turn, a 'juridical person' is 'any legal entity duly constituted or otherwise organized under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association.'[200] Hence, it seems safe to say that this definitional approach is broad enough to include SOEs.

Against this background, it is of particular relevance for this study to consider that Article XXVIII of the GATS introduces two further definitions: one definition is 'juridical person of another Member,' and the other pertains to the specification of when a juridical person is 'owned,' 'controlled,' or 'affiliated.'[201] More specifically, a 'juridical person of another Member' is 'constituted or otherwise organized under the law of that Member.'[202] Accordingly, a juridical person is a body that (i) is established in accordance with the laws of its national system and (ii) enjoys some form of coordinated structure, although no detail is provided as to what is considered to be an organized structure. Hence, regarding SOEs, they are defined based on the latter two elements, which contribute to the definition of their boundaries under multilateral service regulation.

Then, according to Article XXVIII(n)(i) of the GATS a juridical person is 'owned' when 'more than 50% of the equity interest in it is beneficially owned by persons of that Member.' Therefore, the GATS uses a quantitative approach to define when a legal subject is owned by another. Building on this, a government minority-owned SOE would not qualify as a juridical person owned by a Member for GATS purposes. However, they would still be included under the scope of the GATS if their ownership is retained for more than 50% by private shareholders of another WTO Member. Hence, both majority-owned and minority-owned SOEs fall under the scope of the GATS. This is particularly relevant to note given that most of the service sectors that were once government-owned are currently liberalized, such as telecommunications and railway transport.

Then, the notion of 'controlled' is addressed. According to Article XXVIII:1(n)(ii) of the GATS, a juridical person is controlled 'by persons of a Member if such persons have the power to name a majority of its directors or otherwise to legally direct its actions.'[203] The term has been explicitly addressed by the Panel in *EU - Energy Package*.[204] The adjudicating body stated that 'the concept of control under Article XXVIII(n)(ii) of the GATS is [not] a matter to be assessed in the abstract, but rather on a case-by-case basis.'[205] In light of these considerations, the notion of control is anchored in (i) the factual power of appointing the majority of board members; and (ii) the notion of direction. The State's control over an enterprise should be legal in character, as opposed to economic.[206] Hence, it can be argued that, although the notion of 'control' may take any form, which is confirmed by the fact that a case-by-case analysis is required to assess its existence, it is also based on a formal requirement. Hence, the type of control encompassed is *de jure* control.

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[200] Article XXVIII(l) of the GATS. Emphasis added.
[201] See Mavroidis (n 11) 223; Simon J Tans, *Service Provision and Migration. EU and WTO Service Trade Liberalization and Their Impact on Dutch and UK Immigration Rules* (Brill, 2017) 72 f.
[202] Article XXVIII(m) of the GATS.
[203] Emphasis added.
[204] WTO, *European Union and its Member States — Certain Measures Relating to the Energy Sector*, (10 August 2018) WT/DS.
[205] Ibid., para. 7.470. See also para. 6.53.
[206] Feinäugle (n 191) 563 seq.

Lastly, a juridical person is 'affiliated' with another, be it a natural or juridical person, 'when it controls, it is controlled by, that other person; or when it and the other person are both controlled by the same person.'[207] This definition suggests that affiliation is another illustration of the control criterion. However, no references to the legal nature of the conduct are introduced. This suggests that the conduct encompassed is a *de facto* type of control. In this regard, it could be argued that the adoption of a control-based approach contemplates a more intense linkage than the one required by the ownership criterion.

Against this background, the following emerging constitutive criteria can be drawn. At a general level, under the GATS, the criteria that are used to qualify an entity as a juridical person, and therefore as a service supplier, are (i) the establishment of the entity pursuant to the laws of the State; and (ii) an organized structure. Arguably, these two elements can be used to define the notion of SOEs. Indeed, taking into account particularly sensitive services sectors, such as health or energy services, SOEs have traditionally been established by States themselves through laws or other formal acts to ensure the supply of such services and the development of the market. In this context, if SOEs engage in the provision of services based on an act of delegation, of whatever form by the Member, then they can be assimilated to that Member. As to their structure, the organization is in a corporate form.

The analysis also identified clear-cut quantitative parameters adopted by the GATS. More specifically, the analysis clarified that a juridical person is 'owned' if another person owns at least 50% of its shares. Although the wording of the provisions refers to prospective owners as 'persons of a Member' instead of a 'Member' directly, this clear-cut criterion still provides an important hint as to the level of ownership deemed to be relevant under the GATS. Accordingly, through a systemic interpretation, it could be argued that the term 'governmentally-owned' under Article XXVIII:1(m) of the GATS includes majority State-owned enterprises. This interpretation leaves out of its scope minority-owned enterprises and those enterprises that, although not owned by the government, are influenced by it in their management and decisions. Nevertheless, they could still be included under the scope of the GATS if more than 50% of their shares are owned by foreign private shareholders.

3.1.3. The notion of 'monopoly supplier': the establishment by the State and the enjoyment of a monopoly position

Having considered the constitutive elements of the notion of 'service supplier,' it is now possible to consider the case in which such a service supplier operates in a monopoly situation. According to Article XXVIII(h) of the GATS, a monopoly supplier is defined as 'any person, public or private, which in the relevant market of the territory of a Member is authorized or established formally or in effect by that Member as the sole supplier of that service.' The wording clarifies that the ownership pattern of the economic operator is not relevant for the qualification of an entity as a monopoly supplier under the GATS. Indeed, based on the neutrality principle, the definition embraces 'any' person, regardless of their ownership. Rather, the provision, by referencing authorization and establishment, focuses on the *de jure* or *de facto* involvement of the government in the creation of the monopoly in which the economic operator performs its activities. Natural monopolies fall outside the

[207] Article XXVIII(n)(iii) of the GATS.

scope of the GATS.[208] The definition of Article XXVIII of the GATS should be read in conjunction with Article VIII:1 of the GATS, which states that: 'Each Member shall ensure that any monopoly supplier of a service in its territory does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with that Member's obligations under Article II and specific commitments.'

By regulating artificial monopolies, the GATS implicitly allows Members to establish them. In line with the neutrality principle underpinning WTO law, the GATS does not impose the adoption of specific economic models or institutional changes on Members. Accordingly, the establishment or maintenance of monopolies is not a concern per se under the multilateral regulation of trade in services. Rather, the issue is the total control that monopoly service suppliers could potentially enjoy over essential facilities due to their advantageous position.[209] Therefore, the provisions aim to regulate these economic entities so that they avoid gaining enough power to hinder or circumvent multilateral obligations. Hence, Members establishing or authorizing a monopoly or monopoly service suppliers are required to ensure that the MFN principle is complied with. However, the same cannot be said for the national treatment principle (NT) that only applies to scheduled sectors, provided that Members did not to apply further limitations.[210] Therefore, equal access to the controlled facility between foreign and national suppliers is not necessarily ensured and may vary depending on undertaken commitments.

The wording of the analyzed provisions also reveals that, within the meaning of Articles XXVIII and VIII of the GATS, a monopoly is not only artificial, but it also requires the active involvement of the State in its establishment. Indeed, 'monopoly or exclusive service suppliers in the meaning of GATS Article VIII clearly owe the creation or maintenance of their dominant market position to governmental action.'[211] This makes it necessary to understand which type of State intervention is deemed relevant in this context.[212] The case law has not specifically addressed this issue. The wording used in Article XXVIII(n) of the GATS revolves around two verbs: 'established' and 'authorized.' According to the Oxford English Dictionary, 'to establish' means 'to start or create an organization, a system, etc. that is meant to last for a long time,' whereas 'to authorize' refers 'to give official permission for something, or for somebody to do something.' Hence, both verbs refer to a positive act of the government, which either intervenes to create the monopoly or to approve it. Therefore, the State's mere tolerance of the emergence of a monopoly position acquired by an SOE through its activities is not enough to fall under the scope of the GATS. However, once an active involvement of the State is assessed, this could either be *de jure* or *de facto*, which shows a fairly broad approach of

[208] In economic theory, the expression 'natural monopoly' refers to a market in which demand can be satisfied by one single firm at the lowest cost rather than by two or more. In other words, a natural monopoly is the expression of a specific relationship between supply and demand, in which the number of suppliers is irrelevant. See *ex multis*: Richard A Posner, *Natural Monopoly and Its Regulation* (CATO Institute, 1999) 1.

[209] Mattoo (n 190) 37; Munin (n 173) 194.

[210] For an overview of the MFN and NT principles under the GATS see: Adattya Mattoo, 'National Treatment in the GATS, Corner-Stone or Pandora's Box?', (1997) 31(1) Journal of World Trade 107–135; Geza Feketekuty, 'Assessing and Improving the Architecture of GATS', in Pierre Suavé and Robert M Stern (eds), *Gats2000. New Directions in Services Trade Liberalization* (Brookings Institution Press, 1999), 90 f; Picone and Ligustro (n 173) 370 f.

[211] Werner Zdouc, WTO Dispute Settlement Practice Related to the GATS, (1999) 2(2) Journal of International Economic Law 305.

[212] Sadeq Z Bigdely and Stefan Reichsteiner, 'Article VIII', in Wolfrum, Stoll and Feinäugle (eds) (n 173) 207; Feinäugle (n 191) 556.

the GATS. Not only an official act can be deemed to constitute a monopoly, but also other measures adopted by the government reaching the same outcome are relevant. For instance, this would be the case of a licensing system established by the government to run a transport service sector where requirements are built around the characteristics of a specific SOE supplier. The license would be awarded to that supplier which would be the only one to meet all the characteristics and eventually constitute a *de facto* monopoly established by the State.

Although in a different context,[213] Article VIII of the GATS provides additional details on the regulatory framework. Indeed, the definition of monopoly is based on the structure of the 'relevant market.' There are several approaches to determine the relevant market, leading to different results. Looking, for instance, at the transport sector, it would be possible to design the market related to a specific highway as the relevant market, in so following a narrow approach. A wider definition would be reached by taking into consideration all the highways belonging to a specific geographical area. In any case, due to the market-based approach of this provision, also under Article VIII of the GATS the ownership pattern of the service supplier is irrelevant for qualifying an economic operator as a monopoly supplier. In line with the rationale of this legal framework, monopoly service suppliers are required to act in compliance with the MFN principle and the specific commitments undertaken by each Member. Thus, the actual coverage of this provision is highly dependent on the commitments undertaken by each Member. Consequently, its scope can be weakened by the willingness of Members to disclose government-mandated monopolies.[214] Indeed, despite the obligation under Article VIII:4 of the GATS to notify to the Council for Trade in Services about granting monopoly rights to a service supplier, information asymmetries may arise with reference to the sectors where no commitment has been specifically adopted or the mode of supply is left open. Economic operators - whether private or public - acting in a competitive environment are not covered by its regulatory framework. Therefore, SOEs acting in a competitive environment do escape the multilateral regulation on trade in services applicable to monopoly service suppliers, regardless of the actual share of capital retained by the establishing State.

In light of the above, it can be noted that under the GATS the qualification of an entity as a 'monopoly supplier' is arguably intertwined with the definition of a monopoly. Particularly, the identification of a monopoly depends on the structure of the market itself, whereas the qualification of an economic operator as a monopoly supplier depends on the State's intervention to establish or authorize it. Therefore, similar to what has been observed under the ASCM, the GATS aims at regulating State intervention in the economy to the extent it threatens the functioning of market forces. However, an additional concern is addressed under service regulation, which is the complete control of essential facilities for service supply.

In this context, State ownership is not adopted as a constitutive element for the qualification of a monopoly or a monopoly service supplier. Nevertheless, the approach adopted by the GATS is broad and SOEs are arguably included within the notion of 'monopoly service supplier' to the extent it

[213] Federico Ortino, 'Treaty Interpretation and the WTO AB in US-Gambling: A Critique', (2006) 9(1) Journal of International Economic Law 135.

[214] Mattoo (n 190) 45. With reference to the public utility sector, the author notes that government monopolies exist in more countries than those that decided to disclose them in the context of the GATS. On the transparency principle and the GATS see: Bernard Hoekman, 'Tentative First Step: An Assessment of the Uruguay Round Agreement on Services', World Bank Policy Research Working Paper 1455 (1995) 4.

meets the requirements set out in Article XXVIII of the GATS. In this context, the intervention of the government is addressed and regulated to avoid complete dominance of essential facilities by non-governmental economic operators. SOEs would be captured under the GATS regulation on monopoly suppliers if they are (i) established or authorized by the State; and (ii) enjoy a monopoly position ensured to them by State intervention.

3.1.4. The notion of 'exclusive service supplier': active involvement of the State in the economy through an act of authorization or establishment

The last category of entities relevant for SOEs under the GATS is that of exclusive service suppliers, regulated under Article VIII:5 of the GATS. The provision does not define what an exclusive service supplier is. However, it specifies that, either through a formal act or *de facto*, it (i) is established or authorized by the government; (ii) such authorization involves a small number of service suppliers; and (iii) it does not operate in competition with other economic operators because of government intervention. It is left undefined what the provision means by 'small number of service suppliers.' Assuming that the notion of 'exclusive service supplier' does not coincide with that of 'monopoly supplier' and in order to interpret the provision in a way that is effective, it would be logical to assume that in a given market there could be at least two established exclusive service suppliers, which are not in competition with each other due to government intervention. This is the approach adopted by the Panel in China-Electronic Payment Services,[215] which defined 'exclusive service supplier' as 'one of a small number of suppliers in a situation where a Member authorizes or establishes a small number of service suppliers, either formally or in effect, and that Member substantially prevents competition among those suppliers.'[216]
Exclusive service suppliers could cause concern in the context of vertical or horizontal multi-stage production processes and particularly when they retain monopoly or monopsony control over one or more stages of production: such an advantageous position could translate into the power to discriminate between national and foreign suppliers.[217] With respect to SOEs, they could retain such leverage in services that are essential for the growth and development of society, such as energy services. Due to liberalization policies that have been occurring since the '70s, government-mandated monopolies are now rare in this sector.[218] However, SOEs still retain a key role in the service sector. Indeed, due to their economic resources they are able to retain the position as exclusive suppliers, since they are among the few economic actors to have such resources at their disposal. This is at the expense of private investors who, by contrast, do not enjoy the same resources and are not protected from the risks associated with high-intensive capital sectors, such as the energy market. From an international trade perspective, concerns have been raised in relation to the structure of the market, which is usually vertically integrated. This makes it possible for SOEs to potentially discriminate between trading partners. Such behavior would ultimately result in a structural restriction on foreign suppliers seeking to access the national market of trading partners.

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[215] WTO, *China-Certain Measures Affecting Electronic Payment Services* (16 July 2012) WT/DS413/R.
[216] Ibid para 7.587.
[217] Mattoo (n 190) 61.
[218] For a detailed historical account of the evolution of international trade in the energy sector see: Anna-Alexandra Marhold, *Energy in International Trade Law. Concepts, Regulation and Changing Markets* (CUP, 2021) 5 f.

Despite some constitutive elements being left undefined, the analysis reveals that Article VIII:5 of the GATS arguably encompasses SOEs competing in the same sector in a monopsony context. Therefore, some interesting insights and indicators emerge about how SOEs can interact with each other when the State actively engages in the economy. More specifically, if SOEs carry out their activities in a sector in which no competition is allowed due to government intervention, then they are captured under the GATS. This would not be the case in a competitive environment.

3.1.5. The notion of 'public entity' under the Annex on Financial Services: State ownership, State control and the exercise of public functions

In its relevant part, the Annex on Financial Services deals with the notion of 'public entity.' This is defined as:

> '(i) a government, a central bank or a monetary authority, of a Member, or an entity owned or controlled by a Member, that is principally engaged in carrying out governmental functions or activities for governmental purposes, not including an entity principally engaged in supplying financial services on commercial terms; or
>
> (ii) a private entity, performing functions normally performed by a central bank or monetary authority, when exercising those functions.'

As mentioned already,[219] the definition of 'public entity' specifically refers to the context of financial services, and its relevance outside of the scope of the Annex on Financial Services is debated. However, pursuant to Article XXIX, the Annex is part of the GATS. Therefore, it can provide useful insights and hints as to the interpretation of its provisions. More specifically, the Annex embraces a structural and functional approach that the interpreter could use when addressing the qualification of SOEs as public entities under the GATS. More specifically, the definition follows a four-binary approach. Firstly, the government can be a public entity. Then, a public entity may be a subject entrusted to pursue economic and financial objectives. Thirdly, an entity owned or controlled by the government and that carries out activities for governmental purposes is considered. Fourthly, private entities qualify as public ones if they carry out public functions, specifically those performed by the second category of bodies. Hence, as illustrated in Chapter 3, when it is not a government, a central bank, a monetary authority or a private entity, the definition of 'public entity' revolves around three elements: (i) State ownership, (ii) State control, or (iii) the exercise of public functions. However, these are rather vague and undefined notions. For instance, what is meant by 'governmental functions' or 'governmental purposes' is not specifically addressed, and possibly left to interpretation on a case-by-case basis. In any case, the supply of services based on commercial terms is left outside the scope of the definition. Therefore, entities carrying out their functions based on commercial terms do not qualify as public entities for the purposes of financial services regulation.
Against this background, it is interesting to note that the Annex on Financial Services provides a definition of 'services supplied in the exercise of governmental authority,' which are '(i) activities

[219] See Chapter 3, Section 3.

conducted by a central bank or monetary authority or by any other public entity in pursuit of monetary or exchange rate policies; (ii) activities forming part of a statutory system of social security or public retirement plans; and (iii) other activities conducted by a public entity for the account or with the guarantee or using the financial resources of the Government.'

Against this background, it can be argued that the approach adopted by the Annex is based on (i) the identity of the economic actor (a central bank, a monetary authority or any other public entity; and (ii) the nature of the activity concerned (monetary or exchange rate policies, social security). The definition applies specifically to financial services and related sectors covered by the Annex. However, pursuant to Article XXIX of the GATS, the Annex is an integral part of the Agreement, and it can be considered as 'context' for the interpretation of the expression 'governmental authority' in Article III:2 of the GATS.[220]

3.2. Final remarks: the constitutive elements of SOEs under the GATS

The analysis assessed the constitutive elements used to define economic operators that can be relevant to the notion of SOEs under the GATS (see Table 1).

The multilateral regulation of international trade in services adopts a binary approach, distinguishing between public and private subjects. The first category embraces WTO Members. This notion, as demonstrated, is rather broad because it includes both central and local government. The second category includes all those entities, which are not officially part of the organizational structure of the Member itself but are linked with it through an act of State delegation for the exercise of governmental powers. In other words, the act of formal delegation is the bridge between the two binaries of the GATS. Such link is also required with reference to the category of monopoly or exclusive service suppliers in the form of government intervention in the economy.

Against this background, some remarks can be made as far as the notion of SOEs is concerned. Firstly, the element of 'ownership' of an entity is irrelevant per se under the GATS. More specifically, the ownership pattern is not considered to determine the scope of the Agreement and is not determinative

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[220] The introduction of this definition in the Annex on Financial Services is particularly important in light of the fact that the GATS, while stating that 'services in the exercise of governmental authority' are out of its scope, does not define 'governmental authority' (Article I.3(b) of the GATS). This notion has been highly debated among scholars with reference to the exact meaning. Behind the lack of a definition of 'governmental authority' there is the wide variety of institutional organizations across Members at the national level. However, there seems to be some degree of consensus on the notion of 'authority' encapsulating an element of subordination. This is because the State cannot be considered to be on the same level as its citizens. Its superiority is linked to the power to command, control and make decisions binding on others.
Several suggestions concerning the interpretation of 'governmental authority' have been put forward by scholars. Such an interpretative approach is suggested by the word 'in the exercise of' which has been interpreted as implicitly referring to an act of delegation. In other words, the expression would entail a connection between the State and its economic actors. The connection is an act of delegation for the exercise of powers typically pertaining to the State to an enterprise thus authorized to exercise such power. In such a situation, the enterprise does not necessarily need to be public. It could also be private but *de facto* controlled by the State. Another interpretative approach that has been suggested revolves around the public function of the service supplied. A governmental service is the expression of public interest, thus excluded from the scope of the GATS. However, it is unclear what public interest is, also considering that its boundaries would probably change across jurisdictions. See: Eric Leroux, 'What is a "Service Supplied in the Exercise of Governmental Authority?" Under Article I:3(b) and (c) of the General Agreement on Trade in Services?' (2006) 40(3) Journal of World Trade 345; Rudolf Adlung, 'Public Services and the GATS' (2006) 9(2) Journal of International Economic Law 455-485; Markus Krajewski, 'Public Services and Trade Liberalization: Mapping the Legal Framework' (2003) 6(2) Journal of International Economic Law 341-367; Zacharias (n 199) 60.

of the existence of a monopoly or exclusive service supplier. Rather, monopolies and exclusive service suppliers are defined through a market-based approach. Then, one is left to wonder if the GATS is able to capture SOEs entrusted with the management of natural monopolies by the State. In other words, would the use of an SOE be enough to meet the criteria of government intervention in the economy under Article XXVIII and VIII of the GATS? Answering this question means defining the public or private qualification of SOEs. Indeed, only the determination of whether SOEs are public or private entities could be conclusive in the case of establishing a new SOE *de facto* dedicated to the management of the natural monopoly. However, the analysis would change if an explicit act of delegation can be spotted. In this scenario, the conduct of the concerned SOE would be attributable to the State and thus fall under the scope of the GATS pursuant to Article I.

The GATS displays a legal framework focused on market dynamics rather than on the nature and characteristic elements of the entities to which it applies. However, the analysis showed that the multilateral regulation of trade in services offers some hints as to the characteristics that typically pertain to SOEs. Particularly, constitutive criteria of SOEs under the GATS include, first, the act of delegation as the link between the State and the non-governmental entity concerned. The act has to be explicit. It is possible to envisage an official document, a national law, or the statute of the enterprise itself. Secondly, the GATS is the first WTO Agreement to adopt a quantitative criterion to determine when an entity is 'owned' by another. Hence, an enterprise is owned by the State when the latter retains more than 50% of its share. Therefore, only majority State ownership is considered. The GATS also acknowledges that an enterprise may also be controlled by or affiliated with another entity. Although no quantitative criterion is given in this regard, it seems that the two expressions cover *de jure* and *de facto* control, respectively (see Table 1 below).

Table 1: Summary of constitutive elements of SOEs under the GATS

Subject	GATS Article	Constitutive elements
Member	Article I:3(a)	*Structure of the State apparatus (both central and local government); *Non-governmental bodies: (a) delegation by the State; (b) exercise of delegated power.
Service supplier	Article XXVIII(g)	*Same criteria as juridical person; * Supply of a service.

Subject	**GATS Article**	**Constitutive elements**
Juridical person	Article XXVIII(j)-(l)-(m)-(n)	*Legal entity; * Establishment under applicable law of the State concerned; Or *Organized structure. **Ownership**: * Majority ownership: at least fifty percent of share owned by another the State. * Minority ownership: more than fifty percent owned by foreign private shareholders. **Control (*de jure* control):** *Case-by-case assessment; * Formal link with the State (it could take the form of State legal direction and power to name the majority of members of the board of directors). **Affiliation:** * *De facto* control
Monopoly supplier	Article XVIII(h) - Article VIII:1	*Ownership structure irrelevant; * *De jure* or *de facto* establishment or authorization by the State.
Exclusive service supplier	Article VIII:5	* Two or more service suppliers operating in a segmented market; * Established by the State; * Non-competitive environment due to State intervention.

4. The notion of SOEs in the plurilateral framework of the Government Procurement Agreement (GPA)

Another regulatory framework worth employing to explore the concept of SOE is that of public procurement. SOEs have come into greater play in public procurement procedures at the international

level. Due to the regulatory and financial advantages that they can enjoy, SOEs could be able to submit better offers than their private counterparts or affect the outcome of proceedings when they can access information not available to the public.[221] From the international trade law perspective, SOEs in government procurement procedures can challenge cornerstone principles of transparency and non-discrimination promoted by WTO law and hinder the flow of trade. These issues are exacerbated by the fact that SOEs may escape international regulation on government procurement to the extent that they are corporations in nature and therefore do not fall under the notion of State.

As widely known, under WTO law, government procurement regulation is covered by the GPA.[222] Although negotiated and established under the multilateral context of the WTO, the GPA is a plurilateral agreement that only applies to WTO members that agreed to be parties to it.[223] It has been designed with the aim of opening public procurement markets and enhancing trade between signatories based on transparency and non-discrimination. These have been important principles ever since the first negotiations for the establishment of the GPA were carried out. They are crucial for the functioning of the Agreement as they inspire future negotiations to expand the GPA scope. However, the coverage of the Agreement depends on the specific commitments accepted by Members. For the purposes of this study, it is important to note that WTO Members that rely on SOEs the most, such as China and Russia, are currently not parties to the GPA.

Prior to the GPA, public procurement was mostly excluded by multilateral treaties due to the inherent characteristics of the public procurement market, generally considered a strategic sector by governments to protect their national industries. Under the GATT, the only provision dealing with government procurement was Article III:8(a) of the GATT, which exempted it from the application of the national treatment principle. However, acknowledging the benefits of its liberalization, negotiations in this regard started to take place during the Tokyo Round. On that occasion, the first agreement on government procurement was signed in 1979 and it entered into force in 1981. Parties then aimed at expanding the scope and coverage of the agreement during the Uruguay Round.

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[221] See OECD, 'Ownership and Governance of State-Owned Enterprises. A Compendium of National Practices 2021' (2021) 32; Rajni Bajpai and Bernard C Myers, 'Enhancing Government Effectiveness and Transparency: The Fight Against Corruption' (World Bank, 2020) 97.

[222] Revised Agreement on Government Procurement, Mar. 30, 2012, Marrakesh Agreement Establishing the World Trade Organization, Annex 4(b), 1915 U.N.T.S. 103 [hereinafter GPA].

[223] The GPA membership currently includes Armenia, Australia, Canada, the European Union, Hong Kong (China), Iceland, Israel, Japan, Republic of Korea, Liechtenstein, Republic of Moldova, Montenegro, Netherlands with respect to Aruba, New Zealand, Norway, Singapore, Switzerland, Chinese Taipei, Ukraine, United Kingdom, United States. However, Any WTO member is allowed to participate in the Government Procurement Committee as an observer provided a written notice to the Committee is submitted and the consequence attribution as observed by the Committee itself. The following WTO Members are observers to the Agreement: Afghanistan, Albania, Argentina, the Kingdom of Bahrain, Belarus, Brazil, Cameroon, Chile, China, Colombia, Costa Rica, Cote d'Ivoire, Dominican Republic, Ecuador, Georgia, India, Indonesia, Jordan, Kazakhstan, Kyrzyg Republic, Malaysia, Mongolia, Borth Macedonia, Oman, Pakistan, Panama, Paraguay, Philippines, Russian Federation, Kingdom of Saudi Arabia, Seychelles, Sri Lanka, Tajikistan, Thailand, Turkey, Vietnam. The Agreement contains 22 provisions and the Government Procurement Committee monitors its implementation. The Committee's activities are managed and organized by a chairperson, elected by the parties to the Agreement, with the assistance of the WTO Secretariat. Between 2018-2020 Mr Carlos Vanderloo (Canada) was Chairman of the Committee. For a detailed analysis of the Agreement see: Matsushita and others (n 175); Sue Arrowsmith and Robert D Anderson (eds), *The WTO Regime on Government Procurement. Challenge and Reform* (CUP 2011); Simon J Evenett and Bernard Hoekman, *The WTO and Government Procurement* (Edward Elgar Publishing, 2006); Sue Arrowsmith, *Government Procurement in the WTO* (Kluwer Law International 2003); Sue Arrowsmith, 'Reviewing the GPA: The Role and Development of the Plurilateral Agreement After Doha' (2002) 5(4) Journal of International Economic Law 761; Gabrielle Z Marceau and Annet Blank, 'The History of the Negotiations of Government Procurement since 1945' (1996) 4 Public Procurement Law Review 77; Aaditya Mattoo, 'The Government Procurement Agreement: Implications of Economic Theory' (1996) 19(6) The World Economy 695.

Eventually, the GPA 1994 was signed on 15 April 1994 and entered into force on 1 January 1996. Shortly after, Parties to the GPA started a new round of negotiations, which eventually led to the adoption of GPA 2012 and entered into force on 6 April 2014.[224]

4.1. The subjective scope of the GPA

The subjective scope of the GPA is what makes it important for the analysis of the notion of SOEs. More specifically, the GPA only applies to procuring entities that each signatory agreed would be subject to its legal framework based on the principles of non-discrimination and reciprocity. According to Article I of the GPA, a 'procuring entity' is 'an entity covered under a Party's Annex 1, 2 or 3 to Appendix I.' Appendix I, an integral part of it, contains seven annexes for each Member, reflecting the extent of the scope of agreed coverage. Commitments encompass 'central government entities' (Annex 1);[225] 'sub-central government entities' (Annex 2); 'all other entities' (Annex 3); 'goods' (Annex 4); 'services' (Annex 5); 'construction services' (Annex 6); 'general notes' (Annex 7).

The first three Annexes encompass several categories of entities. Annex 3 is particularly interesting because its very nature refers to entities that could be akin to SOEs. Hence, constitutive elements to define the notion of SOEs could emerge from its examination and guide the interpreter accordingly.

4.1.1. SOEs and the notion of 'other entities' under the GPA

The entities other than central government and sub-central governmental authorities that parties wish to list under the GPA are generally included under Annex 3 on 'other entities.' This has been defined as a 'catch-all category' with an anti-circumvention purpose.[226] With respect to SOEs, this Annex is of particular interest because it is where WTO Members are expected to submit entities involved in the pursuit of public policies or entrusted with the supply of public utilities.[227] The Agreement does not provide a definition of 'other entities,' however. This is probably due to the lack of consensus on what constituted a 'public undertaking' during preparatory works.[228] Indeed, since the very beginning of negotiations on government procurement, the difficulty of finding a unitary definition of public undertakings was acknowledged because their characteristics widely differed across States. Therefore, delegations decided that it would be more appropriate and effective to draw up a list of relevant entities instead of setting up a general definition.[229] Ultimately, the 'positive list' approach characterized the coverage of the GPA in terms of entities. This approach was used in previous

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[224] WTO Document GPA/W/297 (11 December 2006).

[225] Therefore, not all government entities fall under the scope of the GPA, as only those contained in the Annexes are covered in this regard. However, those who are covered must ensure that in awarding contracts they do not discriminate between national and foreign goods and services. See Skye Mathieson, 'Accessing China's Public Procurement Market: Which State-Influenced Enterprises Should the WTO's Government Procurement Agreement Cover?' (2010) 40(1) Public Contract Law Journal, 233-266.

[226] Petros C Mavroidis and Bernard Hoekman, 'The WTO's Agreement on Government Procurement: Expanding Disciplines, Declining Membership?', The World Bank Policy Research Working Paper 1429 (1995) 3.

[227] Adrian Brown and Craig Pouncey, 'Expanding the International Market for Public Procurement: the WTO's Agreement on Government Procurement' (1995) 69 International Trade Law and Regulation 6.

[228] Ibid.

[229] Annet Blank and Gabrielle Marceau, 'A History of Multilateral Negotiations on Procurement: From ITO to WTO', in Bernard M Hoekman and Petros C Mavroidis (eds), *Law and Policy in Public Purchasing: The WTO Agreement on Government Procurement* (University of Michigan Press, 1997) 38.

versions of the GPA, in GPA 1994 and GPA 2007 and, as noted already, it also characterizes the current legal framework of GPA 2012.

4.1.2. Annex 3 on 'other entities': national qualification, application of national public law, and the provision of essential public services

Looking more specifically at Annex 3 to the Agreement, the approach adopted in the lists is not uniform or harmonized throughout the Parties to the GPA. Some of them provide a simple list of covered entities,[230] whereas others submit their own definition.[231] Definitions can also be accompanied by indicative lists, which are, therefore, non-exhaustive and potentially open.[232] The variety of entities addressed, and the terminology used in these documents closely resembles what has been observed with reference to Article XVII of the GATT.

The following constitutive criteria can be identified. Firstly, there is the national qualification.[233] Accordingly, procuring entities under Annex 3 are those subjects enjoying the same qualification at the national level. Secondly, an entity falls within the notion of procuring entity under Annex 3 if it is governed at the domestic level by public law.[234] Lastly, a combination of criteria is used: the entity concerned is a public enterprise, and it carries out one of the indicated activities in the list. Relevant activities include the provision of a service to the public linked to essential sectors, such as production, transport and distribution of water or electricity, but also the provision of airport facilities, maritime ports, the provision or operation of networks providing a service to the public in the field of transport by urban railway, automated systems, tramway, trolley bus, bus or cable or the provision or operation of networks providing a service to the public in the field of transport by railways.[235] The analysis of these criteria reveals a stronger role for national law in the context of the GPA compared to other agreements.

As mentioned already, lists of covered entities are the result of bilateral negotiations conducted on the basis of a rather strict application of the principle of reciprocity.[236] Hence, a Party offers concessions only to other Parties offering similar concessions. Reciprocity arguably entails a certain degree of comparison between national systems and the parties' economic models. Consequently, it is likely more feasible to reach an agreement between parties that share similar economic models, whereas some difficulties may arise when diverging systems are involved. Ultimately, WTO Members with important public sectors - such as non-market economies or former NMEs - may be discouraged from applying for membership in the GPA or would simply be unable to find an agreement on coverage. In this regard, indeed, several issues may arise. Firstly, a strict application of the reciprocity principle makes it difficult to find a true correspondence between market-based and non-market-based systems. Indeed, if a national economy heavily relies on the functioning of SOEs,

[230] See: Australia, Canada, Hong Kong, Israel, Japan, Korea, New Zealand, Singapore, Chinese Taipei, US.

[231] See: Armenia, EU, Iceland, Lichtenstein, Moldova, Norway, Switzerland, Ukraine, UK.

[232] In this context, the EU, for instance, makes available an indicative list of contracting authorities and public undertakings for each Member State, while Armenia provides a link to its official electronic bulletin on procurement.

[233] See for instance Annex 3 of Moldova, and UK.

[234] See for instance Annex 3 of Armenia.

[235] See for instance Switzerland and UK. Ukraine is the only Member that basis its definition solely based on a list of activities.

[236] Wang Ping, 'Coverage of the WTO's Agreement on Government Procurement: Challenges of Integrating China and Other Countries with a Large State Sector into the Global Trading System' (2007) 10(4) Journal of International Economic Law 894. See also Wang Ping, 'The Procurement of State Trading Enterprises under the WTO Agreements: A Proposal For a Way Forward' in Arrowsmith and Anderson (eds) (n 223) 197-251.

their presence may be pervasive, and no real correspondence may be found with a system where their operations are quantitatively reduced and limited to specific sectors. Secondly, the lack of a coherent practice as to the identification of the entities falling within Annex 3 makes it difficult for aspiring Members to elaborate a proposal of coverage in the first place.[237]

4.2. Article XIX of the GPA and the withdrawal of a covered entity: State control and influence

Against this background, some clarification on the defining characteristics of covered entities can perhaps be sought in Article XIX.1 of the GPA, dealing with modifications and rectifications to coverage of parties' commitments. Pursuant to this provision, WTO Members seeking to withdraw a covered entity from an Annex are required to submit a notification. Such notification should include the information that 'government control or influence over the entity's covered procurement has been effectively eliminated.' Therefore, the GPA covers entities that are controlled or influenced by the State.[238] This is in line with the rationale of the Agreement itself: if the ultimate goal is to open the market of public procurement, then any intervention of the State in the economy that may influence the liberalization process should be addressed, as could be the case for SOEs and related entities. However, the case law has made it clear that the notion of control under the context of the GPA has a narrow scope. In other words, the relevant control is only the one exercised by the State on listed entities, and it cannot be interpreted as to include under the scope of the GPA other entities, that, although controlled by the State, are not included in the list.[239]

4.3. Final remarks: the definitional approaches to SOEs emerging from the GPA

The analysis showed that the GPA, despite its several structural aspects that raise some issues when entities owned or controlled by the State are involved, provides interesting insights and hints concerning the definition of SOEs and related entities. More specifically, the Agreement makes it clear that direct involvement of the State in the economy through ownership and control is regulated to the extent it can hinder the purposes of the Agreement itself. Unlike the GATS, however, the GPA does not offer additional guidance as to the level of State ownership or control that could be deemed relevant to fall under its scope. Against this background, the constitutive criteria used by Parties to identify entities falling under Annex 3 are mostly based on national qualification or on the national applicable law to the relevant entities. Alternatively, Parties adopt a definition revolving around the public nature of the enterprise concerned and, cumulatively, on the type of activity perfomed. However, not every kind of activity is considered relevant in this regard. Rather, only those linked to the provision of public services in the context of essential sectors, such as water, energy and transport, seem to be taken into account.

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[237] Ibid 902. See also: Wang Ping, 'Accession to the Agreement on Government Procurement: The case of China', in Arrowsmith and Anderson (n 223) 92-116.

[238] In this regard, it should be noted that in the previous text of the current Revised GPA, Annex 3 referred to 'other entities that procure.' Thus, under the heading, any entity that was controlled by the government and that engaged in public procurement activities constituted fell potentially under the scope of Annex 3. In any case, it is possible to draw a parallel with what has been observed under GATS Article XXVIII. See Section 3.

[239] WTO, *Korea - Government Procurement* (1 May 2000) WT/DS163/R, para 7.57.

Despite the growing importance of SOEs in the government procurement sectors, it has been observed that the design of the GPA does not incentivize States based on economies with a huge public sector to accede to the plurilateral framework. This causes two consequences with long-term repercussions. From a general perspective, if the GPA is not able to expand its membership, then it fails its very built-in mandate in this regard.[240] From a SOEs perspective, instead, the failure of the GPA to attract new Parties under its scope means that those Members that exploit these enterprises the most are not bound by plurilateral obligations. Hence, a considerable number of SOEs engaging in international trade and in public procurement procedures are not captured by the GPA. However, the accession of these countries to the GPA is of crucial importance to ensure that public procurement procedures involving SOEs and related entities are carried out in accordance with the principles of transparency and non-discrimination.

5. The WTO Agreement on Agriculture (AoA) and the notion of SOEs

States have a long tradition of actively engaging in the economy in order to support the agricultural sector, which has also been done through the exploitation of economic operators under their control or ownership. This also emerged from the analysis of Article XVII of the GATT in the fields where STEs are more active. It is not unusual for SOEs to operate in the agricultural sector. In that context, they can play a crucial role as food security stabilizers and actively implementing food policies of the State.[241] Moreover, the prominent role of SOEs and related entities in the agricultural sector can also be appreciated in bilateral and plurilateral agreements concluded outside of the institutional framework of the WTO. Indeed, it has been noted elsewhere that the vast majority of PTAs dealing with SOEs related entities regulate them in the agriculture sector.[242]
Such an active role of the State in the agricultural sector through State ownership can be explained by its very intrinsic characteristics related to its volatility. Indeed, much more than any other sector, the performance of the agricultural sector is heavily subject to weather conditions and other natural events, which may negatively impact the costs of production and related prices. For this reason, following the end of the WWII, governments started to pursue unilateral food security policies, with the aim to reach self-sufficiency. These elements are arguably at the very core of the reason why it was particularly difficult to conclude a WTO multilateral agreement in the first place.[243] Eventually, the multilateral regulation of trade in agriculture was encapsulated in the AoA. The Agreement acknowledges the active role played by Members in the agricultural sector. This makes it particularly interesting for the purposes of this study because it can provide some hints and clarification as to constitutive criteria that could be applicable to SOEs.

[240] Cf. GPA Article XXIV.7(b).
[241] James A Austin and Jonathan Fox, 'State-Owned Enterprises: Food Policy Implementers', in James A Austin and Gustavo Esteva (eds), *Food Policy in Mexico. The Search for Self-Sufficiency* (Cornell University Press, 1987) 61-91.
[242] Luca Rubini and Tiffany Wang, 'State-Owned Enterprises', in Aaditya Mattoo, Nadia Rocha and Michele Ruta (eds), *Handbook of Deep Trade Agreements* (World Bank, 2020) 481.
[243] As known, the GATT did not specifically regulate the field of agriculture. The only discipline dedicated to it was encapsulated in Article XI.1 of the GATT. This provision, dealing with the prohibition of quantitative restriction, provided for an exception related to farm products. The first multilateral agreement on agriculture saw the light of the day only in 1995. Mavroidis (n 11) 3122 f; Matsushita and others (n 175) 251 f; Picone and Ligustro (n 173) 149 f.; Bernard O' Connor, 'L'Accordo sull'Agricoltura', in Venturini (n 174) 127 f.

5.1. The notion of 'government agency' under Article 9.1(a) and (b): governmental function and the source of power

Article 9.1(a) and (b) of the AoA dealing with export subsidy commitments explicitly refers to subsidies provided 'by governments or their agencies.' The provision does not define what government agencies are. However, some elements worth consideration emerge from the wording of the provision.

First of all, it can be noted that the expression used in the relevant provisions put on the same level the government, on the one hand, and related agencies, on the other hand. Particularly, the use of 'or' paired with the term 'their' makes it explicit that a strong connection is required between the State and the entity concerned. In this sense, it is necessary to ask whether such proximity entails that the two – government and agencies – share some similarities.

Some light is shed in this regard by the AB, which dealt with the notion of government authority in *Canada - Dairy*.[244] As the content of this decision is particularly important for the defining elements that emerge with reference to the attribution criteria, it will be analyzed in detail in Chapter 4. Here, it suffices to mention the criteria set forth by the AB that enable an entity to be identified as a government agency, namely those of function and source of power. More specifically, the functional requirement means that an entity is a governmental agency if it performs functions of a governmental character. These would entail the power to 'regulate,' 'restrain,' 'supervise,' or 'control' the conduct of private citizens. Then, the source requirement focuses on the origin of the governmental power, which, in the AB's perspective, must be conferred upon the entity by the government. As noted already, although seemingly straightforward, this approach is rather problematic to the extent that the notion of what is 'governmental' is subject to several considerations.[245]

5.2. Final remarks: clarifying the boundaries of the notion of governmental agency

Under the context of the AoA, an entity is a government agency, and thus belongs within the boundaries of the notion of 'State,' if it shares with it the exercise of functions typically associated with the government. In turn, such power has to derive from a delegation of the State. Arguably it is this delegation that justifies the exercise of governmental powers. Hence, an SOE that carries out governmental functions which have been delegated to it by the State falls within its boundaries for the purposes of the AoA. This might be particularly relevant in local communities, where local authorities may own an enterprise and entrust it with the provision of essential local functions related to food supply and conservation for and within the municipality.

At this point, it is possible to draw a parallel between the expressions used in Article 1 of the ASCM and Article 9.1(a) and (b). As can be recalled, the first provision refers to 'a government or any public body,' whereas the second mentions 'governments or their agencies.' At first glance, one may note that the two expressions share some similarities. Firstly, they both refer to governments and other entities. Secondly, their focus is on the qualification of an entity as a public body or government agency rather than on the control that may be exercised on them by the State.[246] These elements can be inferred from the entity's statute, or by looking at the type of activities performed. Any evaluation

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[244] WTO, *Canada - Dairy* (13 October 1999) WT/DS103/AB/R para 97.

[245] Gregory Messenger, 'The Public-Private Distinction at the World Trade Organization: Fundamental Challenges Determining the Meaning of "Public Body" (2017) 15(1) International Journal of Constitutional Law 64 f.

[246] Rubini (n 21) 134.

concerning the power exercised by the State in a specific case seems to be irrelevant in this context. The major difference between the two expressions lies perhaps in the difference with which the relationship between the State and the entity involved is made explicit. While in the case of the AoA the use of the term 'their' arguably implies a close connection between the State and the entity, such connection is less clear under the ASCM with all the consequences seen in Section 2 *supra*.

6. Conclusions: the role of State ownership under the multilateral trading system

Having considered the issues raised by SOEs under the multilateral trade legal context on State trading, the study focused on the regulation and coverage of these entities under other WTO Agreements other than the GATT, namely the ASCM, the GATS, the GPA and the AoA. In this context, the focus was on several notions related to different types of economic operators that, due to their intrinsic characteristics and their relationship with the State, were deemed to be close enough to SOEs to allow an investigation into the boundaries of their notions and shed light on their relationship with the State in the multilateral context. In doing so, the study identified constitutive elements of both governmental and non-governmental entities. This step was functional in order to provide an understanding of whether and to what extent SOEs could, or could not, be assimilated with the economic operators envisaged under the WTO Agreements and, accordingly, whether their conduct could fall under their scope.

Against this background, the analysis of all the WTO Agreements considered, including the GATT, identified two macro-categories of entities: public economic operators and private economic operators. The first category undoubtedly encompasses WTO Members. In this regard, custom unions aside, the notion of 'State' is relevant. This is conceived in its widest sense, including not only the central government but also local branches and decentralized governmental entities.

Beyond the central State, entities outside of the government structure can be considered. In this case, the notion of the 'State' could be stretched to include those entities that may share a special relationship with it. As seen, under the WTO legal framework, such subjects are sometimes identified as enterprises. This was the case with STEs, but also with the notion of 'public body' under Article 1 of the ASCM. Moreover, under the framework of the GATS, reference can be made to the concepts of 'service supplier,' 'monopoly service supplier,' and 'exclusive serve supplier.' The GPA also refers to enterprises, especially in Annex 3 on 'other entities.' In this context, the AoA clarifies the features of the relationship that can tie the State to its enterprises, which include the exercise of governmental functions and the delegation of those functions from the State itself.

Against this background, it is not easy to determine if, and when, SOEs or otherwise State-controlled economic operators are public or private entities under the multilateral framework of trade law. This is because the element of ownership has no autonomous relevance in any of the legal fields considered. This means that the mere fact that the State is a shareholder does not make the enterprise public per se under WTO law. Hence, the ownership pattern alone is not relevant for qualification purposes. Arguably, this is due to the principle of neutrality that underpins WTO law. In this context, the multilateral trading system seems to consistently value criteria other than the ownership of an enterprise for its qualification as a private or public body. Indeed, as illustrated in Chapter 2, under Article XVII of the GATT, the qualification of an enterprise as STE does not rely on its ownership. Rather, the focus is on granting exclusive or special privileges by the government to the enterprise

concerned. Hence, the definitional approaches arguably revolve around the source criterion, as the exclusive and special privileges must be conferred by the State, and a functional criterion, because the activities in which the enterprise engages are the expression of the granted privileges and rights. These definitional approaches are consistent with the aim of Article XVII of the GATT, which is to avoid undue restrictions and discrimination on international trade flow through the use of STEs. However, they are also narrow in scope. Indeed, being based on a criterion with undefined boundaries, that of 'exclusive or special privileges,' they may not be able to effectively pursue that objective. This should be kept in mind especially when SOEs are involved, as they are only partly covered under the notion of STE.

State ownership is also irrelevant per se under Article 1 of the ASCM to establish whether an entity is a public body. Rather, such a qualification hinges on the presence or exercise of the governmental authority conferred to it by the government. However, other solutions revolving around State control and the exercise of governmental functions have been put forward by WTO adjudicative bodies and scholars. In any case, public ownership is a circumstantial element that only together with other criteria, such as the presence of State influence over the entity's decision, can determine the qualification of an entity as a public body. In other words, the focus is on the relationship between the enterprise and the State, and on the characteristics of their interaction. The study of how these two entities relate to each other is important not only to prevent the conferral of undue financial benefits to enterprises by the State and similar entities but also for the purpose of attributing the conduct of these entities to the State itself. In this context, full, majority or minority State ownership is not sufficient to determine that an SOE is a public body included within the boundaries of the notion of 'State.'

The perspective is slightly different under the GATS. In that context, the ownership structure of the enterprise is not relevant to determine whether it constitutes a monopoly or an exclusive service supplier. Rather, on the one hand, the emphasis is on the establishment of the entity in accordance with national law and the presence of an organized structure; on the other hand, the focus is on the activity exercised by the entity and on the active engagement of the State in the market. In any case, the novelty introduced by the GATS is the indication of the level of ownership deemed relevant for the application of the Agreement, that is, majority State ownership. Hence, also under the GATS, the focus is on the relationship between the enterprise and the State, without any clarification being provided on the consequences of the qualification of the public or private nature of the former.

In this context, the GPA adopts a slightly different approach in the sense that State ownership is regulated to the extent it hinders the application of the Agreement. However, the Agreement does not specify the level of State ownership deemed relevant for its application. In turn, the AoA clarifies the relationship between the State and its entities. Relevant criteria in this regard do not revolve around State ownership but rather on the presence of an act of delegation by the government and the exercise of a relevant function.

Against this background, it is possible to conclude that, under the WTO legal framework as it stands, the determination of an SOE as a public or private entity does not depend on the nature of the owner nor on its ownership pattern. Consequently, an SOE is not a public entity just because it is owned by the State. Its public nature can only be determined when and if such ownership is accompanied by other elements. More specifically, an SOE would qualify as a public subject, falling within the

extended boundaries of the notion of 'State' under the WTO if: (i) the enterprise is owned and effectively controlled by the State; and (ii) there is a delegation by the State that allows the exercise of governmental functions by the enterprise concerned; or (iii) there is a conferral of exclusive or special rights by the State. In this context, the first criterion appears to be necessarily accompanied by one of the other two, alternatively.

These considerations shed light on the converging points that are common to all the legal fields analyzed when the qualification of an SOE as a public entity under the WTO legal framework is concerned. First of all, there is the State source criterion. All analyzed agreements require an act of delegation by the State, either central or local authorities. Secondly, there is the functional approach. This encapsulates the idea that the enterprise concerned should exercise functions typically attached to the State or generally to the public sphere.

Considering SOEs as private economic operators, their conduct becomes relevant only when there is a strong link with the State. This can be a conferral of responsibility for the pursuit of a public purpose or pervasive control over the activities of the privately owned enterprise. This setup is justified given that the WTO is primarily concerned with regulating the conduct of States that may hinder the liberalization of international trade, whereas private conduct is, in principle, outside of its scope. However, when there is a strong tie, the boundaries of what is public widen so as to include private economic actors as well.

Chapter Five
DEFINITIONAL CRITERIA OF SOES EMERGING FOR THE PURPOSES OF ATTRIBUTION OF CONDUCT WITHIN THE SCOPE OF THE WTO DSU

1. Identifying definitional elements for SOEs by looking at rules on attribution for the purposes of international responsibility

Having explored the notion of SOEs under what can be defined as 'primary rules' within the sphere of WTO law, this chapter considers the boundaries of the notion at issue as they emerge from 'secondary rules', i.e., from the perspective of the international responsibility of the WTO Members and specifically from the rules which qualify the notion of attribution of wrongful conduct to a State. The choice to further the analysis with this approach is premised on the systematization of the notion of attribution under the international rules on State responsibility, which is considered the subjective constitutive element of an internationally wrongful act.

Norms on attribution are crucial to determine when and under which circumstances conduct adopted and implemented by State organs and non-State organs (including SOEs) can be attributed to the conduct of the State, thus matter for the purposes of international responsibility.[1] Norms on attribution make it possible to determine, on the one hand, under which circumstances the conduct of SOEs is attributable to the government using them and, on the other hand, the legal conditions under which the conduct of legal entities, which are distinct from State organs and have independent legal personalities, as may be the case for SOEs, is carried out on behalf of the State.

From the perspective of international trade law, norms on attribution contribute to understanding when the implementation by SOEs of export or import policies in breach of international obligations is attributable to the State that established, or owns or controls them. Due to the negative spillovers that the use of SOEs may have on international trade flow, an investigation of applicable attribution criteria can play a role in dis-incentivizing States from using these enterprises as a circumventing tool. In this context, the analysis of secondary norms on attribution (i.e., the conditions under which the conduct of an entity, including an entity other than the State, can nonetheless be considered State

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[1] The international law on State responsibility for internationally wrongful acts provides that when a State commits an act in breach of an obligation of international law its international responsibility arises. This is premised on the fact that there is an international law obligation in force and that the State acted in breach of such obligation. In this regard, Article 2 of the ILC Draft Articles on the International Responsibility of States on 'elements of an internationally wrongful act of a State' as adopted in the second reading by the ILC:

> There is an internationally wrongful act of a State when conduct consisting of an action or omission:
> (a) is attributable to the State under international law; and
> (b) constitutes a breach of an international obligation of the State.

Therefore, an internationally wrongful act is formed by an objective element, that is, the breach of an international law obligation, and a subjective one, namely the imputability of the internationally wrongful act to the State. Attribution is one of the two prerequisites for the application of the rules on State responsibility. Despite being Draft Articles and not an international treaty, international tribunals and legal practitioners refer to the ARSIWA to draw the boundaries of State responsibility. More specifically, the ARSIWA aim to define a set of general rules governing the attribution of conduct to a State that are meant to apply to all fields of international law. See International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1; Draft articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries 2001 in Report of the International Law Commission on the work of its fifty-third session, 23 April - 1 June and 2 July - 10 August 2001, Official Records of the General Assembly, Fifty-Sixth Session, Supplement No.10, A/56/10, Yearbook of the International Law Commission, 2001, Volume II (Part Two).

conduct) can contribute to defining the boundaries of the notion of State and SOE in a complementary fashion to what has been delineated under primary rules. With this in mind, the chapter explores whether there are defining criteria for SOEs emerging from secondary rules on the international responsibility of States. Specifically, the focus is on the criteria of attribution that are employed according to the qualification assigned to these entities by WTO adjudicating bodies.

1.1. Is there *lex specialis* within the WTO legal framework?

As one of the outcomes of the Uruguay Round negotiations, the WTO dispute settlement system (DSS) represented an important step towards the 'judicialization' of disputes on international trade.[2][3] Pursuant to Article 23 of the DSU, the WTO DSS is the only means available to WTO Members to settle disputes in the WTO multilateral system, while WTO adjudicating bodies enjoy exclusive jurisdiction. Notwithstanding its central role, the relationship between the WTO DSS and international law is still disputed among scholars. In this regard, although this position appears to be superseded,[4] it has been debated whether the WTO system constitutes a 'self-contained legal regime.'[5] Thus, the multilateral legal framework is conceived as a closed and self-sufficient special law, with its own governing principles and expertise, able to solve disputes and rely solely on its rules, thus excluding the application of general international law rules or only admitting them under determined circumstances,[6] and developed to deviate from what is provided under general law.[7] An alternative perspective questions if the WTO system should be seen as part of the general international law order.[8]

In the first scenario, the WTO adjudicating bodies should not rely on general international rules on State responsibility but solely on provisions contained in the WTO Agreements. In the second scenario, one should consider that, provided that WTO Agreements do not contain rules governing interpretative issues of the agreements or attribution, WTO adjudicating bodies should rely on general international law provisions. In line with this view, given its incompleteness and in order to be

[2] John H Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (CUP, 2006) 135. For a detailed account of the historical development of trade adjudication: Giorgio Sacerdoti, 'Adjudication of International Trade Disputes: from Success to Crisis. What's Next?' [2023] The Law and Practice of International Courts and Tribunals, 1-31.

[3] The rules and procedures governing WTO dispute settlement are contained in the Dispute Settlement Understanding (DSU), which forms part of the WTO Agreements. By acceding to the WTO, Members accept the DSU and the jurisdiction of the WTO adjudicating bodies by virtue of the 'single undertaking' principle. See Chapter 2, section 3.4.

[4] Joanna Gomula, 'Responsibility and the World Trade Organization' in James Crawford, Alain Pellet, Simon Olleson and Kate Parlett (eds), *The Law of International Responsibility* (OUP, 2010) 791.

