THE CASE FOR A NEW "PUBLIC BODY" STANDARD: THE FUTURE OF STATE-OWNED ENTERPRISES WITHIN THE WORLD TRADE ORGANIZATION

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The times, they are a-changing. The erstwhile confidence in the international order ordained following the Second World War has coincided, if not caused, dynamic geopolitical change in the twenty-first century. Whether brought about by malevolent opportunists or sincere critics, paradigmatic assessments are occurring.

This Comment addresses one of them, mainly the economic ascendency of China and the proliferation of its state-owned enterprises (SOEs) throughout the global economy. As a member of the World Trade Organization (WTO), China has committed itself, at the very least in spirit, to a multilateral trade regime premised on liberalized markets and limited subsidies. Peer nations, notably the United States, western Europe, and Australia, consider Chinese SOEs contrary to that commitment. Typically, the legal recourse for those challenging SOEs is to lodge a violation of the WTO's anti-subsidy compact, the Agreement on Subsidies and Countervailing Measures (SCM), in the WTO's dispute resolution mechanism. However, SOEs are only subject to the SCM if they are determined to be a "public body," and the WTO has struggled to provide a consistent standard for "public body" determinations.

This Comment does just that. First, an introduction to the economic theories and principles of subsidies and political economy is provided. The next several sections then comparatively analyze the two standards currently used to determine a "public body," making sure to identify their benefits and demerits, both institutionally and geopolitically. Lastly, the Comment proposes a new standard to accommodate both the WTO's diverse membership and ideological foundation.

* J.D., Temple University James E. Beasley School of Law, 2023; B.A., Anthropology, University of Pittsburgh, 2014. Many thanks are in order. First, special thanks to the inimitable Professor Jeffrey L. Dunoff, to whose brilliance, wisdom, and guidance this Comment vibrates. I owe gratitude as well to all the TICLJ members, past and present, for their efforts on my behalf. I also want to thank Austin Miller for his camaraderie and friendship, and Saarah Dhinsa for her majesty and support. Lastly, a token of love to my mother, sisters, and brother—I am a palimpsest of your devotion. This Comment is dedicated to my late father, a veritable force, and to the people of Ukraine and Iran, whose struggles animate the free world—Слава Україні, زن، زندگی، آزادی!

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I. INTRODUCTION

Based on 2020 data, China possesses the world's second-largest economy as measured in gross domestic product (GDP).[1] Despite the COVID-19 pandemic, China's economy was the only major economy to sustain positive growth in 2020, leading analysts to forecast that China will surpass the United States as the world's largest economy by 2026.[2] Chinese state-owned enterprises (SOEs) are a significant reason for China's economic accession and sustainability.[3] In 2018, although Chinese SOEs only accounted for 5% of China's total industrial enterprises, they represented 28% of total profits, 38.8% of total assets, and 17.8% of employment.[4] Over the past twenty-one years, the number of Chinese SOEs

1. *See GDP (Current US$)*, WORLD BANK GROUP, https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?most_recent_value_desc=true (last visited Oct. 6, 2022) (totaling United States as largest economy with GDP of around $23 trillion and China with a GDP of $18 trillion).

2. *See* Naomi Xu Elegant, *China's 2020 GDP Means it Will Overtake U.S. as World's No. 1 Economy Sooner than Expected*, FORTUNE (Jan. 18, 2021, 5:00 AM), https://fortune.com/2021/01/18/chinas-2020-gdp-world-no-1-economy-us/ (noting China's 2.3% year-on-year economic growth).

3. *See, e.g.*, Karen Jingrong Lin et al., *State-Owned Enterprises in China: A Review of 40 Years of Research and Practice*, 13 CHINA J. ACCT. RSCH. 31, 31–32 (2020) (explaining how essential SOEs have become to Chinese economy).

4. *See China Statistical Yearbook 2019*, NAT'L BUREAU OF STAT. OF CHINA, http://www.stats.gov.cn/tjsj/ndsj/2019/indexeh.htm (last visited Sept. 12, 2021) (calculating

listed on the *Fortune Global 500 (FG500)* has increased from nine to ninety-one.[5]

The global success of Chinese SOEs is frustratingly apparent to the world.[6] A common complaint is that Chinese SOEs are unfairly subsidized by the Chinese government, namely, the Communist Party of China (CPC).[7] Aggrieved nations assert that CPC subsidizations effectually make Chinese SOEs state participants in a market-based global economy premised on the free exchange of commodities and services.[8] Specifically, the advantages SOEs possess—direct subsidies, concessionary financing, government guarantees, preferential regulatory treatment, antitrust exemptions, and bankruptcy rules—are considered adverse for non-state actors in a liberalized global market.[9] In extrapolation, larger SOEs, such as Chinese SOEs, can negatively affect international markets, undermining the multilateral trade system.[10]

This Comment will provide an explanation of subsidies to clarify its argument[11] and conclude that subsidies can be "particularly harmful" under current international law.[12] They subvert free trade by impeding the exports of non-subsidizing nations, encourage predatory pricing (typically price undercutting), and unfairly increase the subsidizing nation's global market share of the commodity or service.[13] However, given the enormity of Chinese SOEs,[14] the international

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percentages by cross-referencing "13-2 Main Indicators of Industrial Enterprises above Designated Size by Industrial Sector" with "13-4 Main Indicators of State-Holding Industrial Enterprises by Industrial Sector").