[5] ILC, Fragmentation of International Law: Difficulties Arising from Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi (13 April 2006) A/CN.4/L.682. For a critical view on this matter see: Anja Lindroos and Michael Mehling, 'Dispelling the Chimera of 'Self-Contained Regimes' International Law and the WTO' (2006) 16(5) The European Journal of International Law 857 f; Mariano Garcia-Rubio, *On the Application of Customary Rules of State Responsibility by the WTO Dispute Settlement Organs: A General International Law Perspective* (IUHEI, 2001), 35 f.

[6] Riccardo Pisillo Mazzeschi, 'La protezione internazionale dei diritti dell'uomo e il suo impatto sulle concezioni e metodologie della dottrina giuridica internazionalistica' (2014) 2 Diritti Umani e Diritto Internazionale 279 f.

[7] International Law Commission, Report of the Study Group of the International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' A/CN.4/L.702
18 July 2006, para 10-11.

[8] Joost Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?' (2001) 95 American Journal of International Law 535 f; Petros C Mavroidis and David Palmeter 'The WTO Legal System: Sources of Law' (1998) American Journal of International Law 398 f.

effective, the WTO legal regime 'cannot be read in clinical isolation from public international law.'[9] This means that WTO adjudicating bodies, while required to primarily rely on WTO law to settle WTO-related disputes brought before them,[10] can also refer to general international law to the extent that WTO Agreements do not set up a *lex specialis* regime on the settlement of trade disputes among Members. From the perspective of the international responsibility of States, this prompts further reflection on whether the WTO legal framework distances itself from general international rules or if, on the contrary, it does not contain, not event in part, a *lex specialis* within the meaning of Article 55 of the ARSIWA.[11]

There is no provision specifically dealing with attribution under WTO law.[12] Generally speaking, in the WTO legal framework, an internationally wrongful act takes the form of a failure of a Member to carry out its obligations under the WTO Agreements. However, the scope of the complaints which may be brought under the WTO DSS is broader than that of breaches of a WTO obligation. These could be 'violation complaints', when the Member concerned has allegedly failed to comply with its obligations, as well as 'non-violation complaints' (NVCs).[13] The latter occur when there is no violation of WTO law, but the implemented measure still impairs or nullifies a benefit of another Member under WTO Agreements. Building on this, Article 3.3 of the DSU deals with the settlement of the situations in which a WTO Member considers its benefits under the Agreements to be directly or indirectly impaired by measures adopted by another Member.

Under WTO law, then, as explained by the Appellate Body (AB), the impairment of benefits as a consequence of a Member's conduct provides the link between the objective and subjective elements of the measures complained of, that the WTO legal framework requires, for the purposes of dispute resolution.[14] From this perspective, the subjective requirement is expressly linked not only to conduct in breach of WTO law obligations but also with a pre-determined type of consequence of conduct, namely nullification and impairment. This is because the latter extends to any conduct that, although not in violation of WTO Agreements per se, causes determined effects, namely impairment or nullification of benefits, which other Members are entitled to.

Within such broad scope of WTO complaints, it must be noted that WTO disputes usually concern governmental measures, for which there is little doubt that they are attributable to the State.[15] This means that it is not infrequent that the issue of 'attribution' is only indirectly dealt with by WTO adjudicating bodies, without connecting criteria being explicitly elaborated and considered. In other

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[9] WTO, *US – Standards for Reformulated and Conventional Gasoline* (29 April 1996) WT/DS2/AB/R, para.17. See also Chapter 2, Section 3 of this work.

[10] It should be recalled that WTO adjudicating bodies cannot receive any claim of international law, i.e., they do not enjoy general jurisdiction. Rather, their jurisdiction is exclusive and limited to WTO-related matters regulated by WTO laws that adjudicating bodies can enforce. See Gabrielle Marceau, 'WTO Dispute Settlement and Human Rights' (2002) 13 European Journal of International Law 756

[11] Article 55 of the ARSIWA reads: 'These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.'

[12] Santiago Villalpando, 'Attribution of Conduct to the State: How the Rules of State Responsibility May Be Applied within the WTO Dispute Settlement System' (2002) 5(2) Journal of International Economic Law 396.

[13] This concept has also been included in the GATS. See Petros C Mavroidis, *The Regulation of International Trade. Vol 3* (MIT Press, 2016). Generally see: Frieder Roessler, 'The Concept of Nullification and Impairment in the Legal System of the World Trade Organization' in Ernst U Petersmann (ed), *International Trade Law and the GATT/WTO Dispute Settlement System* (Kluwer Law International, 1997) 126 f.

[14] WTO, *United States - Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* (15 December 2003) WT/DS244/AB/R, para 81.

[15] Villalpando (n 12).

words, when dealing with this subject matter, both panels and the AB tend to focus rather on the violation of the multilateral obligation at issue or the impairment or nullification of benefits as a result of a Member's given conduct. However, as it will be demonstrated *infra*, WTO adjudicating bodies on different occasions have had to determine when a certain measure was attributable to a WTO Member.[16] In doing so, panels and the AB have made reference to or applied the international rules on State responsibility as codified in the 2001 Draft Articles on States Responsibility for Internationally Wrongful Acts (ARSIWA)[17] relatively consistently.[18]

Remarkably, in this context, WTO adjudicating bodies have referred to the ARSIWA when they had to define the content of primary rules.[19] Indeed, 'connecting' criteria can be identified in WTO primary rules, such as Article XVII of the GATT and Article 1 of the ASCM, which are also relevant in dispute settlements in the WTO legal context. These 'connecting' criteria may also count for the purposes of finding a Member's conduct in breach of the obligation or with the effect of impairing or nullifying benefits of other Members. From this perspective, WTO law seems to show that the distinguishing line between primary and secondary rules is somehow conflated, at least in terms of their application. In the discussion that follows, the criteria linking the conduct of entities to the State can also be referred to as 'connecting criteria.' This expression is used in a wider sense than 'attribution criteria' to indicate those criteria that connect the conduct of an entity to the State that does not necessarily involve a breach of WTO obligations.

1.2. Are the lines between primary and secondary norms blurred within the WTO legal framework?

Against this background, the study is premised on the ongoing academic debate about the theoretical distinction between primary and secondary rules in the international law of State responsibility.

As widely known, during the process of systematization of the subject matter, the International Law Commission (ILC), upon the initiative of the then Special Rapporteur Roberto Ago, premised its drafting work on the distinction between primary and secondary rules of international law.[20] The expression 'primary rules' identifies international rules which impose on States several obligations whose breach can be a source of responsibility.[21] Such rules may be customary or treaty rules. In turn, 'secondary rules' refer to the regulation of the conditions under which a primary rule is breached and the legal consequences related to that breach.[22]

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[16] Villalpando (n 12) 396. See also: Yenkong Ngangjoh Hodu, 'WTO Treaty System and State Responsibility: Revisiting the Question of Attribution and its Development Perspective in the WTO' (2008) 9(1) Journal of World Investment & Trade, 71.

[17] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp. IV.E.1 [Hereinafter ARSIWA].

[18] Anna Ventouratou, 'The Law on State Responsibility and the World Trade Organization' (2021) 22 (5-6) Journal of World Investment & Trade 777 f.

[19] As it results from the analysis of relevant case law conducted to understand whether the Draft Articles have been used, and to what extent, for the purposes of attribution under the WTO DSS.

[20] Georg Nolte, 'From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-State Relations' (2002) 13(5) EJIL1097. See also: James Crawford, Pierre Bodeau and Jaqueline Peel, 'The ILC's Draft Articles on State Responsibility: Toward Completion of a Second Reading' (2000) 94 American Journal of International Law 660; Alain Pellet, 'Remarques sur une révolution inachevée—Le projet de la C.D.I. sur la responsabilité des États' (1996) 42 Annuaire Francaise de Droit International 8.

[21] Report of the International Law Commission on the Work of its Thirty-Second Session (5 May-25 July 1980), A/35/10, in Yearbook of the International Law Commission Volume II Part 2, Para 23.

[22] See Report of the ILC, 32nd Session, ILC Yearbook 1980, Vol II(2), 27, para. 23.

The distinction between primary and secondary rules followed by the ILC was a 'central organizing device'[23] that served the practical purpose to allow the Commission itself to complete its task successfully. The distinction helped the ILC focus only on the rules concerning the consequences of an internationally wrongful act committed by the State, excluding from consideration the substantive rules to which such violation related.[24] The distinction presupposes that international law rules are divided between two separate categories – substantive obligations and rules governing State responsibility – and as such they are susceptible to be applied independently.[25]
More recently, however, scholars started to question the benefit of such distinction and wonder if it merely reflects an artificial construction with limited practical purpose or, on the contrary, it is still justified in the light of the features of the international legal framework today.[26] Ultimately, critics note that a clear distinction between primary and secondary obligations is hard to draw as the two categories embrace rules often closely intertwined, if not inseparable, with frequent overlaps.[27] The idea is that rather than regulating the consequences of a breach of a primary obligation, these rules impose new substantive obligations on States. This is especially evident in the context of the secondary rules on attribution to the extent that they are not only relevant when an internationally wrongful act occurs but also contribute to defining the scope of primary rules.[28] Criticism also revolves around the circumstances precluding wrongfulness.[29]
The blurriness between primary and secondary rules of international law is confirmed by the inconsistent application of rules on attribution by international courts and tribunals. International judges increasingly tend to apply these rules not to determine the international responsibility of governments but rather to draw the line between the notion of State as opposed to private entities, especially in investment disputes (for example, to determine locus standi of a claimant, or to distinguish treaty from contract breaches).[30] Against this background, the study aims at understanding whether this might be the case also for international trade law.
As is generally accepted, norms on attribution belong to the realm of the subjective element of an internationally wrongful act. Notwithstanding this, the establishment of attribution is based on objective elements. This, together with the above-mentioned overlap between primary and secondary

[23] James Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 96 American Journal of International Law 876.
[24] Eric David, 'Primary and Secondary Rules', in Crawford, Pellet, Olleson and Parlett (eds) (n 4) 28. Indeed, under the first Special Rapporteur F.V. Garcia Amador, the ILC linked the regulation of State responsibility with the treatment of aliens. This approach was probably not so much justified from a methodological point of view as from the perspective of state practice, since the overwhelming majority of judicial and arbitral decisions in the area of state responsibility concerned precisely the treatment of the alien. See: Giorgio Gaja, 'Primary and Secondary Rules in the International law on State Responsibility' (2014) 97 Rivista di Diritto Internazionale, 982 f. On the role played by the distinction between primary and secondary rules for the draft of ARSIWA see: Jean Combacau and Denis Alland, '"Primary" and "Secondary" Rules in the Law of State Responsibility: Categorizing International Obligations' (1985) 26 Netherlands Yearbook of International Law 81-109.
[25] Ulf Linderfalk, 'State Responsibility and Primary-Secondary Rules Terminology - The Role of Language for an Understanding of the International Legal System' (2009) 78 Nordic Journal of International Law 54 f.
[26] Linderfalk ibid 53 f. See also: David (n 24) 27 f.; Gaja (n 24); Vincent-Joel Proulx, *Institutionalizing State Responsibility* (OUP, 2016), 18 f.
[27] Tullio Treves, 'The International Law Commission's Articles on State Responsibility and the Settlement of Disputes', in Maurizio Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Martinus Nijhoff Publishers, 2005) 227.
[28] Gaja (n 24) 982; Anastasios Gourgourinis, 'General/Particular International Law and Primary/Secondary Rules: Unitary Terminology of a Fragmented System' (2011) 22(4) The European Journal of International Law, 1022.
[29] Gaja (n 24) 985; David (n 24) 27.
[30] James Crawford, *State Responsibility: The General Part* (OUP, 2013) 114.

norms on attribution, suggests that the analysis of the category of norms qualified as 'secondary' in international law theory may be useful in further defining the notion of SOEs in a complementary fashion with the analysis carried out on primary rules.
In light of the above, the study focuses on the reconstruction of the notion of SOEs in the context of the ascertainment of attribution of conduct under the WTO legal system, which serves to determine when a Member has failed to comply with multilateral trade rules through non-State entities. To this end, the work is structured into two parts. The first part addresses the notion of attribution under general public international law on State responsibility to understand how the basic principles of attribution may relate to SOEs and related entities. More specifically, the secondary rules on attribution as codified by the ILC in the 2001 Draft Articles on States Responsibility for Internationally Wrongful Acts (ARSIWA)[31] are taken into account. Hence, the analysis focuses on the constitutive elements of entities whose conduct is considered under the ARSIWA, such as *de jure* and *de facto* State organs. The second part of the study focuses on the notion of 'attribution' within the context of WTO law and adjudicative practice. The aim is to compare attribution criteria emerging from this system with the ones emerging from the ARSIWA context.

2. Qualifying SOEs under general international law on the international responsibility of States: defining criteria according to the ARSIWA

It is an established principle under public international law that the State is accountable for the conduct of its organs.[32] Being abstract entities, States cannot operate but through natural and juridical persons acting on their behalf.[33] States are responsible for the conduct of their organs and agents carrying out activities for them.[34] This principle was endorsed by the ILC during the preparatory works on the ARSIWA, where it clarified that there is no international responsibility for the State without attribution.[35] In this context, attribution is one of the two constitutive elements of an internationally wrongful act. This also emerges from the legal structure adopted by the 2001 ILC Draft Articles, which constitute the current legal framework for State responsibility despite their debated relationship with international customary law.[36]
Attribution operates as a 'bridge' that links, on the one hand, the conduct of a particular entity and, on the other hand, the State. It allows the latter to be held responsible for the conduct of the former

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[31] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), Chp. IV.E.1 [Hereinafter ARSIWA].
[32] Looking at the case law, this principle has also been clearly expressed in the seminal *Moses* case where the tribunal stated that 'an officer or person in authority represents pro tanto his government, which in an international sense is the aggregate of all officers and men in authority.' Cfr. Moses Case, Moore, History and Digest, vol. III, p. 3127, at p. 3129 (1871) as cited in the Commentary to the Draft Articles. For doctrinal references see *ex multis*: James Crawford and Simon Olleson, 'The Character and Forms of International Responsibility', in Malcolm Evans, *International Law* (OUP, 2018); Paolo Palchetti, *L'organo di fatto dello Stato nell'illecito internazionale* (Giuffré, 2007).
[33] Condorelli Luigi and Kress Claus, 'The Rules of Attribution: General Considerations', in Crawford, Pellet, Olleson and Parlett (eds) (n 4) 237; Marko Milanovic, 'Special Rules of Attribution of Conduct in International Law' (2020) 96 International Law Studies*,* 295-393.
[34] Article 1 of the ARSIWA states: 'Every internationally wrongful act of a State entails the international responsibility of that State.'
[35] Report by Mr. Roberto Ago Chairman of the Sub-Committee on State Responsibility, A/CN.4/152, 16 January 1963, 227 f.
[36] Crawford (n 30) 45.

provided that certain conditions are met.[37] Therefore, in principle, a State is not responsible for the conduct of private entities and individuals which are not organs of the State.

The regulatory framework adopted by the ARSIWA on attribution is based on a public-private dichotomy to distinguish between 'State organs' and 'non-State organs' whose conduct is attributable to the State.[38] Accordingly, the regulatory framework concerning attribution is based on three categories of provisions.[39] The first category is set out in Articles 4 to 7 of the ARSIWA and deals with the attribution to the State of the conduct of State organs as they are so qualified under the domestic law of the State. The second category is encapsulated in Article 8 and regulates the attribution to the State of the conduct of a 'non-State organ.' The third category regulates attribution to the State of the conduct of a private person or group of persons carried out in the absence of official authorities (Article 9), in the event of an insurrectional movement (Article 10), or in case of acknowledgment by the State of the private conduct as its own (Article 11).

Against this background, it must be noted that the legal framework emerging from the ARSIWA does not deal with SOEs specifically. No provision in the Draft Articles regulates the attribution of the conduct of SOEs to States. However, the ARSIWA Commentary addresses entities related to SOEs, namely public enterprises, under the category of 'parastatal entities' under Article 5 of the ARSIWA and Article 8 of the ARSIWA.[40] The lack of a special framework for SOEs and related entities means that general rules are applicable whenever these enterprises are concerned. This is the reasoning followed by international courts and tribunals, which tend to apply or refer to ARSIWA provisions when dealing with the attribution of SOE conduct to States for the purposes of determining the international responsibility of the State who owns the enterprise. Although the approach followed may differ across international adjudicators,[41] the exploration of attribution - which aims to establish when an act is an act of the State - always and necessarily involves an analysis of the boundaries of the notion of 'State.' The study of how the ARSIWA are interpreted and applied then becomes relevant to directly specify the relationship between SOEs and the State, and by contrast clarify the boundaries of the notion of SOEs also when addressing a rule which would fall in the category of 'primary rules' in the systematization outlined above.

With this in mind, the following analysis focuses specifically on Articles 4, 5, and 8 of the ARSIWA.[42] Considering the type of entities captured under these provisions, they can provide

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[37] Carlo De Stefano, *Attribution in International Law and Arbitration* (OUP, 2020) 19.

[38] Jaemin Lee, 'State Responsibility and Government-Affiliated Entities in International Economic Law: The Danger of Blurring the Chinese Wall between "State Organ" and "Non-State Organ" as Designed in the ILC Draft Articles' (2015) 49(1) Journal of World Trade 121. It has been argued that the theoretical foundation of this structure is that States cannot control all the activities carried out by nationals. If the contrary were true, the scope of the private sphere of individuals and the freedom of enterprises would be unduly restricted. See Olivier De Frouville, 'Attribution of Conduct to the State: Private Individuals', in Crawford, Pellet, Olleson and Parlett (n 4) 261.

[39] Crawford (n 30) 115.

[40] See Commentary Article 8, para 6.

[41] As mentioned, investment tribunals use the ARSIWA, or implicitly apply them, to identify the boundaries of the SOEs and related entities, to determine whether SOEs have standing in investor-state dispute settlement or to interpret the term governmental authority in a way as to include a variety of economic operations and so hold States accountable. See: Ming Du, 'The Status of Chinese State-owned Enterprises in International Investment Arbitration: Much Ado About Nothing?' (2021) 20(4) Chinese Journal of International Law, 785–815; Luca Schicho, *State Entities in International Investment Law* (Nomos, 2012) 43 f; Deborah Russo, 'The Attribution to States of the Conduct of Public Enterprises in the Fields of Investment and Human Rights Law', (2019) 29(1) IYIL 93-110. The European Court of Human Rights tends to conflate attribution and jurisdiction in this context. See: Milanovic (n 33) 349-50.

[42] According to Schicho, the architecture adopted in the ARSIWA with reference to attribution sees Article 4 as the fundamental provision, to which Articles 5 and 8 make reference. Schicho (n 41) 83.

important hints as to the boundaries to be drawn between these enterprises and the State when applying WTO rules. By contrast, the attribution of conduct performed in the case of State power vacuum or insurrections is outside of the scope of this analysis, as they are arguably not conceived to regulate the consequences of the conduct of commercial entities.[43] Following the reconstruction of the boundaries of the notions of *de facto* and *de jure* organs, the study aims to map the constitutive elements of SOEs emerging from these provisions and their application by international courts and tribunals.

2.1. Article 4 of the ARSIWA: the constitutive criteria of 'State organs'

Article 4 of the ARSIWA ('conduct of organs of a State') reads:

> '1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial, or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
>
> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.'[44]

This provision stipulates the generally accepted principle under international law that the State is responsible for the acts of its organs, i.e., for the conduct carried out by those individuals and entities that qualify as 'State organs.'[45] However, it does not provide a clear-cut definition of 'State organs.' This notwithstanding, the analysis of the text and the ILC Commentaries allows us to delineate the boundaries of the notion.

Firstly, paragraph 1 of the provision refers to legislative, executive, and judicial power. On the one hand, for the purposes of attribution, this indicates that the separation of powers is irrelevant. In other words, the expression 'any other functions' means that no distinction is made as to the type of functions performed by a State organ as long as they reflect the exercise of sovereign authority.[46] On the other hand, the provision espouses the principle of the unity of the State, thus adopting an all-encompassing approach towards State organs. The notion in question includes all 'individuals and

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[43] Although beyond the scope of this analysis, one may consider the element of attribution in the context of the conduct of the insurgents in relation to business activities of private individuals. For a detailed account see: Marco Pertile, *Diritto internazionale e rapporti economici nelle guerre civili* (Editoriale Scientifica, 2020).

[44] Emphasis added.

[45] This principle is well reflected in case law of international courts and tribunals. See for example: Salvador Commercial Company, UNRIAA, vol. XV (Sales No. 66.V.3), p. 455, at p. 477 (1902); and Finnish Shipowners (Great Britain/Finland), ibid., vol. III (Sales No. 1949.V.2), p. 1479, at p. 1501 (1934); Texaco v Lybia, Preliminary Award, 27 November 2010, para 399 seq; Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I), p. 87, para. 62; Loewen v United States, Decision on Jurisdiction, 9 January 2001, para 70; CMS v Argentina, Decision on Jurisdiction, 17 July 2003; MCI Power v Ecuador, Award, 31 July 2007.

[46] Crawford (n 30) 115. In this regard, Article 4 of the ARSIWA by making explicit reference to the legislative, executive and judicial powers acknowledges that the separation of powers may take different forms across national jurisdictions. This is also reflected in the reference to 'any other functions.'

collective entities' that belong to the State's structure,[47] namely central and local State organs that exercise governmental powers on behalf of the State itself.[48] In other words, the range of subjects encompassed by the provision is rather broad because it includes natural or legal persons exercising any function for the State. There are no specific considerations given to State ownership under Article 4 of the ARSIWA, as the focus should be on whether the subjects belong to the structure of the State, or not.

The domestic organization of States pertains to the factual background, on which the analysis of the qualification of an entity as a State organ is conducted.[49] This approach, by acknowledging that States are free to define their national organization, confers Article 4 of the ARSIWA a sufficient degree of flexibility irrespective of structural divergences across States. However, an overall assessment of the entity and the environment in which it operates is required.[50]

Article 4 of the ARSIWA encapsulates a structural test for the qualification of a given entity as a State organ, strictly linked to the conditions set out by the national legal framework.[51] Therefore, it is the national law of the State that primarily establishes the qualification of individuals and entities as organs of the State.[52] Despite the importance of the national law criterion for the purposes of qualification of an entity as an organ of the State under international law, it is not exclusive.[53] Indeed, Article 4(2) of the ARSIWA specifies that an organ 'includes any person or entity which has that status in accordance with the internal law of the State.'[54] The verb 'to include' suggests that a given entity may still be a State organ, even without an official qualification under national law. Therefore, this verb introduces the notion of a *de facto* organ. As the criterion of national law is not the only one available to determine whether a given entity qualifies as a State organ, it is crucial to assess which elements create a link between the State and other entities not officially part of the public establishment that is so intense to justify the attribution of the entities' conduct to the State.[55] An entity could qualify as an organ of the State if it still acts on its behalf, notwithstanding the absence of an official link with the State. This would then be a *de facto* organ pursuant to Article 4(2) of the ARSIWA. The ARSIWA Commentaries explain that this provision is an anti-circumvention tool,[56] to prevent States from acting through individuals or entities to perform actions that would otherwise be internationally unlawful.[57]

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[47] ARSIWA Commentaries, para 1.

[48] Notably, the ICJ in the *Genocide Convention* case held that 'the expression "State organ," as used in customary international and in Article 4 of the ILC Articles, applies to one or other of the individual or collective entities which make up the organization of the State and act on its behalf.'

[49] Ian Brownlie, *System of the Law of Nations: State Responsibility. Part I* (Clarendon Press, 1983) 133, 136, 150.

[50] Schicho (n 41) 87.

[51] Paolo Palchetti, *L'organo di fatto dello Stato nell'illecito internazionale* (Giuffré, 2007) 12 f. According to Roberto Ago from the perspective of international law, national law is useful to determine the qualification of an entity as an organ of the State for international responsibility purposes. Roberto Ago, '*Le délit international'* (1939) 68, RCADI 464.

[52] This reflects the principle according to which international law does not interfere with States' national organization.

[53] Eileen Denza, 'The Relationship between International and National Law', in Malcolm D Evans (eds), *International Law* (OUP, 2006) 423.

[54] Emphasis added.

[55] Paolo Palchetti (n 51) 159.

[56] ARSIWA Commentary to Article 4, para 10 in its relevant parts states: 'a State cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law. This result is achieved by the use of the word "includes" in paragraph 2.'

[57] In this regard, it is important to note that once a given entity is qualified as a *de facto* State organ, its conduct is attributable to the State, which is *per se* responsible for all the acts, *ultra vires* included. Crawford (n 30) 126.

As the notion of *de facto* organ revolves around the absence of a formal link with the State, the analysis of Article 4(2) of the ARSIWA is usually read in relation to Article 8 of the ARSIWA, addressing individuals acting under the instruction, direction, and control of the State. However, there is a distinguishing line between the two situations that these norms regulate. While Article 4 deals with cases in which the conduct concerned is carried out by an entity so close to the State that it ceases to be independent and rather acts as a State instrument, Article 8 of the ARSIWA refers to situations in which the State does not recognize individuals as forming part of its organization, but nevertheless they act on its behalf.[58] This point has been clarified by the International Court of Justice (ICJ) in the Bosnian Genocide judgment, where, in response to the Tadič decision issued by the International Criminal Tribunal for the former Yugoslavia (ICTY) (see *infra*), the Court stated that 'in order to grasp the reality' of the relationship between the State and the entity concerned,[59] it is necessary to look beyond the formal element of the legal status. According to the ICJ, this is indeed the only way to ensure that States do not escape their international obligations and related responsibility when acting through allegedly independent entities and/or individuals. However, this is considered an exceptional situation for which the required standard of proof is particularly high. From this perspective, to prove that a given entity constitutes a *de facto* State organ, it must be established that the State exercises a 'particularly great degree of State control.'[60] Such control must be so intense that the entity concerned completely lacks independence and is reduced to a 'mere instrument'[61] of the State itself. Hence, the lack of independence is the distinguishing line between the notion of *de facto* organs under Article 4 from individuals addressed in Article 8 of the ARSIWA.[62] The latter can indeed act under the instruction, direction, or control of the State, but this does not exclude them from retaining some degree of autonomy.

In light of the above, the constitutive elements of a State organ under Article 4 of the ARSIWA are (i) the *de jure* or *de facto* enjoyment of such status by the entity concerned; and (ii) the performance of actions on behalf of the State. These findings are summarized in Table 1 and reflect different types of connections with several degrees of intensity. Firstly, a given entity is a State organ if it is so established under national law. In this case, the entity is part of the State's apparatus, and it is, therefore, a *de jure* organ. Here, the relevant criterion revolves around the formal link between the State and the entity, which is also the most intense link between the two as the organ itself belongs to the same unity of the State. Secondly, absent a formal link with the State, the entity acting on behalf of the latter may qualify as a *de facto* organ. Here, the qualification privileges a factual approach rather than a formal one.[63] Indeed, absent a formal link at the national level, an entity may qualify as a State organ by practice.[64] In this case, the link is less strong from a formal perspective because of the shift towards factual elements.

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[58] Giovanni Distefano and Aymeric Hêche, 'L'organe de facto dans la responsabilité internationale: curia, quo vadis?' (2015) LXI Annuaire Français De Droit International, 7.

[59] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment) ICJ Reports 2007, para 392.

[60] Ibid para 393.

[61] Ibid para 394.

[62] Crawford (n 30) 148.

[63] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) ICJ Reports 2007, para 291 at 43.

[64] ARSIWA Commentary to Article 4.

2.1.1. SOEs as 'organs of the State'

Having seen that Article 4 of the ARSIWA revolves around the qualification of an entity as an organ of the State, either *de jure* or *de facto*, as far as SOEs are concerned, it is debated whether they could constitute a State organ within the meaning of this provision.[65]

It is generally accepted that the mere establishment of an SOE by domestic law is insufficient to make the enterprise part of the State's structure and organization.[66] This suggests that to qualify an SOE as a State organ, the focus should be on the intensity of the relationship between the enterprise and the State, and not on the formal organization. This is especially true for qualifying an SOE as a *de facto* State organ. In this case, indeed, the required intensity level shall eliminate any element of discretion on the part of the entity under analysis. In other words, the SOE would not retain any ability to make independent decisions without the involvement of the State. For instance, a case in which such a qualification could be envisaged is when the enterprise concerned is a tool through which the government directly manages a certain activity and therefore assumes full responsibility for it.[67] If the qualification as a State organ occurs, then all conduct of the SOEs would be attributable to the State. Provided the range of different activities that SOEs might carry out, the commercial or sovereign character of these activities is irrelevant for the purposes of international responsibility.

Another critical issue that should be considered in this framework looking at SOEs is the role of State ownership under Article 4 of the ARSIWA. This is indeed a debated point. Scholars appear to have taken two approaches. On the one hand, some argue that State ownership is among the elements that should be considered for the qualification of an SOE as a State organ under Article 4 of the ARSIWA.[68] On the other hand, others claim that, given the emphasis Article 4 puts on the identity of the subject, rather than on its functions, consideration of State ownership under the former legal framework dealing with State organs is 'conceptually' misplaced.[69]

Building on this, it can be argued that the ownership pattern of an SOE concerned is not relevant under Article 4 of the ARSIWA. Therefore, State ownership is not a criterion that determines the expansion of the notion of the State in context of the Draft Articles, not even as a circumstantial element. Rather, the focus is on the structure of the State or on the complete lack of independence that characterizes the conduct of the enterprise.

As illustrated in the following discussion, the analysis under Articles 5 and 8 of the ARSIWA is somewhat less problematic. There is little doubt that, under these provisions, State ownership constitutes an element to be considered and can affect the qualification of an SOE as an entity exercising governmental authority or acting on behalf of the State.

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[65] In favor of such qualification see: Lee (n 38) 117-138; Nick Gallus, 'Enterprises as Organs of the State and BIT Claims' (2006) 7 Journal of World Investment & Trade 761; Jonas Dereje and Staatsnahe Unternehmen, 'Die Zurechnungsproblematik Im Internationales Investitionsrecht un Weiteren Bereichen Des Völkerrechts' (2015) 405 as cited in Judith Schönsteiner, 'Attribution of State Responsibility for Actions or Omissions of State-Owned Enterprises in Human Rights Matters' (2019) 40(4) University of Pennsylvania Journal of International Law, 895-936.

[66] ARSIWA Commentary on Articles 5 and 8, points 42 and 112.

[67] Russo (n 41) 96.

[68] See Abby Cohen Smutny, 'State Responsibility and Attribution: When is a State Responsible for the Acts of State Enterprises?', in Todd Weiler (ed), *International Investment Law and Arbitration*, (Cameron May Ltd., 2005) 35.

[69] See Lee (n 38) 129.

2.2. Article 5 of the ARSIWA: the constitutive criteria of persons and entities exercising 'elements of governmental authority'

Article 5 of the ARSIWA reads:

> 'The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.'[70]

This provision aims at regulating the attribution of the conduct of 'parastatal entities' to the State.[71] Contrary to State organs, 'parastatal entities' do not belong to the organization of the State but exercise governmental authority on behalf of the State itself and its organs.

In Article 5, the word 'entity' is used intentionally as opposed to 'organ' ex Article 4.[72] In the drafters' view, being more general, the term 'entity' would better reflect the wide range of bodies that the State can entrust with the exercise of governmental authority. The categories of subjects that may fall within the scope of Article 5 of the ARSIWA include 'public corporations', 'semi-public entities', 'public agencies', and 'private companies.'[73] As mentioned already, together with Article 8 of the ARSIWA, this is the only provision that considers entities related to SOEs, namely public enterprises, under the ARSIWA.

The architecture of Article 5 of the ARSIWA relies on three distinct, yet intertwined, elements that should characterize any subject falling within its scope. Firstly, the entity has to be entrusted by national law to exercise power:[74] hence, there is an act of delegation by the State at the domestic level to an entity that does not qualify as a State organ under Article 4 of the ARSIWA. In practical terms, this may constitute a specific domestic law or a delegation issued by a State organ.[75] Sometimes, powers are conferred by the State explicitly in the statute of the entity concerned or in an executive order. However, the use of less formal means of conferral, like contractual arrangements, is not infrequent as it can potentially avoid any examination of the link between the entity concerned and the State.[76] Secondly, the delegated power and the related conduct have to be the expression of 'governmental authority.' Thus, while including a functional test, Article 5 of the ARSIWA also raises the issue of what is to be considered 'governmental authority.' The ARSIWA leave the term undefined and does not aim to define it.[77] Despite the lack of a definition,[78] it is possible to identify a bulk of activities that are generally acknowledged to pertain to this category. The Commentary refers to the powers of detention, immigration control, quarantine, and identification of property for

[70] Emphasis added.
[71] Commentary, para 1.
[72] Commentary, para 2.
[73] Commentary, para 2.
[74] Commentary to Article 5, para 7.
[75] Schicho (n 41) 125.
[76] Crawford (n 30) 130.
[77] Commentary, para 6.
[78] Against this background, during the drafting of the ARSIWA Germany questioned whether the Draft Articles sufficiently took into consideration the increasing level of outsourcing activities by governments. While the UK doubted the possibility of effectively reaching a common definition on governmental authority. See Christine Chinkin, 'A Critique of the Public/Private Dimension' (1999) 10(2) EJIL 390.

seizure.[79] However, the ARSIWA, on the one hand, acknowledge that the notion depends, to a certain extent, on the specific historical and social background considered.[80] This means that the perception of what is 'governmental' can vary across States according to the characteristics of a given society and related traditions. On the other hand, they also provide a set of criteria that are of relevance to determining whether a given conduct is governmental, such as the nature of the conferred powers, the manner of conferral, their purpose, and the degree of accountability of the entity towards the government. If the activity corresponds to the exercise of governmental authority, then attribution to the State can occur regardless of the degree of control exercised by the State on the entity concerned. Any subject that falls under the scope of Article 5 of the ARSIWA is characterized by the governmental nature of the powers conferred. Such powers reflect 'functions of a public character normally exercised by State organs,'[81] i.e., functions that are typically retained by the State for itself. However, against this theoretical design, experience shows that the line between public and private activities has blurred due to the increase outsourcing of governmental activities from the State to other entities. Scholars, thus, consider a certain act as governmental when it cannot be performed by a private entity without the government's consent.[82] At the same time, the mere fact that a private entity actually performed a certain act without the State's permission cannot automatically rule out the application of Article 5 of the ARSIWA.[83]

Against this background, the idea is that governmental authority can only be expressed through the exercise of sovereign powers. From this point of view, the functional test of Article 5 of the ARSIWA depends to a great extent on the distinction between acta iure imperii and acta iure gestionis.[84] The ARSIWA Commentary acknowledges that the concept of governmental authority has a changing nature and depends on the social and historical context.[85]

2.2.1. SOEs as 'entities exercising elements of governmental authority'

From a general perspective, Article 5 of the ARSIWA and the regulatory framework it encapsulates have become increasingly important in the last few decades due to, on the one hand, the tendency of

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[79] Commentary, para 2.
[80] Commentary, para 6.
[81] Commentary, para 2.
[82] Crawford (n 30) 130.
[83] Crawford (n 30).
[84] The distinction between *acta iure imperii* and *acta iure gestionis* derives from international rules on State immunity. More specifically, the distinction derives from the restrictive immunity doctrine, as opposed to the absolute immunity one. According to the restrictive immunity doctrine, States enjoy immunity from jurisdiction of foreign States only with reference to their sovereign acts (*acta iure imperii*). From this perspective, acts of a commercial nature performed by the State belong to the category of *acta iure gestionis* and are not covered by immunity. Considering the relationship between immunity and attribution, it should be clarified that while immunity operates at a procedural level, as it prevents a State from being brought before the national courts of a foreign State, attribution establishes the conditions under which the conduct of a given entity is to be considered a conduct of the State, for which the State might be internationally responsible. In this context, while acts covered by immunity, being expression of the sovereign power of States are attributable to them, not all conduct imputable to the State enjoy immunity from jurisdiction. See *ex multis*: Carlo De Stefano, *Attribution* (OUP, 2022), 23 f; Alexander Orakhelashvili, 'Jurisdictional Immunity of States and General International Law – Explaining the Jus Gestionis v. Jus Imperii Divide' in Tom Ruys, Nicolas Angelet and Luca Ferro, *The Cambridge Handbook of Immunities and International Law* (CUP, 2019) 105 f.; Hazel Fox and Philippa Web, *The Law of State Immunity* (OUP, 2013) 25 f.; Natalino Ronzitti and Gabriella Venturini, *Le immunità giurisdizionali degli Stati e degli altri enti internazionali* (CEDAM 2008).
[85] Commentary, para 6.

States to contract out to non-State organs functions typically considered to be 'governmental';[86] and, on the other hand, the widening variety of entities that could potentially fall within that notion, including SOEs. These two developments inevitably contributed to blurring the line between what is usually conceived as a public or a private activity.[87]

Under Article 5 of the ARSIWA, SOEs may become relevant when they are entrusted by the State to perform activities corresponding to the exercise of governmental authority. An official act of entrustment alone would arguably be insufficient to make the enterprise fall within the boundaries of the notion of the 'State' according to this provision. Rather, it is necessary to investigate the nature of the activity concerned and, more specifically, to assess whether it corresponds to the exercise of 'governmental authority.' The boundaries of the notion 'governmental authority,' although not defined in the ARSIWA, are clear enough to make it possible to exclude activities of a commercial character from the scope of criteria that establish attribution of SOE conduct to the State. In this context, any acts beyond the mandate of the State that the SOE may adopt would not entail the international responsibility of the State itself.[88] This is also in light of the third constitutive criterion adopted in Article 5 of the ARSIWA, that of the exercise of functions normally exercised by the State organ. Therefore, from the SOE's perspective, the sole performance of activities of commercial character rules out their qualification as entities within the meaning of Article 5 of the ARSIWA.

However, the conclusion just reached might not be as straightforward in light of several considerations. Firstly, although commercial in character, the activity performed by the SOE also potentially qualifies as an expression of functions normally performed by an organ of the State. This is relevant when activities related to public functions are outsourced to SOEs, such as the provision of essential public services. Secondly, what constitutes 'governmental authority' or a 'governmental function' differ across national jurisdictions. Therefore, an entity would qualify as an SOE under one legal framework, but not necessarily under a different national framework.

It has been questioned whether Article 5 of the ARSIWA can be truly universally applicable or whether it intrinsically encapsulates Western concepts ill-suited to adapt to other contexts.[89] For the purposes of this study, these critiques might find some merit. Indeed, based on the ARSIWA Commentary, the ownership of assets is irrelevant for the determination of a certain conduct as expression of governmental authority. However, as seen in Chapter 1, State ownership determines different types of relationships between the State and its economic operators, with different levels of intensity across different national economic models. In turn, the Article 5 of the ARSIWA approach may raise issues given the diversity characterizing governmental ownership in contexts that do not belong to the same economic model, as demonstrated in Chapter 1.

[86] Similar issues arise under the WTO legal framework. See *infra*.

[87] Chinkin (n 78) 390. The author notes that the matter of State responsibility arising from the conduct of entities other than State organs ultimately assumes that the distinction between the conduct of State organs and that of other entities ultimately relies on a common understanding, which really reflects philosophical orientation on the role assigned to the State and to the appropriate level of activity of its role. In other words, the dividing line between what is considered to be a public or a private activity is 'culturally specific.' See also: Alexander Kees, 'Responsibility of States for Private Actors', Max Planck Encyclopedia of International Law (2011).

88 This is clarified by the Commentary. Indeed, para 5 states that for the purposes of international responsibility of States 'the conduct of an entity must accordingly concern governmental activity and not other private or commercial activity in which the entity may engage. Thus, for example, the conduct of a railway company to which certain police powers have been granted will be regarded as an act of the State under international law if it concerns the exercise of those powers, but not if it concerns other activities (e.g., the sale of tickets or the purchase of rolling stock).'

[89] Katja Creuz, *State Responsibility in the International Legal Order: A Critical Appraisal* (CUP, 2020) 53 f.

In any case, as the term 'governmental' is not defined, reconstructing its boundaries is crucial to avoid it being an empty shell concept. Of course, exploring such a controversial boundary implies a methodological choice. This is because the study of this notion might prompt a broader reflection: what task is considered to be 'typical' of a government? The answer to this question may change across historical periods.
In this context, the study of relevant WTO case law should be taken into account because it provides important hints on how the term 'governmental authority' is brought to life by legal practitioners and WTO adjudicative bodies.

2.3. Article 8 of the ARSIWA: the constitutive criteria of a person or group of persons acting 'on the instructions of, or under the direction or control of' the State

Having considered entities sharing a particularly intense link with the State – namely, State organs, *de facto* organs and entities entrusted by national law to exercise elements of governmental authority – Article 8 of the ARSIWA then focuses on the private 'persons' whose conduct, under specific circumstances, is attributable to the State. In this regard, the provision balances the need to ensure that States are not held accountable for every conduct of private entities and the need to ensure that their international law obligations are not violated by using private subjects as a proxy for the commission of acts that would be otherwise unlawful. In particular, Article 8 of the ARSIWA reads:

> 'The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.'

Compared to the provisions previously examined, it is interesting to consider that the wording of Article 8 refers to a 'person or group of persons' instead of 'entity.' This difference is due to the specific category of subjects that Article 8 of the ARSIWA addresses, who are private and, although not officially part of the State's structure, act on its behalf or under its control.[90] Therefore, this criterion of attribution requires a specific factual relationship between the person and the State that reflects a 'real link' between the subject performing the act and the State itself.[91] This connection may result from an act of authorization granted by the State to a private person or group of private persons.[92] Here lies the difference from Article 5 of the ARSIWA. While in Article 5 of the ARSIWA, the connection revolves around an official act of the State, such as a law, empowering the entity with the exercise of governmental functions, under Article 8, the focus is on a factual relationship, which may translate into a form of control, between the State and the subjects concerned. Considering the categories of subjects encompassed by the expression 'person or group of persons' the Commentary clarifies that they include both natural and legal persons, such as SOEs.[93]
In this context, Article 8 of the ARSIWA covers two situations: (a) the person or group of persons concerned acts under the instruction of the State; and (b) the person or group of persons concerned

[90] Schicho (n 41) 148 f.
[91] Commentary Article 8, para 1.
[92] In this regard, the Commentary in paragraph (2) gives the example of State organs recruiting private persons or groups to act as auxiliaries that act outside the official structure of the State.
[93] Commentary Article 8, para 6.

acts under the direction or control of the State.[94] The legal connection between the person and the State, therefore, revolves around the definition of instruction, direction, and control. However, the level of intensity required for a relevant link between the State and the person or group of persons to be established is left undetermined by the wording of this provision.

Considering the notion of 'instruction', this corresponds to an instruction of a general character. The provision does not specify the means through which the State can instruct private persons. Therefore, the list of means of instruction is left open. More specifically, instruction may take the form of an instigation by State organs to private subjects to perform a certain activity. These situations however are usually identified in military contexts, especially private military or security corporations that the State hires to perform certain operations on its behalf.[95]

Considering 'control', the degree of control required under Article 8 to attribute a conduct to the State is more controversial. Indeed, the lack of a definition has sparked a lively debate on the level of control required for attribution to arise. Specifically, the discussion revolves around the notions of 'effective control' and the 'overall control.'

With respect to effective control, when the ICJ addressed this issue first in the Military and Paramilitary Activities in and against Nicaragua case,[96] it clarified that the notion of 'control' implies a complete dependence of the non-State organ on the State.[97] Hence, in order to attribute all acts of non-State organs as a whole to the State, the Court requires the establishment of 'effective control' exercised by the State. It is insufficient to prove the State's general involvement in the conduct of the entity concerned.[98] Rather, the Court requires, on the one hand, the adoption of directions by the State on specific operations and, on the other hand, the State's involvement in each of the specific operations.[99] The ICJ endorsed the notion of 'effective control' in the Armed Activities case,[100] and subsequently more extensively in the Bosnian Genocide case, in which it rejected the 'overall control' test as expressed in the ICTY case law.[101]

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[94] Ibid. See also: Giulio Bartolini, 'Il concetto di "controllo" sulle attività di individui quale presupposto della responsabilità dello Stato', in Marina Spinedi, Alessandra Gianelli, and Maria Luisa Alaimo (eds), *La codificazione della responsabilità internazionale degli stati alla prova dei fatti* (Giuffré Editore, 2006) 25– 52.

[95] Crawford (n 30) 145 f.

[96] *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)* (Judgement) ICJ (27 June 1986).

[97] For an overall and detailed analysis of the case see: James Crawford, 'Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v United States of America)', in Max Planck Encyclopedias of International Law (January 2019).

[98] Milanovic (n 33) 317-318.

[99] Antonio Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18(4) European Journal of International Law 653.

[100] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (Judgment) ICJ Reports 2005, p. 168.

[101] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Judgment) ICJ Reports 2007, p. 4. The Court was called to rule on whether the genocide carried out by Bosnian Serb militias could be attributable to the Former Republic of Yugoslavia (FRY). Discussing the 'overall control' test as expressed in the ICTY case law (see *infra*), the ICJ criticized its application in the field of State responsibility. In the Court's view, the overall control test broadens the scope of State responsibility 'well beyond the fundamental principle governing the law of international responsibility' which is that 'a State is responsible only for its own conduct, that is to say, the conduct of persons acting, on whatever basis, on its behalf. That is true of acts carried out by its official organs, and also by persons or entities which are not formally recognized as official organs under internal law but which must nevertheless be equated with State organs because they are in a relationship of complete dependence on the State.' It has been argued that with this decision the debate on the necessary level of State control required under Article 8 of the ARSIWA came to an end. See Crawford (n 30) 156. On this point, it has also been noted that, in the light of the relevant State practice, the notion of 'overall control' is the most appropriate to deal with the legal qualification of certain entities as *de facto* organs. Giulio Bartolini, (n 73) 37. See also in this chapter § 2.1.

The latter notion of 'overall control' has been supported by the ICTY starting with the *Tadić* case.[102] Contrary to the notion of 'effective control',[103] this approach distinguishes between two degrees of control, the first being related to 'effective control' and the second properly pertaining to 'overall control.' Firstly, when acts are performed by unorganized groups, in order for attribution to occur it must be established that (a) the State exercised 'some measure of authority'; and (b) the State issued specific instructions with reference to the acts to be performed.[104] Thus, the standard of 'effective control' applies to this category of entities. Secondly, when the act is carried out by an organized and hierarchically structured group of persons, the applicable standard is that of the 'overall control' test. In other words, it is sufficient to prove an overall engagement of the State in the operations carried out by the group for the State's responsibility to be raised.[105] Therefore, proof of the issuance of specific instructions for specific operations is not necessary. It is sufficient to establish that the State exercises overall control over the group itself. The standard of proof is, therefore, looser than under the 'effective control' test.

The ARSIWA Commentary makes reference to the two approaches but it does not adopt a final stance on the level of control required for the purposes of attribution. It only states that in order for attribution to occur a certain level of authority should be exercised by the State over the person or group concerned. According to the Commentary, indeed, 'in any event it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it.'[106]

2.3.1. SOEs as entities instructed or controlled by the State

Article 8 of the ARSIWA arguably concerns economic operators, which the State exercises its control on. This may be the case, for instance, for former SOEs that, although privatized, may still be subject to the control of the State and perform activities on its behalf.[107] In other words, the SOE and the State share a link strong enough that the former exercises *de facto* governmental authority, although

[102] *Prosecutor v. Dusko Tadic (Appeal Judgement)*, IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 July 1999. See: Susan Lamb, 'Tadić Case', in Max Planck Encyclopedias of International Law (April 2009); Cullen, The Concept of Non-International Armed Conflict in International Humanitarian Law (2010); See also: André JJ De Hoogh, 'Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, the Tadič Case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia' in James Crawford and Vaughan Lowen, *The British Year Book of International Law 2001* (OUP, 2002) 255-292.

[103] As already known, on that occasion, the ICTY explored the possibility of attributing the conduct of certain non-State organs to a foreign State in order to be able to qualify the dispute as 'international' and establish its own jurisdiction. The Appeals Chamber of the Tribunal ultimately rejected the decision adopted by the ICJ in the *Nicaragua* case because, in its view, the test as delineated by the former did not 'prevent States from escaping international responsibility by having private individuals carry out tasks that may not or should not be performed by State officials, or by claiming that individuals actually participating in governmental authority are not classified as State organs.' See *Prosecutor v. Dusko Tadic (Appeal Judgement)*, para 117.

[104] *Prosecutor v. Dusko Tadic (Appeal Judgement)*, para 118. As widely known, the ICTY's decision raised some criticism. For instance, in its Separate Opinion Judge Shahabuddeen clarified that the Appeals Chamber's decision was adopted in a different context than the one in which the ICJ operated. According to the Judge, the ICJ dealt with a matter of State responsibility, whereas the Appeals Chamber referred to the field of individual criminal responsibility. See also: Milanovic (n 33) 295.

[105] The Appeals Chamber justified the application of a less stringent standard to organized groups on the fact that 'a member of the group does not act on his own but conforms to the standards prevailing in the group and is subject to the authority of the head of the group.' See: *Prosecutor v. Dusko Tadic (Appeal Judgement),* para 116.

[106] Commentary, para 5.

[107] Cohen Smutny (n 68) 17.

the enterprise still retains some degree of autonomy. Evaluating the factual circumstances in which a parastatal entity operates may not be as easy, especially when complex entities, characterized by different ownership and control patterns, such as SOEs, are concerned.
Under Article 8 of the ARSIWA, it is relatively easy to determine when an SOE is instructed or directed by the State to perform a given activity. This is due to the fact that Article 8 of the ARSIWA leaves States free to determine the appropriate means to use to this end. In other words, any instruction or direction suffices to bring SOEs under the notion of 'State.'
On the contrary, the assessment of the level of control required to qualify an SOE as controlled by the State is more controversial. It is challenging to determine under which circumstances the boundaries of the notion of 'State' for the purposes of international responsibility of States stretch to encompass SOEs and related entities and to what extent. Based on the 'effective control' approach, it should be established that the State exercises its control over each and every activity performed by the SOE concerned. Due to the high standard of proof required, the notion of 'State' for the purposes of international responsibility of States expands to include these entities only with great difficulty. The lack of transparency that often surrounds SOEs' activities and the unofficial means through which States precisely attempt to hide their relationship with these enterprises make such an assessment particularly challenging. Under the 'overall control' standard, SOEs may qualify as organized and structured entities due to their form as an 'enterprise.' In this case, it would be sufficient to establish a general control exercised by the State on the activities and management of the enterprise as a whole. In this case, the boundaries of the 'State' for the purposes of international responsibility of States may encompass SOEs more easily because of the looser standard of proof required compared to the one attached to 'effective control.'

Table 1. Qualification criteria under Article 4, 5 and 8 of the ARSIWA

ARSIWA Provision	Entity	Qualification criteria
Article 4, paragraph 1	*De jure* organ	• **Focus on the status of the entity:** functions carried out are irrelevant • **Formal link:** the entity belongs to the State's apparatus • **Acting on behalf of the State**
Article 4, paragraph 2	*De facto* organ	• **Absence of formal link** • **Lack of economic, legal and financial independence**: the entity is a "mere instrument" of the State • **Acts on behalf of the State**

Article 5	Parastatal entity	• **Empowerment by the national law**: presence of an internal act of the State • **Exercise of governmental authority** • **Exercise of functions of a public character normally exercised by State organs**

Article 8	Person or group of persons	• **Focus on a factual relationship between the State and the person or group of persons**
		• **Instruction**
		• **Direction and control**
		  • **Effective control**: adoption of instructions on specific operations + enforcement of each specific operation
		  • **Overall control** (organized and structured groups)

3. The qualification of SOEs under WTO DS practice related to attribution

Having considered the notion of attribution and the constitutive elements of the main notions involved, the focus of this discussion is on the notion of attribution as the element that links the conduct of a non-State entity to the State for the purposes of ascertaining whether the Member has breached WTO law or has nullified or impaired the benefits of (an)other Member(s). Attention is given to the preliminary step to be conducted by WTO adjudicating bodies to assess whether and under which circumstances a certain action has to be considered conduct of a WTO Member. The study shows if and how the ARSIWA provisions on attribution have been applied by WTO adjudicative bodies, and/or which other criteria have been employed. The analysis of the emerging criteria makes it possible to understand which elements from case law deal with attribution and to what extent they can define the notion of SOEs within the multilateral trading system.
Against this background, while the previous Chapters of this study considered WTO law from the perspective of primary rules of the WTO legal framework to understand if and to what extent economic operators include SOEs, the following discussion considers the WTO practice from the perspective of attribution of conduct to a Member State emerging from the WTO DSS in order to identify the connecting criteria used for this purpose.
With all this in mind, as a selection device, the analysis takes the decisions of the WTO adjudicative bodies explicitly or implicitly addressing the ARSIWA provisions most related to SOEs, that is Articles 4, 5, and 8 of the ARSIWA respectively dealing with State organs, persons or entities

exercising elements of governmental authority, and persons or group of persons directed or controlled by a State, as its departure point. The objective of the analysis is twofold. Firstly, the study wishes to map the attribution criteria that panels and the AB have used to attribute the conduct of entities linked to the government to the State. In this regard, the concept of 'link' has to be understood broadly, thus including the establishment of the entity by national law, State ownership, control, or influence. Secondly, the goal is to assess whether the mapped attribution criteria point to elements that may be considered constitutive elements of SOEs and help delineate the boundaries of the notion.

3.1. Connecting criteria for the purposes of imputability of conduct of entities as *de jure* or *de facto* State organs to a WTO Member under the WTO DSS: the belonging to the State structure and the dependency from the State

The WTO legal system embraces the principle of the unity of the State. At the treaty level, the Understanding on the Interpretation of Article XXIV of the GATT 1994 on Regional Trade Agreements states that 'each Member is fully responsible under GATT 1994 for the observance of all provisions of GATT 1994, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its territory.'[108] Adopted during the Uruguay Round to clarify the meaning of Article XXIV:12 of the GATT on Regional Trade Agreements, the Understanding makes it clear that conduct on all levels of government - be it central or local entities - shall be attributed to a WTO Member under the multilateral legal system. This principle is further elaborated in the following paragraph, which specifies that a WTO Member can be brought before dispute settlement proceedings for measures adopted by 'regional or local governments or authorities' in its territory.[109]
The principle of the unity of the State is also embodied in Article I:3(a) of the GATS, according to which the expression 'measures by Members' includes measures taken by 'central, regional or local governments and authorities.' The provision further specifies that Members shall adopt all reasonable measures available to them 'to ensure their observance by regional and local governments and authorities' within their territory. In other words, the international responsibility of WTO Members can also arise in the context of trade in services for the conduct of their territorial units.
Against this background, WTO adjudicating bodies consistently have affirmed that conduct of State organs might entail the international responsibility of WTO Members. In *Korea - Government Procurement*,[110] the Panel, recalling general international law on State responsibility, stated that:

> 'The Parties to the GPA did not expect incomplete or even possibly inaccurate answers from one portion of the Korean Government speaking only for itself. The answers must be on behalf of the whole of the Korean Government. Negotiations would be impossible otherwise. The Korean Government chose who was tasked with answering the questions and the Korean Government cannot avoid responsibility for the result. […] The actions

[108] See Understanding on the Interpretation of Article XXIV of the GATT1994, para 14. Emphasis added.
[109] Ibid para 14.
[110] WTO, *Korea - Measures Affecting Government Procurement* (19 June 2000) WT/DS163/R. The case concerned certain public procurement practices implemented by the Government of Korea with reference to the construction of the Inchon International Airport. Particularly, the question revolved around the qualification as "covered entities" under the GPA of all the entities involved in the project and entrusted with governmental responsibility.

and even omissions of State organs acting in that capacity are attributable to the State as such and engage its responsibility under international law.'[111]

The Panel, in a footnote, explicitly referred to the draft Articles 5 and 6 of the ARSIWA, which would later become Article 4 of the ARSIWA in the final version adopted by the ILC.[112] From this perspective, it seems that the Panel considered the ARSIWA for the purposes of interpretation of a WTO provision in an auxiliary manner. Although the reference is somewhat vague because the Panel only pointed to the ARSIWA provisions deemed relevant in the specific case, it facilitates understanding that the attribution criteria followed by the adjudicating body are in line with those adopted by the ILC. More specifically, the attribution criterion that appears to be adopted is the belonging of the entity to the State's organizational structure.[113]
The Panel in *US – Gambling*,[114] which concerned the United States International Trade Commission (USITC), stated that as an 'agency of the United States government with specific responsibilities' the actions adopted by it pursuant to those responsibilities and powers were attributable to the US.[115] The Panel explicitly adopted Article 4 of the ARSIWA as the basis of its conclusions. In this regard, the adjudicating body recognized that this provision, although 'not binding as such', still 'does reflect customary principles of international law concerning attribution.'[116] In the following paragraph, it is specified that 'the fact that certain institutions performing public functions and exercising public powers are regarded in internal law as autonomous and independent of the executive organ does not affect their qualification as a state organ'.[117] In this context, 'the fact that the USITC qualified as an

[111] Ibid., para 6.5. Emphasis added.
[112] Ibid footnote 683.
[113] In this regard, a similar decision was adopted by the Panel in *Australia – Salmon*. The dispute concerned compliance with the GATT and the SPS Agreement of the prohibition adopted by the government of Australia regarding the importation of untreated fresh, chilled or frozen salmon from Canada. On that occasion, the Panel, basing its considerations on the former Article 6 of the ARSIWA (now Article 4 of the ARSIWA), held that 'we are of the view that the Tasmanian ban is to be regarded as a measure taken by Australia, in the sense that it is a measure for which Australia, under both general international law and relevant WTO provisions, is responsible.' In this case too, the reference to the ARSIWA was to be found in a footnote and not further specified. See Australia - Measures Affecting Importation of Salmon - Recourse to Article 21.5 by Canada, Report of the Panel, WT/DS18/RW, 18 February 2000 para 7.12. Analogously, in *Brazil - Retreated Tyres*, the Panel stated that 'the measures of Rio Grande do Sul, a state of the Federative Republic of Brazil, are attributable to Brazil as a WTO Member and therefore should be considered as "measures" for the purposes of Article 3.3 of the DSU.' However, in this case no reference to the ARSIWA can be found (See *Brazil - Measures Affecting Imports of Retreated Tyres*, (12 June 2007) WT/DS332/R para 7.400). In some cases, Article 4 of the ARSIWA is not explicitly mentioned, but the decision is based on its attribution criteria. For instance, in *US - Carbon Steel*, the AB ruled that 'in principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings. The act or omissions that are so attributable are, in the usual case, the acts or omissions of the organs of the State, including those of the executive branch.' Ibid para 81.
[114] WTO, *Unites States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (10 November 2004) WT/DS285/R. The case concerned certain measure adopted and applied by the central, regional and local authorities in the United States affecting the cross-border supply of gambling and betting services.
[115] Ibid para 6.127.
[116] Ibid para 6.218. The Panel stated: 'This conclusion is supported by the International Law Commission ('ILC') Articles on the Responsibility for States of Internationally Wrongful Acts. Article 4, which is based on the principle of the unity of the State, defines generally the circumstances in which certain conduct is attributable to a State. This provision is not binding as such, but does reflect customary principles of international law concerning attribution. As the International Law Commission points out in its commentary on the Articles on State Responsibility, the rule that "the State is responsible for the conduct of its own organs, acting in that capacity, has long been recognised in international judicial decisions." As explained by the ILC, the term "state organ" is to be understood in the most general sense. It extends to organs from any branch of the State, exercising legislative, executive, judicial or any other functions.'
[117] *Unites States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (n 114) para 6.129. More recently, the correspondence of Article 4 of the ARSIWA to customary law was acknowledged by the Panel in

'independent agency' did not affect the attributability of its actions to the United States, because what matters is the activity at issue in a particular case, not the formal qualification of the body concerned.'[118] Lastly, the Panel specified that 'official pronouncements by the USITC in an area where it has delegated powers are to be attributed to the State.'[119] Therefore, the Panel used three attribution criteria in its decision: (i) the entity is part of the organization of the State; (ii) the exercised activity corresponds to specific powers and responsibilities; and (iii) the State delegates powers and responsibilities to the entity.

The conclusions of the Panel in US - Gambling raise some concerns about the extent that they conflate the attribution criteria that the ARSIWA allocate to different entities. Indeed, under Article 4 of the ARSIWA, on which the Panel grounded its decision, the only element to be assessed should have been the organizational structure of the State and the consequent allocation of the entity in that structure. Therefore, in this case, the investigation could and should have stopped at the first criterion, that is, the qualification of USITC as a state agency. In this context, the Panel correctly concluded that the qualification given to the entity by the domestic jurisdiction was irrelevant. However, in its decision, the Panel apparently went on with its investigation and incorporated elements that are relevant to Article 5 but not Article 4 of the ARSIWA. This is particularly evident with respect to the emphasis placed on the nature of the activity performed, as opposed to the formal qualification, which is deemed irrelevant. It is argued here that the focus should have been on the activity exercised by the entity only to assess how such activity is exercised, that is, whether the entity in question could still act independently from the government. In other words, once an entity qualified as an organ of the State, the type of activity exercised was no longer relevant since, in any case, the State was responsible for the conduct of its organs. Therefore, provided that the USITC qualified as a State organ, the United States was fully responsible for the overall conduct of this entity, regardless of whether it fell within the scope of delegated powers.

In light of the above, it can be noted that under the WTO legal framework, the act of a State organ is considered an act of the State. The element to be assessed is the link between the entity concerned and the State, which must be of such intensity that the former is entirely dependent on the latter. The link may be explicit in the case of *de jure* State organs or implicit in the case of *de facto* State organs. In this sense, the criteria for attributing the conduct of a State organ to the State under WTO law do not deviate from those established under Article 4 of the ARSIWA. Concerning SOEs, the analysis suggests that the general points made above also remain valid in the specific legal context of the WTO.

3.2. Connecting criteria for the purposes of imputability of conduct of an entity exercising governmental authority to a WTO Member in relevant case law: State control, governmental incentives, and State delegation of governmental powers

On several occasions, adjudicating bodies have ruled on the attribution of the conduct of a non-State entity to a WTO Member. In this regard, case law has mainly focused on three groups of entities:

Thailand - Cigarettes Thailand - Customs and Fiscal Measures on Cigarettes from the Philippines, (12 November 2018) WT/DS371/RW, para 7.636. The case concerned certain fiscal and customs measures adopted by the government of Thailand (customs valuation practices, excise tax, health tax, TV tax, VAT regime, retail licensing requirements and import guarantees imposed upon cigarette importers) affecting the importation cigarettes from the Philippines.

[118] Ibid para 6.129.

[119] Ibid para 6.130.

economic actors, such as government-owned or government-affiliated enterprises; government agencies; and public bodies.
Starting with enterprises that enjoy a strong link with the government, the WTO Panels and the AB have focused on criteria that would establish the attribution of their conduct to Members on several occasions.
In this regard, the decision adopted by the Panel in *Canada - Periodicals*[120] should be considered. This case concerned certain measures adopted by Canada which, according to the United States, restricted or limited the importation of certain periodicals into Canada in breach of Article XI of the GATT (dealing with the general elimination of quantitative restrictions). The Panel considered the conduct of Canada Post, an enterprise fully owned by the government, and its relationship with the State. More specifically, the debated activity concerned a pricing policy implemented by Canada Post, whose applied rates, according to Canada, were market and competition-driven.[121] The Panel noted that:

> 'First, it is clear that Canada Post generally operates under governmental instructions. Canada Post has a mandate to operate on a "commercial" basis in this particular sector of periodical delivery: a mandate set by the Canadian Government. Second, Canada admits that if the Canadian Government considers Canada Post's pricing policy to be inappropriate, it can instruct Canada Post to change the rates under its directive power based on Section 22 of the Canada Post Corporation Act. Thus, the Canadian Government can effectively regulate the rates charged on the delivery of periodicals.'[122]

This ascertained, the Panel concluded that:

> '[T]he pricing policy of Canada Post is a governmental measure. First, in view of the control exercised by the Canadian Government on "non-commercial" activities of Canada Post, we can reasonably assume that sufficient incentives exist for Canada Post to maintain the existing pricing policy on periodicals. Second, as analyzed in the previous paragraph, Canada Post's operation is generally dependent on Government action.'[123]

Thus, the Panel qualified the pricing policy implemented by Canada Post as a governmental measure. This decision was based on the following attribution criteria. Firstly, control exercised by the government over the entity and its activities. The indicator of such control is the possibility of the government to 'mandate' and 'instruct' the non-commercial activities of the SOE. Secondly, the dependence of the entity on the State. Thirdly, the presence of sufficient incentives for the entity to maintain a given policy and change it depending on the government's instructions. In other words, according to the Panel, these three elements cumulatively qualified a policy adopted by a non-State organ as an act of the State.
The adjudicating body did not expressly refer to the ARSIWA in this case. However, the decision implicitly echoes the language and the rationale of Article 5 of the ARSIWA as it encompasses a

[120] WTO, *Canada-Certain Measures Concerning Periodicals* (14 March 1997) WT/DS31/R.
[121] Ibid para. 5.34.
[122] Ibid para. 5.35. Emphasis added.
[123] Ibid para 5.36. Emphasis added.

mandate by the State, the entity's dependence on the government, and sufficient incentives provided by the State, which means the conduct of an entity amounts to the exercise of governmental authority. However, at the same time, the terminology used closely resembles that of Article 8 of the ARSIWA dealing with private persons. Interestingly, in this case, State-ownership was not considered by the Panel in its line of reasoning.

More recently, in China - Raw Materials,[124] concerning the adoption by China of certain measures allegedly restraining, from the US perspective, the export from China of various raw materials in breach of Articles VIII, X, and XI of the GATT and various provisions of the Accession Protocol of China, the Panel ruled on the attribution of the conduct of China's Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters (CCCMC) to the government of China. Having noted that China delegated to the CCCMC a 'certain implementing authority' to coordinate export prices, the Panel attributed the CCCMC's conduct to the Chinese government.[125] In this case, then, the criterion endorsed was that of delegation. Arguably, this approach is in line with Article 5 of the ARSIWA.

The analyzed case law shows that under the multilateral context of the WTO, the notion of 'State' expands to include not only organs of the State, such as institutions, but also entities that, while outside the structural organization of the State, still perform governmental functions.

The criteria to determine whether a certain entity constitutes a governmental agency was a central focus in *Canada – Dairy*. As seen in Chapter 3, this case dealt with an alleged dairy subsidy scheme set up by Canada, which was deemed by New Zealand to be inconsistent with, inter alia, Article 9 of the AoA. The Panel found that the delegation of authority to a given entity was a constitutive element of a 'governmental agency'**,** although under the specific context of Article 9.1(a) of the AoA.[126] On this point, the adjudicating body explicitly referred to Article 7 of the ARSIWA (now Article 5 of the ARSIWA), and acknowledged that '[it] might be considered as reflecting customary international law.'[127] From this perspective then, the element of delegation, identified as a constitutive element under primary law, also appears to be a connecting criterion for the purposes of attribution. Afterward, the AB deliberated on the ordinary meaning of 'government.' It observed that 'the essence of "government" is the enjoyment of the effective power to "regulate", "control" or "supervise" individuals, or otherwise "restrain" their conduct, through the exercise of lawful authority.'[128] Against this background, the AB delineated the boundaries of the notion of 'governmental agency' by defining it as 'an entity which exercises powers vested in it by a "government" to perform functions of a "governmental" character, that is, to "regulate", "restrain", "supervise" or "control" the conduct of private citizens.'[129] Therefore, the constitutive elements of a governmental agency, that are also connecting criteria to determine the imputability of its conduct to the State are: (i) the delegation by the State (central government and local authorities) to the entity certain powers; and (ii) the

[124] WTO, *China - Measures Related to the Exportation of Various Raw Materials* (5 July 2011) WT/DS394/R WT/DS395/R WT/DS398/R.

[125] Ibid para 7.1005.

[126] WTO, Ibid. Specifically, the Panel stated that '7.77. While we acknowledge that producers play an important role in the provincial marketing boards, we also note that these boards act under the explicit authority delegated to them by either the federal or a provincial government. Accordingly, they can be presumed to be an "agency" of one or more of Canada's governments in the sense of Article 9.1(a).'

[127] Ibid footnote 427.

[128] WTO, Report of the Appellate Body, (n 131) para. 97.

[129] Ibid para. 97.

governmental nature of such conferred powers, which, inter alia, includes the power to regulate a particular sector of the economy.[130]

The AB again discussed the notion of a governmental agency in Canada - Renewable Energy with reference to Article III:8 of the GATT.[131] In this case, the analysis started with the ordinary meaning of the term 'agency.' The AB noted that an agency is defined as '[a] business, body, or organization providing a particular service, or negotiating transactions on behalf of a person or group.'[132] By relating these findings to the notion of government, the AB concluded that a governmental agency is an entity 'acting for or on behalf of the government in the public realm within the competences that have been conferred on them to discharge governmental functions.'[133] In other words, the connecting criteria for attribution purposes as identified by the AB are: (i) the entity acts for or on behalf of the State; (ii) the delegation of powers by the State; and (iii) the governmental nature of the conferred powers.

The approach followed by the WTO adjudicating bodies in the discussed cases closely resembles that of Article 5 of the ARSIWA. Therefore, it seems possible to consider that, for attribution purposes, the term 'governmental agency' under the WTO legal framework encompasses not only entities that are formally integrated within the structure of the State but also those that exercise governmental functions. Thus, the criteria of attribution as used and applied in the multilateral context of the WTO make it possible to conclude that the presence of a power of a governmental nature exercised by an entity - by virtue of a conferral by the State - also coincides with the defining elements of the notion of a governmental agency.

Lastly, both the Panel and the AB in *US - Anti-dumping (China)* discussed the relationship between the government and public bodies.[134] As demonstrated already in Chapter 3, the criterion followed by the Panel, which brought the notion of 'public body' to the boundaries of the notion of 'State,' was control. The AB subsequently reversed the decision of the Panel and affirmed that the control criterion was insufficient to determine whether an entity qualifies as a public body.

For the purpose of this study, it is interesting to note that the AB brought Article 1 of the ASCM under the umbrella of State responsibility rules. The adjudicating body did so by affirming that Articles 4, 5, and 8 of the ARSIWA are 'relevant rules of international law applicable in the relations between the parties' pursuant to Article 31(3)(c) of the Vienna Convention' because like Article 1 they 'set out rules relating to the question of attribution of conduct to a State.'[135] However, the AB

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[130] Ibid para. 100.

[131] WTO, *Certain Measures Affecting the Renewable Energy Generation Sector / Measures Relating to the Feed-In Tariff Program* (6 May 2013) WT/DS412/AB/R WT/DS426/AB/R. The case concerned certain measures adopted by the Canadian government relating to local content requirements in a feed-in tariff program.

[132] WTO, Ibid., para 5.60.

[133] WTO, ibid para 5.61. Interestingly, in reaching such a conclusion, the AB considered Article XVII:1 and XVII:2 of the GATT as 'relevant context' for the interpretation of the notion at issue in the context of Article III:8 of the GATT. From the reference made by the provision to both State enterprises and enterprises that have been granted by the State special rights or exclusive privileges, the AB inferred that the GATT acknowledges that 'there is a public and a private realm, and that government entities may act in one, the other, or both.' In this regard, it continued that 'Governments may limit the actions of entities to the public realm or give entities competences to act in the private realm.' Against this background, governmental agencies acted in the public realm to discharge governmental functions. Cf. Para. 5.61.

[134] WTO, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (22 October 2010) WT/DS379/R; *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (11 March 2011) WT/DS379/AB/R.

[135] WTO, Report of the AB, Ibid para. 309. The AB also recognized that Articles 4, 5 and 8 of the ARSIWA 'are not binding by virtue of being part of an international treaty. However, insofar as they reflect customary international law or

explained that there were still differences between the two sets of rules. Specifically, according to it, while the ARSIWA uses the conduct of the entity as the connecting element for attribution, Article 1 of the ASCM follows two different connecting criteria, namely, the conduct and the type of the entity under consideration.[136] In other words, the distinction in terms of the identity of the subject results in the application of different attribution criteria. More specifically, if an entity is a public body, then its conduct will be attributable to the State. In the case of a private body, however, it would be necessary to prove entrustment and direction for any of its acts to be considered acts of the State. As noted, in this decision, the AB defined the public body as an entity that 'possesses, exercises or is vested with governmental authority.' The AB then read its findings in relation to Article 5 of the ARSIWA.[137] In this regard, the AB found that the fact that a given entity is 'empowered, if only to a limited extent or in a specific context, to exercise specified elements of governmental authority' is the '"core" of the notion of "public body"[138] and coincides with "the essence of Article 5"'.[139]

Against this background, a few considerations can be made. Firstly, looking at State ownership, this is not adopted by WTO adjudicative bodies as an attribution criterion and does not suffice per se to qualify any act as an act of the State. Secondly, this decision suggests that connecting criteria on attribution confirm the binary system followed by subsidy regulation, based on the type of subject whose conduct is examined. Indeed, if the entity is a private body, the attribution criteria to be followed are embodied in the type of delegation received (i.e., entrustment or direction), on the one hand, and the source of the delegation (i.e., by the State), on the other hand. If the entity is a public body, the criterion is that of possession, vestment, or exercise of governmental authority. Thirdly, the AB seems to refer to the ARSIWA for interpretation purposes. In this regard, it has been noted that the adjudicating body, in doing so, does not clarify why the ARSIWA are deemed to be relevant for interpretation purposes of WTO provisions.[140] In light of the above, the lack of clarification as to the relationship between the two sets of provisions suggests that there is a conflation within the WTO legal framework between primary and secondary rules.

3.2.1. SOEs as entities exercising governmental authority

The analysis of connecting criteria for the purposes of attribution emerging from WTO case law has revealed interesting dimensions about the relationship between the State and categories of entities belonging to the public sphere. In this regard, it has been highlighted how the wording used by WTO adjudicating bodies to identify relevant connecting criteria for the purposes of attribution resembles that of Article 5 of the ARSIWA.

In this context, then, it seems possible to consider the qualification of SOEs as entities exercising governmental authority. This in turn helps identify and assess which constitutive elements emerging from the connecting criteria could be used to define the notion of SOEs. In this regard, perhaps the

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general principles of law, these Articles are applicable in the relations between the parties.' Ibid., para. 308. See also: Isabelle van Damme, Treaty Interpretation by the WTO Appellate Body (OUP, 2009) 372 f.

[136] Report of the AB, ibid para 309.

[137] The reference to the ARSIWA by the AB has been criticized by scholars as misplaced and insufficient to solve the public body issue. See: Michel Cartland, Gérard Depayre and Jan Woznowski 'Is Something Going Wrong in the WTO Dispute Settlement? (2012) 46(5) Journal of World Trade 996.

[138] Report of the AB (n 136) para. 310.

[139] Ibid.

[140] Van Damme (n 135) 374.

most important findings for the purposes of this study are the ones emerging from case law dealing with economic actor, government-owned and government-affiliated entities. The connecting criteria identified by the study are: the exercise of control by the State; a sufficiently strong link between the State and the entity to make the latter dependable on the former; and the creation of sufficient incentives by the State through regulatory frameworks for the entity to perform a certain activity or implement a public policy. As it will be seen *infra*, adjudicating bodies also apply these criteria to determine when the conduct of private entities can be assimilated to an act of the State. Arguably, this suggests that SOEs are conceived as private entities by WTO adjudicating bodies for the purposes of attribution. This shows that state ownership alone is not a connecting element for the conduct of the owned entity to the State owner and also sheds light on how SOEs are conceived among WTO panels and the AB.

The study also identified other connecting criteria for the purposes of attribution, namely the delegation of the State of a certain governmental power and the exercise of that power. As illustrated above, these criteria have been used by adjudicating bodies to determine whether the conduct of entities affiliated to the State could be imputable to a WTO Member. From the perspective of SOEs, the relevance of these connecting criteria changes on a case-by-case basis. For instance, they may concern SOEs that are founded within the national public system, entrusted with the provision of an essential public service, such as health services, and whose activities are determined by the State in terms of provision, supply and related modalities.

3.3. Connecting criteria for the purposes of imputability of conduct of private bodies to a WTO Member: governmental incentives, entrustment and direction

During the GATT era, Panels dealt with the issue of determining to what extent a measure adopted by private bodies could be attributed to the State. Since the first decisions, the main attribution criteria seemed to revolve around the degree of government involvement in the measure concerned. In this regard, the Panel in Review pursuant to Article XVI:5,[141] while examining the grant of subsidies by non-State actors, stated that in order for that conduct to be attributable to the State, 'the source of the funds and the extent of government action, if any, in their collection' should be considered.

Subsequently, in Japan - Trade in Semi-Conductors, the Panel stated:[142]

> 'The Panel considered that it needed to be satisfied on two essential criteria. First, there were reasonable grounds to believe that sufficient incentives or disincentives existed for non-mandatory measures to take effect. Second, the operation of the measures to restrict export of semi-conductors at prices below company-specific costs was essentially dependent on Government action or intervention. The Panel considered each of these two criteria in turn. The Panel considered that if these two criteria were met, the measures would be operating in a manner equivalent to mandatory requirements such that the difference between the measures and mandatory requirements was only one of form and

[141] GATT, *Review pursuant to Article XVI:5* (24 May 1960) BISD 9S/192, para. 12.

[142] GATT, *Japan - Trade in Semi-conductor* (4 May 1988) L/6309-35S/116. The case revolved around the consistency of a bilateral agreement concluded between with Japan and the US involving Article XXIII:2 of the GATT (nullification or impairment).

> not of substance, and that there could be therefore no doubt that they fell within the range of measures covered by Article XI.1.'

From these statements, it emerges that two criteria are used to qualify a measure adopted by a private party as a governmental measure and therefore attributable to the State: (i) the measure concerned is to be adopted by the State; and (ii) the State has to provide 'sufficient incentives or disincentives' to private persons concerned to act accordingly**.** These criteria were also followed by the Panel in EEC – Restrictions on Imports of Apples.[143]
Following the establishment of the WTO, the Panel ruled again on this matter in *Japan – Film*.[144] In this regard, in an oft-quoted passage, it explained the issue it was facing in the following terms:

> 'As the WTO Agreement is an international agreement, in respect of which only national governments and separate customs territories are directly subject to obligations, it follows by implication that the term measure in Article XXIII:1(b) and Article 26.1 of the DSU, as elsewhere in the WTO Agreement, refers only to policies or actions of governments, not those of private parties. But while this 'truth' may not be open to question, there have been a number of trade disputes in relation to which panels have been faced with making sometimes difficult judgments as to the extent to which what appear on their face to be private actions may nonetheless be attributable to a government because of some governmental connection to or endorsement of those actions.'[145]

Against this background, to determine whether a private action, adopted following non-mandatory administrative guidance issued by the State, could amount to a governmental measure, the adjudicating body began by considering the meaning of the term 'measure.' In this regard, the Panel noted that this 'certainly encompasses a law or regulation enacted by a government.'[146] It continued, 'it is also true that not every utterance by a government official or study prepared by a non-governmental body at the request of the government or with some degree of government support can be viewed as a measure of a Member government.'
In other words, in the view of the Panel, not all State involvement in a certain private action is relevant when determining whether that action falls within the notion of 'government.' The Panel specified that 'where administrative guidance creates incentives or disincentives largely dependent upon governmental action for private parties to act in a particular manner, it may be considered a governmental measure.'[147] In the case, the Panel recognized, on the one hand, that the company to which administrative guidance was provided was not legally bound to comply with it. On the other

[143] GATT, *European Economic Community - Restrictions on Imports of Dessert Apples* (22 June 1989L/6491 - 36S/93) para 12.8 - 12.9. The case revolved around certain measures adopted by the EEC with reference to the imports of apples from Chile. The main issues were the licensing system applied by the European Economic Community to imports of apples from Chile, the suspension of import licenses for apples originating in Chile, and the implementation of a quota system.
[144] WTO, *Japan - Measures Affecting Consumer Photographic Film and Paper* (31 March 1998) W/DS44/R. The case pertained some regulations adopted by Japan and their impact on the distribution, offering for sale and internal sale of imported photographic film and paper.
[145] WTO, Ibid para 10.52.
[146] WTO, Ibid para. 10.43.
[147] WTO, Ibid para 10.45.

hand, the Panel realized that such compliance was expected because of the great power retained by the government in the national economy. Therefore, the Panel found that:

> 'Past GATT cases demonstrate that the fact that an action is taken by private parties does not rule out the possibility that it may be deemed to be governmental if there is sufficient government involvement with it. It is difficult to establish bright-line rules in this regard, however. Thus, that possibility will need to be examined on a case-by-case basis.'[148]

State involvement was the criterion adopted by the Panel to qualify a measure taken by a private entity as a State measure. In this regard, in line with the previous case law, it was specified that such involvement must reach a certain level of intensity so that the measure can be considered attributable to the State. Despite recognizing the difficulty of reaching this type of determination, the Panel did not define the standard necessary for such a conclusion. However, it confirmed that the examination had to be carried out on a case-by-case basis. The criterion of 'sufficient government involvement' was again referred to in Canada-Autos. On that occasion, the Panel, in discussing whether a private action could amount to a 'requirement' in the context of Article III of the GATT, clarified that such determination should 'necessarily rest on a finding that there is a nexus between that action and the action of a government such that the government must be held responsible for that action.'[149]
Subsequently, in Korea - Commercial Vessels,[150] the Panel discussed the meaning of 'entrustment' and 'direction' in the context of the ASCM. As may be recalled, Article 1.1(a)(iv) of the ASCM provides that a government makes payments to a funding mechanism or entrusts or directs a private body to carry out one or more of the types of functions illustrated in (i) to (iii). In this regard, the Panel noted that 'the issue of entrustment or direction does not have to do with a government's power, in the abstract, to order economic actors to perform certain tasks or functions. It has instead to do with whether the government in question has exercised such power in a given situation subject to a dispute.'[151]
In the quoted passage, the Panel seems to suggest that entrustment coincides with the effective exercise by the State of its power, which is essential to entrust a certain entity with a task. Consequently, only the effective exercise of power, as opposed to the abstract possibility to exercise that power, determines the extension of the notion of State for the purposes of attribution.
The issue of entrustment or direction by a government toward a private body was discussed again by the AB in *US - DRAMS*.[152] In this case, the government of Korea invoked Article 8 of the ARSIWA as the legal basis for the attribution of conduct of private bodies to the State. It argued about the 'striking' similarity between the wording of this provision and that of Article 1 of the ASCM.[153] Against these statements, the AB explained that 'Paragraph (iv) covers situations where a private body is being used as a proxy by the government to carry out one of the types of cantons listed in

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[148] WTO, Ibid para 10.55.
[149] WTO, Ibid., para. 10.107.
[150] WTO, *Korea - Measures Affecting Trade in Commercial Vessels* (7 March 2005) WT/DS273/R. The case revolved around the consistency of certain subsidies to the shipbuilding industry given by the Korean government.
[151] WTO, Ibid., para. 7.392.
[152] WTO, *United States - Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea* (27 June 2005) WT/DS296/AB/R. The case pertained to the adoption of countervailing duties by the United States on dynamic random access memory semiconductor chips made in Korea.
[153] Ibid., para. 69.

paragraphs (i) through (iii) [of Article 1 of the ASCM].'[154] It then clarified that 'entrustment' occurs when the government gives responsibility to a private body, and 'direction' refers to situations where the government exercises its authority over a private body.' In other words, the attribution criteria used in this case were: (i) a demonstrable link between the government and the private body concerned; (ii) the entrustment by the State, meaning a conferral of responsibility to the private body; or (iii) the direction by the State, meaning the exercise of authority over the private body.

More recently, the Panel ruled again on the relationship between the action of the government and private conduct in Saudi Arabia - IPR.[155] The Panel reaffirmed that, for the purposes of attribution of the conduct of private bodies to the State, it is necessary to prove the existence of a 'sufficient nexus between the action of private entities and the action of a government (or another organ of the Member).'[156] Then, based on an explicit reference to Article 8 of the ARSIWA, it stated that, although some actions would appear to have a private character, they could still be attributable to the State when there was some governmental connection. Therefore, 'the fact that acts or omissions of private parties "may involve some element of private choice" does not negate the possibility that those acts or omissions can be attributed to a Member insofar as they reflect decisions that are not independent of one or more measures taken by a government (or other organs of the Member).'[157]

3.3.1. SOEs as private bodies

The connecting criteria that emerged for the purposes of attribution regarding private bodies include the presence of sufficient incentives adopted by the State inducing the adoption of specific conduct by the private bodies, along with the elements of entrustment (i.e., the delegation from the State of certain responsibility to the private body concerned) and direction (i.e., the exercise by the government of its authority over the private body). Considering SOEs, these connecting criteria may be relevant for attributing their conduct to the State if they are not part of the structure of the State but nevertheless share a factual relationship, by virtue of acting on its behalf.

In this regard, however, the relevant case law reveals an overlap between connecting criteria pertaining to private bodies and those that emerged with reference to public bodies. More specifically, criteria like the act of delegation from the State, the conferral of exclusive or special rights/privileges or governmental authority, and the exercise of the conferred powers could be appreciated with reference to both categories.

This overlap has important consequences for the notion of SOEs. Firstly, State ownership is insufficient per se to determine that an activity of the State-owned entity is an act of the State. Secondly, by referring to the connecting criteria typically used under the multilateral trading system to attribute the conduct of private entities to WTO Members, adjudicating bodies suggest that SOEs are conceived as private entities. As such, they can only be captured under the WTO legal framework under the notion of 'State' if a specific link with the government is established. Arguably, this perspective is confirmed by the fact that the wording used in the case law with reference to these connecting criteria resembles the rationale of Article 8 of the ARSIWA. In both legal frameworks,

[154] Ibid., para 108.

[155] WTO, *Saudi Arabia - Measures Concerning the Protection of the Intellectual Property Rights* (16 June 2020) WT/DS567/R. The case concerned the alleged failure of the government of Saudi Arabia to ensure appropriate protection of intellectual property rights in favor of entities based in Qatar.

[156] Ibid. para 7.51.

[157] Ibid. para 7.51.

the conduct of a private entity is attributable to the State because the latter exercises enough pressure, through whatever means, to determine the private body to adopt a specific conduct.
While this is true under the GATT, the connecting criteria emerging from subsidy regulation and case law reveal a more articulated scenario because they introduce the notions of 'entrustment' and 'direction.' Looking at SOEs, these connecting criteria require that they are entrusted with a given responsibility by the State or that they exercise governmental authority over a private body. In the first case, SOEs implementing a public policy could be regarded as an extension of the government for attribution purposes. In the second case, SOEs acting in a vertically integrated market sector involving public services, such as energy production or distribution, could be considered as such.

4. Concluding observations: overlaps with general international law on State responsibility and conflation between primary and secondary multilateral rules on trade regulation

The study of WTO case law explored and mapped the connecting and attribution criteria guiding the imputability of the conduct of an entity to a WTO Member. In this regard, the study also focused on case law dealing with WTO primary norms, which regulate the conduct of the State without reference to any specific entity. The aim was to assess the criteria emerging from the different legal context and determine whether the WTO law follows a *lex specialis* approach in this regard, especially when SOEs are concerned.

4.1. Connecting criteria regarding SOEs as State organs

The analysis first looked at the connecting criteria that could qualify an SOE as a 'State organ.' Neither the ARSIWA nor WTO law, and their related practice, specifically deal with SOEs in these terms. However, the analysis shows that the common connecting criterion that also emerged consistently under the WTO legal framework is the integration of the enterprise into the structure and organization of the State. The approach adopted at the multilateral level is, therefore, in line with general public international law. Moreover, both legal frameworks focus on the status that the entity enjoys at the national level, meaning that the focus is on the organizational structure of the State itself. In this context, the ARSIWA arguably show a more articulated approach than the WTO legal framework as they encompass the notion of *de facto* organ. As illustrated above, SOEs would fall into this category if they do not enjoy any degree of independence in their decision-making process and are completely dependent on the State. The WTO law seems not to contemplate this type of subject. This suggests that the connecting criteria adopted by WTO law for attribution purposes of State organs only partially overlap with general international law. However, for the type of entities that the multilateral trading system does not cover, no different legal framework amounting to *lex specialis* has been adopted. Hence, one might assume that if adjudicating bodies ever have to deal with this category, they could refer to general international law rules on attribution.

4.2. Connecting criteria regarding SOEs as entities exercising governmental functions

Looking at SOEs as entities exercising governmental functions, the study highlighted that, although not officially part of the State central or local structure, their conduct can be attributable to the State,

which would, in turn, be responsible for it. From the perspective of the ARSIWA, the attribution criterion adopted for 'parastatal entities' and enterprises linked with the State is the exercise of governmental authority, that is, the exercise of 'functions of a public character normally exercised by State organs.'[158] Under the WTO legal framework, the analyzed case law shows that the notion of 'State' expands to include not only organs of the State, such as institutions, but also entities that, while outside the structural organization of the State, perform governmental functions by virtue of an act of entrustment of the government and by being under its control. Hence, connecting criteria followed under the WTO legal framework by adjudicating bodies do not deviate from general international law. WTO adjudicating bodies clarify that to successfully conduct this type of assessment, recourse is made to connecting criteria that are very similar to those upheld under the general international law of international responsibility.

These findings can be complemented by looking at the connecting criteria emerging from primary rules of WTO law. Indeed, under the WTO legal framework, there are some specific provisions in WTO Agreements that, although not dealing with attribution per se, attribute the conduct of non-State organs to WTO Members and thus encapsulate the related connecting criteria used in this regard. Namely, these are Article XVII of the GATT, Article I of the GATS, Article 1 of the ASCM, and Article 9 of the Agreement on Agriculture (AoA).[159] As worth mentioning again, these provisions have been the object of analysis in previous chapters. However, while, in that context, the study sought to determine the constitutive criteria of SOEs and related entities emerging from their regulatory frameworks, here they are considered to extrapolate the connecting criteria emerging from these frameworks to distinguish between what the State is and is not.

Starting from the GATT, Article XVII dealing with STEs, as it may be recalled,[160] requires WTO members to ensure that STEs carry out their sales or purchases relating to imports or exports in accordance with the principle of non-discrimination. The wording of this provision covers State enterprises and enterprises enjoying exclusive or special privileges. Looking at possible connecting criteria for the purposes of attribution, Article XVII of the GATT arguably adopts two different approaches, depending on the entity under consideration. Regarding privileged enterprises, two attribution criteria emerge from the wording of the provision at issue: (i) the conferral by the State of exclusive or special privileges; and (ii) the exercise of the aforementioned privileges. An exclusive right could be the grant of a monopoly by the State, whereas a special privilege could refer to the grant of a subsidy. Also, as the Understanding on the Interpretation of Article XVII of the GATT clarifies, such special and exclusive rights or privileges may include statutory or constitutional powers. The grant of all these privileges could then be read as an expression of 'governmental authority' under WTO law.[161] From this perspective, this approach does not differ from the system established under Article 5 of the ARSIWA.

As far as State enterprises (SEs) are concerned, Article XVII of the GATT uses the entity's own qualification as SE as the main connecting criterion. In other words, as selling and buying activities - which usually would not determine the international responsibility of the State - are included among those activities for which the State is responsible, this means that any act of that entity is an act of the

[158] Commentary to Article 5 ARSIWA, point 2.
[159] Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 410.
[160] For a detailed analysis of this provision and of the notion of STEs contained therein please refer to Chapter 2 of this study.
[161] Villalpando (n 12) 406.

State solely because the entity constitutes a SE considered under this provision. The emphasis is also on the nature of the activity exercised.[162] This is confirmed by the Ad Note to Articles XI, XII, XIII, XIV, and XVII that clarifies that 'the terms "import restrictions" or "export restrictions" include restrictions made effective through state-trading operations.'[163] This Note aims once again to prevent the use by Members of STEs as a circumvention tool for their WTO obligations.[164] The focus on the activity performed also in this case is reminiscent of Article 5 of the ARSIWA legal framework.

Looking at the GATS, Article I deals with the scope and definition of the agreement being considered. More specifically, Article I:3(a)(ii) of the GATS defines the measures adopted by Members as measures taken by 'non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities.' The connecting criteria that would link the conduct of non-State organs to the State are (i) the exercise of governmental authority; and (ii) the delegation of such power by the State in its entirety, including both central and local authorities. This legal framework arguably does not depart from Article 5 of the ARSIWA either.

Considering multilateral subsidy regulation, connecting criteria are encapsulated in Article 1 of the ASCM.[165] It worth noting that this provision refers to three categories of entities that may be providers of subsidies: the government and public bodies, on the one hand, and private entities, on the other hand, according to Article 1.1(a)(i) and Article 1.1(a)(iv) of the ASCM respectively.[166] In this regard, the panels and the AB clarified that the difference between Article 1.1(a)(i) and Article 1.1(a)(iv) of the ASCM does not lie in the type of activity but rather in the identity of the actor involved. This is because the rationale of this legal framework is to prevent Members from circumventing their WTO obligations by using a private entity as a proxy.[167] As noted with reference to Article XVII of the GATT, in this case the wording of the provision also suggests that connecting criteria change according to the nature of the entity concerned. Considering the government and public bodies, the applicable principle arguably corresponds to a rationae personae principle. Indeed, once the qualification of an entity as a public body is ascertained, then the government is responsible for its conduct, regardless of the type of activity exercised. Instead, in the case of a private actor, the focus is on the link of entrustment or direction between the State and the entity concerned. Hence, the attribution criteria used are similar to those contained in Article 8 of the ARSIWA. Against this

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[162] Similarly see Villalpando (n 12) 406.

[163] Note Ad Articles XI, XII, XIII, XVII of the GATT.

[164] GATT, *Japan - Restrictions on Imports of Certain Agricultural Products*, (2 February 1988) BISD 35S/163, para 5.2.2.2.

[165] WTO, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (11 March 2011) WT/DS379/AB/R, para 308. The AB on that occasion stated that 'both Article 1.1(a)(1), on the one hand, and Articles 4, 5 and 8 of the ILC Articles, on the other hand, set out rules relating to the question of attribution of conduct to a State.

[166] Ru Ding '"Public Body" or Not: Chinese State-Owned Enterprise' (2014) 48(1) Journal of World Trade 167.

[167] See WTO, *United States - Measures Treating Export Restraints as Subsidies* (29 June 2001) WT/DS194/R, para 8.53; WTO, *United States - Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS)* (27 June 2005) WT/DS296/AB/R. In the words of the AB, referring to the Panel's decision in *US - Export Restraints*: 'Paragraph (iv) of Article 1.1(a)(1) further states that the private body must have been entrusted or directed to carry out one of the type of functions in paragraphs (i) through (iii). As the Panel in *US – Export Restraints* explained, this means that 'the scope of the actions ... covered by subparagraph (iv) must be the same as those covered by subparagraphs (i)-(iii)'. A situation where the government entrusts or directs a private body to carry out a function that is outside the scope of paragraphs (i) through (iii) would consequently fall outside the scope of paragraph (iv). Thus, we agree with the *US – Export Restraints* Panel that 'the difference between subparagraphs (i)-(iii) on the one hand, and subparagraph (iv) on the other, has to do with the identity of the actor, and not with the nature of the action'. Ibid, para 112.

background, Article 1 of the ASCM does not provide further guidance as to the practical standard determining whether attribution may or not occur.
Against this backdrop, Article 9 of the AoA, dealing with export subsidy commitments undertaken by WTO Members under the Agreement itself, contains a list of export subsidies regarding specific products that Members have subjected to reduction commitments. Each element of this list envisages a more or less intense level of governmental action, which may be direct or indirect.[168] The terminology used across commitments reflects different layers of intensity of the government's active role in the economy. These are expressed with the verbs 'to provide'[169] or 'to mandate.'[170] For the purposes of this analysis, the focus should be on two elements. The first one pertains to Articles 9.1(a) and 9.1(b) of the AoA prohibiting the adoption of certain export subsidies by the 'governments or their agencies.' The term 'governmental agency' is not defined. Thus, it is necessary to refer to relevant case law to clarify the term (for systematic purposes, the notion has been considered in detail under Chapter 3, section 5). The second element worth considering is contained in Article 9.1(c) of the AoA. This provision states that:

> '[P]ayments on the export of an agricultural product that are financed by virtue of governmental action, whether or not a charge on the public account is involved, including payments that are financed from the proceeds of a levy imposed on the agricultural product concerned or on an agricultural product from which the exported product is derived.'[171]

The attribution criterion is in the expression 'by virtue of governmental action', whose meaning have been specified by the Panels and the AB. In particular, the AB acknowledged the expression's 'open-ended' and almost 'abstract nature.'[172] However, it stated that 'by virtue of' clarifies the meaning of the words.[173] This is because it establishes that a demonstrable link between the governmental action, on the one hand, and the financing of the payments, on the other, is needed.[174] Concerning the first element, the AB clarified that it may include 'any governmental action,'[175] namely the powers to 'regulate', 'control' or 'supervise' individuals, 'or otherwise restrain their conduct through the exercise of lawful authority.'[176] In other words, the expression 'by virtue of' embodies the

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[168] Luca Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (OUP, 2009) 127.
[169] Among the export subsidies subject to reduction commitments Article 9.1(d) lists: 'the provision of subsidies to reduce the costs of marketing exports of agricultural products (other than widely available export promotion and advisory services) including handling, upgrading and other processing costs, and the costs of international transport and freight.'
[170] Article 9.1(e) refers to: 'internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments.'
[171] Article 9.1(c) AoA. Emphasis added.
[172] WTO, *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products, Second Recourse to Article 21.5 of the DSU by the New Zealand and the United States* (20 December 2002) WT/DS103/AB/RW2 WT/DS113/AB/RW2, para. 129. The case involved certain measures adopted by the government of Canada in favor of national dairy farmers.
[173] Ibid.
[174] WTO, *Canada – Dairy (Article 21.5 – New Zealand and US)* (11 July 2011) WT/DS103/RW WT/DS113/RW para. 113.
[175] WTO, *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products, Second Recourse to Article 21.5 of the DSU by the New Zealand and the United States* (n 118) para 131.
[176] WTO, Canada-Measures Affecting the Importation of Milk and the Exportation of Dairy Products (13 October 1999) WT/DS103/AB/R WT/DS113/AB/R, para. 97.

relationship between the action of the government and the financing of the payments. However, the opposite is not true, as not all governmental actions will be intense enough to establish a meaningful link between the two elements.[177] In this regard, an action of the government corresponding to the mere enabling of payments would not be sufficiently intense for the link to occur. The AB acknowledges that '[i]t is extremely difficult … to define in the abstract the precise character of the required link between the government action and the financing of the payments, particularly where payments-in-kind are at issue.'[178]

Against this background, it is possible to observe that, under Article 9 of the AoA, attribution revolves around the meaning to be given to 'governmental action.' In this regard, the boundaries of the notion as understood by the WTO adjudicating bodies are quite broad. Thus, one could argue that the exercise by an SOE or other State-affiliated entity of such activities would constitute the exercise of governmental functions and entail the international responsibility of the State with reference to that conduct. In any case, the reference to activities encapsulating a governmental character resembles Article 5 of the ARSIWA.

In light of the above, primary rules too suggest that connecting criteria for the purposes of attribution adopted under the WTO legal framework do not deviate from general international law. However, WTO adjudicating bodies have provided no further clarification regarding the connecting criteria related to the most controversial elements of primary rules applicable to SOEs, which may be public bodies, such as the possession, exercise, or vestment of governmental authority.

In this context, the WTO legal framework adopts 'State control' as an additional criterion that is not adopted under general international law. Arguably, this additional criterion is not, however, a deviation from the ARSIWA nor the constitution of a *lex specialis* framework for attribution under WTO law. Rather it shows the lack of clear boundaries within the multilateral trading system between primary and secondary norms because of which a definitional criterion used in primary rules also serves as a connecting criterion for attribution purposes within the same legal system.

4.3. Connecting criteria regarding SOEs as private bodies

Looking at SOEs as private bodies, the study highlighted that, from the perspective of general international law, attribution revolves around the notions of direction and control. Direction and control are exercised by the State to determine the adoption of certain conduct by private subjects which are outside the official structure of central or local government. In a similar vein, the analysis of WTO case law has demonstrated that there are several connecting criteria in this regard, including entrustment, direction and governmental measures constituting enough incentives and expectations on private bodies to adopt a given conduct. When present, these criteria suggest that the conduct carried out by private entities is covered by the notion of what is 'governmental', and the related entities fall within the notion of 'State' for the purposes of attribution.

In this context, it seems that the WTO legal framework adopts a more formal approach than general international law, which, as seen already, focuses on a factual relationship between the State and the subject concerned. Taking this into account, the way in which these criteria have been interpreted and their substantive meaning clarified by the WTO adjudicating bodies make them largely coincide with general international law on State responsibility as encapsulated within the ARSIWA. While under

[177] Ibid para. 131.

[178] Ibid para. 134; *Canada – Dairy (Article 21.5 – New Zealand and US)* (n 120) para. 115.

the ARSIWA, the focus is on 'instructions' (understood in the broadest sense), 'direction' and 'control', under WTO law, adjudicating bodies clarified that 'entrustment' and 'direction' coincide with the conferral of responsibilities by the State and State control, respectively. In this context, also the act of delegation adopted by the State to grant exclusive or special privileges to the enterprise under the WTO legal framework does not necessarily have to be a national law. Instead, the delegation itself can be conceived in a rather broad sense and ultimately overlap with the criterion of the factual relationship followed by Article 8 of the ARSIWA. In any case, the expectations generated on private bodies by the State through governmental measures to adopt a given conduct could very well coincide with the factual control required under general international rules on attribution Hence, the study suggests that also with reference to the qualification of SOEs as private bodies, connecting criteria for attribution purposes adopted under the WTO legal framework do not deviate from general international law framework.

These findings can be completed by taking into account connecting criteria emerging from primary WTO rules. As governmental barriers to trade have been lowered globally, it has become crucial in the multilateral context to assess when the conduct of private subjects may be disruptive of international trade flow and when that conduct is attributable to the State.[179] This is important to understand when a legal system that only addresses States, such as the WTO one, sometimes also regulates private bodies, under certain conditions. In this regard, the WTO Agreements contain specific provisions that link the conduct of private subjects to that of the government. They mostly coincide with the provisions analyzed on the attribution of conduct of entities exercising elements of governmental authority.

Starting with the GATT, Article XVII on STEs is relevant insofar as 'non-governmental enterprises' described in the Understanding on the Interpretation of Article XVII of the GATT are considered. An extensive analysis of this provision was conducted in Chapter 2. Here, it suffices to say that the conduct of 'non-governmental enterprises' is linked to the State based on three criteria: (i) the grant of exclusive or special privileges to the enterprise; (ii) this conferral is implemented by the State; and (iii) the exercise of granted exclusive or special rights. In other words, the legal framework contemplates a situation in which an enterprise is required by an act emanating from the State to perform an activity based on the privileged conferred. No specification is provided as to the type of activity to be performed. However, one may assume that there is an expectation upon the non-governmental enterprise to act in accordance with the privileges received stemming from the governmental measure.

Multilateral subsidy regulation too provides interesting indicators on connecting criteria between the State and private bodies. As mentioned already, Article 1.1(a)(iv) of the ASCM regulates payments made by the government or through the entrustment or direction of a private body. Hence, the conduct of a private entity is attributable to the State based on that entrustment or direction. In other words, the activity of the private body concerned is guided and determined by the acts adopted by the State concerning entrustment and direction. As seen already, the provision does not define 'entrustment' or 'direction.' Therefore, it is necessary to refer to the interpretation of these terms in the case law. They have been considered in detail in this Chapter (*supra*, Section 3.3 and 3.3.1).

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[179] Jan Bohanes and Iain Sandford, 'The (Untapped) Potential of WTO Rules to Discipline Private Trade-distorting Conduct', Society of International Economic Law (SIEL) Inaugural Conference 2008 Paper (25 July 2008) 1. Available at: https://papers.ssrn.com/sol3/JELJOUR_Results.cfm?form_name=journalbrowse&journal_id=1138803 (last accessed on 20th July 2022); Petros C Mavroidis and Werner Zdouc, 'Legal Means to Protect Private Parties' Interests in the WTO. The Case of EC New Trade Barriers Regulation' (1998) 1 3) Journal of International Economic Law 407-432.

However, additional clarification can be sought by looking at other connecting criteria for attribution purposes used in multilateral subsidy regulation, namely 'mandate' or 'control.'[180] They are used in Annex 1 of the ASCM in the Illustrative List of Export Subsidies, particularly in items (c) and (d). More specifically, lit. (c) deals with internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favorable than for domestic shipments. In turn, lit. (d) refers to the provision through government-mandated schemes of imported or domestic products or services for use in the production of exported goods, on terms or conditions more favorable than for provision of like or directly competitive products or services for use in the production of goods for domestic consumption, if (in the case of products) such terms or conditions are more favorable than those commercially available on world markets to their exporters. The two items not only cover the conduct of the State but also that of third parties mandated by the government to adopt the subsidizing conduct. However, the boundaries of the 'government mandate' criterion are not defined.[181]

In this context, items (j) and (k) revolve around the notion of 'government control.' More specifically, lit. (j) considers the provision by 'special institutions controlled by the government' of export credit guarantee or insurance programs, of insurance or guarantee programs against increases in the cost of exported products or of exchange risk programs, at premium rates which are inadequate to cover the long-term operating costs and losses of the programs. In this context, lit. (k) considers 'special institutions controlled by and/or acting under the authority of governments' granting export credits at rates below those which they actually have to pay for the funds so employed. However, the degree of control relevant for the purposes of attribution assessment is not defined.

Lastly, Article 9.1(c) of the AoA is worth considering because it clarifies the notion of 'governmental action.' As demonstrated already, the wording of this provision contains the following expression: 'by virtue of governmental action, whether or not a charge on the public account is involved.' The analysis of connecting criteria related to entities exercising governmental authority (sections 2.2, 3.2. and 3.2.1) illustrated how broad the interpretation of the boundaries of 'governmental action' by the WTO adjudicating body is. It is now appropriate to consider the imputability criteria when private entities are involved.

The AB in *Canada – Dairy* (Article 21.5 – New Zealand and the United States II) stated that 'Article 9.1(c) does not require that payments be financed by virtue of government "mandate", or other "direction."' However, 'the word "action" certainly covers situations where government mandates or directs that payments be made,' and 'it also covers other situations where no such compulsion is involved.'[182] This interpretation of the provision is also supported by its wording, which does not require the involvement of public funds for the payment to occur. Therefore, the notion of 'governmental action' is rather broad and encompasses actions of private bodies. In this case, the criterion connecting the action of the private body with the State is the establishment by the State of a regulatory framework that guides, although indirectly, the conduct of the private body.[183]

Furthermore, it should be noted that WTO Agreements regulate the conduct of non-governmental bodies to which States increasingly tend to outsource activities traditionally performed by public

[180] Bohanes and Sandford (n 179) 1.
[181] Wolfgang Müller, *WTO Agreements on Subsidies and Countervailing Measures: A Commentary* (CUP, 2017), 604.
[182] WTO, *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products. Second Recourse to Article 21.5 of the DSU by New Zealand and the United States* (3 December 2001) WT/DS103/AB/RW2 WT/DS113/AB/RW2, para. 128.
[183] Bohanes and Sandford (n 179) 12.

authorities, such as activities related to technical regulation. In this regard, the Technical Barriers to Trade (TBT) Agreement provides important hints on the criteria used to connect the conduct of private entities to the State. Article 3 of the TBT deals with the preparation, adoption, and application of technical regulation not only adopted by local government bodies, but also by non-governmental bodies. Annex 1.8 of the TBT defines a 'non-governmental body' as a 'body other than a central government body or a local government body, including a non-governmental body which has the legal power to enforce a technical regulation.' Thus, the definition revolves around the provision of a legal power by the State to the public or private body concerned. This approach is arguably narrow because it excludes a wide range of private entities that are generally considered to be standardizing bodies.[184] In other words, this regulatory framework adopts the element of delegation of legal powers as the criterion that links the conduct of the private body to the State.[185]

In light of the above, the approach followed both by WTO Agreements and adjudicating bodies consistently focuses on the establishment of a demonstrable link between the act of the State and the conduct of a private body. In this regard, identified attribution criteria may be divided into three groups. The first includes an act of delegation by the State, the grant of special/exclusive rights or governmental authority, and the exercise of conferred rights or governmental authority. As seen already, this set of criteria is also used by adjudicating bodies to link the conduct of parastatal entities and fully State-owned enterprises to the State. This approach is particularly important for the purposes of this study because it may suggest that SOEs are conceived as private entities by WTO adjudicating bodies.

The second group of criteria encompasses 'entrustment' and 'direction' by the State, which emerged from subsidy regulation. The case law clarified that an act of entrustment is the conferral by the State to the entity concerned with responsibility. By contrast, the direction is the exercise by the State of control over the entity. Although neither the panels nor the AB specify the level of control or the intensity of the link required for attribution to occur, recent case law clarifies that a certain degree of autonomy in decision-making by the private subject does not hinder the possibility to attribute its conduct to the State. The rationale behind adopting these two criteria under multilateral regulation on subsidies reflects an anti-circumvention purpose. The aim is to prevent Members from using private bodies to confer subsidies they would not be allowed to grant. This is particularly important with respect to SOEs. Indeed, if they implement a subsidy scheme under governmental instructions or State control, the boundaries of the 'State' would expand to encompass them.

The third group of criteria that have been identified considers sufficient incentives generated by the State to promote the private body's adoption of a given conduct. Such incentives are the result of a

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[184] Apurba Khatiwada, 'Non-Governmental Bodies in the TBT Agreement', (April 29, 2011). Available at SSRN: https://ssrn.com/abstract=2473627 or http://dx.doi.org/10.2139/ssrn.2473627 (last accessed 20 July 2022), 5. On private standards see: Petros C Mavroidis and Robert Wolfe, 'Private Standards and the WTO: Reclusive No More', (2017) 16(1) World Trade Review 1-24; Alessandra Arcuri, 'The TBT Agreement and Private Standards', in Tracey Epps, Chapman Tripp and Michael J Trebilcock (eds), *Research Handbook on the WTO and Technical Barriers to Trade* (Edward Elgar Publishing, 2013) 485-524.

[185] For a critical opinion on this aspect see Villalpando (n 12) 407. The author indeed notes that under Article 3 of the TBT the conduct of private body is not directly attributed to the State, but rather it is treated 'as if' it was the conduct of the Member.