5. *See* Lin et al., *supra* note 3, at 31 ("In particular, in 2000, there were 27 FG500 SOEs, 9 were from China . . . ."); *see also* SCOTT KENNEDY, THE BIGGEST BUT NOT THE STRONGEST: CHINA'S PLACE IN THE FORTUNE GLOBAL 500, CHINESE BUS. & ECON. 5 (2020), https://csis-website-prod.s3.amazonaws.com/s3fs-public/200818_Kennedy_Fortune_Global_500.pdf ("China's largest firms in most industries are SOEs, and 91 of the 124 Chinese members to the latest Fortune Global 500 are SOEs.").

6. See *infra* Parts II and III discussing various referrals and complaints filed in the World Trade Organization's Dispute Settlement Body against China as well as motivations for a broad definition of "public body" in several free trade agreements. *See also China Says U.S. Demand on Its State-Owned Enterprises Is "Invasion" on Economic Sovereignty*, REUTERS (May 25, 2019, 12:34 PM), https://www.reuters.com/article/us-usa-trade-china/china-says-u-s-demand-on-its-state-owned-enterprises-is-invasion-on-economic-sovereignty-idUSKCN1SV0I7 (describing Trump Administration's demand that China immediately halt development of SOEs during trade negotiations).

7. See *infra* Parts II and III for an analysis of allegations against Chinese SOEs.

8. *See* Przemyslaw Kowalksi et al., *State-Owned Enterprises: Trade Effects and Policy Implications* 1, 10 (OECD, Trade Policy Papers no. 147, 2013) https://www.oecd-ilibrary.org/trade/state-owned-enterprises_5k4869ckqk7l-en (discussing anti-competitive effects and commercial tensions SOEs can cause in international markets).

9. *See id.* at 4.

10. *Id.* at 9.

11. See *infra* Part II.A for an exposition on prevailing economic thought on subsidies.

12. *Trade Guide: WTO Subsidies Agreement*, INT'L TRADE ADMIN., https://www.trade.gov/trade-guide-wto-subsidies (last visited Oct. 7, 2022).

13. *Id.*

14. *See* Jude Blanchette, *Confronting the Challenge of Chinese State Capitalism*, CTR. FOR STRATEGIC & INT'L STUD. (Jan. 22, 2021), https://www.csis.org/analysis/confronting-challenge-chinese-state-capitalism ("According to Freeman Chair calculations, the combined assets for

community—especially the United States (China's largest trading partner)[15]—rightly recognizes that economic relations with China are not zero-sum[16] and cannot be ignored or wastefully antagonistic.[17]

This Comment centers on the legal recourse available to the international community in addressing what it considers the illegally advantageous structure and unfair trade practices of Chinese SOEs. Specifically, this Comment proposes a new "government control" standard after a critical examination of the two inconsistent approaches to whether a Chinese SOE is a "public body" under the World Trade Organization (WTO) Agreement on Subsidies and Countervailing Measures (SCM).[18] Under the SCM, WTO members can seek redress for subsidy violations only if the offending entity is either a "government" or "public body."[19] However, the WTO's Dispute Settlement Body (DSB) has struggled to provide a consistent standard for "public body" determinations.

The imperative of critically examining these "public body" standards cannot be understated. These standards dictate the perpetuation of a liberalized global market-based economy, in which actors possess competitive economic parity and reliable standards of redress.[20] To that end, this Comment explains the WTO's treatment of subsidies, comparatively analyzes the distinctive standards for "public

China's 96 largest SOEs total more than $63 trillion, an amount equivalent to nearly 80 percent of global GDP.").

15. *See China Trade Balance, Exports and Imports by Country 2019*, WORLD INTEGRATED TRADE SOL., https://wits.worldbank.org/CountryProfile/en/Country/CHN/Year/2019/TradeFlow/EXPIMP/Partner/by-country (last visited Oct. 7, 2022) (calculating United States' 16.75% export partner share, nearly 6% more than second largest importer).