'government measure,' which is broadly understood and includes regulatory or administrative measures and public policies.[186]

Looking at SOEs, this approach is particularly worth considering in the context of the multilateral trade legal framework. On the one hand, SOEs operate independently from the State, and on the other hand, the State acts as an owner comparable to private shareholders. Notwithstanding the independence enjoyed by the SOE, if it performs its activities based on incentives to act in a certain way generated by domestic non-mandatory measures, then its conduct is attributable to the State. This approach expands the notion of 'State' enough to allow it to capture SOEs independently from the economic model in which they operate. Indeed, by focusing on incentives and pressure exercised by the State, these connecting criteria may encompass SOEs both in market economies countries, where governments may try to hide their high involvement in the national economy behind the general compliance with market forces, and in State capitalist ones, which may resort to unofficial means to guide the conduct of their SOEs in a desired way. In this context, it remains to be specified what level of 'control' is relevant to determine when an SOE falls within the notion of the State. In other words, adjudicating bodies do not specifically deal with the 'overall control' or 'effective control' debate delineated in the context of general international law. Neither the Panel nor the AB ever mentioned the necessity to control each specific activity of the enterprise. Rather, the focus has been on the possibility of the State to influence its decision-making process, so, within the WTO legal framework, an 'overall control' standard would arguably suffice. This interpretation is confirmed by the case law dealing with subsidy regulation, which clarified that the presence of partial decisional autonomy of the private body concerned does not impede the attribution of the conduct to the State.

4.4. Connecting criteria on SOEs and related entities under WTO law: contributing to the debates on WTO law as *lex specialis* and on the distinction between primary and secondary norms

The conducted analysis shows that no *lex specialis* could be envisaged within the WTO legal framework as to the connecting criteria that may be used to define SOEs and related entities.[187] As demonstrated in this study, connecting criteria followed under the WTO legal framework largely overlap with the attribution criteria in general international law on State responsibility as encapsulated in the ARSIWA. These findings are applicable to both SOEs as public and private bodies.

Notwithstanding this overlap, when SOEs are concerned, the WTO legal framework arguably adopts a less clear-cut distinction than the one followed under general international law on State responsibility, particularly with reference to the categories of entities and related attribution criteria as encapsulated under Articles 5 and 8 of the ARSIWA. Indeed, the WTO practice shows that it has introduced a criterion that cannot be found under general international law, namely that of 'State control.' This criterion, however, is relevant not only for private bodies but also for 'parastatal' entities. This intra-category overlap within the same legal system may suggest that there is a conceptual conflation between the two when SOEs and related entities are concerned. This is further

[186] Cf. WTO, *Argentina - Measures Affecting the Importation of Goods* (22 August 2014) WT/DS438/R WT/DS444/R WT/DS445/R, para. 6.230; *Argentina - Measures Affecting the Importation of Goods* (15 January 2015) WT/DS438/AB/R WT/DS444/AB/R WT/DS445/AB/R, para. 5.142.

[187] On the lack of *lex specialis* concerning rules on attribution under the WTO legal framework see also Villalpando (n 12).

exacerbated by the fact that it is not specified for either entity the level of State control that is relevant for attribution purposes. In other words, a different measurable intensity of State control in this regard would make it possible to distinguish between categories and clarify the legal framework applicable to SOEs. Instead, the conflation of the legal framework as it stands requires the interpreter to rely on elements other than 'control' to qualify an SOE, such as the characteristics of the domestic context in which the SOE operates, to determine whether the control exercised by the State stems from an official act of delegation or from another type of governmental measure.

Similar conclusions can be reached for SOEs as private bodies and related connecting criteria. Indeed, the study has highlighted that under the WTO law and practice, there is an overlap between connecting criteria identified with reference to private and public bodies. Such overlap arguably confirms that there is a conflation between primary and secondary norms, which allows constitutive criteria in the former to permeate the legal framework of the latter in the WTO legal framework. Against this background, the most critical findings stemming from this overlap with the most impact on the qualification of SOEs are encapsulated in the connecting criteria that suggest that SOEs are conceived as private entities by WTO adjudicating bodies. At the same time, the connecting criteria regarding the conduct of private bodies adopt a broad enough approach to potentially encompass SOEs engaging in international trade in both State capitalist and market-based economies. This shows that it might be feasible to find a common denominator regarding SOE regulation under the multilateral legal framework. Once again, this suggests that SOE regulation within the WTO legal framework should start with a shared consensus on the nature of these enterprises, provided that Members are left with enough national policy space to use them as a tool for national public policy objectives.

Table 2. Connecting criteria emerging from imputability principles under the WTO multilateral trading system

Type of entity	Connecting criteria
Organ of the State	a) Integration in the State's apparatus
Entities exercising elements of governmental authority	a) Delegation of powers by the State (either central or local authorities) b) Exercise of governmental functions (excluding the regulation of the market) c) Exercise of control by the State on the entity

Type of entity	Connecting criteria
Private body	a) Act of delegation by the State b) Grant of special/exclusive rights or governmental authority c) Exercise of conferred right or governmental authority OR a) Entrustment (conferral of responsibilities on the private body by the State) b) Direction (exercise of control on the entity by the State) OR a) Regulatory framework that although not binding, generates sufficient incentives to adopt a certain measure or implement a given policy

Part III
Preferential Trade Agreements (PTAs)

Chapter Six
THE NOTION AND REGULATION OF STATE-OWNED ENTERPRISES UNDER PLURILATERAL PREFERENTIAL TRADE AGREEMENTS (PTAS)

1. The growing inclusion of SOEs in PTAs: an overview

Although the multilateral legal framework for international trade provides important elements regarding the definition of SOEs, the analysis above shows that it is not able to capture the phenomenon in its entirety and complexity. Indeed, each analyzed field takes into consideration one or more specific aspects that may characterize SOEs without fully grasping the multi-faceted aspects of these entities. The difficulties in tracing the boundaries of the notion of SOEs in the multilateral context for international trade are further exacerbated by the lack of shared definitions in international trade law. This lacuna prevents an appropriate comprehension of legal notions. It leaves any distinction between, for example, the notion of STEs and that of SOEs based on factual terms. Put differently, the constitutive elements of STEs that have been mapped in Chapter 2 reveal their limited ability to encompass the notion of SOEs: the empirical factual activity and characteristics of SOEs are broader than the ones emerging from Article XVII of the GATT and regulated in the Agreement. In this sense, it is possible to state that the factual notion of SOEs does not fall within the boundaries of the legal notion of STEs. Given the difficulty in delineating a consistent definitional approach for SOEs under the WTO law, and in light of the need for such an approach for the purposes of trade liberalization, the question is now addressed whether the Members of the WTO have turned to the bilateral route to tackle the issue.

Practice shows that governments increasingly resort to mega-regional and bilateral negotiations to break the current multilateral impasse on many issues. This is also the case for the SOE definition and regulation. Indeed, an overview of recent preferential trade agreements (PTAs) shows that a growing number of them displays a discipline specifically dedicated to SOEs and related entities, including a definition of these enterprises.

Such practice has already been detected and addressed by the scientific community. Indeed, over the past decades, scholars have increasingly studied the regulation of SOEs and related entities in preferential arrangements. Studies in this field mainly deal with the regulation of SOEs in a specific agreement,[1] and on data analysis.[2] These studies are of fundamental importance in advancing

[1] On the TPP/CPTPP see *ex multis*: Jorge A Huerta-Goldman and David A Gantz (eds) *The Comprehensive and Progressive Trans-Pacific Partnership* (CUP, 2021); Gary Hufbauer and Julia Muir, 'The Trans-Pacific Partnership', in Ricardo Meléndez-Ortiz, Christophe Bellmann and Miguel Rodriguez Mendoza, *The Future and the WTO: Confronting the Challenges, A Collection of Short Essays* (International Centre for Trade and Sustainable Development, 2012) 47-52; Gary Hufbauer and Cathleen Cimino-Isaacs, 'How will TPP and TTIP Change the WTO System?' (2015) 18(3) Journal of International Economic Law 679-696; Minwoo Kim, 'Regulating the Visible Hands: Development of Rules on State-Owned Enterprises in Trade Agreements' (2017) 58(1) Harvard International Law Journal, 225-272; Chunding Li and John Whalley, 'Effects of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership' (2021) 44(5) The World Economy 1312-1337; CL Lim, Deborah K Elms and Patrick Low (eds), *The Trans-Pacific Partnership: A Quest for a Twenty-First Century Trade Agreement* (CUP, 2012). On the USMCA, see Sergio Puig, 'The United States-Mexico-Canada Agreement: A Glimpse into The Geoeconomic World Order' (2019) 113 AJIL Unbound 56-60; David A Gantz, *An Introduction to the United States-Mexico-Canada Agreement* (Edward Elgar Publishing, 2020).

[2] Luca Rubini and Tiffany Wang, 'State-Owned Enterprises', in Aaditya Mattoo, Nadia Rocha and Michele Ruta (eds), *Handbook of Deep Trade Agreements* (World Bank, 2020) 463.

knowledge on SOEs and related State practice, which also mapped the existence of specific definitions of different categories of public entities in almost three hundred preferential arrangements.[3] However, a horizontal assessment of the definitional approaches to SOEs, as are adopted in preferential agreements by major WTO economies outside the institutional framework of the WTO, has not been conducted so far. This study aims to fill this gap.

From the perspective of international law, PTAs are international treaties concluded between two or more States or custom unions to remove trade barriers, grant preferential market access and pursue trade liberalization in terms that go beyond the level of liberalization granted to, or committed towards the generality of the other States through unilateral regulation or the MFN treaty obligation (notably, under the GATT, the GATS and TRIPs), respectively.[4] Recent PTAs tend to include provisions not only limited to trade in goods but also covering trade in services and investments between the Parties.[5] From the WTO perspective, PTAs are preferential arrangements concluded between Members that pursue the liberalization of 'substantially all trade' between their signatories, hence an exception to the non-discrimination principle and, specifically, the MFN clause pursuant to GATT Article 1, GATS Article II and TRIPs Article 4. The analysis of the definitional approaches followed by States towards SOEs within preferential treaties can reveal the definitional strategies followed by WTO Members in a narrower context. The preferential ambit is supposedly smoother for the purposes of reaching an agreement on the inclusion and regulation of SOEs, by virtue of the limited number of participants and the strong reciprocal interest for engagement.

In light of this last remark and given the limits of this work compared to the previously mentioned comprehensive studies, it is argued here that a selection of PTAs may be effective for the purposes of analyzing the definitional criteria of SOEs in preferential treaty terms. At the same time, such selection is effective, provided it encompasses a sufficient number of countries and regional groups. It would ensure a worldwide grasp of the constitutive criteria of SOEs and of how WTO Members possibly export their vision in this regard. Ultimately, the study of definitional approaches on SOEs included in PTAs helps gather information on the categories of economic operators that, by certain countries in their reciprocal relations, are perceived to fall under the notion of SOEs and which are the characteristics that require regulation. Arguably, if their aim is trade liberalization, PTAs should not aim to cover all SOEs. However, the negotiation efforts would probably be targeted to cover those that may represent an obstacle to international trade in the Party relations.

By way of general framework and on preliminary grounds, it can be noted that SOE regulation in PTAs evolved over time. On the one hand, starting from the 1990s, [6] the number of preferential agreements presenting clauses specifically addressing and regulating SOEs and related entities increased. On the other hand, the substantive regulation and the scope evolved. While most of the

[3] Ibid 467.

[4] See Kyle W Bagwell and Petros C Mavroidis (eds), Preferential Trade Agreements (CUP, 2011); Petros C Mavroidis, 'Preferential Trade Agreements' in *The Regulation of International Trade. Vol. 1* (MIT Press, 2016) 291; Thomas Cottier, Charlotte Sieber-Gasser and Gabriela Wermelinger, 'The Dialectical Relationship of Preferential and Multilateral Trade Agreements' in Andreas Dür and Manfred Elsig, *Trade Cooperation: The Purpose, Design and Effects of Preferential Trade Agreements* (CUP, 2015) 465.

[5] Marc Bungenberg, 'Preferential Trade and Investment Agreements and Regionalism' in Rainer Hofmann, Stephen W Schill and Christian J Tams (eds) *Preferential Trade and Investment Agreements: From Recalibration to Reintegration* (Nomos 2013) 272.

[6] Rubini and Wang (n 2) 474.

older agreements referred *tout court* to GATT provisions - particularly Article XVII of the GATT on STEs - in more recent agreements, the trend is to use the same vocabulary as the GATT but to depart from the substantive multilateral regulation (e.g., including the service sector), at least partially.[7] Hence, States have often used WTO agreements as the basis for new negotiations on international trade. Provisions governing entities other than those covered by the WTO agreements are WTO-x obligations, as are provisions that specifically refer to SOEs. In this regard, PTAs regulating SOEs seem to be treating them as a whole new category of entities other than public and privately-owned corporations. Arguably, such evolution in the regulation of SOEs in PTAs has not 'come out of thin air.'[8] On the contrary, it has been heavily based on multilateral agreements,[9] to rebalance the two elements of the embedded liberalism compromise: the regulation of the role of the State in the economy and the grant of enough policy space to employ SOEs to reach public policy goals.
However, recently concluded PTAs, particularly those signed in the past ten years, display an effort to address, or at least acknowledge, significant problems with State enterprises that have arisen under WTO law.[10] The SOEs-related concerns addressed include the lack of transparency in management and conduct of these entities, the lack of cooperation between governments, a lack of clear and explicit assessment of the ties between the government and the enterprise, and a lack of a precise definition, which makes it difficult to classify an entity and determine the applicable legal framework accurately. Overall, a solid anti-circumvention rationale emerges to prevent States from using these enterprises as proxies to carry out their own policies and failing to uphold their international obligations. Besides, objectives pursued by PTAs concerning SOEs are rarely stated explicitly.[11] Hence, they must be inferred from the general content of the PTA and its interpretation.
Against this background, an increasing number of PTAs contain a definition of SOEs. Although definitional approaches may vary, as will be seen in the analytical parts of this chapter, they signal States' necessity to designate the boundaries of enterprises linked to the State. From a legal perspective, establishing a definition is essential to determine the object of the regulation and to decide whether a specific legal framework applies to a given situation. Looking at SOEs, their definition enables governments to, at the very least, determine which enterprises are covered under the agreements and which are not. But most importantly, a definition could be constructed in a functional way to target only SOEs perceived by the Parties concerned as an obstacle to trade liberalization. In this regard, the shift observed in the construction of PTAs about the regulation of SOEs is significant. While older PTAs included SOE-regulation in competition-related chapters,[12] modern preferential agreements often contain a separate chapter dealing with the subject matter. This shift arguably reflects a change in how governments perceive SOEs at the international level: more

[7] For a focus on the liberalization of the services sector at the regional and bilateral level: Panagiotis Delimatsis, 'The Evolution of the EU External Trade Policy in Services – CETA, TTIP, and TiSA after Brexit', (2017) 20(3) Journal of International Economic Law 583–625.
[8] Kim (n 1) 228.
[9] Hufbauer and Cimino-Isaacs (n 1) 685 f.
[10] Kim (n 1) 243; Leonardo Borlini and Peggy Clarke, 'International Contestability of Markets and the Visible Hand: Trade Regulation of State-Owned Enterprises between Multilateral Impasse and New Free Trade Agreements' (2021) 26 Columbia Journal of European Law 115.
[11] Rubini and Wang (n 2) 471.
[12] Ibid 492.

than just a competition-related issue, but a complex and multifaceted phenomenon worthy of specific regulation.
At the same time, multiple definitional approaches are adopted in PTAs. This variety makes it challenging to find a shared definition of SOEs. To some extent, it echoes the fragmented scenario observable in national jurisdictions that contributes to hindering the adoption of a harmonized definition of SOEs on the international plane. This is not surprising considering the political and economic factors behind the conclusion of PTAs. It can also show the difficulty, at the present, for a multilateral agreement on an enhanced inclusion and regulation of SOEs in trade matters. Nevertheless, PTAs are a valuable tool to identify convergence of interests, paths and patterns to stimulate discussion on the definition of SOEs at the multilateral level, which is more likely to occur than if this matter was left entirely to national authorities.[13]
In light of the above, the objective of the analysis is twofold. Firstly, the analysis aims to map the definitional criteria of SOEs in selected PTAs. Secondly, the goal is to determine whether arrangements reached outside the WTO can capture a wider variety of State-owned and State-led entities than multilateral agreements. To this end, the study focuses on PTAs concluded at the mega-regional plurilateral and bilateral levels.[14]
More specifically, as far as the criteria for the selection are concerned, first a formal criterion is followed, as PTAs already notified to the WTO are considered. However, since notified agreements do not necessarily imply that they are actually in force, further selection is brought by the analysis of notified PTAs which are currently in force according to the official portals of each government considered. In this context, plurilateral PTAs are addressed first, as they are an example of a possible shared regulation of SOEs between various different jurisdictions outside the barriers of the WTO multilateral legal framework.
Secondly, the bilateral agreements concluded by China, the European Union (EU), the United States (US), and Australia are analyzed. The contribution of these countries to the international regulation of SOEs is crucial at a double level. From a general perspective, they are all leading proponents of PTAs globally. This element is crucial to provide the analysis the widest geographic breadth possible, as these governments put in place bilateral relationships across regions from all over the world, with limited overlapping. Considering SOEs more specifically, these countries are also, for several reasons, the most involved in the topic of SOEs either because they are great advocates of the regulation of these enterprises or because they are based on an economic model that heavily relies on SOEs.
Looking at China, the study undertaken in the preceding chapters (especially chapter 3) revealed that the Chinese economy heavily relies on SOEs for its functioning. According to OECD estimates, the Chinese government is the full or majority owner of 51.000 SOEs, whose assets amount to USD 29.2

[13] On this point, Horn, Mavroidis and Sapir note that the introduction of WTO+ provisions in PTAs can be interpreted with an opposite meaning, namely that States prefer to deal with most sensitive topics outside the multilateral legal framework of the WTO. See Henrik Horn, Petros C Mavroidis and André Sapir, 'Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements' (2010) 33(11) The World Economy 1567.
[14] It should be noted that the term 'PTAs' differs from that of 'free trade agreements' (FTAs). Despite FTAs referring to the establishment of free trade area between parties, this rarely occurs in practice. In this sense, then, the term PTAs is more accurate as it addresses a system of preferences related to international trade established between the Parties to the Agreement. Simon Lester, Bryan Mercurio and Lorand Bartels, *Bilateral and Regional Trade Agreements. Commentary and Analysis* (CUP, 2015) 5.

trillion.[15] Considering their sectoral distribution, Chinese SOEs appear to be concentrated mainly in the finance sector, with some operating in the manufacturing, electricity, gas and transportation.[16] It has been seen that the relationship between the Chinese government and these enterprises behind the concerns among trading partners when it comes to international trade regulation. For this reason, the treatment reserved, if any, to SOEs and related entities at the bilateral level by China is important, on the one hand, to better understand how SOEs are conceived by the Chinese government and, on the other hand, it reveals possible developments from the perspective of non-free market-based economies.

In this context, the EU and the US have been selected for consideration based on multiple criteria. First, as seen under WTO law analysis, they have been constantly advocating for a regulation of enterprises related to the State at the multilateral level, since the drafting of the Article XVII GATT. Hence, they have been key players in the establishment of the current international trade legal framework dealing with these entities. Such commitment extends to current initiatives and calls undertaken by those countries to further improve such regulation.[17] It derives that the analysis of their bilateral agreements covering the subject of SOEs is able to provide important hints as to how the conception, definition and regulation of SOEs has developed and is developing in recent years. This is even more so considering that the relationship of these two countries with SOEs is not new. SOEs constitute pivotal assets in both economies, where they are employed in key sectors for their development such as energy and transports.[18] In the EU in particular, the concentration of SOEs has raised since the '90s and it reached the valued of USD 2 trillion in assets in 2012.[19] This growing trend does not seem to abate, as several Member States across the EU implement different policies and actions with reference to their SOEs, including the creation of new SOEs, the acquisition of shareholdings in listed companies, and restructuring.[20] Looking at the United States, SOEs are mostly employed in the manufacturing, finance and transportation sector and kept a steady contribution in terms of employment percentage.[21] This means that under the US economy crucial sectors that in other economic context are more or less driven by SOEs are privately-held. This could explain the reason why the US has always advocated for a stringer regulation of entities linked to the State, meaning to protect its economy from unfair State trading practices of trading partners.

However, as underlined in Chapters 1 and 2, it should also be recalled that the economic and legal rationales on which SOEs functioning is premised in market-based economic contexts differs from those characterizing non-market-based countries. Such difference is behind the active role traditionally played by both the EU and the US at the multilateral level to boost the definition and regulation of these economic operators. It also makes it essential to analyze their bilateral agreements covering this topic to understand whether solutions claimed at the multilateral level find a way through, and with which features, in the narrower context of bilateral arrangements.

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[15] OECD, *The Size and Sectoral Distribution of State-owned Enterprises* (OECD publishing, 2017) 8.
[16] Ibid.
[17] Reference here is in particular to the Joint Statement on Trilateral Meeting of the Trade Ministers of the United States, Japan and the European Union (25 September 2018).
[18] European Commission, *State-owned Enterprises in the EU: Lessons Learnt and Ways Forward* (2016) 7; OECD (n 15) 75.
[19] European Commission ibid.
[20] OECD (n 15) 75.
[21] This finding can be appreciated comparing the fundings of OECD estimates carried out in 2012 and in 2017.

Australia is then taken into consideration for multiple reasons. Firstly, it expands the geographic coverage of the study. Secondly, although Australian SOEs are not numerous and concentrated in key sectors of the economy,[22] the Australian government, as it will be seen in Chapter 7, has recently put forward a new framework for SOE regulation based on the competitive neutrality principle. Therefore, to analyze bilateral agreements concluded by Australia covering SOEs means, on the one hand, to understand how this new framework influences SOEs' definition, and, on the other hand, how this is declined with trading partners and if any new definitional and regulatory trend can be envisaged.

Hence, it is possible to observe an extensive range of agreements with limited overlaps between them. Moreover, PTAs have been selected for analysis on the basis of a chronological criterion. Only agreements signed after 2001 are reviewed. It is here considered that the year of the accession of China to the WTO marked the beginning of the 'SOE issue' at the international trade level, including its plurilateral or bilateral turn.

Against this background, Section 2 defines the relationship between PTAs and the multilateral legal regime of the WTO to understand the legal value of their analysis in the context of this study. Section 3 provides an overview of the approaches adopted by PTAs regarding SOEs. Sections 4 and 5 deal with the definitional approaches adopted in selected plurilateral and bilateral PTAs. The aim is to map, on the one hand, the categories of entities related to SOEs considered for regulation and, on the other hand, their constitutive criteria. Section 6 concludes by reflecting on the definitional approaches of SOEs that emerged from the analysis as well as their relevant implications.

2. SOEs in PTAs and the multilateral legal system of international trade

Although States continued to enter into bilateral agreements to regulate their economic relationships,[23] this practice significantly decreased in the first decades after the GATT legal framework for trade was established.[24] However, the trend reversed starting from the 1990s. States increasingly concluded preferential arrangements to the point that PTAs proliferation has been recognized as one of the most notable trends in international trade policy in the last decades.[25] Multiple geopolitical reasons have been identified to explain the rise of preferential agreements,[26] like major regional events such as the dissolution of the Soviet Union, the expansion of the European

[22] Official information on the number and distribution of SOEs in Australia can be found on the Australian government website: https://www.finance.gov.au/government/government-business-enterprises.

[23] Dür and Elsig (n 4) 3.

[24] Ibid 3.

[25] WTO, *World Trade Report. The WTO and preferential trade agreements: From co-existence to coherence* (2011), 44. See also: Peter van Den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization* (CUP, 2017) 673; Paolo Picone and Aldo Ligustro, *Diritto dell'Organizzazione Mondiale del Commercio* (CEDAM, 2002) 499 f; Andreas R Ziegler, 'Preferential Trade and Investment Agreements (PTIAs) and the Bilateralism/Multilateralism Divide' in Hofmann, Schill and Tams (n 5) 187; Joost Pauwelyn, 'Adding Sweeteners to Softwood Lumber: the WTO–NAFTA "Spaghetti Bowl" is Cooking' (2006) 9(1) *Journal of International Economic Law* 197–206.

[26] Jo-Ann Crawford and Roberto V Fiorentino, 'The Changing Landscape of Regional Trade Agreements', Discussion Paper No. 8 (WTO, 2005) 6 f. For an analysis of the impact of PTAs proliferation on welfare see: Caroline L Freund and Emanuel Ornelas, 'Regional Trade Agreements', World Bank Policy Research Working Paper No. 5314 (World Bank, 2016); Jean-Jacques Hallaert, 'Proliferation of Preferential Trade Agreements: Quantifying its Welfare Impact and Preference Erosion' (2008) 42(5) Journal of World Trade 813-836.

Community towards Eastern Europe, and the renewed interest of the US in preferential trade agreements as a consequence of events at the multilateral level.[27] Indeed, given the prolonged negotiations held at the Uruguay Round, States undertook the conclusion of PTAs as a backup in case of failure of multilateral negotiations, and they increasingly pursued them.[28] The stagnation of the Uruguay Round negotiations led scholars and practitioners to consider the adoption of preferential arrangements as a desirable option.[29] A second peak in the rise of PTAs in international economic relations then occurred because of the standstill in Doha Round negotiations.[30] This historical overview is important because it shows not only how PTAs' importance increasingly grew in the context of international trade regulation but also how such growth can be intertwined with the lack of development under the multilateral context for issues that Members strongly feel should be addressed.

One may argue that the proliferation of PTAs being concluded today resembles a similar dynamic that existed before the end of the WWII, where international trade relationships were fragmented and conducted mainly at the bilateral level.[31] Indeed, the conclusion of PTAs is currently being actively pursued worldwide. However, this is a widespread phenomenon not confined to a specific geographic area or economic system, with diverging characteristics from those of the pre-GATT era. The geopolitical and economic context at the basis of the contemporary global environment is also different to that in the early '90s. In practical terms, one significant difference can be seen in the type of States entering into regional and/or bilateral preferential arrangements with each other. While former PTAs usually followed a so-called 'hub and spoke' model, in which a major economy ('the hub') concludes an agreement with one or more minor trading partners ('the spokes'),[32] nowadays

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[27] Although initially a strong opponent of preferential arrangements outside of the GATT framework, the US changed its position following secret negotiations with the Canadian government that aimed to reach a preferred arrangement between the two countries. In this perspective, the US's willingness to conclude a preferential agreement with its most significant trading partner determined the adoption of the provision at issue. Cf. Michael Hahn, 'The Framework of Bilateral Trade Agreements', in Marc Burgenberg and Andrew Mitchell (eds), *European Yearbook of International Economic Law. Special Issue: The Australia-European Union Free Trade Agreement* (Springer, 2022), 43 f.; Mitsuo Matsushita, Thomas J Schoenbaum, Petros C Mavroidis and Michael H Hahn, *The World Trade Organization: Law, Practice and Policy* (OUP, 2015) 508; Kerry Chase, 'Multilateralism Compromised: The Mysterious Origins of GATT Article XXIV' (2006) 5(1) World Trade Review 3; This is the so-called domino-effect theorized by Baldwin. See: Richard E Baldwin, 'A Domino Theory of Regionalism', in Richard Baldwin, Pertti Haaparnata and Jaakko Kiander (eds), *Expanding Membership of the European Union* (CUP, 1995), 25-53. See also Richard E Baldwin, 'The Causes of Regionalism' (1997) 20(7) The World Economy 865 f. Beyond its historical significance, this event provides an interesting account of the influence exercised by political reasons on the conclusion of PTAs and their scope as to the topic that should be included or excluded from it. This is a critical element of preferential agreements, whose conclusion is typically determined by several political and economic circumstances. See: Olivier Cattaneo, 'The Political Economy of PTAs', in Lester, Mercurio and Bartels (n 14) 28. It must be taken into account, however, that such considerations have to be balanced with the legal requirements set out in Article XXIV of the GATT, based on which a PTA is compatible with the WTO legal framework.

[28] Crawford and Fiorentino (n 26) 13.

[29] Philip I Levy, 'Do We Need an Undertaker for the Single Undertaking? Considering the Angles of Variable Geometry' in Simon J Evenett and Bernard M Hoekman (eds), *Economic Development & Multilateral Trade Cooperation* (Palgrave MacMillan, 2006) 417 ff.

[30] Bungenberg (n 5) 270-271.

[31] See Chapter 1, section 4.1.

[32] With this form of agreement, the hub country is given access to markets in spoke countries, but the spoke countries are only given access to the hub country's bigger market. As a result, the hub country is in a good position since it can draw in investments that would otherwise be diverted to spoke countries. See: Arthur E Appleton, Michael G Plummer and Patrick FJ Macrory, *The World Trade Organization Legal, Economic and Political Analysis* (Springer, 2006) 283. For a comprehensive account of the 'hub and spoke' model see: Peter Lloyd, 'The Changing Nature of Regional Trading

agreements are increasingly being concluded between economically powerful nations.[33] Notable examples in this regard are the EU-US PTA, the CETA, and the Australia-China PTA.[34] The Australia-China PTA also makes explicit the second element that diverges from the past, namely the geographical proximity between trading partners entering a PTA. The reference here is to Regional Trade Agreements (RTAs). Traditionally, the adjective 'regional' referred to agreements concluded between States of the same geographical region. More recently, it broadened its meaning to include agreements concluded between States from different regions of the globe. Therefore, it is increasingly the case that RTAs are really 'cross-regional' agreements. More recently, these agreements are referred to as 'mega-regional' agreements. This expression seems to have been used first with reference to deep integration RTAs concluded following the 2008 global financial crisis to regulate trade fields not discussed under the WTO framework,[35] such as the CPTPP.[36] Regarding the objective of the analysis, this variety makes the findings of the study, on the hand, not predominantly the outcome of developed-developing economies negotiations; on the other hand, they reflect the approaches adopted not only by like-minded countries - as it was, for instance, the case of Article XVII of the GATT - but rather between economies based on different models and characteristics.

The exponential proliferation of PTAs in the last few decades has raised several questions concerning whether these agreements are compatible with the objective of trade liberalization pursued by the multilateral legal order or, rather, if they undermine it.[37] As is well-known, according to WTO law,

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Arrangements', in Bijit Bora and Cristopher Findlay (eds), *Regional Integration in the Asia Pacific* (OUP, 1996); Richard E Baldwin, 'The Spoke Trap: Hub-and-Spoke Bilateralism in East Asia', in Barry Eichengreen, Charles Wyplosz and Yung Chul Park, *China, Asia and the New World Economy* (OUP, 2008), 51 f; Jung Hur, Joseph D Alba and Donghyun Park, 'Effects of Hub-and-Spoke Free Trade Agreements on Trade: A Panel Data Analysis' (2010) 38(8) World Development, 1105-1113; Ronald J Wonnacott, 'Preferential Liberalization in a Hub-and-Spoke Configuration versus a Free Trade Area', in Miroslav N Jovanović, *International Handbook on the Economics of Integration. Volume I* (Edward Elgar Publishing, 2011), 150-166.

[33] Lester, Mercurio and Bartels (n 14) 4. In this regard, it should be noted that Pauwelyn and Alschner note that the conclusion of PTAs is not evenly distributed between States. Rather, the majority of PTAs are concluded by a few countries, identified as 'hubs.' See Joost Pauwelyn and Wolfgang Alschner, 'Forget about the WTO: The Network of Relations between PTAs and Double PTAs' in Dür and Elsig (n 4) 505.

[34] The content of these Agreements is considered in this chapter in the section dealing with bilateral PTAs. See section 4f.

[35] Chad P Bown, 'Mega-Regional Trade Agreements and the Future of the WTO' (2017) 8(1) Global Policy Volume 108.

[36] Notably, the CPTPP is an agreement whose membership encompasses Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore and Viet Nam. The CPTPP's predecessor, i.e. the TPP, was a turning point in this regard, as it was among first preferential arrangements to be concluded between jurisdictions not strictly belonging to the same geographic region. Although economic considerations concerning PTAs are outside the scope of this work, it seems appropriate to outline that economic literature focused on the notion of 'natural trading partners' - identified as countries in close geographical proximity with each other. This is a key concept for the conclusion of a preferential trade agreement that is able to create trade rather than divert it. Such a conclusion is based on the assumption that trade volume between close States is higher and that geographic proximity is able to create more trade, rather than divert it. For a detailed economic account: Jagdish Bhagwati and Arvind Panagariya 'The Theory of Preferential Trade Agreements: Historical Evolution and Current Trends' (1996) 86(2) The American Economic Review, Papers and Proceedings of the Hundredth and Eighth Annual Meeting of the American Economic Association San Francisco, CA, January 5-7, 82-87; Paul Wonnacott and Mark Lutz, 'Is There A Case For Free Trade Areas?', in Jeffrey Schott (ed.), *Free Trade Areas and US Trade Policy* (Institute for International Economics, 1989) 59–84; Paul Krugman, 'The Move toward Free Trade Zones' (1991) 76 Economic Review 5-25; Lawrence H Summers, 'Regionalism and the World Trading System', in Jagdish Bhagwati, Pravin Krishna and Arvind Panagarya (eds), *Trading Blocs. Alternative Approached to Analyzing Preferential Trade Agreements* (MIT Press, 1999) 505 f. On PTAs as a tool for policy development: Alan Winters, 'Preferential Trade Agreements: Friend or Foe?', in Kyle W Bagwell and Petros C Mavroidis (eds), *Preferential Trade Agreements: A Law and Economic Analysis* (CUP, 2011), 7 f.

[37] James Lake and Pravin Krishna, 'Preferential Trade Agreements: Recent Theoretical and Empirical Developments', Oxford Research Encyclopedia of Economics and Finance (2019); Hufbauer and Cimino-Isaacs (n 1) 679–696.

PTAs, which would otherwise be incompatible with the MFN rules, [38] are permitted as long as some conditions are met. Article XXIV of the GATT and Article V of the GATS more specifically refer to FTAs and custom unions (CUs).[39] The underlying tension between WTO Agreements and PTAs can be comprehended by looking at the ontological distinction between them. While preferential arrangements aim to limit trade liberalization to one or more trading partners, multilateral ones strive to liberalize trade worldwide.[40] The opinions of legal and economic scholars on this issue can be summarized by referring to the building blocks or stumbling blocks debate. According to this theory, PTAs would be stumbling blocks if they were a barrier to multilateral tariff reduction. In contrast, they are building blocks if they encourage - or at least do not impede - multilateralism.[41] This explains the rationale behind the requirements set out in Article XXIV of the GATT.[42]

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[38] Mavroidis (n 4) 300 f; Claudio Dordi, *La discriminazione commerciale nel diritto internazionale* (Giuffré, 2002). Economic literature focuses on the impact of PTAs on welfare. See: Jacob Viner, *The Custom Union Issue* (OUP, 2014), originally published in 1950 by the Carnegie Endowment for International Peace.

[39] FTAs identify a free trade area, in which parties to the agreement enjoy a liberalized trade between themselves, while maintaining their own trade policy. A CU, on the other hand, is defined by a common trade policy that all of its Parties adhere to. FTAs and CUs are the least advanced models of economic integration, according to economic theory. Creating a common market with free movement of production inputs would be a more intense form of integration, followed by an economic union where all parties share a common economic policy, and finally an economic integration where all parties' monetary, fiscal, and social policies are unified. See Petros C Mavroidis, *The Regulation of International Trade. Vol 1* (MIT Press, 2016) 294; See André Sapir, 'European Integration at the Crossroads: A Review Essay on the 50th Anniversary of Bela Balassa's Theory of Economic Integration' (2011) 49(4) Journal of Economic Literature 1200 – 1229. Sapir does not believe that there should be necessarily a consequential progress in economic integration as argued by Balassa. It should be noted that multilateral agreements also allow the conclusion of preferential arrangements pursuant to the Enabling Clause. However, this legal tool is only available for PTAs concluded among developing countries and its outside of the scope of this study.

[40] See Thomas Cottier, Charlotte Sieber-Gasser and Gabriela Wermelinger, 'The Dialectical Relationship of Preferential and Multilateral Trade Agreements' in Dür and Elsig (n 4) 465; Joost Pauwelyn and Wolfgang Alschner, 'Forget About the WTO: The Network of Relations between PTAs and Double PTAs' in Dür and Elsig (n 4) 497.

[41] See: Jagdish N Bhagwati, *Termites in the Trading System: How Preferential Agreements Undermine Free Trade* (OUP, 2008); Nuno Limão, 'Preferential Trade Agreements as Stumbling Blocks for Multilateral Trade Liberalization: Evidence for the U.S.' (2006) 96(3) American Economic Review 896 – 914; Baybars Karacaovali and Nuno Limão, 'The Clash of Liberalizations: Preferential vs. Multilateral Trade Liberalization in the European Union' (2008) 74 Journal of International Economics 299 – 327; Richard E Baldwin and Elena Seghezza, 'Are Trade Blocs Building or Stumbling Blocs?' (2010) 25(2) Journal of Economic Integration 276-297; Irmgard Marboe, 'Bilateral Free Trade and Investment Agreements: 'Stumbling Blocks' or 'Building Blocks' of Multilateralism? In Hofmann, Schill and Tams (eds) (n 5) 229.

[42] As is well-known, WTO Agreements allow the conclusion of PTAs insofar as they aim at closer integration and further trade liberalization among their Parties. To this end, Article XXIV of the GATT requires that 'duties and other restrictive regulations of commerce (…) are eliminated with respect to substantially all the trade.' Accordingly, first, the parties of a PTA must eliminate internal barriers to trade between themselves. This is necessary to prevent '*PTAs à la carte*', namely agreements specifically designed to cause the most significant amount of trade divergence among the favored partners' target items. The expression 'substantially all trade' has been interpreted from a quantitative and a qualitative perspective. In the first case, a specific percentage can be used to determine how much trade will be liberalized between Parties under the Agreement. In the second case, no significant economic sector can be excluded from the liberalization process.[42] However, only other parties to the Agreement may legitimately enjoy preferential treatment, whereas third parties would not. In this context, Article XXIV.7(a) of the GATT imposes on Members that decide to enter into a PTA to notification requirements. PTAs concluded between WTO Members and between a WTO Member with third countries are generally notified to the Committee on Regional Trade Agreements (CRTA). Pursuant to the wording of Article XXIV.7(a) of the GATT, Members should submit the notification before the conclusion of the PTA. Following the submission, the TPRM Division would then be entrusted to draft a presentation of the Agreement to be circulated among other Members. However, the practice shows that often Members comply with the notification requirement only after the Agreement is concluded, or even already entered into force. In this regard, Mavroidis notes that this practice is important to consider, especially in light of the absence of retroactive remedies in the context of the GATT/WTO legal framework. It also reveals that Members do not conceive the control exercised by the CRTA on PTAs as a necessary step to allow the conclusion of lawful preferential arrangements. Although the CRTA retains the power to declare a PTA inconsistent with the WTO, this never actually happened. In any event, the consistency of a PTA with multilateral trade rules can be discussed before

From an institutional perspective, PTAs have been seen as the root of the decline of the MFN treatment.[43] Although the conclusion of preferential agreements does not seem to abate, the threat they might pose to the multilateral trade system is being reconsidered. In this regard, Mavroidis argues that there is evidence suggesting that PTAs constitute less of a threat to international trade than they once did because levies are at a historic low nowadays.[44] Accordingly, rather than trade divergence, the current issue that PTAs pose is that they cover fields not regulated under multilateral trade agreements. This is a feature that, to some extent, incentivizes Members to enter into preferential agreements in the first place. Indeed, operating outside the formal framework of an international organization makes PTAs typically flexible.[45] As a result, they provide States seeking a speedy regulatory response to growing global concerns an attractive alternative. This development is interesting to consider for the purposes of this study. Indeed, SOEs are a phenomenon that has rapidly evolved in the last few decades, whose features are constantly developing bringing about new challenges in international trade. The WTO has proven incapable of addressing change in a timely and effective manner. Hence, Members wishing to establish a regulatory framework for these entities are attracted to plurilateral or bilateral PTAs, where their demands are likely to be addressed in a relatively short period of time. Moreover, PTAs, being concluded between a limited number of States, sometimes belonging to the same geographical area, are well-suited to address regulatory barriers to trade which, following the lowering of tariffs,[46] constitute the most important obstacle to trade liberalization in the current global economy.

From the above, for the purposes of this work, it is maintained that preferential arrangements can promptly regulate issues not discussed at the multilateral level.[47] In practical terms, such flexibility and promptness translate into the adoption of two categories of clauses. On the one hand, PTAs, while generally enacting new obligations, may contain so-called WTO-plus (WTO+) obligations, which aim to regulate sectors already covered by WTO agreements. If the regulatory level is the same, these rules are referred to as WTO-equal (WTO=). On the other hand, WTO-extra provisions (WTOx)

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the Panels and the CRTA. However, they could draw different conclusions on the same issues absent a coordination mechanism. See Mavroidis (n 4) 299; Bernard M Hoekman and Petros C Mavroidis, 'WTO '*à la carte* 'or WTO '*menu du jour*'? Assessing the case for Plurilateral Agreements', RSCAS 2013/58 Robert Schuman Centre for Advanced Studies Global Governance Programme-57 (EUI, 2013); Peter Hilpold, 'Regional Integration According to Article XXIV GATT', Max Planck Yearbook of Unite Nations law 7 (2003) 236.

[43] Report by the Consultative Board to the Director-General Supachai Panitchpakdi, 'The Future of the WTO. Addressing Institutional Challenges in the New Millennium' (WTO, 2004); Frederick Abbott, 'A New Dominant Trade Species Emerges: Is Bilateralism a Threat?' (2007) 10(3) Journal of International Economic Law 572. These concerns were expressed in the 2004 *Sutherland Report* in which an often-quoted passage states that '[N]early five decades after the founding of the GATT, MFN is no longer the rule; it is almost the exception. Certainly, much trade between the major economies is still conducted on an MFN basis. However, what has been termed the "spaghetti bowl" of customs unions, common markets, regional and bilateral free trade areas, preferences and an endless assortment of miscellaneous trade deals has almost reached the point where MFN treatment is exceptional treatment. Certainly the term might now be better defined as LFN, Least-Favored National treatment' See Report by the Consultative Board to the Director-General Supachai Panitchpakdi, 'The Future of the WTO. Addressing Institutional Challenges in the New Millennium' (WTO, 2004) para 60.

[44] Mavroidis (n 4) 323-324. See also: Petros C Mavroidis, 'Always Look at the Bright Side of Non-Delivery: WTO and Preferential Trade Agreements, Yesterday and Today' (2011) 10(3) World Trade Review 375.

[45] Ibid.

[46] Hilpold (n 42) 229.

[47] Mavroidis and Sapir show that the proliferation of PTAs concluded between WTO Members is also one of the reasons behind the steady decrease of litigation under the WTO. See Petros C Mavroidis and André Sapir, 'Dial PTAs for Peace The Influence of Preferential Trade Agreements on Litigation between Trading Partners' (2015) 49(3) Journal of World Trade (2015) 351 – 372.

establish obligations covering areas outside the purview of WTO agreements. This category of provisions incentivizes States to sign preferential agreements the most.[48]

It is possible to argue that the lack of a regulatory framework on any topic could be interpreted as a voluntary choice by States not to regulate it under the multilateral framework rather than an impossibility of finding a common ground. However, the predominantly regulatory nature of modern PTAs should be highlighted in a context where trade restrictions typically have more to do with regulations than with high tariffs.[49] This trend is confirmed in PTAs increasingly dealing with SOEs. However, provided that trade barriers in the form of regulations are notoriously more difficult to counteract than tariffs, PTAs dealing with SOEs necessarily need to introduce a shared definition of these enterprises in order to establish an effective regulation. Indeed, a definition constitutes a common denominator between the Parties in order to determine, in accordance with the principle of legal certainty, which enterprises are covered, which aspects of them are regulated, and the scope of the agreement. It is with this frame in mind that the analysis of the inclusion and definition of SOEs in PTAs will now be conducted.

3. SOEs in plurilateral PTAs: definitional approaches

The analysis of the definition of SOEs in plurilateral preferential arrangements discusses the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), the United States-Mexico-Canada Agreement (USMCA), and the Regional Comprehensive Economic Partnership (RCEP). For the purposes of this study, these agreements are crucial because they offer critical hints on how international actors in a narrow context, not only including like-minded countries, handled State ownership in economic actors. Moreover, selected PTAs enjoy a broader geographical scope. Consequently, the agreement encapsulated in preferential arrangements does not reflect the understanding of like-minded countries. Rather, they are the opportunity to look at the perspective of Western, south, and Asian jurisdictions working together on a highly debated topic. In this regard, looking at China, the EU, the US, and Australia, whose bilateral agreements are considered *infra*, it should be noted that, while Australia is part of both the CPTPP and the RCEP, the US is a party of the USMCA and China is part of the RCEP. Only the EU is not a party to at least one of the examined plurilateral agreements.

The section develops as follows: firstly, the analysis focuses on Chapter 17 of the CPTPP, particularly the definition of SOEs and the substantive duties placed on Parties concerning these entities. Then, Chapter 22 of the USMCA and the definitional approach are addressed. Finally, the study focuses on the regulatory approach of the RCEP before ending with brief preliminary remarks.

3.1. The general approach of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) to SOEs

[48] This is the suggestion stemming from the study conducted by Henrik Horn, Petros C Mavroidis and André Sapir on 14 EC and 14 US PTAs concluded and notified to the WTO by October 2008. Horn, Mavroidis and Sapir (n 13) 1565.

[49] Hilpold (n 42) 229.

The CPTPP is a mega-regional FTA that entered into force in 2018. Members of the agreement are States belonging to different geographical areas and which widely differ in terms of legal systems, economic models, and degree of development. They also differ regarding the use, structure, and diffusion of SOEs, regulated explicitly under Chapter 17. The economic importance of the CPTPP is significantly reduced compared to that of its predecessor, the Trans-Pacific Partnership agreement (TPP). This was a plurilateral arrangement concluded between 12 States and signed on 4 February 2016. However, following the withdrawal of the US in January 2017, which was a huge setback for the Agreement in terms of economic coverage as it was estimated that the US GDP counted for 85% of the total,[50] the Agreement never entered into force. Indeed, the US market was a key incentive for other partners to go forward with the Agreement. At the same time, the US enjoyed important bargaining power. Subsequently, in an effort to revive the Agreement reached with the TPP, signatories agreed on a revised version of it, which resulted in the CPTPP. Currently, the signatories of the CPTPP score a total GDP of 11.700.515 US dollars, i.e., approximately 12% of the world GDP.[51]

Taking into account SOE regulation, there were no changes in the CPTPP framework. Accordingly, the regulatory framework applicable to SOEs contained in the CPTPP dates back to 2016, when the TPP was concluded. Hence, despite the reduced economic impact of the Agreement, it is still worth examining the boundaries of the concept of SOEs. Moreover, Chapter 17 of the TPP/CPTPP was established with Chinese SOEs in mind.[52] The aim was not only to somehow limit the threat of Chinese SOEs but also to ensure that a detailed regulatory framework on SOEs would bind China should it ever accede to the Agreement. These features make the CPTPP particularly suitable for starting a debate on SOE regulation at the multilateral level, as it was concluded by economies based on different models.[53] This is important to assess the influence of the TPP/CPTPP regulatory framework over subsequent bilateral arrangements.

Under the CPTPP, SOEs are defined in Article 17(1). According to this provision, an SOE is ‘an enterprise that is principally engaged in commercial activities in which a Party: (a) directly owns more than fifty percent of the share capital; (b) controls, through ownership interests, the exercise of more than fifty percent of the voting rights; or (c) holds power to appoint a majority of members of the board of directors or any other equivalent management body.’

This definitional approach is based on four main criteria. The first criterion is the activity criterion, which states that the SOE must ‘principally’ engage in commercial operations. Paragraph 1 of the same provision defines ‘commercial activities’ as actions performed to maximize profit and resulting from the creation of a good or the provision of a service that will be sold to a consumer in the relevant

[50] Joshua P Meltzer, ‘The Significance of the Transpacific-Partnership for the United States’ (Brookings, 16 May 2012). < https://www.brookings.edu/testimonies/the-significance-of-the-trans-pacific-partnership-for-the-united-states/>.

[51] The reduction of the Agreement’s economic leverage is connected to the withdrawal of the US from the TPP operated by ex-President Donald Trump through the presidential memorandum for the US Trade Representative Subsequently, the US did not join the CPTPP. As a matter of fact, the US GDP amounts to 23.315.081 US dollar. Data from the World Bank data catalogue: https://datacatalog.worldbank.org/search/dataset/0038130 (lastly accessed 27 April 2023).

[52] Mark Wu, ‘The “China, Inc.” Challenge to Global Trade Governance’, (2016) 57 Harvard International Law Journal 316.

[53] For an economic perspective on PTAs rules dealing with Chinese SOEs see: Kevin Lefebvre, Nadia Rocha and Michele Ruta, Containing Chinese State-Owned Enterprises? The Role of Deep Trade Agreements, World Bank (March 2021). The authors note how tighter SOE regulations in third-country RTAs increase China’s exports to such markets in comparison with the exports to the rest of the world.

market. In this context, the enterprise itself determines quantities and prices. Cost recovery or not-for-profit activities are excluded.[54] However, no specification is provided as to what 'principally' means.[55] Probably, the term can be interpreted as referring to the fact that the primary activity conducted by the SOE, which occupies most of its resources, must be profit-seeking. As a second criterion, the Agreement adopts State ownership.[56] It expressly covers majority ownership only. Therefore, the State acting as a minority shareholder does not fall under the scope of the CPTPP. Thirdly, the control criterion is adopted. Control manifests through the exercise of voting rights deriving from State ownership. The fourth criterion is the power to appoint members at the managerial level of the entity. The aim is to capture those situations in which the State can exercise its influence over the composition, and therefore the operations, of the executive body of an SOE.

The scope of the control criterion in this context is debated among academics.[57] According to Matsushita and Lim, the notion of control linked to the possession of majority voting rights includes under its scope the *de facto* control exercised by the State as a minority shareholder. Given the complex ownership and control pattern of SOEs, the assessment of *de facto* control under Article 17 CPTPP would require an investigation into interlocking and indirect ownership structures, any forms of indirect control, including shareholder alliances, and connections between the government and other parastatal actors.[58] Moreover, according to the authors, the addition of the term 'control' refers to a situation in which the State not only possesses voting rights but also exercises them.[59] In a similar vein, Fleury and Marcoux argue that the definition does include the reference to an effective influence exercised by the State,[60] while Willemyns reaches a different conclusion.

In my opinion, the definition adopted by Article 17 of CPTPP can potentially encompass minority State ownership and the exercise of *de facto* control by the State. Looking at Article 17.1(b), the provision does not refer to a specific level of ownership. This means that it does not rule out the possibility that the State may act as a minority shareholder or through unofficial means and links with other quasi-governmental entities. At the same time, lit. (b), by requiring the State to control the exercise of the majority of voting rights, describes a situation in which the State is in the position to influence the decision-making process of the enterprise concerned, which is consistent with regulating SOEs that may adopt behavior that hinders international trade. At the same time, the provision leaves out of its scope the State able to exercise effective control amounting to less than 50% of the voting rights. This could be an issue in the case of SOEs with heavily dispersed ownership patterns, in which both government and private investors retain ownership over a minority of shares. However, lit. (b)

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[54] Article 17.1 CPTPP, Footnote 1.

[55] See Jaemin Lee, 'Trade Agreements' New Frontier - Regulation of State-Owned Enterprises and Outstanding Systemic Challenges' (2019) 14 Asian Journal of WTO and International Health Law and Policy 47 f.

[56] Before the TPP, the relevant ownership threshold was left undefined. See Kim (n 1) 236. See also: Jan Yves Rem and Iain Sandford, 'Rules for State-Owned Enterprises in Chapter 17 of the Trans-Pacific Partnership Agreement: Balancing Market-Oriented Discipline and Policy Flexibility for States', in Huerta-Goldman and Gantz (eds) (n 1) 510-541.

[57] In this regard, one may look at the contribution of Ines Wyllemins, who argues that *de facto* SOEs are not covered under the CPTPP. On the contrary, Fleury and others and Mitsuo Matushita and others believe that *de facto* SOEs are included. See Ines Wyllemins, 'Disciplines on State-Owned Enterprises in International Economic Law: Are We Moving in the Right Direction?' (2016) 19 Journal of International Economic Law 666; Julien Sylvestre Fleury and Jean-Michel Marcoux 'The US Shaping of State-Owned Enterprise (2016) 19 Journal of International Economic Law' 453.
Disciplines in the Trans-Pacific Partnership' 453; Mitsuo Matsushita, CL Lim, 'Taming Leviathan as Merchant: Lingering Questions about the Practical Application of Trans-Pacific Partnership's State-Owned Enterprises Rules' (2020) 19 World Trade Review 413.

[58] Matsushita and Lim ibid 413.

[59] Ibid.

[60] Fleury and Marcoux (n 57) 453.

is probably an example that using precise terminology is essential to establish a complete and effective legal structure that is not as dependent on interpretation. Also, decisive State influence may be regulated under Article 17.1(c) of the CPTPP. Indeed, the wording of the provision does not provide a specification of how the power of appointment should be expressed. Hence, determining whether the power of appointment exists, and to what extent, arguably requires investigating interlocking directorships and multilayer links with other SOEs, governmental bodies, or other means. This criterion might cover SOEs in which the State exercises decisive *de facto* influence. However, despite the similarities with lit.(b), the coverage of lit. (c) is narrower as it covers only the specific circumstance envisaged, i.e., power of appointment. Hence, it may not encompass all other situations in which State influence is present.

Against this background, the CPTPP reveals a more detailed definitional approach than Article XVII of the GATT.[61] While, on the one hand, the CPTPP builds its definition on clear-cut criteria, on the other hand, the analysis of Article XVII of the GATT is based on constitutive elements largely undefined. The definition approach followed by the CPTPP is broader in coverage as, unlike WTO Agreements, it also covers SOEs engaging in trade in services and poses more significant transparency obligations. It is interesting to note that in a narrower but more diversified context than the multilateral ones, the Parties achieved a higher level of specificity than under the WTO. A practical reason behind this result may be the increased bargaining power that the US had in the TPP negotiations. In other words, the US would have been able to impose its definition of SOEs based on State ownership under the TPP as opposed to the difficulties of exercising such influence in the multilateral context of the WTO.[62]

The CPTPP then introduces some elements that limit the scope of the notion of covered SOEs. Firstly, there is the annual revenue requirement. The agreement only covers SOEs that gained 200 million Special Drawing Rights (SDR) in any one of the three previous consecutive fiscal years.[63] Put differently, the Agreement does not encompass small SOEs because of their relatively low impact and risk of distorting international trade. Secondly, carve-outs regarding the kinds of entities that fall within the SOE definition are introduced. This is not surprising as opening up to exclusion was probably the price to pay for bringing very different economies on board together. More specifically, subjects excluded from the scope of application of Chapter 17 include central banks and monetary authority when performing regulatory or supervisory activities or conducting monetary and related credit policy and exchange rate policy;[64] financial regulatory bodies, including non-governmental ones, exercising regulatory or supervisory authority over financial services suppliers;[65] SOEs and SEs when rescuing a failing or failed financial institution or any other failing or failed enterprise principally engaged in the supply of financial services;[66] SWFs exception regarding the provision of

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[61] Matsushita and Lim (n 57) 402. See also: Mikyung Yun, 'An Analysis of the New Trade Regime for State-Owned Enterprises under the Trans-Pacific Partnership Agreement' (2016) 20 Journal of East Asian Economic Integration 3-35.
[62] Matsushita and Lim (n 57).
[63] CPTPP Article 17.13(5). SDRs are international reserved assets instituted by the IMF. They do not correspond to a currency but rather entitle IFM Members to claim a freely usable currency of other Members, thus providing them with liquidity. Using market exchange rates, a basket of significant values of currencies is totaled up to come up with the SDR's currency value (the U.S. dollar, Euro, Japanese Yen, Pound Sterling, and the Chinese renminbi).
[64] CPTPP, Article 17.2, para 2.
[65] Ibid para 3.
[66] Ibid para 4.

non-commercial assistance (NCA);[67] IPFs and owned enterprises by them, with the exception of the application of NCA provisions.[68]
Moreover, Annex 17-D includes for each Party a list of provisions of Chapter 17 that do not apply to SOEs and designated monopolies at the sub-central level. This drastically narrows the scope of the Agreement. This is also because many countries employ a large number of sub-central SOEs that have the same potential to seriously affect international trade.[69] Moreover, most sub-central SOEs escape the application of the rules on non-discrimination, commercial considerations, NCA, and transparency. Given that these rules correspond to the cornerstone principles behind the protection of liberal international trade, these carve-outs risk jeopardizing the effectiveness of the regulatory framework of SOEs under the CPTPP. In the same vein, the examined discipline does not include SOEs that provide goods or services to carry out governmental functions for a Party and SOE purchases and sales of commodities or services.[70] Also, NCA provisions and the transparency principle do not apply to services supplied in the exercise of governmental authority.[71] Then, Article 17.9 of the CPTPP confers on Parties the right to adopt a list of nonconforming activities of state-owned enterprises or designated monopolies that would not be subjected to the non-discrimination principle and NCA obligations.[72]
If an entity falls under the notion of SOE, the CPTPP subject its members to several substantive obligations. These rules can be divided into three categories: the commercial consideration requirement, the obligations on the assistance provided to SOEs, and transparency requirements. Firstly, Parties must ensure that SOEs act consistently with commercial considerations. These are outlined as the following: price, quality, availability, marketability, transportation, and other terms and conditions of purchase or sale, or other factors that a privately owned enterprise in the relevant business or industry would typically take into account when making commercial decisions. Purchases and sales of goods and services performed by SOEs should be motivated by commercial considerations.[73] In other words, SOEs should behave similarly to POEs. This requirement is crucial for preserving the competitive neutrality principle and the level playing field between public and private commercial enterprises. Moreover, SOEs should act in accordance with the non-discrimination principle.[74] The aim is to safeguard foreign companies doing business in countries where SOEs are active and vice versa. Both the national treatment (NT) and the most-favor nation (MFN) principles are mentioned in the text.[75]
Secondly, obligations on non-commercial assistance (NCA) are worth analyzing.[76] This notion identifies the assistance provided to an SOE by government ownership or control.[77] 'Assistance' is defined quite broadly, including direct or potential direct transfers of funds and liabilities. These

[67] Ibid para 5(a).
[68] Ibid para 6.
[69] Willemyns (n 49) 673.
[70] CPTPP, Article 17.2 paras 10-11.
[71] Ibid para 10.
[72] Ibid Article 17.9(1)-(2). Lists are contained in Parties' schedules to Annex IV.
[73] CPTPP Article 17.1.
[74] CPTPP Article 17.4(1).
[75] Ibid.
[76] Yoshinori Abe and Takemasa Sekine, 'Non-Commercial Assistance Rules in the TPP: A Comparative Analysis with the SCM Agreement', in Huerta-Goldman and Gantz (n 1) 542-558.
[77] CPTPP Article 17.1.

include grants or debt forgiveness; loans, loan guarantees, or other types of financing on terms more favorable than those commercially available to that enterprise; equity capital inconsistent with the usual investment practice, including for the provision of risk capital, of private investors; goods or services other than general infrastructure on terms more favorable than those commercially available to that enterprise. Three different types of assistance given to SOEs are covered: (i) support that is only given to SOEs; (ii) assistance that is predominantly used by SOEs; and (iii) assistance that favors SOEs by using discretion in how it is given. The agreement clarifies that transactions between SOEs consistent with customary business operations of privately owned firms do not fall under the purview of this notion.[78] Under Article 17.6 of the CPTPP, Parties must ensure that their SEs and SOEs do not provide, either directly or indirectly, assistance to SOEs that may cause adverse effects on the interests of the other Parties to the agreement. Both SOEs engaging in the production and sale of goods, or the supply of services are covered. The provision aims to avoid the assistance that would cause 'adverse effects' to the interests of other Parties to the agreement. Such adverse effects may involve the production and sale of a good by SOE; the supply of a service by SOE from the territory of the Party into the territory of another Party; the supply of a service in the territory of another Party through an enterprise that is a covered investment in the territory of that other Party or any other Party.[79] According to Article 17.7 of the CPTPP, adverse effects include the displacement or impediments from market imports of a like good of another Party or sales of a like good produced by an enterprise that is a covered investment in the territory of the Party; the displacement or impediment of sales of a good from the market of another Party or a non-Party; a significant price undercutting by a good produced by a Party's state-owned enterprise that has received the non-commercial assistance as compared with the price in the same market of imports of a like good of another Party or a non-Party. The same is envisaged for services.[80] Against this background, injury refers to 'material injury to a domestic industry, the threat of material injury to a domestic industry or material retardation of the establishment of such an industry.'[81]

Thirdly, the Agreement establishes important transparency-related commitments. In this regard, Parties are required to publish a list of their SOEs,[82] and notify the establishment or expansion of the scope of a designated monopoly.[83] Then, emphasis is put on the exchange of information between Parties. Specifically, Parties are required to disclose important information about their SOEs if requested by others. Such information may address the structure and the relationship between the entity concerned and the government. More specifically, the following categories of information may

[78] Ibid footnote 4.

[79] CPTPP Article 17.4(2). On this point see: Mukesh Bhatnagar, 'State-Owned Enterprises', in Abhijit Das and Shailja Singh, 'Trans-Pacific Partnership Agreement: A Framework for Future Trade Rules?' (SAGE Publications Pvt Ltd, 2018).

[80] CPTPP Article 17.7(1), para (d)-(e).

[81] CPTPP Article 17.8(1). It has been argued that NCA provisions contained in the CPTPP are narrower than the approach adopted in the Agreement on Subsidies and Countervailing Measures (ASCM) under the WTO, because the CPTPP does not contain an express reference to 'entrustment or direction' and 'taxation forgone' subsidization. This carve-out would affect the ability of the agreement to regulate SOEs. See Jaemin Lee, 'The "Indirect Support" Loophole in the New SOE Norms: An Intentional Choice or Inadvertent Mistake?' (2021) 20(1) Chinese Journal of International Law 63–99.

[82] CPTPP Article 17.10(1). Looking at the TPP negotiations, it has been highlighted that the US administration insisted on imposing transparency requirements on SOEs that were equal to those that applied to POEs. By strengthening transparency obligations, the US would have better controlled activities and policies applicable to trading partners' SOEs. See Raj Bhala, 'Trans-Pacific Partnership or Trampling Poor Partners? A Tentative Critical Review', (2014) 11 Manchester Journal of International Economic Law 39; Fleury and Marcoux (n 57) 462.

[83] CPTPP Article 17.10(2).

be provided: the percentage of shares that the Party, its state-owned enterprises, or designated monopolies cumulatively own and the percentage of votes that they cumulatively hold in the entity; a description of any special shares or special voting or other rights that the Party, its state-owned enterprises or designated monopolies hold; the government titles of any government official serving as an officer or member of the entity's board of directors; the entity's annual revenue and total assets over the most recent three year period for which information is available; any exemptions and immunities from which the entity benefits. Then, the Agreement imposes on Parties the obligation to provide a series of information that would provide the basis for a claim under the NCA obligation. The imposition of such detailed transparency requirements may lead one to believe that this is an indirect way for the CPTPP to bring within its scope cases in which the state acts as a minority owner.[84]

3.1.1. Other entities covered under Chapter 17 CPTPP

In addition to SOEs, the CPTPP also considers a variety of other related entities. This connection is confirmed by their regulation being allocated under the same umbrella of SOE regulation. Firstly, Chapter 17 CPTPP introduces a reference to State enterprises (SEs), although it does not introduce their definition.[85] Then, the agreement considers monopolies, specifically designated or government monopolies. A monopoly is an entity that a Party designates as the sole provider or purchaser of a good or service. Hence, a monopoly requires an active role of the State in the economy to be formed. This also emerges from the definition of a designated monopoly, which is a public or private monopoly designated by a Party.[86] To designate, in turn, means to establish, designate or authorize a monopoly or to expand the scope of a monopoly to cover an additional good or service. The emphasis is on the designation more than on the ownership pattern of the entity considered. Moreover, a government monopoly is a monopoly owned or controlled through ownership interests by a Party or another government monopoly.[87] Ownership and delegation are the defining criteria. However, the wording does not provide additional details. Therefore, it is unclear what amount of State ownership a monopoly requires to qualify as a governmental one.

Thirdly, Independent Pension Funds (IPFs) and State Wealth Funds (SWFs) are considered. As for IPFs, the definition builds on two components. First of all, they are enterprises that a Party owns or controls through ownership interests. The second focal point of attention is their activities. IPFs must only engage in specific operations, namely the administration or provision of pensions, retirement, social security, disability, death, employee benefits, or any combination of these. Then, there is an aim attached to these activities that should be exercised for the sole benefit of natural persons who contribute to such a plan and their beneficiaries. IPFs are also required to invest the funds of these plans. However, they should not be subject to investment instructions from the government of the Party.[88] In other words, the constitutive criteria of IPFs are (i) State ownership, (ii) State control, (iii) the activity performed, and (iv) the aim pursued. Although the levels of State ownership or control

[84] Matsushita and Lim (n 57).
[85] As it will be noted *infra*, SEs are often defined at the bilateral level.
[86] CPTPP Article 17.1.
[87] Ibid.
[88] Ibid.

deemed to be relevant are not specified, it can be argued that control covers *de jure* and *de facto* control similar to the definition of SOEs. This should be limited, however, to decisions different from investment-related ones. Arguably, the activity and aim criteria are the distinguishing line between SOEs and IPFs.

In this context, SWFs are firstly defined as enterprises owned by a Party or controlled through ownership interests. Then, the definition focuses on their activities. Indeed, to qualify as an SWF, an entity must serve solely as a special purpose investment fund or arrangement for asset management, investment, and related activities, using the financial assets of a Party. It should also be a Member of the International Forum of Sovereign Wealth Funds or endorses the Generally Accepted Principles and Practices ('Santiago Principles') issued by the International Working Group of Sovereign Wealth Funds, in October 2008,[89] or such other principles and practices as may be agreed to by the Parties. Hence, the constitutive criteria of SWFs are (i) State ownership, (ii) State control, (iii) the performed activities, and the (iv) the purpose pursued. Similar to what has been observed for IPFs, the last two criteria determine the distinction between SOEs and SWFs, but also between the SWFs and IPFs, as the content of the constitutive criteria differs.

3.2. The general approach of the United States–Mexico–Canada Agreement (USMCA) to SOEs

On 30 November 2018, the US, Mexico, and Canada signed the USMCA which entered into force on 1 July 2020, replacing the North American Free Trade Agreement (NAFTA) among the same Parties.[90] When it first entered into force on 1 January 1994, NAFTA established a trilateral commercial exchange between the Parties. At the same time, it represented the largest free trade area in the world. By renegotiating its terms through the USMCA, the Parties were able to modernize NAFTA provisions and address US concerns about the Agreement's effects on the US economy.[91] The Agreement aimed at, and reached the objective of, leading to a close interconnection between key economic sectors of the three countries.

[89] The Santiago Principles, developed by the International Working Group of SWFs and approved by the IMF's International Monetary Financial Committee in 2008, encourage transparency and a deeper understanding of SWF operations. In this context, they also promote transparency, good governance, accountability, and prudent investment practices. They encompass a variety of objectives, including the promotion of the stability of the global financial system and the free flow of capital and investment; the compliance with all legal, regulatory, and disclosure requirements in the nations where SWFs invest; ensuring that SWFs carry out investments based on economic, financial, and risk-related factors; ensuring that SWFs have an effective governance structure in place that offers adequate operational control. See Régis Bismuth, 'The "Santiago Principles"'for Sovereign Wealth Funds: The Shortcomings and the Futility of Self-Regulation', (2017) 28 European Business Law Review 69-88; Daniele Gallo, 'The Rise of Sovereign Wealth Funds (SWFs) and the Protection of Public Interest(s): The Need for a Greater External and Internal Action of the European Union' (2016) 27 European Business Law Review 459 – 485; Julien Chaisse, Debashish Chakraborty and Jaydeep Mukherjee, 'Emerging Sovereign Wealth Funds in the Making: Assessing the Economic Feasibility and Regulatory Strategies' (2011) 45(4) Journal of World Trade 837 – 875; Anthony Wong, 'Sovereign Wealth Funds and the Problem of Asymmetric Information: The Santiago Principles and International Regulations' (2009) 34(3) Brooklyn Journal of International Law 1081-1109.

[90] On the impact of NAFTA on relevant economies, see: Lorenzo Caliendo, Fernando Parro, 'Estimates of the Trade and Welfare Effects of NAFTA 82', The Review of Economic Studies (2015), 1-44.

[91] Gustavo A Flores-Macías and Mariano Sánchez-Talanquer, *The Political Economy of NAFTA/USMCA* (OUP, 2019), 1; Xin Zhao, Stephen Devadoss and Jeff Luckstead, 'Impacts of U.S., Mexican, and Canadian Trade Agreement on Commodity and Labor Markets' (2020) 52 Journal of Agricultural and Applied Economics 48 f.

For the purposes of this study, it is noteworthy that the Parties agreed on common rules to regulate, inter alia, SOEs and related entities. The relevant regulatory framework is encapsulated in Chapter 22 on 'State-owned enterprises and designated monopolies.' In this context, SOEs are defined as enterprises principally engaged in commercial activities in which a Party (a) directly or indirectly owns more than 50% of the share capital; (b) controls, through direct or indirect ownership interests, the exercise of more than 50% of the voting rights; (c) holds power to control the enterprise through any other ownership interest, including indirect or minority ownership; (d) holds the power to appoint a majority of members of the board of directors or any other equivalent management body.[92] The USMCA definitional approach is arguably broader than the one followed under the CPTPP. While both refer to majority State ownership, only the USMCA takes expressly into account indirect State ownership. This element requires an investigation of ownership chains and interlocking directorships that might connect the State to its SOEs. Indeed, footnote 7 in Chapter 22 clarifies that the expression refers to circumstances in which one or more of a Party's state enterprises hold an ownership interest in another enterprise on its behalf. The State enterprise must either be the sole owner of or jointly control through ownership interests in another enterprise at each level of the ownership chain.[93] In this regard, it is of interest to note how this approach seems to reflect the position adopted by the US and examined by the Panel in United States - Countervailing Measures on Certain Pipe and Tube Products.[94]

The second definitional criterion encompasses control. Similar to the CPTPP, control is linked with the notion of ownership. Considering that the ownership is not further specified, the notion may encompass both *de jure* and *de facto* control through which the State can affect the management and operation of the SOE. The USMCA, however, goes beyond the CPTPP by considering the control of the SOE involved as the third constitutive criterion through any other means, including indirect or minority ownership. One of the most essential elements of this approach is its explicit reference to minority ownership. This is deemed a constitutive element of SOEs to the extent that it allows the State to impact the enterprise. Lastly, the definitional approach relies on the power of appointment criterion, hence capturing cases in which the State has the power to influence the composition of the executive board of the enterprise.

In light of the above, the USCMA can include a wider variety of SOEs under its purview than the CPTPP because its approach goes beyond quantitative proxies. Indeed, it also takes into account other circumstances that require more demanding investigation, such as minority ownership or chains of control, but that are without a doubt among the features that characterize modern SOEs and that allow States to exercise their influence unnoticed. Adopting these definitional standards also gives the USMCA more flexibility, which is likely to discourage States from breaking the terms of the agreement or make it more challenging for them to use ownership to hinder trade liberalization.

Given the substantive obligations that derive from the qualification of an entity as SOE, the CPTPP does have significant influence on the USCMA. The Agreement includes IPFs, government monopolies, and designated monopolies, all of which have definitions and regulations comparable to those introduced under the CPTPP. Hence, the same considerations apply.

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[92] USMCA, Article 22.1.

[93] Ibid footnote 7.

[94] See Chapter 3, section 2.3.5; WTO, *United States - Countervailing Measures on Certain Pipe and Tube Products* (18 December 2018) WT/DS523/R.

3.3. The general approach of the Regional Comprehensive Economic Partnership (RCEP) to SOEs

The Regional Comprehensive Economic Partnership (RCEP) is a free trade agreement signed on 15 November 2020 by 15 countries from the Asia-Pacific region, which makes it the new largest free trade area globally. Members include Australia, Brunei Darussalam, Cambodia, China, Indonesia, Japan, Korea (South), Lao People's Democratic Republic, Malaysia, Myanmar, New Zealand, Philippines, Singapore, Thailand, and Viet Nam. This membership is interesting to consider for three main reasons. Firstly, it encompasses one-third of the global population, exports, and imports.[95] Secondly, it reveals intriguing connections to other significant international associations and treaties. For instance, ten signatories of the RCEP were already Parties to the Association of Southeast Asian Nations (ASEAN) at the time of its conclusion,[96] and seven of them also signed the CPTPP. Thirdly, it is the first PTAs to be concluded among the first three most important Asian economies, namely China, Japan, and the Republic of Korea. It is also the first plurilateral PTA to which China is a party. The RCEP entered into force in 2022 for Australia, Brunei Darussalam, Cambodia, China, Japan, Korea, Lao People's Democratic Republic, Malaysia, Myanmar, New Zealand, Singapore, Thailand, and Viet Nam. In 2023, it entered into force for Indonesia and the Philippines.

The Agreement addresses several aspects of international trade, including trade in goods, trade in services, competition policy, IPRs, and government procurement, to create a comprehensive economic partnership in Asia that includes nations at various stages of economic development.

The RCEP does not explicitly regulate SOEs. Considering the interconnections in membership with the CPTPP and the role of SOEs in the area, this omission comes as a surprise. However, it likely serves as a reminder of how sensitive this subject is still perceived, even in settings where the majority of the States share the same conception of SOEs. The sensitivity is particularly acute with respect to the role that SOEs play in their national economies.[97]

Despite not explicitly mentioning SOEs, the RCEP arguably adopts a sufficiently broad approach to encompass and transversely regulate them. Article 1.2 of the RCEP contains the notion of 'juridical person', which includes 'any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust,

[95] Carmen Estrades, and others, 'Estimating the Economic and Distributional Impacts of the Regional Comprehensive Economic Partnership', Policy Research Working Paper 9939 (2022), 3. Signatories include Australia, Brunei, Cambodia, China, Indonesia, Japan, the Lao People's Democratic Republic, Malaysia, Myanmar, New Zealand, the Philippines, Singapore, the Republic of Korea, Thailand, and Viet Nam.

[96] Established on 8 August 1967 in Bangkok with the signing of the ASEAN Declaration, the ASEAN is an intergovernmental international organization encompassing ten countries from Southeast Asia. The aim is to encourage cooperation between Parties to boost economic, social and cultural growth and to promote peace and stability in the region. Members of the ASEAN currently include: Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Viet Nam.

[97] In this regard, one may also argue that the Chinese government influenced this decision. This is also in the light of the fact that, as explained in the following discussion, Chinese bilateral FTAs do not cover this topic. However, in the aftermath of the signing of the RCEP, the Chinese government announced that it was considering joining the CPTPP. For an analysis of the impact of the two agreements on the Chinese economy: Haiwei Jiang and Miaojie Yu, 'Understanding RCEP and CPTPP: From the Perspective China's Dual Circulation Economic Strategy' (2021) 14(2) China Economic Journal 144-161. See also: David A Gantz, 'The TPP and RCEP: Mega-Trade Agreements for the Pacific Rim' (2016) 33 Arizona Journal of International & Comparative Law 57-69.

partnership, joint venture, sole proprietorship, association, or similar organization.'[98] Thus, enterprises owned by the State fall under the scope of the Agreement. The Agreement also regulates economic operators akin to SOEs, whose regulatory framework is, therefore, potentially applicable to the latter. In this regard, Article 8.17 of the RCEP regulates monopoly suppliers of a service. They are any public or private person who, in the relevant market of the territory of a Party, is authorized, or established formally or in effect by that Party as the sole supplier of that service. The notion is defined in broad terms as to the ownership structure. For this reason, the notion is sufficiently broad to cover SOEs that are at least entirely owned by the government. This is mainly because a positive action of the State is required to establish the monopoly supplier. Closely connected to this notion is that of 'exclusive service supplier,' defined in a way that closely resembles the definition in the GATS. Indeed, under the RCEP, an exclusive service supplier exists when a Party, formally or in effect, establishes or authorizes a small number of suppliers and substantially prevents competition among them in its territory.[99] Lastly, the concept of 'public entity' in Annex 8A on Financial Services is worth consideration. The definition follows a two-track approach. On the one hand, a public entity is a government, a central bank, or a monetary authority of a Party, or an entity owned or controlled by a Party, that is principally engaged in carrying out governmental functions or activities for governmental purposes, not including an entity principally engaged in supplying financial services on commercial terms. Hence, constitutive elements of a public entity are: (i) belonging the State apparatus; or (ii) State ownership or control (iii) paired up with the performance of specific activities. On the other hand, a public entity is a private entity performing functions normally performed by a central bank or monetary authority and in the exercise of those functions. In this context, the entity is privately owned but, at the same time, carries out activities usually performed by the State or other public subjects. As the relevant degree of ownership is not specified, it can be argued that SOEs may fall under the scope of the first part of the definition, i.e., the one encompassing entities owned by a Party carrying out financial services on commercial terms.

3.4. Final remarks on definitional approaches toward SOEs in plurilateral PTAs: majority and minority ownership, *de jure* and *de facto* control and the power of appointment

Three different approaches can be distinguished in the definition of SOEs in plurilateral preferential trade agreements.

The first identifiable definitional approach is based on clear-cut criteria (e.g., majority ownership) and quantifiable proxies (e.g., the 50% threshold identified with reference to voting powers). The CPTPP is the leading example of this model. In this context, the distinguishing line between what constitutes an SOE and what does not revolve around, on the one hand, the majority ownership criterion and, on the other hand, the power of the State to control the majority of voting rights. Compared to multilateral rules, this definitional approach presents advantages and advances. The adoption of quantitative criteria makes it easier to identify which entities fall within the notion of SOEs and which do not. It also increases transparency and facilitates the investigation for national authorities to assess whether an entity constitutes an SOE at the international level. Regarding

[98] Emphasis added.
[99] Ibid Article 8.17.

substantive regulation, Parties are subject to several obligations when their enterprises qualify as SOEs that ordinarily do not apply to their POEs. This might make States that heavily rely on SOEs less likely to take advantage of them in a way that hinders international trade. In other words, this approach prefers a precise definition of SOEs, with clear boundaries over a flexible one. While increasing the understanding of the concept at hand, this definition also risks undermining the effectiveness it seeks to achieve. A definition with fixed and narrow boundaries runs the risk of being under-inclusive. This might be an unintentional incentive for States to circumvent such restrictions. In other words, a rigid definition cannot be modified to account for similar circumstances or, more likely the case, for the development of reality. At the same time, the simpler application of an approach based on quantitative proxies may be more apparent than real, primarily when the definition encompasses *de facto* control. In this case, the definition would require an assessment of unofficial means through which the State may retain a sufficient degree of ownership to influence the enterprise's decisional process and operations. SOEs are an ever-changing and dynamic phenomenon that is likely to remain so. Consequently, although adopting a precise definition must be lauded because it brings some clarity to an otherwise hazy framework, a strict regulatory approach may not be the best solution in the long-run. A definitional approach, which can withstand the test of time and address the broadest possible range of conduct potentially able to hinder international trade, needs flexibility. Flexibility could be reached through, for instance, the adoption of a rebuttable presumption linked to the different levels of State ownership that may exist in an enterprise. In this way, minority ownership could be taken into account under the CPTPP by attaching a presumption of State influence. Then, States could rebut the presumption by proving that, despite owning the enterprise at any level, the enterprise is an independent economic actor with its own decision-making process. Such a solution would also make regulation of State ownership acceptable to most countries that would otherwise refrain from joining a plurilateral regulatory agreement.

The second definitional approach encompasses State ownership and control in all their declinations. Hence, it is more comprehensive and slightly more flexible than the first approach. The USMCA is an example of this model. Given all possible variations of the most debated constitutive elements of SOEs, namely State ownership and control, is arguably the most effective approach among those examined. Indeed, its flexibility allows it to adapt to the many structural and governance circumstances in which SOEs may act as a barrier to global trade. Even so, this approach is also not conclusive as it runs the risk of being over-inclusive by capturing within its scope conduct of SOEs that do not constitute an obstacle to trade. It can be argued that this approach would benefit from the explicit provision of a rebuttable presumption that can consider the reality of the situation in which the examined SOE is involved.

The third identified approach does not adopt a formal position on the notion of SOEs. However, although not explicitly mentioned, these entities might still be covered. The RCEP is an example of this approach. In this model, the lack of an explicit mention of SOEs arguably derives from the neutral approach followed in the first place. From a particular vista, this is the most flexible definitional approach precisely because it adopts a series of definitions wide enough to encompass different types of entities, irrespective of their ownership models. This means that all ownership models are potentially covered. The interpreter plays a key role in this context as they are left to decide whether a particular economic operator comes under the applicable regulatory framework. At the same time,

this over-flexibility makes it the least effective approach because it is based on interpretation, which can vary from case to case and from one provision to another, which therefore makes it easy for States to circumvent.

Chapter Seven

THE NOTION AND REGULATION OF STATE-OWNED ENTERPRISES UNDER BILATERAL PREFERENTIAL TRADE AGREEMENTS (PTAS)

1. SOEs in bilateral PTAs: definitional approaches and substantive regulation

Looking at bilateral agreements, the study focuses on PTAs regulating SOEs concluded by major economies under the WTO dealing with SOEs, namely China, the EU, the US, and Australia from 2001, the year of China's accession, until today.[1] As mentioned already, bilateral PTAs are preferential agreements concluded between two States to regulate trade between them. In this vein, their relationship with WTO rules is guided by the same considerations that have been made with reference to plurilateral agreements (see Section 3 *supra*).

The study is structured as follows. For each country examined, first of all, the definitional approach towards SOEs and related entities is addressed. The aim is to map the definitional criteria for each identified notion. Secondly, the examination focuses on substantive obligations to determine whether the boundaries of the notion can be further refined in light of such obligations.

1.1. SOEs in PTAs concluded by China[2]

[1] Within the limits of this work, a comprehensive analysis of bilateral agreements concluded by Japan have not been included. However, the analysis of bilateral preferential arrangements made by Japan shows that the approach followed by it adopts a very broad definition of "enterprise". This latter notion indeed includes both private and governmentally owned enterprises. However, no further specification is provided regarding this expression. As it will be seen, this is a common trait with the approach followed by China in its PTAs. Furthermore, in some agreements the Japanese government makes direct reference to Article XVII GATT, and on other occasions the notion of state enterprise is specifically introduced in terms of state ownership and state control. However, neither of the latter two concepts is further defined. A specific reference to SOEs and their definition is found in the recently concluded agreement with the UK. The approach followed therein may have been influenced by the definitional approach followed under the CPTPP, given the similarities between the two.

[2] The analysis took into consideration all bilateral PTAs concluded by China from 2001 until today. These include: Free Trade Agreement between the Government of the People's Republic of China and the Government of the Kingdom of Cambodia, entered into force 1 January 2022; Free Trade Agreement between the government of the People's Republic of China and the Government of Republic of Mauritius, entered into force 1 January 2021; Free Trade Agreement between the Government of the People's Republic of China and the Government of Georgia, entered into force 1 January 2018; Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China, entered into force 20 December 2015; Free Trade Agreement between the Government of the People's Republic of China and the Government of the Republic of Korea, entered into force on 20 December 2015; Free Trade Agreement between the Government of the People's Republic of China and the Government of Iceland, entered into force 10 July 2014; Free Trade Agreement between the Swiss Confederation and the People's Republic of China, entered into force on 1 July 2014; Free Trade Agreement between the government of the People's Republic of China and the Government of the Republic of Costa Rica, entered into force on 1 August 2011; Free Trade Agreement between the government of the People's Republic of China and the government of the Republic of Peru, entered into force 10 March 2010; Free Trade Agreement between the government of the People's Republic of China and the government of the Republic of Singapore, entered into force 23 October 2009; Free Trade Agreement between the government of the People's Republic of China and the government of Pakistan, entered into force 10 October 2009; Free Trade Agreement between the government of the People's Republic of China and the government of New Zealand, entered into force 1 October 2008; Free Trade Agreement between the government of the People's Republic of China and the government of the Republic of Chile, entered into force 1 October 2006; Agreement on trade in goods of the framework agreement on comprehensive economic co-operation between the People's Republic of China and the Association of Southeast Asian Nations, entered into force on July 2005; Mainland and Hong Kong Closer Economic and Partnership Arrangement, entered into force 20 June 2003.

The regulation of SOE in international trade relations concerning China dates back to negotiations held on the occasion of China's accession to the WTO.[3] By contrast, PTAs concluded by China do not explicitly refer to SOEs.[4] Notwithstanding this approach, Chinese PTAs provide important hints to reconstruct the notion of SOEs and regulate them. In this regard it should be noted that negotiations for a preferential agreement to be signed between the Chinese and the US government reached a standstill on this issue.

The Chinese PTAs clearly show the will of the Chinese government to pursue a 'go global' agenda, which serves as a tool to forge closer economic ties with its trading partners. This is especially true for the most recent agreements.[5] An expression of the globalization policy pursued by China is the Belt and Road Initiative (BRI), launched by the Chinese government in 2013. The BRI is a major project conceived by the Chinese government to put China at the center of international economic relations. By exploring new markets for international trade and potential partners, this effort aims explicitly to foster and further develop China's economic growth,[6] and its geopolitical relevance.[7] China follows an informal and practical approach to implement the BRI. The final aim is to reach a mutually beneficial and agreed solution through means that can vary from trade partner to trade partner. In this regard, the Chinese government does not necessarily rely on a treaty-based institutional framework to shape its economic relationships with trading partners.[8] Indeed, the type of instruments used the most with BRI trading partners are Memorandum of Understandings (MoUs), which set out the principles guiding the cooperation and the outcome of bilateral negotiations. However, the number of PTAs concluded by China has increased in the last decade to reduce trade barriers, together with BRI partners.[9]

1.1.1. Covered entities

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[3] Tu Xinquan, Na Sun, and Zhen Dai, 'Issues on SOEs in BITs: The (Complex) Case of the Sino–US BIT Negotiations', in Julien Chaisse (ed), *China's International Investment Strategy: Bilateral, Regional, and Global Law and Policy* (OUP, 2019) 194. See also China's accession Working Party Report, Chapter 2, section 3.4.1.

[4] It is not surprising then that negotiations for a preferential agreement to be signed between the Chinese and the US government reached a standstill on this issue. Notwithstanding this approach, Chinese PTAs provide important hints to reconstruct the notion at issue and its regulation.

[5] For instance, the China-Singapore FTA establishes that: 'Recognising that facilitating the "Go Global" efforts of Chinese enterprises is a key pillar of bilateral cooperation, the Parties shall intensify their collaboration in this area. To this effect, the Parties shall endeavor to identify and share information on potential outgoing investment sectors and activities and encourage such enterprises to invest in the other Party' (Article 90). A similar provision can be found in China-Cambodia FTA, Article 8.2.

[6] Yiping Huang, 'Understanding China's Belt & Road Initiative: Motivation, Framework and Assessment' (2016) 40 China Economic Review 3.

[7] Jiangyu Wang, 'China's Governance Approach to the Belt and Road Initiative (BRI): Relations, Partnership and Law' (2019) 14 Global Trade and Customs Journal 222 f.

[8] Wang ibid 224.

[9] Beibei Hu, Yuying Jin and Kai Wang, 'How Free Trade Agreement Affects the Success of China's Belt and Road Infrastructure Projects', (2022) 17 International Studies of Economics. Special Issue: The Economics of the Belt and Road Initiative 484 f.

Although no specific mention of SOEs could be identified, Chinese PTAs cover various entities. They encompass enterprises,[10] public entities,[11] public enterprises,[12] STEs,[13] monopoly suppliers of a service,[14] exclusive service suppliers,[15] and enterprises with special or exclusive rights.[16] From a terminological perspective, it is interesting to note that the least recent PTAs, when applicable, refer to WTO law in the definitions of most of these entities.[17] From a substantive perspective, it should be noted that most of the analyzed agreements recognize the right of the Parties to establish or maintain public or privileged enterprises.[18] This means that a neutral ownership approach underpins Chinese PTAs. The reference to the entities above evolved over time, becoming more frequent and detailed in PTAs concluded after 2005.

1.1.2. The dividing line between the 'State' and other entities

The least recent PTAs arguably focus on the dividing line between what constitutes 'State,' hence obliged to comply with the obligations set out in the Agreement, and what escapes its boundaries. For instance, the China-ASEAN PTA,[19] in Article 15 (on State, Regional, and Local Government), clarifies that '[i]n fulfilling its obligations and commitments under this Agreement, each Party shall ensure their observance by regional and local governments and authorities in its territory as well as their observance by non-governmental bodies (in the exercise of powers delegated by central, state, regional or local governments or authorities) within its territory.'[20] This provision suggests that the notion of 'State,' in line with general public international law, includes both central and local levels of government. At the same time, State agencies and entities not belonging to the State or its institutions but exercising powers delegated to them by the State are equated to the State itself. In other words, it seems that the boundaries of the notion of the State expand or recede according to two elements: the delegation of public powers, on the one hand, and the exercise of such powers, on the other hand. From this perspective, an enterprise delegated by the government to pursue a public objective would belong to the public realm when it also exercises delegated powers in performing that task. Under Chinese PTAs, the delegation of power and its exercise are arguably crucial to determine the public or private nature of economic operators that do not qualify as government agencies.

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[10] See China-Mauritius FTA, Article 8.1; China-Australia FTA Article 9; China-Korea FTA, Article 12.1.
[11] See China-Australia FTA, Annex 8-B, Article 2; China-Georgia FTA, Annex 8-A, Article 2.
[12] Left undefined. See China-Korea FTA, 14.5.
[13] See China-Mauritius, Article 2.10; China-Korea FTA, Article 2.1; China-Switzerland FTA, Article 2.6; China-Singapore FTA, Article 9.
[14] China-Korea FTA, Article 8.1; China-Switzerland FTA, Article 8.2; China-Singapore FTA, Article 59.
[15] China-Korea FTA, Article 8.12; China-Switzerland FTA, Article 8.10
[16] China-Korea FTA, Article 14.5.
[17] See for example China-Iceland FTA, Article 69. Agreements also require Parties to ensure that the measures the adopted are WTO-compliant. See China-ASEAN FTA, Art. 12.
[18] See China-Korea FTA, Article 14.5.
[19] Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Co-operation between China and ASEAN entered into force in July 2005 (hereinafter China-ASEAN FTA). Similarly, see China-Korea FTA, Article 8.1; China-Mauritius PTA, Article 7.2; China-Cambodia, Article 7.1.
[20] A similar provision can also be found in Article 103 of the China-New Zealand FTA, entered into force on 1 October 2008.

1.1.3. The notion of 'juridical person'

No specific mention or reference to SOEs could be found in PTAs concluded by China. However, alternative concepts that offer sufficiently broad boundaries to arguably include them could be examined. From this standpoint, the regulation of SOEs - although not explicitly covered in the text - is actually cross-cutting throughout the agreements. In this regard, the first notion that the interpreter should look at is that of 'juridical person.'[21] This notion encompasses both privately-owned and governmentally-owned entities that (i) are constituted under the law of the Party; and (ii) engage in substantive economic operations in the territory of the Party. The activity carried out may be for profit or not. Also trade in services is considered. Given the neutral approach of this notion towards ownership, it can be argued that SOEs established under Chinese law and engaged in commercial activities are covered regardless of their public or private classification. This is also confirmed by the fact that the definition of a 'juridical person' is often accompanied by a list of entities included in that notion. That list, non-exhaustive in nature, also refers to 'corporations.'[22]

Furthermore, PTAs tend to specify the relationship of a juridical person with other juridical persons. Although limited to this type of relationship, this is relevant to this study because of the clarification provided regarding 'ownership,' 'control,' and 'affiliation'.[23] More specifically, a juridical entity is 'owned' if persons from one of the Parties hold more than 50% of its equity interest, whereas 'control' refers to the power to appoint the majority of the juridical person's directors or otherwise to legally dictate its actions. In this context, 'affiliation' is related to control over another legal entity or to the control of two legal entities by the same legal entity. Arguably, the definitional approach followed in Chinese agreements is sufficiently broad to potentially cover relationships and alliances between SOEs and related entities. However, in practical terms, it would not necessarily be an easy task to spot and examine intra-SOE relationships, also given that the transparency obligations in Chinese PTAs are generally weak.

In any case, the following criteria are used to determine whether an SOE has a link with another SOE or a related entity: majority ownership, *de jure* and *de facto* control through voting and naming rights or legal direction, and affiliation through active or passive control. Compared to what has been observed under the GATS multilateral legal framework dealing with the same notions, some uncertainties persist. For instance, it is unclear whether 'direction' is meant to refer just to the strategic actions of the enterprise or if it deserves a broader scope. One more reason to believe that, although not specifically mentioned, (Chinese) SOEs and their network of relations could incidentally be covered, despite the lack of a precise reference and definition.[24]

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[21] See China-Cambodia PTA, Article 7.1; China-Georgia FTA, Article 8.2; China-Mauritius FTA, Article. 7.2; China-Australia FTA, Article 8.2; China-Peru FTA, Article 5.

[22] These lists are always anticipated by the term 'including'. Therefore, it seems safe to assume that they are not intended to be exhaustive.

[23] See China-Cambodia FTA, Article 7.1; China-Mauritius FTA, Article 7.2; China-Australia FTA, Article 8.2; China-Korea FTA, Article 8.1; China-Switzerland FTA, Article 8.2; China-Costa Rica FTA, Article 90; China-Singapore FTA, Article 59; China-New Zealand FTA, Article 103.

[24] In this regard, it is interesting to note that the China-Australia FTA did not introduce additional provisions on SOEs and competition law provisions, given that such provisions have been introduced under other agreements, e.g. China-Switzerland FTA. See Takemasa Sekine, 'The China-Australia FTA and Australia's FTAs with other Asian Countries: Their Implications for Future SOE Regulation', in Colin B Picker, Heng Wang, Weihuan Zhou, *The China-Australia Free Trade Agreement. A 21st Century Model* (Hart Publishing, 2018).

In this context, the lack of stringent transparency requirements jeopardizes sufficient coverage of problematic SOEs for international trade. Provisions in this regard seem to focus on the right of the Parties not to disclose confidential information or information that would impede law enforcement, or otherwise contrary to the public interest, or which would prejudice the legitimate commercial interests of particular enterprises, public or private.[25] In any case, competition rules apply to public enterprises just as they apply to private ones.[26]

1.1.4. The notion of 'State trading enterprise'

Although SOEs are not specifically considered in Chinese PTAs, STEs occasionally are. Nevertheless, it does not appear that what has previously been noted regarding this notion has changed or been further clarified. Indeed, PTAs merely make reference to Article XVII of the GATT.[27]

1.1.5. The notion of 'public entity'

Chinese PTAs also deal with the notion of 'public entity.'[28] This is defined as (i) a government, a central bank, or a monetary authority of a Party; or (ii) an entity owned or controlled by a Party principally engaged in carrying out governmental functions or activities for governmental purposes; or (iii) a private entity performing functions normally performed by a central bank or monetary authority when exercising those functions.

Similar to what has been observed under the multilateral trading system, the notion is constructed following a two-step approach. Firstly, there is the public/private approach. On the one hand, a public entity is public in nature in the narrow sense of the term. This indicates that the organization is either part of the State's structure or one of its agencies dealing with financial and monetary policies. On the other hand, the entity may have a private character. In this case, the provision requires a connection to the State for the Agreement to apply. This is the exercise of activities usually (i.e., 'normally') exercised by the State and its agencies. Of course, the specific type of activities covered may change depending on the national legal system and which activities are considered 'public' in that context. Then, there is a second category of entities not explicitly designated as public or private. Instead, in this case, the focus is on two elements: (a) the connection of the entity with the State through ownership or control; and (b) the exercise by the entity of activities delegated by the State and corresponding to governmental functions or governmental purposes. In other words, the constitutive elements of a public entity that does not belong to the State are (i) State ownership or

[25] See China-Georgia FTA, Article 13.1; China-Mauritius FTA Article 7.12; China-Iceland FTA, Article 124; China-Costa Rica FTA, Article 162; China-Singapore FTA, Article 35; China-Pakistan FTA, Article 45; China-Korea FTA, Article 12.8.

[26] China-Korea FTA, Article 14.5.

[27] See China-Mauritius FTA, Article 2.11; China-Switzerland FTA, Article 2.1; China-Peru FTA, Article 17 (hereinafter China-Peru FTA); China-Singapore FTA, Article 9; China-Georgia FTA, Annex 8-A.

[28] This notion is mostly introduced within the Annex on Financial Services. Hence, there is a parallel with the systematic placing of this notion under the WTO legal framework. See Chapter 3, section 3.1.5.See China-Georgia FTA, Annex 8-A; China-Australia FTA, ch.8; China-Korea FTA, ch. 9; China-Mauritius FTA, Annex on Financial Services.

control; (ii) the exercise of governmental functions; and (iii) the delegation by the State of such functions.
Although not explicitly mentioned in this context, it is argued that this legal construction of a 'public entity' draws heavily on the positions adopted by the Chinese government on SOEs and the 'public body' issue in the context of multilateral subsidy regulation. However, no further clarification is provided about key terms of the discussion, namely which type of activities can be considered as 'governmental functions.' Arguably, an additional element of governmental 'purpose' is introduced. However, this term hardly clarifies the notion at issue. Lastly, it is unclear what level of ownership or control can be deemed sufficient for an entity to constitute a 'public entity' within the meaning of this provision.

1.1.6. The notions of 'monopoly supplier of a service' and of 'exclusive service supplier'

Under Chinese PTAs, a 'monopoly supplier of a service' is defined as 'any person, public or private, which in the relevant market of the territory of a Party is authorized or established formally or in effect by that Party as the sole supplier of that service.'[29] The notion is rather broad. Firstly, the definition follows an ownership-neutral approach. As a result, it covers all entities, whether owned by the government or private individuals. Secondly, active involvement of the State in the economy is required through a *de jure* or *de facto* act of authorization or formation of the monopoly itself.
A notion close to 'monopoly supplier of a service' is 'exclusive service supplier.' Such an entity exists when a Party (i) establishes or maintains a small number of suppliers for a particular good or service; and (ii) substantially prevents competition among those suppliers in the territory. Considering the language and coverage resemblance with the terminology used in Article VIII.5 of the GATS, these are arguably WTO= clauses.[30] Therefore, the same considerations in Chapter 3, section 3 apply. The substantive provisions applicable to these entities focus on the prevention of cross-subsidization. The Parties must ensure that monopoly and exclusive service providers do not violate their obligations by abusing their dominant position while providing services beyond the range of their monopoly rights. In this context, however, more attention is given to transparency requirements, as trading partners can submit requests for information on relevant operations of these entities to ensure that commitments are respected.[31] Behind these commitments, there is a clear anti-circumvention purpose.

1.2. SOEs in PTAs concluded by the European Union (EU)[32]

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[29] See China-Korea FTAs, Article 8.1; China-Switzerland FTA, Article 8.2; China-Singapore FTA, Article 59; China-New Zealand FTA, Article 103.
[30] See China-Korea FTA, Article 8.12; China-Switzerland FTA, Article 8.10.
[31] See China-Switzerland FTA, Article 1.5; China-New Zealand FTA, Article 172.
[32] The analysis took into consideration all bilateral PTAs concluded by the EU from 2001 until today. These include: the following PTAs have been taken into consideration in this section: Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part *OJ L 149, 30.4.2021, p. 10–2539* (signed 30 December 2020, entered into force 1 January 2021)[hereinafter EU-UK TCA]; EU-China Comprehensive Agreement on Investment (December 2020); Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam *OJ L 186, 12.6.2020, p. 3–1400* (signed 30 June 2019, entered into force august 2020)[hereinafter EVFTA]; Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the

other part *OJ L 29, 4.2.2016, p. 3–150* (signed 21 December 2012, entered into force 1 March 2020)[hereinafter EU-Kazakhstan FTA]; Comprehensive and Enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Armenia, of the other part *OJ L 23, 26.1.2018, p. 4–466* (signed 24 November 2017, entered into force 1 June 2018)[hereinafter EU-Armenia FTA]; Agreement between the European Union and Japan for an Economic Partnership *OJ L 330, 27.12.2018, p. 3–899* (signed 17 July 2018, entered into force 1 February 2019) [hereinafter EUJEPA]; Free trade Agreement between the European Union and the Republic of Singapore *OJ L 294, 14.11.2019, p. 3–755* (signed 13 February 2019, entered into force 21 November 2019) [hereinafter EU-Singapore FTA]; Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part *OJ L 11, 14.1.2017, p. 23–1079* (provisionally entered into force since 2017) [hereinafter CETA]; Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part *OJ L 161, 29.5.2014, p. 3–2137* (signed 21 March 2014, entered into force 1 September 2017)[hereinafter EU-Ukraine FTA]; Association Agreement between the European Union and the European Atomic Energy Community and their Member States, on the one part, and Georgia, on the other part *OJ L 261, 30.8.2014, p. 4–743* (entered into force since 2016)[hereinafter EU-Georgia FTA]; Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part *OJ L 260, 30.8.2014, p. 4–738* (signed 27 June 2014, entered into force 1 September 2014)[hereinafter EU-Moldova FTA]; Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo, of the other part *OJ L 71, 16.3.2016, p. 3–321* (entered into force since April 2016)[hereinafter EU-Kosovo FTA]; Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part *OJ L 127, 14.5.2011, p. 1–3* (signed 6 October 2010, entire into force 13 December 2015)[hereinafter EU-South Korea FTA]; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part *OJ L 164, 30.6.2015, p. 2–547* (signed 16 June 2008, entered into force 1 June 2015)[hereinafter EU-Bosnia Herzegovina FTA]; Interim agreement with a view to an Economic Partnership Agreement between the European Community and its Member States, of the one part, and the Central Africa Party, of the other part *OJ L 57, 28.2.2009, p. 2–360* (signed 15 January 2009, entered into force 4 August 2014)[hereinafter EU-Central Africa FTA]; Interim Partnership Agreement between the European Community, of the one part, and the Pacific States, of the other part *OJ L 272, 16.10.2009, p. 2–715* (provisionally applied since 2014)[hereinafter EU-Pacific States FTA]; Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other (signed 29 June 2012)[hereinafter EU-Central American States FTA]; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Serbia, of the other part *OJ L 278, 18.10.2013, p. 16–473* (signed 29 April 2008, entered into force 1 September 2013)[hereinafter EU-Serbia FTA]; Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part *OJ L 354, 21.12.2012, p. 3–2607* (signed 26 June 2012, entered into force 1 March 2013)[hereinafter EU-Colombia-Peru FTA]; Interim Agreement establishing a framework for an Economic Partnership Agreement between the Eastern and Southern Africa States, on the one part, and the European Community and its Member States, on the other part *OJ L 111, 24.4.2012, p. 3–1172* (signed 29 August 2009, entered into force 14 May 2012)[hereinafter EU-Eastern and Southern African States FTA]; Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Iraq, of the other part *OJ L 204, 31.7.2012, p. 20–130* (provisionally entered into force since 2012)[hereinafter EU-Iraq FTA]; Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Montenegro, of the other part *OJ L 108, 29.4.2010, p. 3–354* (signed 16 October 2007, entered into force 1 May 2010)[hereinafter EU-Montenegro FTA]; Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part *OJ L 289, 30.10.2008, p. 3–1955* (provisionally applied since 2008)[hereinafter EU-CARIFORUM FTA]; Euro-Mediterranean Agreement establishing an Association between the European Community and its Members States, of the one part, and the Republic of Lebanon, of the other part *OJ L 143, 30.5.2006, p. 2–188* (signed 17 June 2002, entered into force 1 April 2006) [hereinafter EU-Lebanon FTA]; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part *OJ L 107, 28.4.2009, p. 166–502* (signed 12 June 2006, entered into force 1 April 2009)[hereinafter EU-Albania FTA]; Euro-Mediterranean Association Agreement between the European Community and its Members States, of the one part, and the People's Democratic Republic of Algeria, of the other part *OJ L 265, 10.10.2005, p. 2–228* (signed 11 April 2002, entered into force 1 September 2005) [hereinafter EU-Algeria FTA]; Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part *OJ L 352, 30.12.2002, p. 3–1450* (signed 18 November 2002, entered into force 1 March 2005)[hereinafter EU-Chile FTA]; Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt, of the other part *OJ L 304, 30.9.2004, p. 39–208* (signed 25 June 2001, entered into force 1 June 2004)[hereinafter EU-Egypt FTA]; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part *OJ L 84,*

The EU, which itself is one of the largest PTA globally, has built the greatest network of preferential arrangements in the post-war era.[33] Its agenda on the conclusion of these agreements and the selection of trading partners evolved over time. Different rationales characterized each agreement according to the historical and factual circumstances of its conclusion. Starting in 2007 with the adoption of the Treaty of Lisbon, which extended the exclusive competence of the Union on foreign direct investments (FDI) and trade, the EU began negotiating more comprehensive and ambitious PTAs, due to the delay, and eventually failure, of the Doha Round.[34] The ultimate goal was to expand the influence of the EU both in terms of coverage by widening the scope of topics covered within the agreements through WTO+ obligations and geographically, as the Union progressively selected larger regions of the world as trading partners, such as India, Canada, and ASEAN countries.[35]
Against this background, EU PTAs can be classified into four categories: (i) first-generation PTAs; (ii) new-generation PTAs; (iii) Deep and Comprehensive Free Trade Areas; and (iv) Economic Partnership Agreements.[36] These categories differ in terms of the historical context in which they were completed, and the goals pursued. First-generation PTAs used to be concluded in the aftermath of the establishment of the EEC with partners in the region to strengthen commercial relations with a focus on trade in goods.[37] The second category of PTAs are usually characterized by a wide coverage encompassing not only tariffs and trade in goods, but also other fields, such as trade in services and public procurement. In turn, Deep and Comprehensive Free Trade Areas pursue deep political and economic integration with Georgia, Moldova and Ukraine in the context the European Neighborhood Policy.[38] Lastly, through Economic Partnership Agreements the EU regulates trade with African, Caribbean and Pacific countries.
In any case, there EU does not follow a standard PTA model.[39] Rather, the PTA structure widely varies according to the specific circumstances of the agreement, the particular characteristics of the trading partners concerned, and the objectives pursued. The EU did not limit itself to preferential agreements with neighboring countries but also entered into preferential agreements with geographically distant partners. While in the first case, the aim was to strengthen the partners' economic and international ties, with the second category of PTAs, the EU aimed to develop the

20.3.2004, p. 13–197 (signed 9 April 2001; entered into force 1 April 2004)[hereinafter EU-North Macedonia FTA]. Moreover, the following texts currently under negotiations have been considered: EU-India FTA and EU-Indonesia FTA.

[33] Raymond J Ahern, 'Europe's Preferential Trade Agreements: Status, Content and Implications', CSR Report for Congress (2011) 1.

[34] Stephen Woolcock, 'European Union policy towards Free Trade Agreements', ECIPE Working Paper No. 03/2007, 1.

[35] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions of 4 October 2006 "Global Europe: Competing in the world" (COM(2006)567 final). From a chronological perspective, this dynamic occurred after the modification of the Lisbon Treaty with reference to the EU Common Commercial Policy (CCP). For the effects on the legitimacy of the negotiation, signature and conclusions of PTAs after ten years from the entry into effect of the Treaty: David Kleimann, 'The Legitimacy of 'EU-only 'Preferential Trade Agreements', in Michael Hahn and Guillaume Van der Loo (eds), *The Law and Practice of the Common Commercial Policy* (Brill, 2020) 461–485.

[36] European Commission, Report on implementation of EU Free Trade Agreements 1 January 2018-31 December 2018 (Luxembourg, 2019), 1-48.

[37] Ibid 8.

[38] Elżbieta Kawecka-Wyrzykowska, 'Importance and Motives of Preferential Trade Agreements in the EU's External Trade' (2020) 6(3) Economics and Business Review 8 f.

[39] See also Leonardo Borlini and Peggy Clarke, 'International Contestability of Markets and the Visible Hand: Trade Regulation of State-Owned Enterprises between Multilateral Impasse and New Free Trade Agreements' (2021) 26 Columbia Journal of European Law 112.

partners' internal stability and progress while also defending its own internal market.[40] In any case, agreements were concluded to pursue primarily commercial and security policy objectives.[41] Focusing on this second set of drivers, EU PTAs' objectives are inextricably related to reducing trade divergence that may result from preferential agreements signed by third parties; developing strategic alliances with quickly expanding economies; and advancing the application and enforcement of international trade rules. The EU occasionally fulfills these objectives by granting selected trading partners access to its market as a bargaining chip to strengthen its influence and urge changes in national law and policy changes, from labor standards to development policy and global governance.[42]

Against this background, EU PTAs expressly cover SOEs. Agreements increasingly incorporate the adoption not only single provisions but entire chapters dedicated to these enterprises. Obligations on SOEs in EU PTAs are WTO+ provisions. Arguably these are adopted to counteract the lack of action of the multilateral trading system, as was the case in the past for other subject matters.

EU PTAs reveal a uniform approach regarding the notion of SOE, in contrast to the substantive obligations, which are delineated differently. In this context, the EU tends to export notions and principles unique to its legal system to third State jurisdictions. This is the case, for instance, with the notion of Services of General Economic Interest (SGEIs) or the implementation of strict transparency standards. As it will be seen shortly, EU PTAs are inspired by the neutrality principle with regard to enterprises. However, such neutrality may be more apparent than real if certain obligations are explicitly imposed on Members toward SOEs and related entities, whereas this is not the case where POEs are concerned. This is the case for transparency obligations. Also, POEs that do not engage in any activity normally carried out by the State come to mind.[43] Notwithstanding this, the adopted definitional and regulatory approach of SOEs in EU PTAs appears to evolve over time. This development is not always harmonized. For example, some definitional criteria appear to be distinctive elements of SOEs because they recur in a large number of PTAs. However, in other preferential arrangements, the same criteria are conflated with others. In any case, some consistency can still be appreciated.

Overall, it can be argued that the approach followed by the EU regarding the regulation of SOEs at the preferential level changes based on what can be achieved at the multilateral level. This also reveals that through PTAs, the EU is exporting its positions that cannot be developed within the WTO either because there is a lack of discussion or because of the need to enjoy more bargaining power.

1.2.1. Covered entities

[40] Alan Winters, 'EU's Preferential Trade Agreements: Objectives and Outcomes', in Gerrit Faber and Pitou Van Dijck (eds), *The External Economic Dimension of the European Union* (Brill, 2000) 195 f.

[41] Woolcock (n 34) 3 ff.

[42] Sophie Meunier and Kalypso Nicolaïdis, 'The European Union as a Conflicted Trade Power' (2006) 13(6) Journal of European Public Policy 906-925.

[43] In this regard, it should be noted that PTAs concluded at the bilateral level occasionally contain provisions applicable to the same extent to SOEs or related entities and POEs, even when the agreement itself does not contain specific provisions on SOEs. This is often the case with reference to Chapters regulating the telecommunication sector. See Ines Wyllemins, 'Disciplines on State-Owned Enterprises in International Economic Law: Are We Moving in the Right Direction?' (2016) 19 Journal of International Economic Law 670.

The scope of the EU preferential agreements is relatively broad and articulated in terms of the types of enterprises and economic operators covered. Indeed, entities covered include not only SOEs,[44] but also State-controlled enterprises,[45] State enterprises (SEs),[46] STEs,[47] public enterprises,[48] enterprises entrusted with special or exclusive privileges,[49] as well as public entities,[50] and exclusive service suppliers.[51] Moreover, PTAs encompass State monopolies,[52] and designated monopolies.[53]

PTAs generally acknowledge the Parties' right to establish or maintain SOEs and related entities.[54] While in line with public international law, this clause also expresses a neutral approach toward ownership structures. In any case, the key goal sought by the EU preferential framework is to prevent States from exploiting these entities as proxies to circumvent their preferential commitments.[55]

Before delving into the study of the notion of SOEs and related entities, it is necessary to define the boundaries of the notion of 'State' as defined within EU PTAs. This is indeed important to distinguish what is State from what is not, and hence how economic operators are linked to the government from an EU perspective. Such a distinction can be drawn by looking at the notion of 'measures adopted or maintained by a Party,'[56] which identifies the boundaries of the concept of 'Party.' On the one hand, this includes national, regional, and municipal governments and authorities. On the other hand, non-governmental entities are considered when they exercise rights granted to them by national, regional, or municipal governments or authorities. Therefore, a two-step approach is adopted: firstly, the 'State' is what belongs to its apparatus. In this context, entities that are not governmental in nature, and that do not belong to the official structure of the State, may still be 'State,' and do not qualify as a private entity for the purposes of the preferential arrangement due to the positive exercise of powers granted

[44] EU-Chile, Chapter 22; EUJEPA, Chapter 13; EVFTA, Chapter 11.

[45] EU-Kazakhstan FTA, Article 164.

[46] EU-Colombia&Peru FTA, Article 263.; EU-Kazakhstan FTA, Article 158; CETA, Article 1.

[47] EU, Chile-Peru FTA, Article 27; EU-South Korea FTA, Article 2.13.

[48] EU-Chile FTA, old, Article 2.1; EU-Egypt FTA, Article 36; EU-Algeria FTA, Article 43; EU-Central American States FTA, Article 280; EU-Serbia FTA, Article 74. Sometimes SOEs are referred to as an example of public enterprise, see EU-Moldova FTA, Article 269; EU-Georgia FTA, Article 142.

[49] EU-Egypt FTA, Article 36; EU-Lebanon FTA, Article 37; EU-Central American States FTA, Article 129; EU-Kazakhstan FTA, Article 16.3, EU-Kosovo FTA, Article 76; EUJEPA, Article 13.1, EU-Singapore FTA, Article 11.3; EU-UK TCA, Article 376.

[50] CETA, Article 13.1; EU-South Korea FTA, Article 7.37; EU-Armenia FTA, Article 181; EUJEPA, Article 13.2; EVFTA, Article 8.41(d).

[51] EU-CARIFORUM FTA, Article 76.

[52] EU-Egypt FTA, Article 35; EU-North Macedonia FTA, Article 39; Eu-Lebanon FTA, Article 36; EU-Serbia FTA, Article 43/EU-Bosnia and Herzegovina FTA, Article 41; EU-Kazakhstan FTA, Article 158; EU-South Korea FTA, Article 11.5.

[53] EU-Chile FTA,2022, Article 179; EU-Colombia&Peru, Article 263; EU-UK TCA, Article 376; EUJEPA, Article 13.1.

[54] See for instance EU-Colombia&Peru FTA, Article 263; EU-Kazakhstan FTA, Article 258; EU-Moldova FTA, Article 336; CETA, Article 18.3; EU-South Korea FTA, Article 11.4; EU-Georgia FTA, Article 205; EU-Ukraine FTA, Article 258; EU-Armenia FTA, Article 303; EU-Vietnam, Article 11.3; EU-UK TCA, Article 379.

[55] A typical provision in this regard usually states: 'Unless otherwise provided, each Party shall ensure that any enterprise, including a State-owned enterprise, an enterprise granted special rights or privileges, or a designated monopoly, that has been delegated regulatory, administrative or other governmental authority by a Party at any level of government, acts in accordance with the Party's obligations as set out under this Agreement in the exercise of that authority.' Cf. EU-Armenia FTA, Article 300; CETA, Article 18.3 (also article 1.10 with reference to persons exercising delegated governmental authority); EUJEPA, Article 13.4; EU-Singapore, Article 11.3; EVFTA, Article 11.3. On the convergence between CETA and CPTPP: Heng Wang, The Future of Deep Free Trade Agreements: The Convergence of TPP (and CPTPP) and CETA? 53 Journal of World Trade (2019), 317 – 342.

[56] EU-Kazakhstan FTA, Article 40(b); EU-South Korea FTA, Article 7.1; EU-Georgia FTA, Article 77; EU-Ukraine FTA, Article 86.2.

to them by the State. Hence, the constitutive elements of the State are (i) affiliation with the State apparatus in accordance with international law; (ii) State delegation and (iii) positive exercise of delegated powers.

1.2.2. The notion of SOEs

As mentioned already, the regulation of SOEs in EU PTAs has evolved over time. More specifically, such evolution occurred in two ways. Firstly, there has been a quantitative development. In PTAs concluded after 2016, the regulation of SOEs is encapsulated in chapters,[57] rather than in single provisions incorporated in single sections of the Agreement, such as competition rules. Interestingly, the SOE chapters' headings frequently include references to SOEs and other entities. Therefore, the two categories are perceived somehow as connected. In this regard, it is interesting to note that even if the heading only refers to SOEs, the chapter may also cover other entities under its regulatory framework,[58] such as enterprises granted special rights or privileges and designated monopolies.[59]
Secondly, the definitional approach concerning SOEs has evolved. PTAs concluded between 2002 and 2006 did not explicitly refer to SOEs. Rather, they addressed public enterprises and State monopolies, but left them undefined. In this context, PTAs focused on substantive regulation. They aimed to ensure that regulated entities complied with the non-discrimination principle and were not used as a tool to distort trade.[60] Moreover, mirroring Article 106(2) of the TFEU, some EU PTAs exempt economic operators entrusted with public services from applying competition provisions if such rules obstruct the task assigned to them.[61]
Most recent PTAs, however, address and define SOEs through clear-cut criteria primarily based on quantitative proxies, namely majority ownership. More specifically, two definitional approaches can be identified. The first model defines SOEs as enterprises (i) involved in commercial activity; and (ii) owned by a Party at the central or sub-central level for more than 50% of the subscribed capital or of the votes attached to the shares issued by the enterprise itself. This definitional model is therefore based on two criteria: on the one hand, there is the activity criterion. In this regard, agreements cover only SOEs engaging in commercial activities, hence not only trade-related ones. The meaning of this expression encompasses activities that produce a good or the supply of a service. Other agreements,

[57] See Kazakhstan, ch. 12; CETA, Ch. 18; Japan, Ch. 13; Vietnam, ch 11; UK, ch 4. With reference to CETA, it has been highlighted how the overall provisions dedicated to SOEs regulation is rather simple and short compared to contemporary preferential agreements. See: Jaemin Lee, 'The "Indirect Support" Loophole in the New SOE Norms: An Intentional Choice or Inadvertent Mistake?' (2021) 20(1) Chinese Journal of International Law 74. For a general comment on CETA: Kevin Ackhurst, Stephen Nattrass and Erin Brown, 'CETA, the Investment Canada Act and SOEs: A Brave New World for Free Trade' 31 ICSID Review (2016), 58-76.
[58] See EU-Armenia FTA, Article 300.
[59] See Japan, ch. 13 on 'SOEs, enterprises granted special rights or privileges, and designated monopolies'; Viet Nam, Chapter 11, *SOEs, enterprises granted special rights or privileges and designated monopolies*; UK, Chapter 4, State owned enterprises, enterprises granted special rights or privileges, and designated monopolies.
[60] For instance, EU-Egypt FTA states that: 'With regard to public enterprises and enterprises to which special or exclusive rights have been granted, the Association Council shall ensure that, as from the fifth year following the date of entry into force of this Agreement, there is neither enacted nor maintained any measure distorting trade between the Community and Egypt contrary to the Parties' interests. This provision should not obstruct the performance in law or in fact of the particular tasks assigned to these enterprises.'
[61] See EU-Egypt FTA, Article 36; EU-Algeria FTA, Article 43; EU-Lebanon FTA, Article 37; EU-Kazakhstan FTA, Article 158; EU-Kosovo FTA, Article 45; EU-Moldova FTA, Article 336; EU-Ukraine FTA, Article 257-258; EU-Singapore FTA, Article 11.4.

however, focus more on the strategic decisions that would affect the firm's long-term success, such as the selection of volumes and prices, which should be made by the enterprise itself.[62] Hence, the attention is on preventing the State from exercising its control over the enterprise. Recent PTAs specify that commercial activities are profit-oriented in nature.[63] In other words, these PTAs only cover SOEs that engage in activities with the aim of selling a product or a service for profit in a market in which price and quantities are determined by the enterprise, i.e., without State influence. On the other hand, there is the majority ownership criterion. In this regard, it is interesting to note that different levels of the State could hold such ownership.[64] Although, from one perspective, it appears to restate the obvious, namely the notion of State under international law, it could be argued that the inclusion of this clarification serves as an anti-circumvention effort against those national organizational models very dissimilar from Western ones.

The second definitional model adopts majority ownership and control as constitutive elements of SOEs. More specifically, SOEs are defined as enterprises (i) in which the State directly owns more than 50% of the share capital; and (ii) is controlled by the State. The concept of control normally refers to any of three components: the ability to directly or indirectly exercise more than 50% of the voting power within the enterprise concerned; the authority to nominate the majority of its board of directors or other management body members; and the ability to lawfully direct the actions of the enterprise or to otherwise exercise an equivalent degree of control in line with its laws and regulations.[65] PTAs following this approach introduce a potentially broad concept of control since direct, indirect, and *de jure*/*de facto* control are all encompassed in this model.[66] Hence, PTAs aim at regulating SOEs that are subject to the influence exercised on them by the State and cannot adopt decisions independently.[67] This approach arguably echoes the 'decisive influence' test applied to government enterprises under the US-Singapore FTA.[68]

Against this background, PTAs contemplate some exclusions that limit the scope of SOEs definition, and the number of entities captured under it. Three criteria are adopted in this regard. Firstly is the revenue criterion, according to which PTAs may not apply to SOEs whose annual revenue is below a given threshold.[69] For instance, in EUJEPA, the threshold amounts to 200 million Special Drawing Rights (SDR).[70] Secondly, there is the activity criterion, according to which PTAs may not apply to SOEs carrying out non-commercial activities.[71] When SOEs engage in both commercial and non-commercial activities, only commercial activities are regulated under PTAs. Moreover, PTAs may limit the application of the non-discrimination principle (hence, discriminatory conduct is possible) when a public objective is pursued. This is the approach followed in EUJEPA, which does not require

[62] See EVFTA, Article 11.1.
[63] EU-Armenia FTA, Article 301; EU-Japan FTA, Article 13.1; EVFTA, Article 11.1.
[64] See EU-Kazakhstan, Article 163(a); EUJEPA, Article 13.2.
[65] EUJEPA, Article 13.1(1)(h).
[66] See EU-UK TCA, Article 376.
[67] In this context, EVFTA explicitly addresses strategic decisions. See: EVFTA, Article 11.1(g)(iii).
[68] See *infra*, section 4.3.2.
[69] For example, in EUJEPA the threshold is 200 million SDR (Article 13.2); in the EU-UK TCA it amounts to 100 million SDR (Article 377).
[70] EUJEPA, Article 13.2 states: 'This Chapter does not apply to a state-owned enterprise, an enterprise granted special rights or privileges or a designated monopoly, if in any one of the three previous consecutive fiscal years, the annual revenue derived from the commercial activities of the enterprise or monopoly concerned was less than 200 million SDR.' Similarly, the EU-UK TCA sets a threshold of 100 million SDR. See EU-UK TCA, Article 377.
[71] See EUJEPA, Article 13.2; EU-Chile FTA, Chapter 22.

Parties to the Agreement to ensure that SOEs comply with the non-discrimination principle when they provide financial services under a government mandate.[72] This also applies to the following activities: (i) support to exports or imports, provided that those services are: (a) not intended to displace commercial financing; or (b) offered on terms no more favorable than those that could be obtained for comparable financial services in the commercial market; (ii) supports private investment outside the territory of the Party; (iii) is offered on terms consistent with the Arrangement, provided that it falls within its scope.[73] In a similar vein, recent PTAs exclude the application of subsidy regulation to SOEs entrusted by the State with the provision of services to the general public for public policy objectives.[74] However, such exemptions should be applied according to the proportionality principle, meaning that they should be carried out transparently and cannot go beyond the public policy objectives pursued.[75] Arguably, this is an attempt to navigate the balance between the State's ability to intervene in its national economy to pursue non-economic objectives and international trade liberalization. Finally, the scope of PTAs may be restricted, and, as a result, Parties' measures may not be covered, if they are implemented in response to specific situations such as global emergencies, public security concerns, or public order issues (e.g., a pandemic).[76]

Focusing on the substantive regulation of SOEs in the EU PTAs, the regulatory framework evolved contrary to what has been observed under the WTO. Firstly, EU PTAs contain an increasing number of WTO+ provisions. Secondly, PTAs have increasingly taken into account the governance of SOEs. More specifically, globally accepted corporate governance standards in this respect, namely the OECD guidelines, are expressly referred to.[77] Thirdly, independence became a requirement that should characterize the relationship between regulatory bodies and regulated enterprises.[78] By requiring States to ensure a certain degree of independence between regulatory and regulated subjects, such clauses might serve as the foundation for communication and trust between different economic models.

Against this background, the elements that strengthen EU PTAs' regulatory framework compared to the multilateral one are transparency requirements regarding SOEs and related entities. Over time, requirements in this area became increasingly stricter and more comprehensive as they came to include an obligation to exchange information among Parties, with a special focus on the quality of the information provided. When there is reason to suspect that an entity's commercial operations are impacting their interests, Parties may ask for additional information from another Party when there is reason to suspect that its interests are impaired by the commercial operations of the latter's SOEs.[79]

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[72] EUJEPA, Article 13.2(6).

[73] See EUJEPA, Article 13.2 and 13.5.

[74] On financial support provided to SOEs and related exceptions: Jung Nakagawa, 'Regulatory Harmonization through FTAs and BITs: Regulation of State-Owned Enterprises', Society of International Economic Law, 3rd Biennial Global Conference.

[75] Cf. EUJEPA, Article 12.3(2).

[76] Cf. EVFTA, Article 11.2.

[77] EVFTA, Article 11.5; EU-UK TCA, Article 381. EVFTA refers to globally accepted standards of governance of SOEs, whereas the UK TCA makes explicit reference to OECD guidelines.

[78] EVFTA, Article 11.5 states: 'Independency of regulatory bodies from regulated enterprises (Vietnam ex 11.5 Each Party shall ensure that its regulatory bodies or functions are not accountable to any enterprises or entities that they regulate in order to ensure the effectiveness of the regulatory bodies or functions, and act impartially in like circumstances with respect to all enterprises or entities that they regulate, including state-owned enterprises, enterprises granted special rights or privileges, and designated monopolies.'

[79] EUJEPA, Article 13.7; EVFTA, Article 11.6; EU-UK TCA, Article 382.

The information to be provided can be divided into three categories: information on the organizational setup of the economic operator in question;[80] second, information on the Party's own national organization;[81] third, information on quantitative data, encompassing the annual revenue and/or total assets of the enterprise during the most recent three-year period. Also, most recent PTAs require publishing a list of subsidy recipients.[82] In any case, transparency obligations cannot require disclosing sensitive information or information that could jeopardize a specific enterprise's legitimate interests, whether private or public.[83] In light of this, the level of detail that Parties are required to disclose concerning their SOEs is significantly higher than in the past and compared to the WTO legal system. This may be an attempt to address the negative impact of information asymmetries within STE notifications made under Article XVII of the GATT. In any case, PTAs frequently recall GATT requirements and demand that actions adopted under the SOEs regulatory framework are not in breach with the GATT.[84]

Lastly, EU PTAs subject SOEs and related entities to competition laws, to prevent the distortion of the level playing field with POEs.[85] More specifically, competition laws apply as long as they do not impede the fulfillment of the specific mission entrusted to SOEs and related entities. From this perspective, it is noteworthy that some PTAs are designed not to impact national systems of state ownership[86] and to ensure that private and public enterprises are treated equally based on their ownership structure.[87] This approach closely resembles the competitive neutrality one followed in Australian PTAs.[88]

Moreover, Parties must ensure that SOEs comply with the non-discrimination principle in purchasing and selling goods and services. They must also act in accordance with commercial considerations. Unlike under the WTO legal framework, EU PTAs consider the non-discrimination principle distinct from the obligation to act in accordance with commercial considerations. This is a WTO+ set of obligations. Hence, the expression 'commercial considerations' is not a mere illustration of the non-

[80] Information on this category may include the composition of the board of directors or other management body in question, the percentage of shares and voting rights that the Party and/or a covered entity of the Party collectively own or hold in the enterprise, as well as the ownership and voting structure of that enterprise. Any special shares, voting rights, or other privileges that a Party, its SOEs, privileged enterprises, or designated monopolies may possess are covered.

[81] In other words, a description of government departments or public bodies should be given, along with any reporting obligations that may be placed on them, as well as their rights and practices regarding the hiring, firing, or compensation of senior executives and members of its board of directors or equivalent management body. Importantly, Parties may be required to describe the competent authority in charge of carrying out the government's ownership functions with regard to the enterprise itself and to identify the government department in charge of regulating its operations, as well as the reporting obligations imposed by that departments/competent authority, as well as the ways in which the latter may be involved in the hiring, firing, and compensation of executives and members of the board. It is of interest to note that these obligations are also contained within the CAI, hence entailing that the web of control and supervision of central and local SASACs, on the one hand, and SOEs, on the other hand, is captured under the Agreement. In other words, it is possible to argue that this is another provision that constitutes a bridge of dialogue between different legal and economic models.

[82] EUJEPA, Article 12.5; EU-Armenia, Article 293.

[83] EU-Colombia&Peru FTA, Article 27-130.2; EU-Moldova FTA, Article 223; EU-Georgia FTA, Article 77; EUJEPA, Article 1.6.

[84] Cf. EU-Lebanon FTA, Article 36; EU-Algeria FTA, Article 42/EU-Colombia&Peru FTA, Article 27.3.

[85] Cf. EU-Colombia&Peru FTA, Article 3; Kazakhstan; CETA, art. 17.3; S Korea, art. 11.4; Georgia, art. 205; Chile, old/Bosnia and Herzegovina.

[86] EVFTA, Article 11.3.

[87] In EUJEPA, Article 11.5 states, 'When applying its competition law, each Party shall respect the principle of non-discrimination for all enterprises, irrespective of the nationality and type of ownership of the enterprises.' See also EU-Chile, regarding the impartiality of controlling bodies over enterprises regardless of their ownership structure.

[88] See *infra*.

discrimination principle. Nevertheless, it is an independent concept related to customary business practices of POEs. Private businesses serve as the general benchmark to be considered.[89] Similarly, recent PTAs specify that the non-discrimination principle includes the national treatment and the most-favored-nation principle.[90]

a) Definitional approach in PTAs currently under negotiation

Having delineated how the definitional approach to SOEs has evolved in EU PTAs, the study now considers the most recent developments in this regard. Specifically, this section focuses on definitional approaches followed by EU textual proposals of PTAs currently under negotiation. Specifically, the analysis focuses on EU-India and EU-Indonesia PTAs.

The study confirms that ownership and control are adopted as constitutive elements of SOEs, with slight differences between them. In the EU-India PTA, the proposal makes a clear distinction between the two mentioned criteria: on the one hand, the majority ownership criterion is adopted, and on the other hand, the idea of (direct and indirect) control is anchored to the power to exercise more than 50% of the voting rights, to appoint a majority of the members of the board of directors or any other equivalent management body. In particular, the first footnote states that 'all applicable legal and factual criteria (...) on a case-by-case basis' should set the basis for establishing control.[91] This could be seen as an effort by the EU to institutionalize and export its stance on the public body issue as expressed in the WTO legal framework.

In the EU-Indonesia PTA, the proposal conflates ownership and control. It states that an SOE is an enterprise in which a Party 'owns more than 50% of the enterprise's subscribed capital or the votes attached to the shares issued by the enterprise.' The power to appoint more than half of the members of the enterprise's board of directors or an equivalent body is also included in the definition. Hence, more precision regarding the dividing line between 'ownership' and 'control' is desirable.

Beyond the definition of SOEs, the rationale underpinning both proposals is to prevent the use of SOEs to circumvent commitments undertaken under the Agreement while defining the regulatory framework for the delegation of authority.[92] However, what is meant by 'delegated authority' is not defined. It is hoped that the final versions of these agreements will include more detail in this regard.

1.2.3. The notion of 'State-controlled enterprise' (SCE)

As mentioned already, PTAs also cover entities other than SOEs, such as State-controlled enterprises (SCEs). In the EU-Kazakhstan PTA, this is defined as any enterprise involved in a commercial activity, on which a Party at the central or sub-central level can exert, directly or indirectly, decisive influence. In this context, a presumption is introduced: a decisive level of influence is presumed if a Party can directly or indirectly appoint more than half of the administrative, managerial, or

[89] CETA, Article 18.1.
[90] EUJEPA, Article 13.5; EU-UK TCA, Article 380.
[91] Similarly in EU-Chile FTA (2022) Article 22.1, footnote 1.
[92] The typical clause on this point states: 'Unless otherwise specified in this Agreement, each Party shall ensure that any person including a state-owned enterprise, an enterprise granted special rights or privileges or a designated monopoly that has been delegated regulatory, administrative or other governmental authority by a Party at any level of government, acts following the Party's obligations as set out under this Agreement in the exercise of that authority.'

supervisory body members. The presumption and the introduction of a 'decisive influence test' confers a high degree of flexibility to the notion of SCEs, enabling the adoption of a relatively broad definition of State influence. In this context, an SCE is an enterprise whose decision-making process is directed by the State.

In light of this, it is argued that a substantive distinction between SCEs and SOEs, as identified above, is hard to find. This is because the term 'influence' is too broad to constitute an effective distinguishing line between the two entities. This is particularly so given the presumption made is hardly distinguishable from the definition of control that is used for SOEs in the second EU definitional model. Moreover, indirect control may well be exercised through State ownership. Hence, the inclusion of an additional category of enterprises related to the State adds a further layer of complexity that risks creating more issues than it can resolve.

1.2.4. The notion of 'enterprise granted special or exclusive rights or privileges'

As discussed already, EU PTAs also cover 'enterprises granted special or exclusive rights or privileges.' This category of entities was also considered under Article XVII of the GATT. The reader may recall that no definition of a privileged enterprise was provided in that context. However, PTAs provide some clarification on the definitional criteria of these enterprises. Firstly, privileged enterprises are not necessarily public. They can be governmentally-owned or privately-owned enterprises. In addition, 'special or exclusive rights or privileges' are those that the State grants to two or more entities and restricts the ability of other businesses to engage in such activities.[93] They may be related to trade in goods, but the service sector is also covered. Hence, the three constitutive criteria of privileged enterprises are (i) the type of activity, (ii) the performance of the relevant activity, and (iii) State delegation.[94] Given this legal reconstruction, public and private monopolies are included in this notion. Arguably, in the light of the ownership-neutral approach adopted by the provision, SOEs (as well to the extent that they are granted monopoly rights over certain products or services) are potentially included under this regulatory framework.

1.2.5. The notion of 'covered entities'

Some EU PTAs do not specifically address SOEs. However, some reference can be found to other concepts whose definition is sufficiently wide to include SOEs under their scope. More specifically, the constitutive criteria used to define the boundaries of the notion of 'covered entities' is an example. EU PTAs show two different definitional approaches to determine the 'covered entities' under the Agreement considered.

The first approach covers three different groups of entities:[95] monopolies and State enterprises; suppliers of a good or service if a) they are one of a small number of goods or services suppliers authorized or established by a Party, formally or in effect, and b) the Party substantially prevents competition among those suppliers in its territory. Arguably, this notion is close to that of an

[93] See: EU-Kazakhstan FTA, Article 163(e).
[94] See also EU-UK TCA, Article 376; EU-Chile FTA, Chapter 22; EUJEPA, Article 13.1.
[95] CETA, Article 18.1.

'exclusive service supplier' found in multilateral agreements. Finally, covered entities are also the ones to whom a Party has granted - formally or in effect - special rights or privileges to supply a good or service, substantially affecting the ability of any other enterprise to supply that same good or service in the same geographical area under substantially equivalent condition.[96] In this regard, reference to the ability of these economic operators to escape competitive pressure or market constraints is also found.[97] This final category may refer to privileged enterprises that, as a result of the special or exclusive right granted by the State, may hinder both international trade and the level playing field between economic actors.

Against this background, the second definitional approach, followed in the EU-China Comprehensive Agreement on Investment (CAI), may also be considered. In this context, 'covered entities' are entities at all levels of the government that are (i) enterprises owned by the State by more than 50% of the share capital; (ii) controlled through ownership interests corresponding to the exercise of more than 50% of the voting rights; (iii) enterprises in which the State holds power to appoint a majority of members of the board of directors or equivalent management body, or (iv) whose decisions are controlled by the State, also through minority ownership.[98] Therefore, even though the CAI does not use the term 'SOE,' it nonetheless encompasses both State-controlled and owned companies.[99] It is interesting to note that these two notions are referred to in their broadest sense. Indeed, both majority and minority ownership are considered, while 'control' includes all types of authority that the State can exercise over the strategic decisions of the enterprise.

1.2.6. The notion of 'enterprise'

When it comes to the ownership structure of enterprises, EU PTAs follow an ownership-neutral approach. The definition of 'enterprise' consistently throughout all the Agreements[100] refers to an entity (i) constituted or organized under applicable law, (ii) whether or not for profit, and (iii) whether privately or governmentally owned or controlled. As a result, neutrality, in a sense, refers to both the operations of the enterprise and the ownership of its structure. Hence, an entity providing goods on the market for reasons other than profit may still qualify as an enterprise. However, enterprises carrying out specific activities may escape the regulation of PTAs.

The definition is also accompanied by examples of entities that fall within this category, including a corporation, trust, partnership, sole proprietorship, joint venture, or other association. The list is intended to be non-exclusive.[101]

Certain agreements use 'legal person' or 'juridical person' instead of 'enterprise.'[102] The constitutive elements are the same. Agreements, however, may specify when 'juridical persons' are 'owned,' 'controlled,' or 'affiliated.' We can compare this regulatory framework and the one observed in

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[96] CETA, Article 18.1.

[97] EVFTA, Article 11.1.

[98] CAI, Section II, Article 3 bis.

[99] Similarly Bernard Hoekman and André Sapir, 'State-Owned Enterprises and International Competition: Towards Plurilateral Agreement' in Bernard Hoekman, Xinquan Tu and Dong Wang (eds), *Rebooting Multilateral Trade Cooperation: Perspectives from China and Europe* (CEPR Press, 2021), 217.

[100] Some agreements use the term 'legal person' or 'juridical person' instead of 'enterprise.'

[101] CAI, Article 2.

[102] EU-Chile FTA (old), Article 2.1.

Chinese PTAs,[103] as there are some similarities between them. Indeed, ownership is linked with majority ownership of the share capital; control corresponds to the power to name the majority of directors or otherwise legally direct their actions, whereas affiliation pertains to control or being controlled by another juridical person. This specification is crucial to ensuring that the relationships between SOEs and related entities are taken into account in the Agreements, in addition to the relationship between the State and its SOEs.

1.2.7. The notion of 'State enterprise' (SE)

Among all the notions considered in this section, the notion of SEs is the least specific. This is because a SE is defined as an enterprise owned or controlled by the State. Usually no further details are provided. While, on the one hand, the lack of a definition may ensure extensive coverage, from a practical standpoint, it may be challenging to determine which entities constitute SEs due to the freedom left to the States to determine, which ownership schemes fall under the notion of 'ownership' and which powers may amount to 'control.'

1.2.8. The notion of 'State trading enterprise' (STEs)

Delving further into related entities to SOEs covered by EU PTAs, the notion of STEs can be considered. More specifically, the need to define these entities seems to emerge in PTAs concluded in 2012. In this regard, the definitional approach evolved from the one followed at the multilateral level. Indeed, STEs are defined relatively broadly. The notion encompasses both public and non-public enterprises, wherever located, at central and sub-central levels, entrusted with exclusive or special rights or privileges. The latter include legislative and constitutional powers. STEs are regulated to the extent that their powers enable them to influence the level or direction of imports and exports through their purchases or sales. This definition heavily draws from that of Article XVII of the GATT and the Understanding on the Interpretation of Article XVII GATT. Therefore, this is a WTO= type of obligation, as the focus is on sales and purchases activities, i.e., trading activities, and the STEs' ability to influence trade through the powers conferred on them. The regulatory framework has an anti-circumvention rationale: the aim is to prevent States from using STEs as a tool to circumvent their obligations under the Agreement. The explicit mention of its provisions confirms the close connection with the GATT. Indeed, in certain Agreements, Parties refer to Article XVII of the GATT without adding new elements.[104] Other Agreements, while referring to Article XVII of the

[103] See EU-CARIFORUM FTA, Article 60(d); EU-Colombia&Peru FTA, Article 11; EU-Kazakhstan FTA, Article 40(d); EU-Moldova FTA, art. 203; EU-South Korea FTA, Article 7.1; EU-Georgia FTA, Article 77(d); EU-Ukraine FTA, Article 86; EU-Singapore FTA, Article 8.2(b); EVFTA, Article 8. 2.

[104] The typical clause in this regard states: 'The Parties affirm their existing rights and obligations under Article XVII of GATT 1994, its interpretative notes and the Understanding on the Interpretation of Article XVII of GATT 1994, contained in Annex 1A to the WTO Agreement which are incorporated into and made part of this Agreement, mutatis mutandis.' See EU-Singapore, Article 2.12; EVFTA, Article 2.20; EU-UK TCA, Article 378.

GATT, also emphasize the transparency requirements.[105] It is of interest to note that STEs are treated separately from 'State enterprises.'[106]

1.2.9. The notions of 'monopoly' and 'designated monopoly'

Another notion that comes into relevance in our analysis is 'monopoly.'
PTAs consistently define a monopoly as an entity (i) involved in a commercial activity, (ii) in a relevant market, and (iii) designated at a central or sub-central level as the sole supplier or purchaser of a good or service. This terminology is very similar to the one used under the WTO legal framework on trade in services.[107] Constitutive elements revolve around the same standards applied at the multilateral level. In this regard, the bilateral level confirms that a positive action of the State in the economy is required for the monopoly to exist. Hence, relevant constitutive criteria are the activity carried out and State intervention in the economy which may be in the form of delegation or authorization of the monopoly itself.
Against this background, the notion of 'designated monopoly' is narrower. Looking at the subjects involved, the monopoly may include one entity, a group of entities, or a government agency. Also in this case, the State is required to act in the form of designation to qualify that particular entity, group of entities, or governmental agencies as the only supplier or purchaser of a given good or service.[108] In this regard, the verb 'to designate' means 'to establish,' 'to authorize' a monopoly, or 'to expand the scope' of a monopoly to include an additional good or service.

1.2.10. The notion of 'public entity,' 'services supplied in the exercise of governmental authority', and 'services of general economic interest'

Finally, EU PTAs cover public entities. Such coverage is most of the time included in Annexes regulating financial services. This is the first parallel to the WTO legal framework. As for the definition, PTAs follow a two-step approach.[109] On the one hand, Agreements first define public entities as a government, a central bank, or a monetary authority. However, a public entity may also be owned or controlled by a Party principally engaged in governmental functions or activities for governmental purposes. Put another way, a body that is neither a governmental authority nor part of the State's structure but still engages in certain types of activity qualifies as a public entity. These should correspond to 'governmental functions' or reflect 'governmental purposes.'. In this context, entities principally engaged in the supply of financial services on commercial terms are excluded from this notion. Secondly, private entities are considered. These can be assimilated to public ones when performing functions normally performed by a central bank, or a monetary authority. Therefore,

[105] Cf. EU-South Korea FTA, Article 2.13; EVFTA, Article 2.20;
[106] See for example EU-Colombia&Peru FTA, which dedicates two different provisions and two different headings to STEs (art. 27), on the one side, and State enterprises and designated monopolies, on the other side (art. 263).
[107] See Chapter 3, section 3.

[108] See EU-Armenia FTA, Article 301; EUJEPA, Article 13.1; EVFTA, Article 11.1; EU-UK TCA, Article 376.
[109] EU-Moldova FTA, Article 241; CETA, Article13.1; EU-South Korea, Article 7.37; EU-Armenia FTA, Article 181; EVFTA, Article 8.41.

the distinguishing criteria between public and private entities are: (i) belonging to the State apparatus; and (ii) delegation, purpose pursued, and activity.

EU PTAs do not provide more details than the multilateral legal framework. Indeed, as observed in Chinese bilateral agreements, the key constitutive elements, such as governmental functions and purposes, remain unspecified. Perhaps, the definition of 'services supplied in the exercise of governmental authority' that can be found in several agreements may provide some clarification in this regard.[110] Indeed, a service is supplied in the exercise of governmental authority if it is supplied neither on a commercial basis nor in competition with one or more service suppliers. While this approach is arguably WTO=, additional definitional criteria are provided.[111] More specifically, a service supplied in the exercise of governmental authority may amount to (i) activities conducted by a central bank or monetary authority or any other public entity in pursuit of monetary or exchange rate policies; (ii) activities part of a statutory system of social security or public retirement plans; and (iii) activities of a public entity exercised for the account, with the guarantee and for the use of the financial resources of the government.[112] Hence, the focus is on the identity of the entity concerned, together with the objectives pursued through its activity.

Against this background, another group of activities is considered only under EU PTAs, namely SGEIs. SGEIs are not defined under EU law. Indeed, Article 106(2) of the TFEU simply states that undertakings entrusted with the provision of SGEIs are subject to the treaty provisions to the extent that their application does not hinder their task.[113] However, they are regarded as a category of services of particular interest that would not be supplied or would be supplied under different conditions in terms of objective quality, safety, affordability, equal treatment, or universal access by market forces absent State intervention.[114] Public authorities at the national level decide which activities qualify as SGEIs and are therefore subject to special public service responsibilities at national, regional, or local levels.[115] Moreover, EU Member States are required to entrust one or more undertakings with the provision of SGEIs through a public service assignment, clearly defining the obligations of the undertakings in question and of the State.[116]

1.3. SOEs in PTAs concluded by the US[117]

[110] See CETA, Article 8.1; EU-South Korea, Article 7.4; EU-Georgia FTA, Article 77; EU-Ukraine FTA, Article 86; EU-UK TCA, Article 124.

[111] See EU-Colombia FTA, Article 152; EU-Peru & Colombia FTA, Article 152.

[112] See EU-Moldova FTA, Article 203. Conversely, economic activities do not include activities carried out in the exercise of governmental authority. See EU-Georgia FTA, Article 77.

[113] For a detailed account on SGEIs: Caroline Wehlander, Jim Davies and Erika Szyszczak, 'Universal Service Obligations: Fulfilling New Generations of Services of General Interest' in Erika Szyszczak and others (eds), *Developments in Services of General Interest* (TMC Asser Press, 2011) 155-176; Wolf Sauter, 'Services of General Economic Interest and Universal Services in EU Law', TILEC Discussion Paper No. 2008-017; Ulla Neergaard, 'Services of General (Economic) Interest and the Services Directive', in Ulla Neergaard, Lynn Roseberry and Ruth Nielsen (eds), *The Services Directive—Consequences for the Welfare State and the European Social Model* (DJØF Publishing, 2010).

[114] European Commission, Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest, SWD(2013) 53 final/2, 21.

[115] Ibid.

[116] See CETA, Article 17.1.

[117] The analysis took into consideration all bilateral PTAs concluded by the US from 2001 until today. The following PTAs have been examined in this section: United States-Bahrein Free Trade Agreement (signed 14 September 2004,

The US has supported the conclusion of preferential agreements ever since the GATT negotiations (see *supra* section 2). Over the last few decades, the US government has signed multiple PTAs, with NAFTA serving as its first significant mega-regional agreement. Its international trade agenda has also included bilateral agreements.[118] From a general perspective, US PTAs follow a standardized and harmonized approach, with less differentiated clauses than those observable under the perhaps more flexible approach followed by the EU. Despite a few exemptions, US PTAs do not differ based on the degree of development of their trade partners. The reasons that guide the US will to enter into PTAs are different. Firstly, there is the willingness to preserve a central role in international trade relations and to shape them through preferential arrangements.[119] Secondly, the conclusion of an increasing number of PTAs has been fueled by the US' acute displeasure with the lack of progress in the multilateral trading system.[120] In this regard, Heydon and Woolcock argue that in the framework of the current global economy,[121] the US is not an absolute but only a relative economic power, with all the consequences in terms of bargaining power. Therefore, economic relations are prompted to find a balance at the bilateral level. This also explains why the US could not exert pressure on its trading partners at the multilateral level to establish agreed solutions on the most sensitive topics.[122] Hence, taking action in a more limited context, such as at the bilateral or cross-regional level, is the only option to shape desired standards on selected issues and to impose them on trading partners. In

entered into force 11 January 2006) [hereinafter US-Bahrein FTA]; United States-Singapore Free Trade Agreement (signed 15 January 2003, entered into force 1 January 2004) [hereinafter US-Singapore FTA]; United States-Australia Free Trade Agreement (signed 18 May 2004, entered into force 1 January 2005)[hereinafter US-AUS FTA]; United States-Morocco Free Trade Agreement (signed 15 June 2004, entered into force 1 January 2006) [hereinafter US-Morocco FTA]; United States-Dominican Republic-Central America Free Trade Agreement (signed 28 February 2006, entered into force 1 March 2006) [hereinafter CAFTA]; United States-Oman Free Trade Agreement (signed 13 October 2005, entered into force 1 January 2009) [hereinafter US-Oman FTA]; United States-Peru Free Trade Agreement (signed 12 April 2006, entered into force 1 February 2009) [hereinafter US-Peru FTA]; United States-Panama Free Trade Agreement (signed 28 June 2007, entered into force 31 October 2012) [hereinafter US-Panama FTA]; United States-Chile Free Trade Agreement (signed 6 June 2003, entered into force 1 January 2004)[hereinafter US-Chile FTA]; United States-Colombia Free Trade Agreement (signed 22 November 2006, entered into force 15 May 2012)[hereinafter US-Colombia FTA]; United States-Korea Free Trade Agreement (signed 30 June 2007, entered into force 15 March 2012)[hereinafter US-Korea FTA].

[118] Jeffrey J Schott and Julia Miur, 'US PTAs: What's Been Done and What It Means for the TPP Negotiations', in CL Lim, Deborah K Elms and Patrick Low (eds), *The Trans-Pacific Partnership: A Quest for a Twenty-First Century Trade Agreement* (CUP, 2012) 45 f.

[119] Kenneth Heydon and Stephen Woolcock, *The Rise of Bilateralism: Comparing American, European and Asian Approaches to Preferential Trade Agreements* (United Nations University Press, 2009)146 f.

[120] This dissatisfaction reached its peak with how the 'public body' issue was held by the Panel and the AB. In other words, it is not only related to the slow pace with which the WTO is able to reach legal solutions to dynamic problems. Hence, the issue finds its roots in the more general framework of how a system created with market economies in mind can deal with NMEs. The dynamics stirred up by this clash over US policy have attracted the attention of newspapers over time. See: The Economist, Who Wins from the Unravelling of Sino-American Trade? (6 November 2022), available at https://www.economist.com/finance-and-economics/2022/11/06/who-wins-from-the-unravelling-of-sino-american-trade; The Economist, The New Order of Trade (6 October 2021), available at https://www.economist.com/special-report/2021/10/06/the-new-order-of-trade; The Economist, America and China are Sparring over Subsidies (32 October 2019); Keith Johnson, U.S. Effort to Depart WTO Gathers Momentum (Foreign Policy, 27 May 2020), available at https://foreignpolicy.com/2020/05/27/world-trade-organization-united-states-departure-china/. For an academic perspective: Lehne, Crisis at the WTO: Is the Blocking of Appointments to the WTO Appellate Body by the United States Legally Justified? (2019), at 29–105.

[121] Heydon and Woolcock (n 119).

[122] This is also due to the questioning of the 'Washington Consensus' also stemming from the disappointment as to the results it reached. See Dani Rodrik, 'Goodbye Washington Consensus, Hello Washington Confusion? A Review of the World Bank's Economic Growth in the 1990s: Learning from a Decade of Reform' (2006) XLIV Journal of Economic Literature 973-987.

other words, the growing dissatisfaction at the multilateral level and the diminished economic power has prompted a shift in the context under which pressure to adopt innovative solutions could be exercised. This is confirmed by the number of WTO+ obligations that the US adopts in PTAs in many subjects, especially regarding compliance and enforcement.[123]

This is the framework in which the PTA provisions on SOEs and related entities must be considered. The dissatisfaction toward the regulation of SOEs at the multilateral level is a common feature that the US shares with the EU and Japan.[124] Hence, the US has been prompted to exercise its influence to ensure these entities are regulated outside the WTO, in a similar vein as China that pushed not to explicitly regulate them (section 5.1.7). In this regard, it is interesting to note that the first attempts have implied a partial departure from the general harmonized approach in US PTAs when dealing with NMEs. In any case, the terminology used can be appreciated as a way for the US to use PTAs as leverage to advance its trade agenda on SOEs regulation in international trade.

1.3.1. Covered entities

In line with what has been observed under the Chinese and EU PTAs, the US approach is inspired by the principle of neutrality. Indeed, the Agreements recognize the Parties' sovereignty to establish or maintain SOEs and related entities.[125] The objective is not to ban their existence but rather to tackle the distortion or restriction of international trade that may derive from their conduct or the way governments exploit them.[126]

Against this background, entities regulated under US PTAs include enterprises,[127] SEs,[128] government enterprises,[129] public entities,[130] and designated monopolies.[131]

1.3.2. The notion of 'government enterprise'

No specific reference to the term 'SOEs' could be found in bilateral agreements concluded by the US.[132] However, the closest observable notion is that of 'government enterprise' used in the US-Singapore FTA.[133] More specifically, an ad hoc chapter of this agreement regulates these enterprises,

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[123] Henrik Horn, Petros C Mavroidis and André Sapir, 'Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements' (2010) 33(11) The World Economy 1568 f.

[124] See Joint Statement on Trilateral Meeting of the Trade Ministers of the United States, Japan, and the European Union, 26 September 2018.

[125] US-Singapore FTA, Article 12.3; US-Australia FTA, Article 14.4; US-Peru FTA, Article 13.6; US-Chile FTA, Article 16.3; US-Colombia FTA, Article 13.6; US-Korea FTA, Article 16.3.

[126] See US-Singapore FTA, Article 12.1; US-Peru FTA, Article 13.6; EU-Colombia FTA, Article 13.6.

[127] See US-Bahrein FTA, Article 1.3; US-Singapore FTA, Article 1.2; US-Australia FTA, Article 1.2; US-Morocco FTA, Article 1.3; CAFTA, Article 2.1; US-Oman FTA, Article 1.3; US-Peru FTA, Article 1.3; US-Chile FTA, Article 2.1; US-Colombia FTA, Article 1.3.

[128] See US-Bahrein FTA, Article 1.3; US-Australia FTA, Article 1.2; CAFTA, Article 2.1; US-Peru FTA, Article 1.3; US-Chile FTA, Article 2.1; US-Colombia FTA, Article 1.3; US-Korea FTA, Article 1.4.

[129] US-Singapore FTA, chapter 12.

[130] US-Singapore FTA, Article 10.19(12); US-Bahrein FTA, Article 11.21; US-Oman FTA, Article 12.20; US-Korea FTA, Article 13.20.

[131] US-Singapore FTA, Article12.3; US-Peru FTA, Article 13.5.

[132] A specific reference to SOEs can be found instead at the cross-regional level. See section 3.1 and 3.2 *supra*.

[133] On the role played by SOEs in the economy of Singapore see: Cheng Han Tan, Dan W Puchniak and Umakanth Varottil, 'State-Owned Enterprises in Singapore: Historical Insights into a Potential Model for Reform' (2016) 28 Columbia Journal of Asian Law 61-97.

addressing anti-competitive corporate practices, designated monopolies, and government businesses. This is also the only FTA in which this notion has been identified.
Before delving into it, it is appropriate to briefly outline how an 'enterprise' is defined within the meaning of US PTAs. An enterprise is any entity (i) constituted or organized under applicable law; (ii) whether or not for profit; and (iii) whether privately or governmentally-owned. Also in this case, a non-exhaustive list of entities falling within this notion is provided. It includes any corporation, trust, partnership, sole proprietorship, joint venture, or other association.[134] Hence, US PTAs adopt a broad notion of 'enterprise', inspired by the neutrality principle both concerning the ownership structure and the activity pursued. However, although not expressly addressed, SOEs may incidentally be subject to all Agreement provisions and regulations.
Looking now at the notion of 'government enterprise,' the first element to address is that its definition is not unitary. In other words, a government enterprise is defined differently in the two juridical systems of the Parties. Article 12.8 states that for the US, a 'government enterprise' is an enterprise owned or controlled through ownership interests by a Party.[135] Hence, the constitutive elements adopted are State ownership and control through ownership. While the relevant level of State ownership is left undefined, the notion of control seems to encompass both direct and indirect control. No other information is given.
From the side of the Singaporean government, the definition of a 'government enterprise' is more elaborate. Indeed, this is an enterprise on which the State or its government enterprises exercise 'effective influence.'[136] This notion can be broken into three components, all targeting those situations in which the State can affect the decisional process of the undertaking concerned. More specifically, there is an effective influence when: (i) the government and its governmental enterprises, alone or cumulatively, retain the ownership of 50% of the voting rights of an entity; (ii) the government and its governmental enterprises, alone or cumulatively, can exercise substantial influence over the composition of the board of directors or any other managing body of an entity or to determine the outcome of decisions on the strategic, financial, or operating policies or plans of an entity, or over the management or operation of an entity. Effective influence is assumed when the State or its government enterprises own less than 50% but more than 20% of the entity's voting securities or own the largest block of voting rights of such entity. This rebuttable presumption is advantageous for two reasons: firstly, it recognizes the importance of minority ownership in the relationship between the State and its enterprises. Put differently, it clarifies that the State can influence an undertaking even if it is not a majority shareholder. On the other hand, it confers flexibility to the concept, enabling it to capture the reality of a State-enterprise relationship beyond its formal determination. However, flexibility may be frustrated due to the differential approach that risks jeopardizing the effectiveness of the definition itself. Arguably, this results from the unilateral pressure exercised by the US in the context of this preferential arrangement. This is further confirmed by the substantive obligations related to government entities. The government of Singapore is required to reduce, and eventually substantially eliminate, its aggregate ownership as well as any other interests that could confer effective influence to it on entities organized under the laws of Singapore. However, the

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[134] See US-Australia FTA, Article 1.2; US-Morocco FTA, Article 1.3; US-Peru, Article 1.3; CAFTA, Article 2.1; US-Panama, Article 2.1: US-Chile FTA, 2.1; US-Colombia FTA, Article 1.3; US-Korea FTA, Article 1.4.
[135] EU-Singapore FTA, Article 12.8 para 6.
[136] Ibid.

US undertakes to ensure that any government enterprise it establishes or maintains accords non-discriminatory treatment in the sale of its goods or services to covered investments.[137] In other words, notwithstanding the neutral approach stated by the FTA, Singapore is expected to reduce and eventually eliminate both majority and minority-owned SOEs. The balance of the agreement is in favor of the US, as most of the obligations on SOEs are only imposed on Singapore. Moreover, although 'nothing in this Agreement shall be construed to prevent a Party from establishing or maintaining a government enterprise,' one Party is required to dismantle the enterprises it owns or controls. Hence, although formally stated, the neutrality principle is impaired in practice.[138]

The imbalance between the Parties to the Agreement also emerges from substantive obligations on government enterprises. Different substantive obligations are imposed on US and Singapore in addition to the commitment to make sure that government enterprises are not exploited in violation of the Parties' obligations under the Agreement. Firstly, the US must ensure that its government enterprises comply with the non-discrimination principle. However, additionally, Singapore must ensure that its government enterprises (i) act solely in accordance with commercial considerations in their purchases and sales activities; (ii) do not, either directly or indirectly, including through its dealings with its parent, subsidiaries, or other enterprises with common ownership: (a) enter into agreements among competitors that restrain competition on price or output or allocate customers for which there is no plausible efficiency justification, or (b) engage in exclusionary practices that substantially lessen competition in a market in Singapore to the detriment of consumers.[139] Compared to US PTAs signed before the TPP, the USA-Singapore FTA contains the most comprehensive non-discrimination obligation.[140] By contrast, for instance, the US-AUS FTA shows a more restrictive approach as the non-discrimination principle only covers SOEs' sales of goods and services.[141]

Against this background, the government of Singapore also undertakes not to, directly or indirectly, influence its government enterprises, if such influence is exercised contrary to the Agreement.[142] In other words, State influence is considered a factor that might harm the SOEs' independence. Interestingly, State influence is not forbidden per se but only when it can affect the decision-making process of the enterprises concerned. Lastly, stringent transparency requirements are imposed when government enterprises are concerned, but solely on the Singaporean government. The latter is required to publish a report containing a series of information concerning its government enterprises at least once a year.[143]

[137] EU-Singapore FTA, Article 12.3(2)(f).

[138] Similarly, Yingying Wu, 'The Latest Regulatory Regime of SOEs Under International Trade Treaties', in Julien Chaisse, Jędrzej Górski and Dini Sejko (eds), *Regulation of State-Controlled Enterprise: An Interdisciplinary and Comparative Examination* (Springer, 2021) 37 f.

[139] See US-Singapore FTA, Article 12.3(2).

[140] Julien Sylvestre Fleury and Jean-Michel Marcoux 'The US Shaping of State-Owned Enterprise (2016) 19 Journal of International Economic Law' 457.

[141] See US-Australia FTA, Article 14.4(1)(b).

[142] Ibid Article 12.3(2)(e).

[143] Relevant information include the percentage of shares and the percentage of voting rights that Singapore and its government enterprises cumulatively own, a description of any special shares or special voting or other rights that Singapore or its government enterprises hold, to the extent different from the rights attached to the general common shares of such entity, the name and government title(s) of any government official serving as an officer or member of the board of directors and the annual revenue and/or total assets of the enterprises concerned. Ibid Article 12.3(2)(g).

1.3.3. The notion of 'State enterprise'

A second notion close to that of SOE under US PTAs is the notion of SEs. An SE is a business that a Party owns or controls.[144] In this case, the notion of control can be considered alone or with reference to ownership interests.[145] The definitional criteria are not specified. However, PTAs clarify that SEs are regulated to the extent that they exercise any regulatory, administrative, or other governmental authority delegated to them by the Party. Therefore, (i) exercising these powers and governmental authority and (ii) State delegation are additional constitutive elements of SEs. It should be noted that several examples are provided as to what activities can be deemed 'governmental,' including the power to expropriate, grant licenses, regulate economic transactions, impose quotas, and collect various taxes.

The study of this notion arguably shows the effort of the US to specify at the bilateral level those elements over which there is much more dissent on the multilateral level. This emerges in US-Peru FTA, in which Article 2.17, dealing with export STEs, states that '[t]he Parties shall work together toward an agreement in the WTO that (a) eliminates restrictions on the right to report; (b) eliminates any special financing granted directly or indirectly to state trading enterprises that export for sale a significant share of their country's total exports of an agricultural good and (c) ensures greater transparency regarding the operation and maintenance of export STEs.'[146] Arguably, this provision might be seen as evidence that PTAs could serve as the foundation for future WTO discussions on SOEs-related issues.

Looking at substantive obligations, Parties are required to ensure that SEs carry out their operations in such a way as not to hinder trade and investment and in accordance with the bilateral obligations (anti-circumvention rationale) and the non-discrimination principle in the sales and purchases of goods.[147] The application of different pricing policies is not per se inconsistent with the Agreements.[148]

Lastly, the US-Australia FTA introduces a competitive neutrality clause. This ensures that governments, at any level, do not provide any competitive advantage to government enterprises simply because governmentally-owned.[149]

1.3.4. The notion of 'public entity'

US PTAs cover public entities under their scope. Two definitional approaches are followed. Firstly, a public entity is (i) a central bank or monetary authority of a Party or (ii) any financial institution owned or controlled by a Party.[150] In this case, constitutive criteria are the identity of the entity concerned, together with State ownership or control. The difference between SEs and other examined

[144] US-Colombia FTA, Article 1.3; US-Bahrein FTA, Article 11.21; US-Australia FTA, Article 1.2; US-Morocco FTA, Article 1.3.
[145] CAFTA, Article 2.1; US-Peru FTA, Article 1.3; US-Chile FTA, Article 2.1; US-Korea FTA, Article 1.4.
[146] Emphasis added.
[147] US-Australia FTA, Article 14.4; US- Chile FTA, Article 16.4; US-Korea FTA, Article 16.3. Certain PTAs only refer to sales activities: US-Australia, Article 14.4; US-Peru FTA, Article 13.6; US-Colombia FTA, Article 13.6.
[148] US-Korea FTA, Article 16.4.
[149] US-Australia FTA, Article 14.4(3).
[150] US-Australia FTA, Article 13.19; CAFTA, Article 12.20; US-Peru FTA, Article 12.20; US-Chile FTA, Article 12.19; US-Korea FTA, Article 1.4.

categories specifically lies in the entity's identity. Arguably, this approach is looser than the approach of Chinese or EU PTAs.

Secondly, a public entity is defined as (i) a central bank or monetary authority of a Party, (ii) or any financial institution; (iii) owned or controlled by a Party; and (iv) principally engaged in carrying out governmental functions or activities for governmental purposes. The notion does not include entities principally engaged in supplying financial services on commercial terms, designated monopolies, or government enterprises.[151] In this framework, it is noticeable that key criteria, such as the notions of 'governmental function' or 'governmental purpose,' are left undefined. This may affect the application of the regulatory framework. In this regard, US PTAs encompass the notion of 'service supplied in the exercise of governmental authority.' This is any service supplied neither on a commercial basis nor in competition with one or more service suppliers. Hence, also in US PTAs, this definition is based on WTO Agreements.

1.3.5. The notions of 'monopoly' and 'government monopoly'

Delving deeper into entities related to SOEs, the study reveals that US PTAs cover several types of monopolies.

In this context, a monopoly is described as an entity that in the relevant market in the territory of a Party is designated as the sole provider or purchaser of a good or service.[152] This notion, therefore, requires active involvement of the State in the economy, aiming to establish a monopoly. More specifically, the State intervenes to ensure that the chosen entity acts as the sole economic operator in purchasing or providing a certain good or service. In other words, the constitutive criteria of a monopoly in this context are (i) the active role of the State in the economy; and (ii) the type of activity carried out by the entity.

Against this background, a government monopoly is a monopoly that is (i) owned or (ii) controlled through ownership interests by (iii) the national government of a Party or another government monopoly.[153] It is interesting to note that in the US-Korea FTA it is specified that the government that may own a government monopoly is the central level of government.[154]Although, ownership and control are left undefined, they still operate as constitutive elements of government monopolies.

Looking at substantive obligations, as it has been observed for SEs, PTAs aim at regulating these entities in order to avoid them being used by Parties to circumvent their obligations[155] or act in a way to hinder international trade flow or the level playing field with POEs. This is confirmed by observing that monopolies are usually regulated within the competition law chapter.[156] In addition to this regulatory framework, they are subject to the application of non-discrimination obligations and must act in accordance with commercial considerations. In this context, the two elements represent two different sets of obligations, contrary to what has been seen under the multilateral context (WTO+).

[151] See US-Singapore FTA, Article 10.20.

[152] US-Singapore FTA, Article 12.8; US-Peru FTA, Article 13.11; US-Chile FTA, Article 16.9; US-Colombia FTA, Article 13.11

[153] US-Singapore FTA, Article 12.8. Similarly, US-Peru FTA, Article 13.11; US-Chile FTA, Article 16.9; US-Colombia FTA, Article 13.11.

[154] US-Korea, Article 16.9.

[155] See US-Singapore FTA, Article 12.3.

[156] ES-Korea FTA, Chapter 16 on competition-related matters.

In turn, 'commercial considerations' are activities consistent with standard business practices of privately-held enterprises in the relevant business or industry.[157] Therefore, private economic operators and their practices serve as benchmarks.

1.4. SOEs in PTAs concluded by Australia[158]

Australia has been a strong proponent of multilateralism in trade regulation.[159] Such a stance is likely the result of historical factors. From the perspective of Australia, preferential agreements were a step backward from trade diversion created by imperial preferences, perceived as a strategy to increase the country's dependence on foreign markets.[160] In other words, Australia's opposition to PTAs was driven by its concern that its regulatory independence and sovereignty would be jeopardized.[161] Since 1997, however, the Australian government has started to embrace preferential arrangements. Through its White Paper 'In The National Interest', the Australian government officials brought bilateralism to the center of its international trade agenda.[162] From this moment on, Australia aimed to establish a wider in scope and more comprehensive preferential arrangements than in the past.[163] In this context, Australia increasingly implemented PTAs to expand its bilateral influence in the Asia-Pacific

[157] EU-Peru FTA, Article 13.11.

[158] The analysis took into consideration all bilateral PTAs concluded by Australia from 2001 until today. These include: Singapore-Australia Free Trade Agreement (singed 17 February 2003, entered into force 28 July 2003)[hereinafter AUS-Singapore FTA]; US-AUS FTA; Thailand-Australia Free Trade Agreement (signed 5 July 2004, entered into force 1 January 2005)[hereinafter AUS-Thailandia FTA]; Australia-Chile Free Trade Agreement (signed 30 July 2008, entered into force 6 March 2009) [hereinafter AUS-Chile FTA]; Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (signed 27 February 2009, entered into force 1 January 2010)[hereinafter AANZFTA]; Malaysia-Australia Free Trade Agreement (signed 22 May 2012, entered into force 1 January 2013)[hereinafter AUS-Malaysia FTA]; Indonesia-Australia Comprehensive Economic Partnership Agreement (signed 4 May 2019, entered into force 5 July 2020)[hereinafter AUS-Indonesia FTA]; Pacific Agreement on Close Economic Relations (signed 14 June 2017, entered into force 13 December 2020)[hereinafter PACER]; Peru-Australia Free Trade Agreement (signed 12 February 2018, entered into force 11 February 2020) [hereinafter AUS-Peru FTA]; Australia-Hong Kong Free Trade Agreement and associated Investment Agreement (signed 26 March 2019, entered into force 17 January 2020) [hereinafter AUS-Hong Kong FTA]; China–Australia Free Trade Agreement (signed 17 June 2015, entered into force 20 December 2015) [hereinafter AUS-China FTA]; Japan-Australia Economic Partnership Agreement (signed 8 July 2014, entered into force 15 January 2015) [AUS-Japan FTA]; Korea–Australia Free Trade Agreement (signed 8 April 2014, entered into force 12 December 2014)[hereinafter AUS-Korea FTA].

[159] Andrew M Mitchell, Elizabeth Sheargold and Tania Voon, 'Regulatory Autonomy and the Evolution of Australia's Participation in PTAs and BITs: The Evolution of Australian Policy on Trade and Investment', in Andrew M Mitchell, Elizabeth Sheargold and Tania Voon (eds), *Regulatory Autonomy in International Economic Law* (Edward Elgar Publishing, 2017) 1 f.

[160] As Caplin showed, during GATT negotiations following the end of WWII, Australian officials believed that preferential arrangements were detrimental to Australia's interests, a nation widely dependent on export trade for primary commodities. In this perspective, preferential arrangement only served the purpose to limit the number of markets to which Australia had access to in order to make it overly dependent on Britain. See Anna Caplin, *Australia and the Global Trade System- From Havana to Seattle* (CUP, 2001) 16.

[161] Mitchell, Sheargold and Voon (n 159) 3 ff.

[162] Commonwealth of Australia, White Paper "In the National Interest. Australia's Foreign and Trade Policy" (National Capital Printing, 1997), 53 ff.

[163] According to Mitchell, Sheargold and Voon, PTAs entered into by Australia can be divided into three generations: the first generation includes agreements concluded between the '80s and 2000. Then, there is the second wave of PTAs ranging from 2003 and 2009. The third wave encompasses PTAs concluded from 2010 on. See Mitchell, Sheargold and Voon (n 159) 3.

region,[164] motivated by resource security reasons.[165] Due to this geographic component, Australian PTAs are especially interesting for the purposes of this study. They provide an account of the preferential arrangements in a region, where SOEs have historically been a crucial component of most national economies. In this context, Australia appears to be using preferential agreements as a way to export basic features of its legal system concerning SOEs and related entities regulation. This dynamic emerges clearly from the competitive neutrality clauses characterizing Australian PTAs. In this regard, it can be argued that Australia is attempting to stimulate domestic reforms in trading partners on sensitive issues.

1.4.1. Covered entities

PTAs concluded by Australia encompass a range of entities more or less related to the notion of SOEs. Besides SOEs themselves,[166] PTAs also regulate legal persons/enterprises,[167] monopolies,[168] exclusive service suppliers,[169] public entities,[170] State enterprises,[171] monopolies,[172] designated monopolies,[173] enterprises with special or exclusive rights,[174] SWFs,[175] independent pension funds,[176] and government monopolies.[177]

Against this background,[178] it is possible to explore the distinguishing line between the 'State,' SOEs, and related entities by looking at how 'measures adopted by Parties' are defined. This distinguishing line emerged, for instance, in the AUS-Indonesia FTA.[179] Under Article 14.2, the Agreement covers measures adopted or maintained by: (i) central, regional, or local governments and authorities; and (ii) any person, including SOEs or any other body, when it exercises any governmental authority delegated to it by central, regional or local governments or authorities. Hence, the distinction between the public and private nature of enterprises is based on the belonging to the State apparatus, the

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[164] Sekine (n 24) 79–104.

[165] Jeffrey D Wilson, 'Resource Security: A New Motivation for Free Trade Agreements in the Asia-Pacific Region' (2012) 25 The Pacific Review 429-453; Christopher Dent, 'Networking the Region? The Emergence and Impact of Asia-Pacific Bilateral Free Trade Agreement Projects' (2003) 16 The Pacific Review1-28.

[166] AUS-Peru FTA, Chapter 16.

[167] AUS-Singapore FTA, Article 1.e; AUS-Chile FTA, Article 2.1; AUS-ASEAN FTA, Chapter 8, Article 2; AUS-Malaysia FTA, Chapter 1 Article 1.1; AUS-Indonesia FTA, Article 1.4; PACER, Chapter 1, Article 2; AUS-Peru FTA, Chapter 1; AUS-Hong Kong FTA, Article 1.3; China, 9.1; AUS-Japan FTA, Article 1.2; AUS-Korea FTA, Article 1.4.

[168] AUS-Singapore FTA, Article 12; AUS-Japan FTA, Article 9.

[169] AUS-Singapore FTA, Article 12; AUS-China FTA, Article 8.23.

[170] AUS-Singapore FTA, Chapter 9; AUS-ASEAN FTA, Annex on financial services, Article 2; AUS-US, Article 13.19; AUS-Malaysia FTA, Chapter 1, Article 1.1; AUS-China FTA, Annex 8B, Article 2; AUS-Korea FTA, Article 8.20.

[171] AUS-US FTA, Article 1.2; AUS-Chile FTA, Article 1.2; AUS-Peru FTA, Chapter 1; AUS-Japan FTA, Article 9.2; AUS-Korea FTA, Article 1.4.

[172] AUS-US FTA, Article 14.12; AUS-Chile FTA, Article 14.1; AUS-ASEAN FTA, Chapter 8, Article 2; PACER, Chapter 7, Article 1.

[173] AUS-US FTA, Chapter 14 (competition-related matters); AUS-Peru FTA, Article 16.1.

[174] AUS-Chile FTA, Article 14.1.

[175] AUS-Peru, Chapter 16, Article 16.1.

[176] Ibid.

[177] Ibid.

[178] It is also interesting to note that the AUS-US FTA when dealing with government procurement adopts a similar approach to the one observed under the GPA. Indeed, the regulatory framework is based on a positive list approach, adopted to identify central government entities, regional government entities and government enterprises. See AUS-US FTA, Chapter 15.

[179] AUS-Indonesia FTA, Chapter 14, Article 14.2.

delegation and the exercise of governmental authority. This is further supported by looking at Article 14.6, footnote 10, which states that, within the specific content of that Article, 'private parties include designated monopolies or States enterprises if such entities are not exercising delegated governmental authority.'

1.4.2. The notion of SOEs

In the context of PTAs concluded by Australia, the most important regarding the notion of SOE is contained in the AUS-Peru FTA. The agreement not only introduces a definition of these enterprises, but also considers aspects not generally considered in other bilateral contexts. Firstly, SOE regulation is incorporated within a dedicated chapter. From a formalistic viewpoint, it can be noted that chapter headings only refer to SOEs, but then provisions also cover other entities. Indeed, the AUS-Peru FTA introduces Chapter 16, entitled 'State-owned enterprises and designated monopolies,' but it also regulates SWFs and IPFs. This means that the Parties have chosen to include a variety of entities under the notion of SOEs. The goal is to regulate all enterprises that could potentially hinder international trade flow. As a result, the focus is not on the perspective of the identity of the entity in question but rather on the impact of its conduct on trade.

a) The definition of SOEs

SOEs are defined as enterprises principally engaged in commercial activities in which a Party (i) directly owns more than 50% of the share capital; (ii) controls, through ownership interests, the exercise of more than 50% of the voting rights; (iii) holds the power to appoint a majority of members of the board of directors or any other equivalent management body.[180] The notion, therefore, identifies an entity that performs 'primarily' business-related activities. To put it another way, for the enterprise to be covered by the Agreement, its conduct must be driven by a profit-making goal. Additionally, the activity performed should lead to the production of a good or the provision of a service that will be offered to a consumer in the relevant market in the quantities and at the prices chosen by the enterprise itself. Therefore, not only must the operations be profit-driven, but additionally, the profit should be attained as a result of choices made by the undertakings in a way free from outside influences, specifically those of the State.
Then, three definitional criteria are followed. The first one has to do with State ownership and more particularly majority ownership exclusively. Secondly, there is State control, which is illustrated in the exercise of the majority of voting rights. It emerges that the regulatory framework aims to regulate the behavior of enterprises whose decisions are influenced by the government. The third constitutive criterion is the authority to appoint members of the management board of the enterprise. This definition seems to establish a non-rebuttable presumption: it is assumed that, provided that the State retains the power to control or name members of the managerial body, the requirement of control is met.
Arguably, this approach is less flexible and hence more prone to circumvention by Parties than the approach observed in previous Agreements. Whether this definition encompasses direct and indirect

[180] AUS-Peru, Article 16.1.

forms of control is debatable. Perhaps a distinction should be drawn between the right to name or vote in the managerial bodies of the SOE and the consequences of such an exercise. In case the State directly appoints members of the managerial body of the enterprise, it would be reasonable to conclude that their decisions would be guided or inspired by the source of their nomination, i.e., the public authority. However, at the same time, it is possible to imagine a situation in which the State indirectly guides behind closed doors the appointment of certain individuals in place of others. This could very well be the case of a fragmented ownership pattern in which the State, although a minority shareholder, still is the biggest among private investors. Arguably, such conduct would not be captured under this notion, and neither that of the entity concerned, because there would be no tangible evidence of the pressure itself.

b) Other entities

As mentioned already, it is interesting to note that in addition to the SOEs, the agreement takes two more categories of entities into account: IPFs and SWFs.[181] More specifically, IPFs are defined through two constitutive elements. On the one hand, the focus is on the structure of the entity, which is an (i) enterprise; (ii) owned by a Party, or (iii) controlled by a Party through ownership interests. Again, ownership and control are not specified further. On the other hand, the focus is on the activities carried out. Indeed, in order to be qualified as an IPF, the enterprise has to engage in an exclusive manner in (i) the administration or provision of a plan pension, retirement, social security, disability, death, employee benefits, or a combination thereof; and (ii) the investment of the assets of these plans. In other words, the definitional criteria are ownership, control, and activity defined in a rather narrow manner.

Similarly, SWFs are defined according to two sets of criteria. The first group is related to the structure of the entity, which is an (i) enterprise, (ii) owned by a Party, or (iii) controlled through ownership interests by a Party. Then, the definition focuses on the type of activities carried out by the enterprise, which (i) has to solely serve as a special purpose investment fund or arrangement; (ii) is a member of the international working group of SWFs; or (iii) endorses the Santiago principles. Hence, the definitional criteria adopted for SWFs are similar to those used for IPFs. Applying these findings to SOEs incorporated in the Agreement, it is possible to draw the conclusion that these notions share certain similarities in terms of structure. However, the divergence lies in the activities performed. In this regard, the difference between an SOE and an IPF or an SWF comes down to the tasks pursued, which are strictly defined ex ante for the SWF. In other words, the notions of IPFs and SWFs, as delineated within the Agreement, identify a special type of SOEs engaged in specific operations for social and investment purposes.

c) Commercial considerations, NCA obligations and transparency requirements

Enterprises that meet the criteria to be classified as SOEs must behave in accordance with commercial considerations with regard to both their purchases and sales of goods and services. In other words, SOEs must treat a good or service provided by an enterprise of the other Party no less favorably than

[181] AUS-Peru FTA, Article 16.1.

they would treat a similar good or service provided by an enterprise of the Party, the other Party, or any non-Party. However, if there is a public service mandate to fulfill, SOEs are not compelled to act in accordance with the non-discrimination principle. According to the Agreement, a public service mandate is a mandate from the government that requires an SOE to provide a service to the general public in its territory, either directly or indirectly.[182] This is the first time we find an acknowledgment of the social role that SOEs could play in an international trade agreement.[183] The Parties acknowledge the stabilizing effect that SOEs may have on markets when they are in trouble, which makes this clause interesting because it touches on a highly sensitive subject.

Parties also introduce NCA obligations.[184] This is the first time to observe the introduction of this type of obligation at the bilateral level. The notion of 'assistance' is identified rather broadly. Indeed, any direct transfer of funds or potential direct transfers of funds or liabilities may fall into this category. Examples of such transfers are grants or debt forgiveness, loans, loan guarantees, or financing on terms more favorable than those commercially available to that enterprise; equity capital inconsistent with the usual investment practice. Also, goods or services on terms more favorable than those commercially available to the enterprise can amount to assistance. This assistance cannot be provided 'by virtue of that state-owned enterprise's government ownership or control.'[185] Put another way, a Party or its SOEs and SEs cannot expressly deny SOEs access to aid, provide support primarily used by SOEs, or give SOEs a disproportionately high level of assistance without justification. As a result, this provision not only considers the potential that the State might provide such support, but it also, and critically, acknowledges that such financial aid may also occur at intra-SOEs/SEs level. This means that both SOEs and SEs are regarded as potential providers and receivers of assistance. The rationale underlying this legal framework is to prevent parties from causing injury to a domestic industry. In this regard, the agreement clarifies what are the adverse effects.[186]

The Agreement then introduces detailed transparency requirements,[187] which are arguably among the most extensive bilateral commitments found in Australian PTAs. For this reason, they might have

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[182] Ibid Article 16.1.

[183] It is also of interest to note that Parties allow SOEs as well as SEs to intervene to save financial institutions in distress together with any failing or failed enterprises engaged in the supply of financial services. Ibid., Article 16.2(4).

[184] Ibid Article 16.6.

[185] Ibid.

[186] The Agreement takes into consideration several situations, namely (i) the displacement or impediment from the Party's market imports of a like good of the other Party or sales of a like good produced by an enterprise that is a covered investment in the territory of the Party; (ii) a significant price undercutting by a good produced by a Party's SOE that has received the non-commercial assistance; (iii) displacement or impediment of the supply of a service; (iv) a significant price undercutting by a service supplied in the market of the other Party by a Party's SOE that has received the non-commercial assistance as compared with the price in the same market of a like service supplied by a service supplier of the other Party, or significant price suppression, price depression or lost sales in the same market.
In this regard, it should be noted that the displacement of a good or service occurs when there is a significant increase in the market share of the good or service of the Party's state-owned enterprise; the market share of the good or service of the Party's state-owned enterprise remains constant in circumstances in which, in the absence of the non-commercial assistance, it would have declined significantly; the market share of the good or service of the Party's state-owned enterprise declines, but at a significantly slower rate than would have been the case in the absence of the non-commercial assistance. It is also specified that the injury should occur for a sufficient period of time to prove the presence of clear trends in the development of the market for the good or service concerned. This period is identified in one year. See ibid Article 16.6(2). In order to examine the impact of NCA, all relevant economic factors should be taken into account. Indeed, it must be demonstrated that the goods or services object of the investment are causing injury linked to the NCA. A determination of a threat of material injury shall be based on facts and not merely on allegations, conjectures, or remote possibility and shall be considered with special care.

[187] Ibid Article 16.10.

major implications for PTAs that are negotiated in the future and not only by Australia. Firstly, the Agreement introduces a publication obligation, according to which each Party is required to make a public list of its SOEs on an official website and update it annually. Secondly, the focus is on the exchange of information between Parties. Upon written request, a Party should provide information concerning its SOEs, which ranges from their structure to the ownership pattern and financial resources.[188]

d) Competitive neutrality

Preferential agreements concluded by the Australian government are the leading proponents of the concept of competitive neutrality globally.[189] Introducing this concept prompts a shift in how State ownership is conceived in preferential arrangements. The competitive neutrality principle is based on the assumption that no enterprise should be favored or penalized based on its ownership structure.[190] Arguably, under this conceptual framework, State ownership is conferred a higher importance than it enjoys under the principle of neutrality. Indeed, while under the neutrality principle, State ownership is not considered for regulation, meaning that a given regulatory framework applies irrespective of the ownership structure of the concerned subject, under a competitive neutrality framework, State ownership is seen as a feature that needs immediate attention and regulation to prevent SOEs and privately owned companies from competing in an impaired playing field. Looking at how the provisions of Australian PTAs concretely regulate this concept, it emerges that the parties shall take all reasonable measures to prevent governments, at all levels, from giving any governmentally-owned firms a competitive advantage in their business operations simply because of that fact.[191] It emerges that the scope of application of the competitive neutrality principle is limited because it only encompasses governmentally-owned business and business activities, as opposed to non-business and non-commercial activities.[192] In any case, active conduct of government is required to ensure this principle is respected.

1.4.3. The notions of 'enterprise', 'legal person' and 'juridical person'

[188] Specifically, information may include the percentage of shares and votes that the Party, its SOEs, or designated monopolies cumulatively hold in the entity concerned; also, rights that are different than the rights attached to the general common shares of the entity should be disclosed, together with the government titles of any government official serving as an officer or member of the entity's board of directors; the entity's annual revenue and total assets over the most recent three year period for which information is available; any exemptions and immunities from which the entity benefits under the Party's laws and regulations; any additional information regarding the entity that is publicly available, including annual financial reports and third-party audits, and that is sought in the written request. Also, information provided could regard specific information on followed policy programs and their effects on trade.

[189] For instance, the AUS-Japan FTA has been the first preferential agreement signed by Japan to contain the regulation of this principle although without addressing it with the expression 'competitive neutrality,' By contrast, in the Agreement concluded by Australia with the US, only Australia expressly undertakes competitive neutrality obligations. See AUS-US FTA, Article 14.4. For a general comment on the content of this agreement: Andre D Mitchell, 'The Australia-United States Free Trade Agreement', in Ross Buckley, Vai Io Lo and Laurence Boulle (eds), *Challenges to Multilateral Trad: The Impact of Bilateral, Preferential and Regional Agreements* (Wolters Kluwer, 2008) 115-24.

[190] OECD, 'Competitive Neutrality. Maintaining a Level Playing Field Between Public and Private Business' (OECD Publishing, 2012) 15; Carlo De Stefano, 'Enhancing Accountability of SOEs/SCEs in International Economic Adjudication through Competitive Neutrality', TDM 6 (2020).

[191] See also AUS-Korea FTA, Article 14.4; AUS-Chile FTA, Article 14.5.

[192] See also AUS-Singapore FTA, Chapter 9.

Having considered the notion of SOEs, it is now possible to look at related entities covered under the Agreements.

In this regard, it is deemed appropriate to start this analysis with the basic concept of 'enterprise' or 'legal person.' The approach adopted by Australian PTAs is similar to the one followed under previously examined preferential arrangements. Indeed, an enterprise is any entity that is (i) constituted or organized under applicable law; (ii) whether or not for profit; and (iii) whether privately owned or governmentally owned or controlled. Hence, also Australian PTAs seem to embrace an ownership-neutral approach.[193] However, in practical terms, such an approach may be diluted by the competitive neutrality principle due to the shift in the conceptualization of State ownership it implies. This framework is further refined when agreements refer to the notion of 'juridical person.' Australian PTAs occasionally define when a juridical person is 'owned' or 'controlled.' More specifically, a juridical person of a Party is 'owned' by another juridical person if individuals from that Party beneficially own more than 50% of its equity stake. Therefore, the majority ownership criterion is followed. In this context, a juridical person is 'controlled' if an entity of the Party enjoys the authority to appoint the majority of its directors or otherwise legally direct its actions.[194] Therefore, 'control' is illustrated into two forms: *de jure* and *de facto* control. While the illustrated approach is the one that is used most frequently in Australian PTAs, it might slightly change in agreements concluded with Parties based on economic models other than MEs. For instance, in the PTA concluded with ASEAN, it is possible to find a differentiated approach. Indeed, for Thailand and Viet Nam, it is specified that a juridical person may also be 'affiliated.' Affiliation occurs when the entity controls or is controlled by another juridical person or when it and the other person are both controlled by the same third person. Although these notions do not directly refer to State ownership, control or affiliation, they provide quantifiable proxies and notions that can be taken into account to define an SOE for international trade regulation.

1.4.4. The notion of 'State enterprise' (SE)

Contrary to other agreements, the notion of SEs has evolved in Australian PTAs. More specifically, two definitional approaches can be identified. The first one is rather vague in character as it defines an SE as an enterprise that is (i) owned; or (ii) controlled through ownership interests;[195] (iii) by the central or regional government of a Party.[196] The most recent PTAs specify the ownership requirement, which is sometimes paired with an activity criterion. Hence, an SE is an enterprise (i) fully or majority owned; or (ii) controlled by a Party;[197] (iii) to perform business activity.[198]

Looking at the substantive obligations, the legal framework under examination is inspired by an anti-circumvention purpose. Indeed, Parties shall ensure that STEs act in accordance with the obligations

[193] See AUS-US FTA, Article 1.2; AUS-Chile FTA, Article 2.1; PACER, Chapter 1, Article 2; AUS-Peru FTA, chapter 1; AUS-Japan FTA, Article 1.2.
[194] See AUS-Thailandia, Article 104.
[195] AUS-Korea FTA, Article 14.2.
[196] AUS-US FTA, Article 1.2. In this agreement SEs are dealt with in the competition chapter. Their definition specifies that these are enterprises owned or controlled through ownership interests by any level of government of a Party. See Article. 14.12, para 9.
[197] AUS-Peru FTA, Chapter 1; AUS-Japan FTA, Article 9.2.
[198] AUS-Chile FTA, Article 2.1.

of the Agreement. This is particularly related to those cases in which SEs exercise regulatory, administrative power, or governmental authority delegated to it by the Party.[199] This is in line with the idea that SEs are not an issue for international trade per se, but only when enjoying an advantage to hinder international trade flow. From this perspective, they are required to comply with the non-discrimination principle in their sales and purchases of goods or services.[200] However, differences in pricing are sometimes expressly permitted,[201] and are not ipso facto targeted as discriminatory.

1.4.5. The notion of 'enterprise with special or exclusive rights'

Another notion emerging from Australian PTAs is that of 'enterprise with special or exclusive rights.' In this regard, preferential arrangements follow two definitional criteria. Indeed, a privileged enterprise is an enterprise to which (i) a Party has granted special or exclusive rights (ii) in its purchases or sales involving either imports or exports. Therefore, for an entity to qualify as an enterprise with special or exclusive rights, it must be able to perform a specific activity due to the delegation of special rights that the State has granted to it.

1.4.6. The notion of 'public entity'

The notion of 'public entity' is less consistent in Australian PTAs than in other analyzed treaties. The definitional strategy used appears to differ depending on the trading partners involved. Two definitional approaches emerge in this regard. Both use a two-step approach, with the key difference being the kinds of entity that are thought to come within the purview of the notion of public entity.
The first approach qualifies a public entity as (i) a government; (ii) a central bank or a monetary authority; or (iii) an entity owned or controlled by a Party principally engaged in carrying out governmental functions or activities for governmental purposes;[202] and (iv) a private entity performing functions normally performed by a central bank or a monetary authority, when exercising those functions.[203] This method holds that an entity is public if it is part of the State's organizational framework, such as the government or particular agencies. In addition to belonging to the State apparatus, an entity is public based on its ownership or control structure and tasks or operations performed of a governmental type. It is not specified what is meant by 'governmental.' As seen already, the meaning to be attached to it widely varies across jurisdictions. Against this background, a private entity too may be public if it exercises activities traditionally belonging to the public domain.
The second definitional approach encompasses a narrower group of entities.[204] Indeed, a public body is (i) a central bank or a monetary authority; and (ii) any financial institution owned or controlled by a Party. Designated monopolies and SEs do not fall into this category. Therefore, the notion does not include any enterprise, but rather identifies a specific category of subjects, namely financial

[199] AUS-US FTA, Article 14.4; AUS-Chile FTA, Article 14.5.
[200] AUS-Chile FTA, Article 14.5.
[201] AUS-US FTA, Article 14.5.
[202] AUS-ASEAN FTA, Annex on Financial Services, Article 2(c); AUS-Malaysia FTA, Chapter 1, Article 1.1; AUS-Hong Kong FTA, Article 8.1; AUS-China FTA, Annex 8B, Article 2.
[203] AUS-Singapore FTA, Chapter 9, Article. 1; AUS-Hong Kong FTA, Article 8.1.
[204] See AUS-Chile FTA, Article 12.1; AUS-Korea FTA, Article 8.20.

institutions. Hence, the focus of the definition revolves around the identity and the activities of the entity concerned.
Against this background, it is interesting to consider the AUS-Korea FTA in more detail. Indeed, Article 8.20 clarifies that a public entity is a central bank or a monetary authority of a Party or any financial institution that performs a financial regulatory function and is owned or controlled by a Party. At the same time, the provision specifies that such public bodies do not constitute SEs or SOEs for competitive neutrality purposes. This is important because it clarifies the characteristics that exclude the qualification of an entity as an SOE.
The meaning of 'governmental' can be examined in light of the regulation of services supplied in the exercise of governmental authority. This notion identifies two categories of activities. Firstly, it encompasses activities performed by a central bank or monetary authority or by any other public entity 'including' the management of official foreign reserves, in pursuit of a monetary or exchange rate policies, or activities forming part of a statutory system of social security or public retirement plans, or other activities conducted by a public entity for the account or with the guarantee or using the financial resources of the government. The second alternative approach echoes WTO law, as it includes services supplied neither on a commercial basis nor in competition with one or more service suppliers.[205] These definitional approaches show that a common denominator regarding the meaning to be attached to sensitive words such as 'governmental' can be found. However, its relevance is limited to the specific context in which it is included. Further guidance might be sought in the regulatory framework on monopolies.

1.4.7. The notions of 'monopoly', 'designated monopoly', 'exclusive service supplier' and 'government monopoly'

The last notions to be considered under Australian PTAs are 'monopoly,' 'designated monopoly' and 'government monopoly.' In this regard, the first element worth considering is the ownership-neutral approach adopted by preferential arrangements: indeed, a monopoly can be privately owned or governmentally-owned. In this context, a monopoly is defined as an entity, such as a consortium or a government agency that in a relevant market in the territory of a Party is designated as the sole provider or purchaser of a good or service. Against this background, a second looser approach can be found. According to this perspective, a monopoly is any person, public or private, authorized or established formally or in effect by that Party as the sole supplier of a service.[206] In both situations, a positive act by the State in the economy is required. This is a delegation act, which may arguably be adopted formally or informally.
Against this background, a 'designated monopoly' is a monopoly that has been established, designated, or authorized by the State.[207] Two consequences may flow from this definition. Firstly, PTAs capture monopolies' conduct as long as they exercise regulatory, administrative or governmental authority delegated to them by a Party. This could be a power to grant import or export licenses, approve commercial transactions, or impose quotas, fees or other charges. Secondly, the

[205] Cf. AUS-Chile FTA, Article 9.1; AUS-Indonesia FTA, Article 9.1.
[206] Cf. PACES, Chapter 7, Article 1.
[207] Cf. AUS-Peru FTA, Chapter 16, Article 16.1.

active involvement of the State in the economy is required. Hence, it is possible to draw a parallel with the WTO legal framework. An active role of the State in the economy is also required for the notion of an 'exclusive service supplier.' Indeed, an entity constitutes an exclusive service supplier when a Party, formally or in effect, authorizes or establishes a small number of service suppliers and substantially prevents competition among those suppliers in the territory.[208] This legal architecture arguably emulates the GATS, and it does not specify any further the meaning of terms already debated in that context. Therefore, the reference to 'a small number' leaves it to the interpreter to determine the concrete meaning of this expression. In any case, the underlying rationale to regulate these entities is of an anti-circumvention nature.

Lastly, Australian preferential agreements also cover the notion of 'government monopoly.' These are monopolies owned or controlled by the Party. No further specification is provided in this regard. Therefore, it is unclear which level of ownership or kind of control is relevant under this legal framework.

Looking at the substantive obligations applicable to monopolies, the regulatory framework pursues an anti-circumvention purpose. Hence, Parties have to ensure that monopolies act in accordance with their obligations under the Agreement.[209] Moreover, monopolies should refrain from abusing their position, especially with reference to the supply of their service outside the scope of their monopoly rights,[210] and follow an anti-competitive practice instead. They are also required to act in accordance with commercial considerations,[211] and in compliance with the non-discrimination principle in the purchase or sale of goods or services activities. Lastly, the focus is on transparency obligations. If a Party believes that the monopoly is acting inconsistently with the obligations of the other Party under the Agreement, then it may request specific information concerning its relevant operations.[212]

1.5. Preliminary conclusions on definitional approaches toward SOEs in bilateral PTAs

The analysis of bilateral preferential arrangements shows that States are willing to regulate SOEs and related entities in their bilateral relationships. Indeed, a wide variety of entities has been observed consistently throughout the treaties examined, including SCEs, SWFs, privileged enterprises, and government monopolies.

This practice is arguably more detailed than the one emerging in WTO Agreements, while it does not seem to deviate significantly from the systematization adopted under plurilateral PTAs. Specific characteristics emerged with reference to each country considered, which are worth consideration. Hence, not only do they make it possible to better define the notion of SOEs and related entities but also to shed light on the specificities of each country in this regard.

[208] AUS-China FTA, Article 8.23.

[209] Cf. AUS-Singapore FTA, Chapter 12; PACER FTA, Chapter 7, Article 13; AUS-Peru, Article 16.3. This last agreement deals with delegated authority under the Agreement. This could be interpreted as to indicate that when there is delegation, there is also an obligation on States to ensure that the enterprise is acting consistently with the obligations set out in the Agreement.

[210] AUS-Singapore FTA, Chapter 12.

[211] AUS-US FTA, Article 14.3.

[212] AUS-Singapore FTA, Article 12.

1.5.1. Chinese PTAs: majority State ownership, de jure and de facto control, affiliation and exercise of governmental functions for governmental purposes

Looking at China, no bilateral preferential agreement concluded by the Chinese government contains a regulatory framework that directly addresses SOEs. As a result, Chinese PTAs feature a model in which the definitional approach does not directly address SOEs but adopts notions wide enough to potentially encompass them, although implicitly. Indeed, the interpretation of relevant notions arguably shows that the followed approach is so broad that SOEs are potentially regulated to a certain extent. In this context, emerging constitutive criteria of SOEs encompass (i) majority State ownership; (ii) *de jure* and *de facto* control; (iii) affiliation, which is expressed through control; and (iv) the exercise of governmental functions for governmental purposes. Regrettably, these notions are not delineated any further. In other words, similar to what has been observed in the context of US FTAs, China seems to be exploiting its bargaining power not to explicitly regulate a sensitive topic for its international trade relations in PTAs concluded at the bilateral level.

1.5.2. EU PTAs: commercial activities, majority State ownership and State control

Considering preferential agreements concluded by the EU, the analysis reveals a formal and substantial evolution concerning the regulation of SOEs and related entities.

From a formal perspective, EU PTAs increasingly encapsulate SOE regulation in specifically dedicated chapters. Moreover, the wide variety of entities related to SOEs considered under EU PTAs make these agreements interesting to analyze for this study. This is a particularly striking difference from Chinese PTAs. Looking at the substantive elements, some patterns emerged concerning the definitions of SOEs and related entities. In this context, recurring constitutive criteria of SOEs include (i) the exercise of commercial activities (a broader category than trading activities contemplated under Article XVII GATT on STEs); (ii) majority State ownership; and (iii) State control. Sometimes, these last two criteria are combined. One more constitutive criterion used for related entities of SOEs is government delegation when the grant of exclusive or special privileges is involved. Therefore, a link is required between the State and the entity entrusted with the exercise of certain activities. This emerges from the notion of government monopolies, whose provisions are clearly aimed at regulating the role of the State and its effects on the market. In so doing, they arguably apply a market-economy-based logic.

As for entities other than SOEs, such as SCEs, the focus is on the influence that the State can exercise on them. More specifically, Agreements target those situations in which the State can significantly impair the capacity of its enterprises to make independent decisions. This strategy is consistent with the goal of SOE regulation, which is to target only those enterprises that can potentially obstruct international trade in line with the EU goals. Put another way, EU PTAs adopt a 'decisive influence' test, which is accompanied by a rebuttable presumption. This introduces a flexible approach that can easily adapt to complex economic operators.

Lastly, EU PTAs reveal a tendency to disseminate, through preferential agreements, notions and institutions typical of the EU legal system. For instance, this is the case for SGEIs or the exemption for companies entrusted with the supply of public services from competition rules when their application may adversely affect the performance of the task assigned to them.

1.5.3. The US PTAs: direct or indirect majority State ownership and State influence

The US does not explicitly refer to the term 'SOEs' in its bilateral preferential arrangements. The closest expression used in this regard is that of 'government enterprise.' This is arguably narrower in scope than SOE because it refers to the State as an institution. In contrast, the expression 'State-owned' refers to a link between the State and its economic operators, which may or may not be institutional. This terminological difference possibly reflects an underlying ideology attached to the enterprises under scrutiny, namely that those most tied to the government are to be targeted because the State and its central agencies easily direct them. The definitional criteria that emerged in this regard are (i) majority State ownership; and (ii) State influence, which is equated to the direct or indirect retainment by the State of at least 20% of voting rights of the enterprise concerned. It is interesting to note the introduction of a quantifiable proxy related to the lowest relevant threshold for State ownership deemed to confer on the State the possibility to influence the decision-making process of the enterprise concerned.

Other definitional criteria used with reference to SOE-related entities in US PTAs, are (i) the exercise of governmental authority, identified, for instance, in regulatory and administrative powers and (ii) the delegation of such powers by the State. Moreover, looking at government monopolies, their definitional elements revolve around State ownership and control and the active role of the State in the economy for their establishment and functioning. It is interesting to note in this regard how the US consistently pursues the establishment of a regulatory framework consistent with its approach under the WTO. This is evident given that definitional criteria put forward under the WTO legal framework to define SOEs are also used to define entities close to them.

Moreover, the preferential agreements concluded by the US, together with those concluded by the EU, are probably the ones in which the attempt to export concepts that cannot be regulated in the multilateral framework is most evident. More specifically, the analysis has shown how the US tries to use its bargaining power to impose definitions and concepts regarding SOEs and related entities as it addressed them under the WTO legal framework, especially with trading partners based on a non-market economy model. The US-Singapore FTA is arguably an example, where the differences between the two parties in terms of the economic model and the role of SOEs justified the adoption of a two-step definitional approach.

In this context, it is interesting to note that a direct reference to the term 'SOEs' seems to characterize plurilateral preferential agreements in which the US is involved, rather than bilateral ones. Therefore, the actual coverage of these enterprises and the assessment of whether they are encapsulated in other notions has to be determined through an interpretative process. However, it appears that the strategy used concerning related entities is sufficiently all-encompassing to cover several types of enterprises. For example, US Agreements adopt a neutral stance when it comes to the ownership structure of the company. This means that, even though SOEs are not specifically addressed, they are potentially subject to the relevant regulatory framework. It is of interest to note that this approach is similar to the one observed under Chinese PTAs.

1.5.4. The Australian PTAs: commercial activity, majority State ownership and State control

The most important feature emerging from Australian bilateral preferential agreements is the introduction of the competitive neutrality approach. The importance of this concept stems from the fact that it implies a change in the perception of State ownership in international commercial relations. Under the neutral approach, State ownership does not play a role per se. However, State ownership is relevant under the competitive neutrality principle because it affects the obligation to treat economic operators equally. Or, to put it another way, State ownership assumes its own significance. Through its PTAs, Australia attempts to promote the adoption of the competitive neutrality principle in international trade relations, with different outcomes.[213]

As far as constitutive elements of SOEs are concerned, recurring elements include (i) engagement in commercial activity; (ii) majority State ownership; and (iii) State control as the power of appointment of Members of the executive body of the enterprise concerned. The difference between SOEs and related entities, such as SWFs and IPFs, appears to rely on the different activities and tasks pursued. In this context, the overall aim of Australian PTAs is arguably to capture under their scope economic operators sharing ties with the State that may constitute an obstacle to international trade due to their exclusive or special privileges, or other advantages.

2. Concluding remarks

The analysis of the notion of SOEs in plurilateral and bilateral PTAs reveals that governments, which are major economies dealing with SOEs and with their regulation under the WTO, take the opportunity to put the most controversial elements of SOEs in order in preferential arrangements, primarily their definition. In this regard, it is interesting to note that such WTO Members, through plurilateral and bilateral agreements analyzed, are paving the way to establish SOE-regulatory frameworks that reflect their perspective on the issue in a way that is precluded to them under the WTO. This is due, on the one hand, to the difficulty of establishing a comprehensive discussion on SOEs among WTO Members and, on the other hand, to the inability of multilateral trade regulation to promptly regulate SOEs-related issues not, at least not with the same results in terms of time and efficiency, as PTAs can ensure.[214] This can be explained by the narrower context of negotiations undertaken for plurilateral and bilateral PTAs compared to the multilateral institutional context of the WTO. Moreover, the WTO Members that most frequently engage in the matter of SOEs or that are based on economies in which they are predominant economic actors enjoy higher bargaining power over their trading partners than under the multilateral framework of the WTO itself. In this context, while PTAs indeed increasingly introduced a definition of SOEs, both at the plurilateral and at the bilateral level, they also show different definitional approaches as a result of the different balance among trading partners in terms of bargaining power. This is reflected in the outcome of the negotiations as encapsulated in PTAs provisions.

[213] See AUS-Japan FTA.

[214] See section 2 *supra*.

2.1. Definitional approaches to SOEs and related entities emerging from plurilateral and bilateral PTAs: characteristics and common features

Contrary to what has been observed under the WTO legal framework, plurilateral and bilateral preferential agreements display a range of definitional approaches regarding SOEs and related entities. Behind each of them, lies a quest for balance. To choose one criterion over another reflects the Parties' will to confer a greater or a lesser degree of coverage of the definition, and of the agreement overall. The lack of a unitary approach shows the challenges related to the definition of these entities, which ultimately aims to avoid, on the one hand, over-inclusion, meaning to regulate enterprises that do not qualify as SOEs or that do not represent an obstacle to trade liberalization; and, on the other hand, under-inclusion, namely not to capture enterprises that do qualify as SOEs and represent an obstacle to international trade development. For instance, this would be the case of enterprises linked to the State through a minority ownership relationship in which the State does not affect their organizational structure or any decision-making process. With respect to under-inclusion, the aim should be to ensure that the definition of SOEs covers all the enterprises that may be an obstacle to international trade liberalization through their official or unofficial link with the State. The scope of the definition in this regard may change according to the type of obstacle discretionally determined by the Parties in the context of the Agreement at stake. This scenario may apply to *de facto* SOEs, which may not have a formal relationship with the State but are still subject to its control over key operational and strategic decisions.

Three definitional approaches can be detected in the analysis of plurilateral PTAs. The first one is based on clear-cut criteria, namely the identification of a certain threshold of State ownership for an enterprise to qualify as SOE, and quantifiable proxies, meaning the specified percentages with reference to the exercise of voting rights, consistently set out at 50%.[215] The second approach encompasses ownership and control in all of their iterations, namely majority and minority State ownership and *de jure* and *de facto* control.[216] This approach may be combined with the previous one when specific thresholds are introduced in the definition. The third one does not define SOEs at all, and possible constitutive elements have to be reconstructed from the general coverage of the Agreement.[217] Arguably, this third approach is functional to incentivize States based on different economic models to gather under the same preferential agreement. In other words, the implicit regulation of a sensitive category of entities, such as SOEs, may be more easily agreed upon for introduction in a PTA than clear-cut obligations to States heavily relying on these enterprises in their national economies.

Looking at bilateral agreements, the definition of SOE seems to be based on two main recurring alternative criteria: (i) full and majority State ownership[218] and (ii) *de jure* and *de facto* State

[215] As seen in Section 3.1, this approach is followed under Chapter 17 CPTPP.
[216] As seen in Section 3.2, this approach is followed under Chapter 22 USMCA.
[217] As seen in Section 3.3, this approach is followed in the RCEP.
[218] Full and majority State ownership have been adopted as a constitutive criterion of SOEs in PTAs concluded by China (see Section 5.5.1), by the EU (see Section 5.5.2), by the US (see Section 5.5.3) and by Australia (see Section 5.5.4). It should be noted in this regard that bilateral PTAs elaborate on this criterion, which can also be considered in its indirect or minority form. See note 312.

control.[219] The concept of control is intended to regulate situations where the government can influence the decision-making of SOEs. Contrary to plurilateral PTAs, when it comes to bilateral preferential arrangements, minority ownership does not appear to be a factor. In this context, other possible alternative criteria that emerged in addition to the two just mentioned include (i) the delegation by the State of governmental functions,[220] (ii) the exercise of the delegated power by the entity to which it was conferred,[221] (iii) the exercise of commercial activity,[222] and (iv) State influence.[223]

In light of this, some parallel can be drawn between plurilateral and bilateral agreements.

Firstly, SOEs are defined in most of the plurilateral, and bilateral preferential arrangements under consideration. This is significant because it signals that there is indeed a legal need to define the boundaries of this notion. Overtime, this need has been translated into the adoption of specific chapters dedicated to the regulation of these enterprises between the Parties.

Secondly, the State practice regarding the definition of SOEs emerging from bilateral PTAs arguably favors the adoption of clear-cut and quantifiable criteria. This shows the positive impact of the TPP/CPTPP on subsequent bilateral agreements and also shows the willingness of States to base SOEs definition on the quantifiable proxies to establish a precise and predictable legal framework. In other words, the definitional approach remains consistent from the plurilateral context to the narrower level of bilateral arrangements. At the same time, while the confusion surrounding the scope of the notion of SOEs in international trade relations is addressed, a rigid approach runs the risk of being excessively static and unresponsive to circumstances that cannot be foreseen beforehand,[224] and makes the related regulatory framework simple to circumvent.[225] For example, most of the examined preferential agreements adopt a definition based on majority State ownership. Without a rebuttable presumption, this regulatory framework gives States enough leeway to circumvent their obligations under those agreements by changing the ownership structure of their SOEs in a way that they appear as minor shareholders while unofficially exercising control over their key business decisions. The same applies to criteria other than quantitative proxies, including revenue criteria, which can be changed by unlawful means. This shows that flexibility is necessary to achieve a balance in a definitional approach concerning complex entities such as SOEs. Indeed, flexibility is probably an essential tool to facilitate and incentivize international cooperation at the treaty level between different economies. This is especially the case with respect to topics that are difficult to establish a consensus, such as SOEs.

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[219] The criterion of State control has been adopted as a constitutive element of SOEs in agreements concluded by China (see Section 5.5.1), by the EU (see Section 5.5.2) and by Australia (see Section 5.5.4).

[220] The criterion of delegation by the State of governmental functions as a possible constitutive element of SOEs have been adopted by Chinese PTAs (see section 5.5.1).

[221] The criterion of delegation as a possible constitutive element of SOEs have been adopted in PTAs concluded by EU PTAs (see sections 5.2.2 and 5.2.4) and US PTAs (see section 5.3.).

[222] The criterion of commercial activity was adopted in PTAs concluded by Australia (see section 5.5.4) and by the EU (see section 5.2.10).

[223] State influence has been adopted as a possible constitutive element under US PTAs. However, in this regard, it should be noted that this criterion is linked to State ownership, and, importantly, it may encompass minority State ownership.

[224] On this point, see also: Leonardo Borlini and Peggy Clarke, 'International Contestability of Markets and the Visible Hand: Trade Regulation of State-Owned Enterprises between Multilateral Impasse and New Free Trade Agreements' (2021) 26 Columbia Journal of European Law 327.

[225] Minwoo Kim, 'Regulating the Visible Hands: Development of Rules on State-Owned Enterprises in Trade Agreements' (2017) 58(1) Harvard International Law Journal 271.

From a legal perspective, the best way to introduce an effective and efficient level of flexibility is arguably the adoption of a rebuttable presumption. Under the general legal theory, a presumption is an interference of a particular fact X that implies another fact Y. Presumptions may be conclusive or rebuttable. In the first case, if fact X is proven, it is not possible to prove that fact Y does not exist. On the contrary, a rebuttable presumption allows us to conclude that although fact X exists, fact Y is not necessarily implied. In the case of SOEs, a rebuttable presumption concerning the definition of these enterprises would allow the related legal framework to adhere more effectively to the reality of the management and structure of these complex entities. Indeed, one may imagine the following presumption, which has been found in the PTAs examined: if the State owns at least 50% of its shares (fact X), an enterprise automatically qualifies as an SOE on which the State exercises its influence (fact Y). In this case, the adoption of a rebuttable presumption would allow the government to prove that, despite its majority State ownership (fact X), it does not exercise its influence on the enterprise whose decision-making process is, therefore, independent (fact Y is dismissed). The type of proof required, however, is probably likely to change from a preferential arrangement to another depending on the type of obstacle to trade tackled by the Parties. In other words, the legal provisions would attach the qualification of an enterprise as 'SOE' provided that the State appears among its shareholders, based on the idea that State ownership equals State influence or control. In this context, the rebuttable presumption would give relevance to the extent of the actual participation of the State in the management of the enterprise and possibly remove its qualification as an SOE. Therefore, the norms would be able to differentiate between various levels of government ownership and be adjusted to the realities that might be attached or not to that ownership. From this perspective, it should be noted that the minority State ownership criterion is explicitly considered only in a few PTAs. This is arguably suboptimal in the long run because it runs the risk of being under-inclusive with reference to those enterprises that could be considered by States as an obstacle to trade. Moreover, attaching a rebuttable presumption to the notion of State ownership in all its manifestations would also allow a smooth application of SOE-related legal provisions based on vague terminology, without relying too much on interpretation and with the possibility of avoiding time-consuming practices and lack of resources for national investigation authorities. A predominant reliance on interpretation and the lack of the necessary investigative resources runs the danger of failing to identify the variety of official and unofficial relationships that could exist between the State and its enterprises, thus hindering the main goal pursued by definitional approaches of SOEs.

Secondly, PTAs enlarge the scope of the definition of SOEs by encompassing not only those involved in trading activities but rather those carrying out commercial activities. Indeed, this last group of activities is larger than trading ones.

Thirdly, plurilateral and bilateral PTAs both define a range of different entities that are related to SOEs. The terminology found in plurilateral and bilateral preferential arrangements in this regard is more articulated than the one used under the WTO Agreements. While the formers refer to several distinctive entities, the latter seems to put all entities under the collective term of 'STE'. SOEs—related entities encompassed in the PTAs include SEs, SCEs, IPFs, SWFs, government monopolies, and privileged enterprises. As demonstrated above, the notion of SEs is usually the least specified, being solely based on 'ownership' and/or 'control'. Exceptionally, Australian PTAs refer to full and majority ownership and specify the type of activities performed and purposes pursued by SEs, which

should correspond to business activities. However, definitional approaches adopted with reference to SOE-related entities are usually based on clear-cut criteria and quantifiable proxies following the definition of SOEs. However, also other criteria can be found, which include (i) State influence; (ii) the grant of exclusive or special privileges; (iii) the delegation of governmental functions; and (iv) the performance of a specific type of activity.

Fourthly, the rationale emerging from PTAs as a whole is that States are willing to regulate economic operators who are sufficiently close to their government to, on the one hand, be assimilated into their institutional organization and, on the other hand, to engage in what are typically considered public functions.

In light of the above, the analysis suggests that plurilateral and bilateral PTAs cover a wider range of economic operators other than the ones covered under WTO Agreements. This wider coverage emerges not only from the constitutive elements that are addressed, that, as seen, include State ownership and control as the primary ones in this regard, but also from the range of SOE-related entities covered. In this regard, PTAs arguably consider SOEs as the primary category that contains all other regulated entities. In other words, SOE-related entities all fall under the broader notion of SOEs but are then characterized by additional criteria, which are different from that of all other entities to which other specific legal requirements are attached. Accordingly, the term SEs, if not further specified, is a synonym of SOEs, as it is a catch-all expression dealing with enterprises owned or controlled by the State; SCEs are the manifestation of SOEs that can be subject to government influence through control; SOEs are privileged enterprises when they are granted special or exclusive rights or privileges to perform their activities; SOEs performing social and public objectives are IPFs or SWFs. This categorization shows that SOEs are not fixed in their structure from the perspective of treaty international trade law. However, it should be stressed that this is a one-way categorization: while, for instance, all SWFs, IPFs or SCEs are SOEs, not all SOEs are SWFs, IPFs, SCEs and so on. This is because each entity only captures one specific characteristic of SOEs and does not fully encompass all of them.

2.2. A renewed conceptualization of State ownership

The study of State practice emerging from plurilateral and bilateral preferential arrangements dealing with SOEs and SOE-related entities shows that PTAs can be divided into two categories.

The first category is State-ownership neutral. Typically, Parties to these agreements allow for both the establishment and maintenance of state monopolies and enterprises. As seen already, clauses of this kind would typically state: ‘Nothing in this Title shall be construed to require any Party to privatise public undertakings or to impose any obligation with respect to government procurement.’[226] Agreements may also require Parties to ensure that SOEs and related entities are subject to competition rules.[227] This last type of provision arguably also contributes to shifting the balance from an ownership neutrality principle to a competitive neutrality one.

[226] EU-Colombia&Peru FTA, Article 107(2); EU – Chile FTA, Article 179; EU-Republic of Moldova FTA, Article 336; EU-Ukraine FTA, Article 257; EU – Georgia FTA, Article 205;

[227] EU-Vietnam FTA, Chapter 10; EUJEPA, Article 11.3 and 11.4; Australia-Chile FTA, Article 14.3-14.4.

The second category of PTAs does not deal with State ownership per se, but rather with its effect on competition between economic operators. In other words, the focus is on maintaining a level playing field between SOEs and POEs. This approach can be observed mainly in Australian FTAs.[228]

In light of the above, PTAs reveal a shift over time in how State ownership is conceived in international trade law. This emerges clearly from the fact that State ownership is adopted as a constitutive criterion in all PTAs defining SOEs. Arguably, the increased reference to State ownership signals that States advocating for this criterion as a constitutive element of SOEs under the multilateral framework of the WTO can impose this standard on their trading partners in the narrower context of preferential arrangements.

In this context, it can be observed that when it comes to regulating State ownership, States generally follow a dual approach. On the one hand, they do not want to affect the choices of trading partners with respect to the ownership models they implement nationally. At the same time, States want to ensure that SOEs do not affect international trade relations and hinder trade liberalization. In other words, there is a change in the legal strategy toward State ownership in PTAs, moving from an ownership-neutral approach to a competitive-neutral one. WTO Agreements and older PTAs focus on applying rules to all undertakings, regardless of their ownership. In this context, State ownership does not play a significant role, as legal rules do not deal with it as such. However, recent PTAs assign a more central role to State ownership than before because they encapsulate the notion of competitive neutrality, according to which any enterprise should be advantaged or disadvantaged solely because of its ownership structure. Indeed, under the competitive neutrality approach,[229] State ownership is considered and conceived as a potential distorting element for the level playing field between SOEs and POEs that needs to be directly addressed and regulated.

Against this background, it is possible to argue that a renewed regulatory approach toward State ownership is emerging in international trade law, although limited to preferential arrangements. We are apparently witnessing an evolution in the regulation of this criterion. State ownership has advanced from being overlooked by the multilateral legal framework to being a crucial component on two distinct levels: on the one hand, it has been acknowledged as a feature that may distort the level playing field between public and private enterprises; on the other hand, when considered in its majority manifesyation, it has been adopted as a defining criterion of SOEs in PTAs.

2.3. The unaddressed elephant in the room: SOEs as public or private bodies

Despite bringing more clarity to the notion of SOEs in international trade relations, PTAs too fail to address the most contentious and fundamental aspect of SOEs, namely whether they constitute a part of the State or they belong to the category of enterprises *tout court*. Indeed, State ownership alone is not able to clarify where SOEs stands in a State-enterprise binary approach. However, it is clear that State ownership is linked with a series of commitments such as transparency and non-discrimination obligations which are imposed on SOEs and related entities. In this regard, Kim noted that SOEs have

[228] See for instance, Australia-Korea FTAs, Article 14.4; Korea-Singapore FTA, Article 15.4; Australia-Singapore FTA, Article 4. For a critical approach towards competitive neutrality and SOEs see: Leonardo Borlini, 'When the Leviathan Goes to the Market: A Critical Evaluation of the Rules Governing State-Owned Enterprises in Trade Agreements' (2020) 33 Leiden Journal of International Law 320 f.

[229] OECD (n 190) 15 f; De Stefano (n 190).

been introduced in the CPTPP as a category without the backing of the necessary legal doctrine to do so.[230] However, the above analysis shows that the same can be observed in subsequent agreements, both at the plurilateral and bilateral level, and irrespective of the part of the globe considered. The lack of clarification with reference to the categories to which SOEs belong generates some inconsistency within a legal framework that explicitly addresses them. Indeed, if the latter are considered as private economic operators, then a differentiated approach towards them imposing additional obligations, as compared to the ones to which POEs are subjected, is not completely justified.[231]

In light of the above, it seems that even in a narrower context than the multilateral context, States struggle to address this point. While not defining which category SOEs belong to makes it easier to persuade more governments to join preferential agreements, at the same time, it hinders the adoption of a standard definition that is effective and coherent. This may explain why the notion of 'public body' is not mentioned in the context of these agreements, but only that of 'public entity.'

All agreements regulating public entities follow a consistent defining format, typically in the section dedicated to financial services regulation. The definitional approach followed in these agreements frequently hinges on a dichotomous distinction between public and private entities, which is arguably largely based on the Annex on Financial Services of the GATS.[232] In this context, the government and its agencies belong to the public sphere. The private sphere includes private organizations that the government has entrusted to carry out duties on its behalf. However, a third group of 'entities' is identified, which perform governmental functions and are controlled or owned by one of the parties to the Agreement. In this third context, the public nature of the entity in question, i.e., its qualification under the umbrella of the 'State', would depend on both the activity performed and the relationship between the entity and the State. In any case, this approach seems to imply that entities related to the State through a more intense relationship than the simple delegation of functions are public in character. This is also because owned and controlled entities are typically regulated in the same paragraph as governments and their agencies. In line with this perspective, SOEs would belong to the sphere of the State. However, these findings are of limited relevance. Indeed, it is unclear whether the defining elements of a notion adopted within a specific field and scope of application such as that of financial services can also be used in different contexts. Moreover, the lack of definition of the terms 'governmental authority' and 'governmental purpose' brings about similar issues in the definition of 'public entity' in financial services regulation. It is noteworthy in this regard that a specification of these terms could not be found even in the more restricted set of bilateral agreements. Therefore, the study suggests that when sensitive issues are involved, fewer Parties participating in the Agreement do not necessarily imply a higher degree of consensus.

Having regard to the notion of 'State' in PTAs, its analysis can bring valuable insights about its scope. Its boundaries are delineated according to general international law, first of all to encompass all levels of government. However, the outer boundaries of the notion are adjustable in the treaty law under consideration. The reviewed PTAs indeed suggest that the inherently public nature of governmental bodies and agencies extends to other entities through the delegation of rights, privileges, and goals

[230] Kim (n 225) 256.
[231] Ibid.
[232] See Chapter 3, section 3.1.5.

related to the public interest from the first ones to the second ones. In other words, government delegation is the determinative component in qualifying an economic entity as public or private in character. This is reminiscent of the customary element of attribution of conduct to the State for the purposes of States' international responsibility. Leaving this suggestive development aside, two final remarks can be made on this point. Firstly, the analysis of PTAs arguably suggests that the element of delegation consistently occurs throughout all the treaty contexts analyzed and regardless of the economic model concerned. Secondly, while the element of 'State delegation' does not raise specific issues, achieving an effective definition of this concept would require that the other terms of the expression to be defined. In particular, a joint reflection on the object of delegation is needed, especially on whether an agreed definition of 'governmental function' or 'governmental purpose' can be found.

This is especially interesting to note for the purposes of this study because it shows how the definition of 'SOEs' implicitly requires defining other concepts than State, ownership and enterprise, that are just as essential to achieving an effective and efficient outcome in the context of international trade law.

Conclusions

1. Summarizing the analysis: SOEs as an unaddressed or fragmentarily addressed notion under international trade law

Starting with the lack of a shared definition of State-owned enterprises (SOEs) under international law, the study delved into the notion and regulation of these enterprises in treaty regimes on international trade to determine whether a definition has emerged or is in the process of emerging. To this end, the study was divided into three main parts.

The first part, encapsulated in Chapter 1, reconstructed the importance of SOEs in the global economy, against the backdrop of the clash between State capitalism and embedded liberalism. This approach made it possible to understand the phenomenon of SOEs, their relevance in the context of international trade, the main issues arising in this particular context, and the theoretical framework, which formed the foundation of the overall legal analysis.

The second part of the research, developed from Chapter 2 to Chapter 4, considered the WTO legal framework. Given the lack of any explicit mention of SOEs in WTO Agreements, the study focused on the notions of entities that are considered similar enough to SOEs. Building on this, the study identified and mapped the definitional and constitutive elements of each of the economic operators considered to determine if, and to what extent, they overlap with the phenomenon of 'SOE.' This analysis contributed to better defining and understanding whether SOEs are captured under WTO law or if, on the contrary, they escape it.

The third part of the study, developed in Chapter 5, focused on the regulatory framework of SOEs emerging from treaty legal regimes and concluded outside the institutional framework of the WTO. Specifically, the analysis considered selected plurilateral and bilateral Preferential Trade Agreements (PTAs) concluded after 2001, the year of China's accession to the WTO and here considered to be the moment when the 'SOE-issue' arose at the multilateral level. The legal value of the analysis of PTAs for the purposes of this study lies in their attempt to systematically define SOEs and to see whether such systematization may have had an impact at the multilateral legal level.

1.1. Occurrence of and approaches to the definition of SOEs in WTO law and PTAs

The study mapped several different constitutive criteria of SOEs in international trade law at the multilateral, plurilateral and bilateral level. In this regard, it is important to remember that adopting one criterion over another reflects a quest for balance pursued by the parties of the regulatory framework. Such balance is between, on the one hand, the risk of over-inclusion, to avoid qualifying as SOEs enterprises that do not belong to that category in practice or that do not represent an obstacle to trade liberalization; and, on the other hand, the risk of under-inclusion, namely, not to capture enterprises that do qualify as SOEs and represent an obstacle to international trade development. From this angle, choosing a constitutive criterion, or a set of criteria, determines the extent of the scope of the definition of SOEs and, consequently, the scope of the agreement in which the definition has been adopted.

Under the WTO Agreements, the study identified a list of constitutive criteria in single provisions and related subjects, that allow for the inclusion and regulation of SOEs in each of these contexts, as

they identify a link between the enterprise concerned and the State intense enough to put the former on the same level of the latter. The analysis suggests that this approach is justified by the power that such a link confers on the State to interfere with the SOE management and decision-making process, hence potentially affecting international trade flow. Abstracting out from each provision analyzed, the relevant criteria encompass:

i. **The level of integration of the enterprise within the State**: this criterion is used to determine whether the enterprise concerned is established by the State and integrated within its official domestic structure in the form, for instance, of a governmental agency. This is arguably the criterion that is able to identify the most intense link between the State and the SOE;

ii. **An act of delegation of the State**: this criterion encompasses those situations in which the State uses official or unofficial means to entrust the enterprise concerned with specific duties or powers. The link is less intense than the one under the first criterion. However, the focus is on the willingness of the State to confer such a duty or power. In other words, the focus revolves around the source of the delegation, which is the State and related public authorities, at the central and local levels;

iii. **The grant of exclusive or special privileges by the State**: this criterion captures enterprises that enjoy powers conferred on them by the State or public authorities, which are not available to their private counterparts. WTO Agreements do not define what exclusive or special privileges are. However, some guidance can be found on the WTO website where an example of a special privilege is a subsidy grant. In turn, a monopoly right is an example of an exclusive privilege. In any case, the criterion aims at capturing enterprises that due to such exclusive or special privileges may affect international trade flow;

iv. **The performance of the delegated governmental powers or governmental functions**: this criterion encompasses those delegations from the State involving the conferral of powers or functions typically exercised by the State itself or its public authorities. The case law clarified that it is not sufficient for the enterprise to receive such delegation and potentially enjoy the delegated governmental powers of performing the governmental function. It is required to actually exercise and perform these functions. The main difficulty linked with this criterion is the distinguishing line between what is a governmental power or function and what is not. This determination indeed differs across national jurisdictions and there is no shared definition at the multilateral level.

v. **The pursuit of public policy objectives**: this criterion is closely intertwined with the previous criterion. However, the focus in this context is on something other than powers but rather on the final aim pursued by the enterprise through the performance of its activities. This may involve, for instance, enterprises that pursue objectives related to national food security or that confer subsidies in the context of a national scheme for these purposes;

vi. ***De jure* and *de facto* State control**: this criterion identifies a link between the State and the enterprise, through which the former can impact the decision-making process of the latter. Overall, the multilateral agreements cover this element in both of its manifestations, namely if the State exercises control through official means or undetected practice. In any case, it is usually expressed through factual elements, such as the power of the State to control the everyday management of the enterprise, to exercise the majority of its voting rights, or to appoint the majority of board members;

vii. **State influence**: the criterion of State influence is the least specified among the criteria mapped at the multilateral level. However, similar to what has been observed for the criterion of State control, State influence aims at capturing the link between the State and the enterprise that allows the former to affect the latter decisions and management. The criterion usually refers to *de facto* State control situations;

viii. **The exercise, possession or vestment of governmental authority**: this criterion has been elaborated specifically by the Appellate Body (AB) in the context of subsidy regulation to determine whether an SOE is a public body. Legal scholars and practitioners have been highly critical of it because it conflates the element of governmental function with that of governmental control, without defining either term. Indeed, no further clarification is provided in the case law, which contrasts to previous constitutive criteria. The investigation, however, should revolve around the enterprise's identity in the context in which it operates. This assessment has to be conducted on a case-by-case basis. State ownership and State control are only relevant if other elements are proven, such as that the enterprise performs functions of governmental character in the relevant national context.

ix. **Entrustment**: this criterion is about whether a private body and its conduct can be linked to the notion of 'Member.' The case law clarified that the notion of 'entrustment' is linked to the conferral of responsibility on the private entity. Overall, the mere possibility that the State has the power to confer such responsibility is not enough for the enterprise to be covered under the notion of the 'State.' Indeed, it is necessary that the State actually exercises its powers in this regard. Such exercise is ultimately the demonstrable link that allows WTO law to apply to the entity concerned.

x. **Direction**: this criterion is closely intertwined with 'entrustment', as it pertains to the link between a private body and its conduct with a 'Member.' However, it explicitly involves a form of command by the State through which the latter exercises its authority over the entity concerned. Also in this case, the exercise constitutes the demonstrable link between the State and the enterprise that allows for WTO law to apply.

Against these findings, it is worth noting that neither full and majority State ownership nor State control are considered to be constitutive criteria of entities that are commonly viewed as 'SOEs.' The case law clarifies that these two criteria, namely State ownership and State control, may be relevant only if accompanied by other elements, such as the exercise of governmental authority by the State.

Moreover, the identified constitutive criteria tend not to apply cumulatively. Rather, for each given legal context under consideration within the WTO framework, only one or more are relevant.

At the same time, notwithstanding this observation, the constitutive criteria identified all share a common rationale, which is based on anti-circumvention. In other words, the WTO legal framework aims at preventing Members from using economic operators, with whom they share an intense link, as a tool to circumvent their multilateral obligations and constitute a potential obstacle to international trade flows. Overall, this aim is pursued by favoring factual over formal aspects in the application of the WTO Agreements.

Despite this common trait however, the analysis shows that the constitutive elements identified are able to capture and regulate only a portion of the totality of economic operators that fall under the factual notion of SOEs in international markets.

Therefore, each WTO Agreement is able to encompass only a fraction of SOEs and potentially a number of them escape multilateral regulation.

Take, for example, Article XVII of the GATT and the criterion of being granted special and exclusive rights which is the relevant provision for STEs. While some SOEs are granted such rights, thus falling within the scope of the GATT, this feature is not common to all of them nor is it the only one that can be envisaged in a given factual situation. Consequently, the coverage of Article XVII of the GATT and the related notion of STE is only partial when SOEs are concerned.

Similarly, these conclusions can be illustrated with reference to the notion of 'public body.' Regardless of the definitional approach of WTO adjudicative bodies (including the State control approach, the governmental function approach or the governmental authority one), neither the notion of control nor that of governmental function or governmental authority can be characterized by precise and defined boundaries. Considering the ASCM, although the qualification of an SOE as a public body says nothing about the compatibility of its conduct with the Agreement itself, this undefined legal framework makes it easier for Members to circumvent their multilateral obligations and thus quantitatively reduce the number of entities that might fall under its scope. It also has important consequences with respect to the remedies that may possibly be exhausted. Moreover, SOEs whose activities are not the expression of a public function but are nevertheless directed or influenced by the State fall out of the scope of the ASCM. If, by contrast, SOEs are to be regarded like private entities, they could fall within the notion of a public body if entrustment or direction can be established.

In a similar vein, under the GATS, the constitutive elements adopted for the notion of 'monopoly and exclusive service supplier' revolve around the active conduct of the State that authorizes an enterprise to provide a certain service on its own. In this context, two limitations can be identified as far as the coverage of SOEs is concerned: firstly, the agreement only covers the supply of the service. Thus, SOEs that carry out other activities, albeit related to the service itself, are excluded from the scope of the provisions. Secondly, determining if the GATS provisions are applicable to SOEs depends on whether the type of activity performed by distinct SOEs corresponds to the exercise of governmental powers delegated by the State. Therefore, the conclusions that can be drawn under the GATS are similar to those of the ASCM: by making the normative system of references too wide-ranging, the uncertainty of applicable notions increases the likelihood that not all SOEs, which might hinder international trade flows because of their intense link with the State, are captured under the relevant legislation.

Following the same line of reasoning, the limited coverage of SOEs in the context of the WTO is further confirmed in the plurilateral context of the GPA. This Agreement gives ample space for national qualification as a public enterprise and the application of domestic law to the entity concerned. Premising the qualification of an entity on national criteria introduces a high degree of fragmentation and does not incentivize the adoption of a uniform approach in the long run.

Another conclusion that emerges from the analysis. Even though a comprehensive, unitary, and coherent definitional approach to SOEs cannot be discerned in the WTO context, the definitional criteria that have been identified throughout this study show a tendency to emphasize the activity of the enterprise. This revolves around the type of activity performed (whether the scrutinized activity is a trading activity or a governmental-type one, with regulatory or administrative characteristics), why it is performed (meaning that the activity is performed because there is an official or unofficial act of the State granting or delegating that performance) and how it is performed (whether the activity is governmental in nature or not). This emerges clearly by looking at the recurring elements of the delegation by the State (the 'why'); the requirement that such delegation confers a specific power,

right or function of a governmental nature corresponding to those usually pertaining to the State (the 'what') and, lastly, the actual exercise of that delegated power or function (the 'how').

Arguably, however, this activity-based approach creates more issues than it solves because it lacks objectivity. Indeed, the link between the State and the enterprise, which is the basis for the activity concerned, may not be easy to detect. Moreover, most of the terms of this approach are not based on a shared definition at the international level, such as what is a 'governmental function' or a 'governmental power.' However, against the common anti-circumvention rationale among WTO Agreements outlined above, this definitional tendency seems to be aimed at tackling State interventionism in the economy, which, by delegating to entities other than the government the exercise of governmental-type activities might hide protectionist tendencies of Members and hinder international trade liberalization.

The overall set of criteria emerging from the analysis of WTO Agreements reveals a conception of SOEs as enterprises enjoying governmental-like powers and carrying out governmental-like functions on behalf or under the control or on the instruction of the State. Taking a closer look, this definitional approach is based on a double standard. First of all, there is the relationship between the State and the enterprise in which the former can influence and determine the behavior of the latter in a way that is potentially detrimental to international trade flow. Secondly, the types of activities performed by the enterprise are assimilated to those usually performed by the government and the public authority.

Overall, the following observations may be concluded from the analysis of WTO law. Lacking explicit inclusion, definition, and regulation of SOEs, and despite the definitional tendency to capture certain entities on the basis of a certain qualification of the activity they performed, the WTO legal framework as it currently stands is only able to capture some of the types of SOEs that actively engage in the international markets and influence the flow of international trade. Hence, there is a gap between the entities initially envisaged as worthy of inclusion under the rules of the multilateral trading system and those which emerged globally after the establishment of this particular legal system.

The second part of the analysis dealt with PTAs. In respect of selected legal frameworks, the study highlighted that the constitutive criteria are often specified by adopting certain thresholds or circumstances. This clarifies the scope of the definition followed in preferential arrangements in accordance with the principle of legal certainty. Identified constitutive criteria under PTAs encompass:

i. **Full and majority State ownership**: in PTAs, State ownership is usually identified as full or majority ownership, but also minority ownership can be considered. In this case, minority ownership is linked to the threshold of 20% of the enterprise's shares.
ii. ***De jure* and *de facto* control**: the criterion of State control is often linked with practical features, such as the exercise by the State of at least the majority of voting rights or the power of the State to appoint members of the executive body of the enterprise.
iii. **Governmental delegation**: this criterion covers governmental acts by virtue of which the enterprise enjoys specific powers and rights.
iv. **Affiliation**: the criterion of affiliation under PTAs refers to situations in which the enterprise is either *de facto* controlled by the State or where the government is a minority shareholder that is involved in the decision-making process of the enterprise.
v. **The performance of commercial activities**: this criterion covers SOEs engaging in profit-seeking activities, and not only trading ones.

vi. **The exercise of the delegated power by the entity to which such power was conferred**: this criterion shows that PTAs often require the exercise of the power that has been delegated, in addition to the delegation itself.

In a first line of remarks, compared to the definitional approach identified under the WTO Agreements, the analysis of PTAs revealed that overall PTAs display a more structured approach toward the definition and regulation of SOEs, although some criteria are common to the two legal frameworks, such as governmental delegation and the exercise of governmental power.

More specifically, based on the research findings, plurilateral agreements show three main definitional approaches toward SOEs.

The first approach is based on the adoption of clear-cut and defined criteria. More specifically, such criteria encompass: (i) majority State ownership, where the State owns at least 50% of the share capital of the enterprise; (ii) State control, assimilated to the exercise by the State of the power of exercising at least 50% of the voting rights; (iii) the power to appoint a majority of members of the board of directors or any other equivalent management body.

The second approach considers the criteria of ownership and control in the broadest possible scope. Accordingly, the criterion of State ownership is considered in all three general forms: full, majority and minority ownership. The analysis of treaty law at the plurilateral level showed that minority ownership may take the form of direct or indirect State ownership, hence requiring an investigation of interlocking relationships between the State and its enterprises. At the bilateral treaty level, it was found that minority ownership is tied to the notion of State influence. Accordingly, State influence is envisaged when the State owns less than 50% but more than 20% of the share capital. Looking at State control, the examined PTAs encompass both *de jure* and *de facto* State control. This criterion is often anchored to the exercise of the majority of voting rights by the State or the appointment of the majority of members of the executive organs of the enterprise.

By contrast, the last definitional approach followed in PTAs does not expressly address SOEs but nevertheless encompasses them. Agreements embracing this approach adopt notions and definitions of other relevant economic operators, which are wide enough to encompass SOEs and related entities, although not explicitly.

As a second line of remarks, the analysis supports the assertion that plurilateral approaches heavily influenced SOEs' definition and regulation in bilateral preferential arrangements that were concluded by China, the EU, the US, and Australia. Although the analysis uncovered specificities related to PTAs concluded by each of the countries concerned, the overall definitional approaches were consistent in the sense that they display a structured approach towards SOEs.

Altogether, there is a specific approach of plurilateral and bilateral PTAs, according to which SOEs are predominantly conceived as enterprises where the State is the majority shareholder; moreover, the State exercises control in the form of power of appointment of the majority of members of the executive board or the power to exercise the majority of voting rights. Arguably, the rationale behind this two-pronged, objective approach is to avoid SOEs being exploited as means to impair trade liberalization through a preferential arrangement. Such an approach is pursued by tackling all possible situations that may facilitate State intervention and influence on the decision-making process of the enterprise concerned.

In light of the above, no unitary and shared definition of SOEs among current treaty legal regimes on international trade exists. Rather, it is possible to find several criteria and definitional approaches that apply under different legal frameworks. Despite this fragmented landscape, however, it can be argued

that, when SOEs are concerned, WTO Agreements and PTAs share the same ultimate goals: that is to avoid SOEs being used as a tool to hinder trade liberalization within the boundaries defined by the parties to the agreement. What differs between the two 'types' of treaty regimes is the way in which this objective is pursued. While PTAs adopt a more structured approach, WTO regulation, which is capable of being applied to SOEs, appears much more fragmented.

Moving to consider entities related to SOEs that are addressed with different terminology such as State-controlled entities (SCEs), State-Wealth Funds (SWFs), or State-Invested Enterprises (SIEs),[1] the analysis showed that there is no unitary definitional framework. Beyond this common aspect, different considerations can be drawn depending on the legal framework under analysis.

Under WTO law, it is difficult to delineate the line that distinguishes SOEs from other entities due to the lack of an explicit reference to these terms. Some guidance can be found in negotiations in Members' accession and in STEs' notification,[2] where the study highlighted that the participating Members have identified several categories of entities that, in the light of the discussions, appear to differ from SOEs to a certain extent. More specifically, the difference revolves around ownership structure and the type of relationship between the entities and the State. Indeed, State-controlled enterprises (SCEs) appear to be enterprises not owned by the State but whose decision-making process is heavily influenced by it, which may be the case of former SOEs. In other words, the analysis suggests that at least part of the WTO membership perceives the category of 'SOEs' as possibly encapsulating all enterprises in which the State retains full or majority ownership. At the other end of the spectrum, 'SCEs' are considered to include those undertakings not owned by the State at all but nevertheless controlled and directed by the government. Under the latter configuration, it could be argued that a type of SCEs consists of State unitary enterprises (SUEs), which are a category that could capture enterprises subject to the most intense control of the State, where the decision-making process of the enterprise entirely depends on the State. This is supported by the Member's practice which does not grant SUEs any ownership rights on their assets. Lastly, State-Invested Enterprises (SIEs) have been found in practice too. In this particular case, the relevant criterion to qualify an enterprise as an SIE is the receipt of public funds to finance the enterprise's assets. In light of these considerations, under the examined practice, there seem to be several categories of economic operators which are addressed as distinct and separate: SOEs, in which the State ownership patterns seem to be relevant, and SCEs, in which the focus is on the intensity of the impact of the State on the decision-making process and management of the enterprise concerned, irrespective of ownership.

Under PTAs, the analysis shows that the difference between SOEs and related entities is the result of the balance emerging from the constitutive criteria adopted. More specifically, taking a closer look at the relevant provisions, SOEs appear to be conceived as a general category encompassing all other related entities. The latter usually distinguish themselves because the scope of their definition is narrowed by adopting further, more specified criteria. As seen already, the constitutive criteria relevant for these entities are: (i) State ownership, (ii) State control, (iii) the activity performed, and (iv) the aim pursued. The last two requirements establish differentiated entities within the realm of SOEs. This is what emerged, for instance, with respect to Independent Pension Funds (IPFs) and State Wealth Funds (SWFs). Sometimes, however, such distinctive criteria are not as straightforward to identify. For instance, this is the case for SCEs, whose notion under PTAs seems to be anchored to

[1] See Chapter 1, section 1.

[2] The analysis of these documents has been carried out in Chapter 2 of this study.

the idea of ‘influence.’ The latter, in turn, seems to be too broad to constitute an effective distinguishing line between SOEs and SCEs, also in light of the fact that both ‘influence’ and control in the form of indirect control are tied to the presence of State ownership.[3] In this context, then, the analysis suggests that, under PTAs, the expression ‘SCEs’, if not considered as a synonym of SOEs, it largely overlaps with it.[4]

To further advance the abstraction of the general tenets for a (shared) notion of SOEs under international trade law, it is possible to delineate the convergences and divergences between the two analyzed legal systems.

1.2. The point of convergence between multilateral and preferential trade treaty cooperation: the lack of qualification of SOEs as public bodies

The study reveals one common point between SOE definition and regulation in WTO Agreements and PTAs: the lack of specification as to the qualification of these enterprises as public bodies. In other words, neither the WTO agreements nor plurilateral or bilateral PTAs address the issue of whether SOEs constitute public entities, falling within the boundaries of the notion of ‘State.’ Indeed, existing multilateral and preferential regulations concerning SOEs seem to disregard any public/private distinction when dealing with these enterprises. PTAs seem to be introducing SOEs as a separate category of subjects covered under the agreements without specifying the premise of such categorization. On the one hand, this shows that a narrower context of negotiations does not necessarily involve a higher degree of specification, especially with respect to highly controversial and contentious issues. On the other hand, it generates paradoxes and inconsistency within the legal framework applicable to SOEs compared to other economic subjects.

From the WTO perspective, the lack of qualification of SOEs might be justified by the neutrality principle, on which the system is premised. More specifically, one may argue that the WTO does not aim to limit the Members’ right to establish these types of enterprises. Yet, when a Member avails itself of these enterprises in the economy, it risks being bound by obligations that are not imposed on a Member that makes less use of them. As emerged in Chapter 2, this is particularly evident in WTO Protocols of Accession, which often contain WTO+ obligations when dealing with State ownership. Moreover, the public or private qualification of SOEs is consistently debated in WTO disputes, especially in disputes related to subsidy regulation when the notion of ‘public body’ is explicitly at stake.

Looking at PTAs, the qualification of an enterprise as ‘SOE’ imposes a series of obligations on signatories that do not apply when other economic operators are concerned. However, provided that the distinction between the two categories (SOEs and the rest) is left implicit in the system, such discrepancy in terms of legal treatment between SOEs and POEs does not appear to be justified from a legal perspective. This impedes clearly identifying a rationale and leaves unclear why SOEs should be treated differently from an entity that is not identified as different from them.

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[3] See Chapter 5, section 4.2.3 on EU PTAs. For a detailed account on the criterion of ‘State influence’ and its relationship with State ownership see Chapter 5, section 4.3.2.

[4] It should be noted that this reconstruction differs from the one contemplated by other authors, according to which that of ‘SCEs’ is a broader category than SOEs. For instance, according to Julien Chaisse, Jędrzej Górski and Dini Sejko ‘the most obvious incarnation of SCEs is state-owned enterprises (SOEs).’ See Julien Chaisse, Jędrzej Górski and Dini Sejko, ‘*Regulation of State Controlled Enterprises: An Interdisciplinary and Comparative Examination*’ (Springer, 2022).

Against this background, the only hint regarding the qualification of SOEs can be found in WTO case law. The analysis of relevant disputes seems to suggest that adjudicating bodies regard SOEs as also including private bodies not linked to the State if certain conditions are not met. This emerges specifically from WTO case law dealing with connecting criteria for attribution purposes (Chapter 4). In this regard, the connecting criteria used by WTO adjudicating bodies with reference to government-owned entities include (i) the action of the State in the form of a regulatory framework that, although not binding, (ii) generates sufficient incentives on its subjects to adopt a certain measure or implement a given policy. A closer look shows that these criteria overlap with those required to attribute the conduct of private entities to the State. The qualification of SOEs as private entities also emerges from the case law dealing with the notion of 'public body.' In this context, similar considerations can be made regarding the case law dealing with subsidy regulation and the 'public body' issue. In that context, the AB seems to suggest that SOEs are private bodies until the exercise, vestment or possession of governmental authority can be proven.
In any case, the overall State practice that emerged from WTO agreements and PTAs does not seem to fully support the perspective expressed in WTO case law by adjudicating bodies. That this is a point of contention emerges from the third party intervention in the same case law, where Members are split as to the constitutive criteria necessary to determine whether an SOE constitutes a public body or not. Thereby, some argue that State ownership alone is sufficient to determine the public character of the enterprise, while others insist on the exercise of governmental functions. The same can be observed within STEs notifications submitted by Members pursuant to Article XVII of the GATT, and more specifically, in the wide range of the notified enterprises, encompassing inter alia branches of the government and enterprises subject to domestic public law. The fact that this point is not clarified, even outside the institutional framework of the WTO, arguably confirms that the issue is not settled. It is possible to debate whether the qualification of SOEs is not addressed because of the difficulty for the parties involved in reaching an agreement or if it is due to a lack of willingness in this regard. However, the heated discussions that we can observe on this issue, for instance especially within third party intervention in WTO disputes when the notion of 'public body' is addressed, together with the definition of SOEs adopted by some WTO Members outside the multilateral institutional framework, suggest that the first option should be taken as correct.

1.3. The points of divergence in the treaty law: the definitions drafted, the terminology employed and the role of State ownership as regards SOEs

The first point of divergence emerging from the analysis concerns the very existence, and elements of a definition, of SOEs. As demonstrated already, neither within the GATT system, which originated immediately after WWII, nor in the WTO law, which emerged in the '90s, is explicit mention made to SOEs. Hence, the study reconstructed SOEs definitional aspects by examining the constitutive criteria of entities covered in the WTO Agreements which identify SOEs. As outlined previously, this exercise implied a comparison between a factual notion (that of SOEs) and a legal one (those of related entities regulated under WTO Agreements). By contrast, most PTAs do expressly regulate SOEs, and such regulation has evolved over time. More specifically, preferential arrangements began to consider enterprises related to the State starting in the '90s, but their regulation evolved rapidly in the last two decades, arguably as a reaction to the SOE issue increasingly perceived after China's accession to the WTO in 2001 and the high-paced growth of the Chinese economy. More specifically,

SOEs increasingly started to be explicitly addressed and, while at first, they were regulated within specific provisions, usually in chapters dealing with rules on competitions, in most recent plurilateral and bilateral PTAs, SOEs are increasingly considered within specifically dedicated chapters. This evolution can be appreciated both at the plurilateral level among megaregional arrangements, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the US-Mexico-Canada Agreements (USMCA) in particular, and at the bilateral one in PTAs concluded by major WTO economies. In sum, the definitional framework emerging from the WTO law is more fragmented. A comprehensive definitional approach cannot be envisaged at the multilateral level. On the contrary, the analysis of PTAs revealed the emergence of more structured definitional approaches or the recurrence of specific groups of criteria.

Another difference between the multilateral and the preferential frameworks analyzed is the terminology used. In this context, the analysis of WTO law showed that, on the one hand, the constitutive elements used in multilateral agreements are often too vague to allow for the development of an effective and efficient legal system capturing trade-law-eluding SOEs in the ever-expanding framework of international trade. For instance, this is the case of Article XVII of the GATT, which leaves key notions and terms related to its scope largely undefined. One may argue that vague terminology brings flexibility to the multilateral trading system. However, in the quest for balance between over-inclusion and under-inclusion regarding the definition of SOEs, the constitutive criteria identified by relevant terminology should still allow for the efficient and effective regulation of actors who, while not strictly envisaged at the time of negotiations, exist and are relevant in international trade relations today. Notwithstanding this, the approach adopted by the multilateral regulation appears not to be able to adapt effectively to the evolution of economic actors characterizing the contemporary global economy. At the same time, each WTO Agreement, through the qualifying criteria adopted within its framework, is only able to regulate a specific and limited fraction of existing types of SOEs. Indeed, the application of criteria used, for example, under the ASCM are not the same and do not unquestionably apply under different legal frameworks of other Agreements.

In turn, PTAs increasingly use a more specific vocabulary to define and regulate SOEs and related entities. The greater precision and specificity as compared to multilateral regulation can be appreciated on multiple levels. Firstly, as mentioned already, the very adoption of a definition of SOEs reflects a higher degree of specificity than multilateral agreements. In this regard, most of the terminology used is defined by the parties at the plurilateral and the bilateral level. Moreover, the study highlighted how several PTAs elect the activity as a definitional criterion of SOEs. In this regard, it is often specified that SOEs engaging in commercial activities are covered under the scope of the agreement. This approach is arguably more comprehensive than the one followed under the WTO Agreements, which usually consider only trading activities.

One last difference between the definitional approaches of SOEs in WTO agreements and PTAs pertains to the role of State ownership as a constitutive criterion of these enterprises. Under the WTO legal framework, State ownership is not relevant per se for the purposes of qualification of covered entities. Rather, it is merely adopted as a criterion for the qualification of an SOE as a 'public body' and only when combined with other elements, such as the exercise of effective control by the State or the exercise of governmental functions by the entity considered. The irrelevance of State ownership as a constitutive criterion of SOEs is a common feature shared by all WTO Agreements analyzed. Considering the GATT, the analysis of Article XVII of the GATT in Chapter 2 revealed that State ownership is irrelevant for the qualification of an enterprise as STE. Rather, such qualification

revolves around the government granting exclusive or special privileges to the enterprise concerned. From this perspective, the definition revolves around two other criteria: first, the source criterion, as the exclusive and special privileges have to be conferred by the State; second, a functional one, because the activities in which the enterprise engages are the expression of the granted privileges and rights.

Again, in the WTO legal framework, in a similar way, State ownership does not play a central role under Article 1 of the ASCM to establish whether an entity is a public body or not. As seen already, such a qualification hinges on the presence or exercise of the governmental authority conferred by the State. Despite other solutions revolving around State control and the exercise of governmental functions that have been put forward both by WTO adjudicative bodies and scholars, public ownership remains a circumstantial element that only together with other criteria can determine the qualification of an entity as a public body.

Also, under the GATS, the concerned enterprise's ownership structure is irrelevant to determining whether it constitutes a monopoly or an exclusive service supplier. As seen already, the qualification, on the one hand, depends on the establishment of the entity in accordance with national law and the presence of an organized structure; on the other hand, the focus is on the activity exercised by the entity and on the active engagement of the State in the market. However, unlike any other WTO Agreement, the GATS indicates the level of ownership deemed relevant for the application of the Agreement, that is, majority ownership, if another person owns the economic operators.

In the same framework but in a plurilateral context, the GPA takes into consideration the national qualification of the enterprise as a public body. Hence, again, State ownership is not acknowledged as a constitutive criterion that is relevant per se.

Overall, it emerges from the analysis that, under the WTO legal framework as it stands, the consideration of an SOE for the purposes of extending the scope of application of multilateral rules, which are addressed to WTO Members, does not depend on the nature of the owner nor on its ownership pattern. Consequently, an SOE is not a public entity only because the State owns it. Its public nature can only be determined when and if other elements accompany such ownership. More specifically, an SOE would qualify as a public subject, falling within the extended boundaries of the notion of 'State' (or 'government' if one thinks of, for instance, about the EU) under the WTO if: (i) the enterprise is owned and effectively controlled by the State; and (ii) there is a delegation by the State that allows the exercise of governmental functions by the enterprise concerned; or (iii) there is a conferral of exclusive or special rights by the State. In this context, the first criterion appears to be necessarily accompanied by one of the other two, alternatively.

Contrary to the WTO legal framework, State ownership is adopted as a constitutive element of SOEs in all plurilateral and bilateral PTAs directly addressing them. For instance, Chapter 17 of the CPTPP adopts both the criteria of full and majority State ownership and control. Similarly, the USMCA refers to full, majority, and minority State ownership and control. However, similar to what has been observed under WTO law and subsidy regulation in particular, it does not seem to say anything per se regarding the public nature of these enterprises.

2. The focal point of the findings: the emergence of a new approach towards 'State ownership' in international trade law

Based on the above, it emerges that a new conception of State ownership and its role as a constitutive element of SOEs that are worthy of regulation is emerging in international trade law. Indeed, State ownership is slowly going from being overlooked to being a crucial component of SOE definition and regulation, although in ways that differ between WTO law and PTAs.

2.1. The evolution of the role of 'State ownership' under the WTO legal system: neutrality in principle and relevance in practice

With respect to the WTO legal framework, it can be argued that State ownership is not adopted as a relevant criterion for the qualification of enterprises under WTO Agreements because of the neutrality principle that underpins the entire system. However, the type of issues brought about in the system by SOEs belonging to different economies seems to challenge such neutrality.

From a general perspective, the issue emerging under the multilateral context in relation to State ownership seems to be intertwined with the different use of SOEs by States based on different economic models. While under market-based economies, State ownership might not necessarily entail the exercise of a strong influence by the State on the owned economic operators. In non-market-based economies, State ownership may allow States to heavily influence the decision-making process of the enterprise concerned. This is especially true given the practical repercussions caused by SOEs' behavior and exploitation on international trade flow and how WTO Members reacted to them.

The analysis undertaken throughout this study sheds light on cracks that are slowly, but consistently, showing regarding the neutrality principle, which reveal a shift in the conception of the State ownership criterion among the WTO Members. This is particularly evident looking at Article XVII of the GATT and the notion of STEs. The findings in this regard show that State ownership, although ultimately not included in the wording of Article XVII of the GATT, is increasingly perceived as an element worth considering. A specific example in this regard is represented by the WTO Protocols of Accession, and the related negotiations in particular. In other words, the element of State ownership thrown out the door of the treaty text when Article XVII of the GATT was being negotiated comes in through the window of Protocols of Accession within the WTO legal framework. More than simply included as a feature of the economy of the aspiring Members, the analysis of Working Party Reports (WPRs) on Accession shows that State ownership is treated as a constitutive criterion of SOEs or, in any case, as an element imposing on certain Members additional obligations than those required of original Members. This observation about State ownership is identified in the pivotal WPRs of China, Saudi Arabia, Russia, and Viet Nam.

Moreover, State ownership also emerged as a constitutive element of the enterprise in State practice, specifically in submitted notifications on STEs to the Trade Policy Review Mechanism and in the discussions during the GATT and WTO preparatory works. Outside the GATT, State ownership also came up in discussions within the case law related to Article 1 of the ASCM with reference to the public body issue. In this context, perspectives expressed by the State can be divided into two groups. One group affirms that State ownership is a sufficient criterion to determine that an SOE is a public body. A second group claims that such qualification revolves around the exercise of governmental functions. The mere fact that such debate exists at all is of great relevance for the purposes of this study because it shows the increasing consideration of the role of State ownership under the multilateral trade framework. Arguably, due to the impossibility of relying on State ownership in the context of multilateral agreements, States have steadily begun to include this element in preferential

arrangements. In this regard, the adoption of the criterion of 'State ownership' as a constitutive element of SOEs outside the context of the WTO might be interpreted as a confirmation of the cracks characterizing the neutrality principle.

2.2. 'State ownership' as a declared and defined constitutive element of SOEs under PTAs

Looking more specifically at PTAs, the most recent preferential arrangements reveal a shift in the conception of the element of State ownership between or among sub-sets of trading partners. Indeed, the negotiating parties generally follow a dual approach when dealing with State ownership in this context. On the one hand, they do not want to hinder the ownership models implemented at the national level, nor do they wish to scrutinize that choice. At the same time, States want to ensure that choices made at the national level, including the establishment of SOEs, do not affect international trade relations or hinder trade liberalization.

Arguably, this quest for balance reveals a change in the legal strategy toward State ownership followed in PTAs, which moves from an ownership-neutral approach to a competitive-neutral one. While WTO Agreements and older PTAs focus on applying rules to all undertakings, regardless of their ownership and hence do not assign any particular relevance to State ownership, recent PTAs assign a more central role to State ownership than before through the principle of competitive neutrality. According to this principle, any enterprise should not be advantaged or disadvantaged solely because of its ownership structure. Under this framework, State ownership gains autonomous relevance because it is considered and conceived as a potential distorting element for the level playing field between SOEs and POEs in international trade that, as such, needs to be directly addressed and regulated.

More specifically, it emerges that the renewed relevance of the criterion of State ownership can be appreciated on two distinct levels: on the one hand, it has been accepted as a feature that may distort the level playing field between public and private enterprises; on the other hand, when considered in its majority and minority manifestation, it has been adopted as a defining criterion of SOEs in PTAs.

3. Where to next? The suitability of defining and regulating SOEs in the WTO legal framework

The analysis carried out in this study showed that there is yet to be a single applicable definition of SOEs in current international treaty regimes on trade. Possible definitional elements of these enterprises are scattered throughout WTO Agreements, whereas PTAs follow a more structured approach.

Against this current state of affairs, it is clear that the creation of a stable and effective legal framework for SOEs and related entities is desirable as a common legal background for international trade. The establishment of such a common legal background, however, cannot disregard the need for a shared understanding of who and what should be regulated and why. Considering the WTO legal framework, one can argue that the lack of specific regulation of SOEs might be the result of a willing choice not to regulate these enterprises rather than of an underlying difficulty in dealing with them in the first place. The two observations may very well be true when SOEs and related entities are concerned, especially in light of the regulatory framework emerging from PTAs. More specifically,

the reason behind the lack of a specific mention of SOEs in WTO Agreements might depend on the Member under scrutiny.

Indeed, the study carried out shows that WTO Members do not share the same interests in this regard. On the one hand, the Members based on non-market economies, on State capitalist models or simply heavily relying on SOEs do not seem to be pushing to regulate these entities under WTO Agreements. Arguably, this is also reflected outside the WTO legal framework, for instance, in PTAs concluded by China, which do not specifically mention SOEs. On the other hand, WTO Members based on market economies and with a limited public sector and circumscribed intervention of the State in the economy argue that multilateral trade rules should be strengthened to face the challenges posed by State ownership, SOEs, and related entities on international trade. These tend to be those Members, such as the US and the EU, which used to enjoy strong bargaining power within the WTO but this has gradually eroded with the expansion of the WTO membership and the new demands of new Members, often characterized by different economic and political models. As a consequence of such erosion, these Members appear to be seeking and leading the quest for legal solutions for SOE-related issue outside the institutional framework of the WTO. In the last few decades, this dynamic has resulted in the establishment of a corpus of legal provisions that address the most debated aspects of SOEs in international trade, starting with their definition. This shows that, despite the lack of a consistent definitional approach to SOEs in international trade law, there is still space to work in the direction of a uniform notion.

It is clear from the analysis of the WTO Agreements that multilateral rules on trade are not able to grasp the complexity of the phenomenon of SOEs, not only partially. In this regard, it can be argued that WTO rules are not able to capture a wider variety of entities than the ones originally envisaged when the system was first established in the '50s. At the same time, the inability to adapt to new global challenges is an issue of the WTO system more generally, which is not only related to SOEs. Those challenges, however, undoubtedly take on particular features in the context of SOE regulation. Indeed, in this field, the WTO seems to be increasingly passing its role as a common denominator for international trade regulation to plurilateral and bilateral PTAs. In other words, the WTO is missing the opportunity to lead the establishment of efficient and effective regulation of key players in modern economies in favor of a fragmented legal approach. Provided its nearly global character, with its 164 Members at the time of writing, this appears to be a huge step back for the timely rise of a harmonized legal approach towards these entities.

Following on from these observations, the multilateral re-negotiation of WTO Agreements including Members based on different economic models, as suggested by Mavroidis and Sapir, [5] would be the best solution to reach a comprehensive definition and regulation of SOEs under the WTO. Not only would negotiations at the multilateral level revitalize WTO's role as an international trade discussion forum, but they would also facilitate reaching an agreed comprehensive solution on the regulation of globally-dispersed entities, which are not only typical of State capitalist countries. However, the global nature of WTO membership has probably become a double-edged sword in this context. If, on the one hand, a comprehensive discussion would arguably allow for a truly global consensus on SOEs and a more coherent and comprehensive legal approach, in practical terms a negotiation involving countries based on different economic, legal and political models is generally considered hardly likely to happen anytime soon. Besides, even if such a multifaceted dialogue was possible, there is a high

[5] Petros C Mavroidis and André Sapir, 'China and the World Trade Organization: Towards a Better Fit', Working Paper, Issue 06 (Bruegel, 11 June 2019) 43.

risk that political considerations would prevail over legal ones.[6] If this is the case, the possible outcome would be the creation of a legal framework characterized by blunt terminology as a result of a political compromise between Members. This vague legal framework would hardly be an evolution of the WTO regulatory approach towards State-owned entities.

As repeatedly observed in this study, WTO Agreements do not recognize the criterion of 'ownership' as an independent and relevant criterion for the purposes of qualification of SOEs. Rather, ownership is able to determine whether the SOEs are public entities, but this is only when combined with other elements.

However, the cracks concerning the neutrality principle suggest that a rigid and formal application of the criterion, coupled with the clash between State capitalist countries and the embedded liberalism on which the Organization is premised, not only cannot be justified any longer but also does not allow the WTO legal system to evolve in a manner that is truly able to gather a multitude of economic models under its institutional framework. Hence, it is argued that the criterion of ownership should not be disregarded any longer; rather, it should be assigned a stronger relevance under the multilateral legal framework of the WTO.

The following section put forwards two suggestions that allow State ownership to be considered an independent constitutive criterion under the WTO legal framework. To this end, first of all, a possible osmosis between definitional approaches adopted at the preferential and multilateral levels is discussed. Secondly, the proposal takes into consideration the adoption of interpretative declarations that aim to extend the boundaries of the examined notions to include SOEs.

3.1. Adopting 'State ownership' as an independent constitutive criterion of SOEs: a 'differentiated ownership' approach

Given the evolution of the role of State ownership under treaty legal regimes on international trade, it must now be clarified how ownership could gain independent relevance as a qualifying criterion to improve the effectiveness of WTO regulation on SOEs.

The analysis showed how the constitutive criteria adopted by WTO Agreements with reference to SOEs are either incomplete, as they can only capture certain types of SOEs, or too broad, thus ineffective. In this context, it is argued that the limited coverage of WTO regulations towards State-owned and assimilated entities could be overcome by acknowledging State ownership as a necessary and sufficient constitutive criterion to qualify an entity as a public body in the multilateral trading system. In other words, under the WTO legal framework, an entity in which the State is a shareholder would be considered *tout court* public in nature. Based on this perspective, State ownership would act as a common denominator, flattening and overcoming the differences between different economic models when SOEs are concerned. In other words, ownership can play an 'interface' role in the sense as envisaged by Jackson.[7] It would smooth the interactions between multiple national economic

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[6] Political considerations are outside the scope of this contribution. However, it cannot be ignored that because of the very nature of SOEs, legal solutions for them have to deal with the reality of political relations among States. In this regard, it cannot be ignored that the creation of a roundtable for discussion on SOEs, however desirable for the mentioned reasons, seems increasingly distant and difficult to achieve, given the return of bi-polarism in international relations which seems to characterize the US-China relations. Cfr. Richard Maher, 'Bipolarity and the Future of U.S.-China Relations' (2018) 133 (3) Political Science Quarterly497-525; Colin Dueck (30 November 2020) 'America Is Navigating a Bipolar Era amid a Growing Chinese Threat', <https://www.aei.org/articles/america-is-navigating-a-bipolar-era-amid-a-growing-chinese-threat/>.

[7] See Chapter 2, section 2.1.

models premised on different governing techniques and principles in one of their major friction points: SOEs as a functional tool of State capitalism.

Building on Mavroidis and Sapir's proposal to introduce a majority ownership presumption in the context of multilateral subsidy regulation for determining whether an entity is a public body,[8] this study puts forward the proposal of a qualification process that could inspire WTO Agreements in their entirety when dealing with SOEs. This proposal consists of two steps.

In the first step, only State ownership is relevant. The national context in which the SOE operates is not taken into account. One may argue that this is in breach of the neutrality principle inspiring the multilateral trading system. However, this is not the case. On the one hand, Members would not be forced to adopt a specific ownership pattern for their economic operators; on the other hand, the presumption that ownership equates to the public nature of an entity is rebuttable.

In the second step, national frameworks come into play. In other words, States can prove that their SOEs' ownership pattern does not correspond to any public influence exercised on the enterprises' activities and decision-making process. If the presumption is rebutted, then the State could not be held responsible for violating the WTO Agreements, as the SOE concerned would belong to the realm of private entities.

Such a twofold approach is respectful of the WTO rationale discussed earlier: public ownership in economic actors is not an issue per se, but only to the extent it is disruptive of international trade flow. It would allow WTO Members to save energy and resources in their investigations dealing with trading partners' SOEs and related entities, while bringing national needs to the center.

However, some distinctions could be drawn between full, majority, and minority State ownership. In this regard, the presumption would automatically operate with full or majority State ownership. Hence, if the State is the sole investor or it retains the majority of the share capital, SOEs would qualify as public entities. Such a straightforward qualification appears reasonable to the extent that it shapes the WTO Agreements by renewing them, to the point of expanding the range of state-related entities to which they can apply. Hence, filling the gap between economic actors originally envisaged in GATT/WTO negotiations and those that emerged in the last few decades. Looking at minority ownership, the qualification as a public subject should be accompanied by other factual elements, such as the government's right to appoint members of the board of directors. Indeed, the simple government retainment of a few shares does not necessarily reflect an underlying pervasive State influence on the enterprise's activities. Hence, it might be more appropriate to better circumstantiate and qualify the State's intervention in the economic actor and the intensity of the relationship that ties them.

In the end, it seems safe to say that the 'differentiated ownership' approach solves more problems than it creates, both from a substantial and evidentiary standard perspective. In light of the embedded liberalism compromise, this solution allows to acknowledge the vital role of the active engagement of the State at the domestic level. Giving WTO Members the possibility to prove that their positive action in the economy aims to pursue non-economic objectives and counteract negative market externalities helps shed light on the positive role that SOEs can play at the national level. Moreover, a linear qualification process brings legal certainty, which determines the development of a stable and consistent legal framework. In other words, the semi-automatic qualification of an entity as public if

[8] Petros C Mavroidis and André Sapir, *China and the WTO. While Multilateralism Still Matter* (Princeton University Press, Kindle version, 2021).

State-owned could be the necessary starting point for developing a unified multilateral regulatory framework for SOEs in the future.

In addition, this approach makes it possible to put the burden of proof on the Member that is able to provide evidence about its relationship with the SOE concerned in the most effective manner. Consequently, this approach reduces the resources needed by Members to investigate the distinct characteristics of foreign SOEs in light of the national context in which they operate.

Ultimately, the strength of this approach lies in the fact that it attaches central importance to the most common element of SOEs and related entities: State ownership. Leaving aside, at least in the first instance, any consideration of how this shared element develops and operates in the national context, it helps simplify the debate and establish the basis for a much-needed updating of multilateral agreements through instruments that already exist outside the institutional framework of the WTO.

The introduction of a differentiated approach toward State ownership at the multilateral level might be achieved in different ways. The following section illustrates possible steps that might lead to such a result. Firstly, consideration of State ownership under the multilateral agreements might be prompted by the crystallization of definitional approaches to SOEs in preferential rules. Secondly, possible actions adopted by WTO Members could be envisaged, namely adopting an interpretative declaration or modifying single provisions relevant to SOEs operations.

3.1.1. Possible routes ahead at the multilateral level a) Crystallizing of preferential definitional approaches of SOEs and considering them at the multilateral level

The analysis of definitional approaches regarding SOEs observed in PTAs seems to reveal a structured regulatory framework, which arguably shows where the definition of SOEs at the international trade level is heading. This stance may be advanced in the light of the selecting criteria used in this study to identify the scope of the analysis of PTAs, namely the chronological criterion by virtue of which PTAs concluded after China's accession to the WTO in 2001 have been considered; and the subjective criterion, which circumscribed the selection of relevant PTAs to those concluded by WTO Members that strongly advocate for a regulation of SOEs or whose economy is strongly based on the functioning of these enterprises.

Indeed, it was observed that governments that are major economies under the WTO and at the same time deal with SOEs use preferential agreements to put in order the most controversial elements of SOEs. Hence, such WTO Members, through plurilateral and bilateral agreements analyzed, are opening up the way for the establishment of a regulatory framework on SOEs reflecting their perspective on the issue in a way that is precluded at the multilateral level. Arguably, this is due to the narrower context of negotiations undertaken for plurilateral and bilateral PTAs compared to the multilateral institutional context of the WTO. At the same time, such a narrower negotiating context confers to WTO Members a higher bargaining power than the one enjoyed in the institutional framework of the WTO. Overall, such a definitional framework could be interpreted as a need for change regarding the definitional framework of SOEs in international trade law and, in particular, the role to be assigned to State ownership in this context.

Therefore, the relatively harmonized definitional approaches emerging from PTAs suggest that such a regulatory framework displays a corpus of legal provisions that cannot be ignored or disregarded by those who address SOEs regulation in international trade. With this in mind, it would be possible that, in the long run, such rules, including the State ownership criterion, would eventually crystallize

and constitute a starting point to, at the very least, prompt Members and adjudicating bodies to consider State ownership as an independent criterion for the definition of an enterprise as an SOE and public body.
At the same time, of course, it worth remembering that the legal value of this a PTAs analysis does not lie in the possibility of using them for the interpretation of WTO treaties. In this regard, while the conduct of a substantial number of WTO Members outside the institutional framework is considered to be a relevant subsequent practice by WTO adjudicating bodies,[9] the relevance of preferential agreements, if accepted, would, in any case, be limited to the relations between signatory States of considered PTAs, with the fragmentation that such an approach would ensue.

3.1.2. b) Preserving but updating existing WTO law: adopting interpretative declarations to relevant treaty provisions

The second suggestion takes into consideration the role of interpretative declarations[10] pursuant to Article IX:2 of the Marrakesh Agreement, whereby members may revise their interpretative approach towards provisions particularly relevant to the notion of SOE.
As widely known, Article IX:2 of the Marrakesh Agreement confers to the Ministerial Conference and to the General Council the exclusive authority to adopt interpretations of multilateral agreements in the WTO context. The decision can be adopted by a majority of three-fourths of the Members and it is binding upon all of them, as was clarified by the AB.[11] In the literature, it has been argued that Members can adopt unilateral interpretative declarations in the WTO context outside the procedure of Article IX:2 of the WTO Agreement, provided there is no legal provision prohibiting it.[12] However, this type of interpretative declaration would be given a different legal value than authoritative interpretations adopted by the Ministerial Conference or by the General Council. In other words, they would not be binding on WTO Members. Nevertheless, they aim to clarify the common understanding of certain treaty provisions.
The adoption of interpretative declarations would benefit, primarily, Article XVII of the GATT and Article 1 of the ASCM, with the degree of flexibility required to approach entities in an effective manner. Indeed, these statements could be adopted at any time and do not have to comply with procedural requirements. Through their adoption, Members could officially recognize the relevance of control and ownership criteria as constitutive elements of STEs and a public body. In turn, this

[9] Isabel Van Damme, *Treaty Interpretation by the WTO Appellate Body* (OUP, 2009)
[10] As already known, interpretative declarations are unilateral statements, however phrased or named, that States may purport to specify or clarify the meaning or scope of a treaty or of certain of its provisions, in accordance with the definition adopted in 2011 by the International Law Commission (ILC) in the Guide to Practice on Reservations to Treaties. See ILC, Guide to Practice on Reservations to Treaties, (2001) Yearbook of the International Law Commission, Vol. II, Part Two, point 1.2. Thus, contrary to reservations, an interpretative declaration does not have the effect of modifying treaty obligations, but it is a means to clarify the common understanding of the treaty or provision to which they refer. Thus, interpretative declarations constitute an element to be taken into account in the interpretation of the treaty to which they refer to. Ibid point. 4.7.1 f. Usually, interpretative declarations are adopted by States individually. However, the ILC Guide recognizes that interpretative declarations can be formulated jointly by several States, without this circumstance affecting their unilateral character. Ibid point. 1.2.1.
[11] See WTO, Appellate Body, *United States-Final Anti-Dumping Measures on Stainless Steel from Mexico* (30 April 2008) WT/DS344/AB/R, note 308. Case law has shed light on the legal value of interpretations adopted by the Ministerial Conference or by the General Council pursuant to Article IX:2 of the WTO Agreement, which are binding on all Members. WTO, *US – Clove Cigarettes*, (4 April 2012) WT/DS406/AB/R, para 250.
[12] Yuka Fukunaga, 'The Appellate Body's Power to Interpret the WTO Agreements and WTO's Members' Powers to Disagree with the Appellate Body' (2020) 20(6) Journal of World Investment and Trade 792-819.

would expand the range of entities captured under Article XVII of the GATT and clarify the scope of Article 1 of the ASCM, reducing the gap between the notions of SOEs, STEs, and specify the relationship between the government and economic entities.

Lastly, if the same interpretative declaration is endorsed or adopted jointly by several Members, this could create a coherent interpretative basis that would facilitate multilateral negotiations on State-owned entities in the future.

In light of the above and provided the complexity of the notion of 'SOEs' that the study highlighted, it should not be excluded that the solutions discussed here might be considered closely intertwined between one another and part of an evolutionary process that would eventually lead to the adoption of State ownership as an independent constitutive criterion under the multilateral legal framework.

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United States-Mexico-Canada Agreement (USMCA)

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