16. *See, e.g.*, Sarah Zheng, *China-US Relations Not a Zero-Sum Game, Says 'Tough' Joe Biden*, S. CHINA MORNING POST (Sept. 24, 2020, 12:53 PM), https://www.scmp.com/news/china/diplomacy/article/3102831/china-us-relations-not-zero-sum-game-says-tough-joe-biden (noting President Biden's acknowledgment of high stakes realities of the United States-China relationship); *see also* Alicia García-Herrero & Gary Ng, *China's State-Owned Enterprises and Competitive Neutrality*, BRUEGEL, Feb. 2021, at 1, 2, https://www.bruegel.org/sites/default/files/wp_attachments/PC-05-2021-3.pdf ("Second, even if European firms do not enter the Chinese market, potential distortions created by Chinese SOEs operating globally might have a major impact on the EU single market. In other words, Chinese firms are too big to be ignored, whether in China or in Europe.").

17. *See* Ryan Hass & Abraham Denmark, *More Pain than Gain: How the US-China Trade War Hurt America*, BROOKINGS: ORDER FROM CHAOS (Aug. 7, 2020), https://www.brookings.edu/blog/order-from-chaos/2020/08/07/more-pain-than-gain-how-the-us-china-trade-war-hurt-america/ (finding trade war cost U.S. economy 300,000 jobs, 0.3% of real GDP, $1.7 trillion in stock losses, and forced companies to accept lower profit margins, cut wages, defer potential wage hikes, and raise prices for American consumers, all while increasing trade deficit to record $419.2 billion).

18. Agreement on Subsidies and Countervailing Measures, art. 1.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14 [hereinafter SCM].

19. *Id.*

20. *See* Dukgeun Ahn, *Why Reform Is Needed: WTO 'Public Body' Jurisprudence*, 12 GLOB. POL'Y 61, 61 (2021) (discussing changes in US policies in response to WTO's jurisprudence concerning SOEs and settlement dispute system).

body" determinations, and offers correctives for future adjudicative efficiency in addressing the conduct of Chinese SOEs.

Such an endeavor is daunting given the complexities of international trade and its concomitant body of law, the obfuscation caused by China's lack of transparency, and the ramifications of international political economy.[21] Nevertheless, this Comment delineates a roadmap for navigable understanding in four parts. Part II provides an introduction to international trade and its governing law, particularly how subsidies operate under orthodox international political economy.

Parts III and IV comparatively analyze the two distinct standards for "public body" determinations. Part III scrutinizes the "government ownership" standard first established in *Korea – Measures Affecting Trade in Commercial Vessels*.[22] Specifically, Part III examines the tension between the "government ownership" standard's bright-line enforcement and its unpragmatic effect on international trade given the prevalence of mixed-ownership models among WTO members.[23] Part III also investigates regional treatments of SOEs in two free trade agreements: the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)[24] and the United States-Mexico-Canada Agreement (USMCA).[25]

Part IV inspects the "vested with governmental authority" standard as set forth in *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*.[26] Specifically, Part IV focuses on the ill-formed definition the WTO Appellate Body (AB) applied to synonymize "public body" and "government" as unreflective of Chinese SOE ownership structures. In addition, Part IV critiques *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India* (*India*).[27] Used in serio-comic relief, Part IV employs *India* to illustrate how near-total state ownership may not result in qualification as a "public body" due to the "actual control" standard's steep evidentiary burden. Lastly, Part V synthesizes the critiques from Parts III and IV and offers a new "government control" standard for "public body" determinations. A list of common abbreviations is included in Part VI for the

21. *See, e.g.*, Kowalski, *supra* note 8, at 9.

22. Panel Report, *Korea–Measures Affecting Trade in Commercial Vessels*, WTO Doc. WT/DS273/R (adopted Apr. 11, 2005) [hereinafter *Korea*].

23. *See infra* Part III for a discussion of "government ownership standard" enforcement.

24. Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Mar. 8, 2018, https://www.dfat.gov.au/trade/agreements/not-yet-in-force/tpp/Pages/tpp-text-and-associated-documents [hereinafter CPTPP] (not yet in force).

25. Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada, Nov. 30, 2018, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between [hereinafter USMCA].

26. Appellate Body Report, *United States–Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, ¶ 317, WTO Doc. WT/DS379/AB/R (adopted Mar. 11, 2011) [hereinafter *AB-China*].

27. Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WTO Doc. WT/DS436/AB/R (adopted Dec. 8, 2014) [hereinafter *India*].

reader's convenience.

II. THE WORLD TRADE ORGANIZATION, SUBSIDIES, AND CHINA

The WTO is the only global international organization dealing with global trade.[28] Established in 1995, the WTO's goal is to ensure that global trade flows "smoothly, predictably, and freely" between the 164 members who represent 98% of world trade.[29] As such, the WTO's raison d'être is to facilitate free trade.[30] In furtherance of this objective, one of the WTO's main activities is "negotiating the reduction or elimination of obstacles to trade" and "agreeing on rules governing the conduct of international trade."[31] Subsidies are one such obstacle to international free trade.

The WTO and its predecessor, the General Agreement on Tariffs and Trade (GATT), are premised upon the operation of liberalized markets, or market-based economies (MBEs), as opposed to non-market economies (NMEs).[32] GATT drafters failed to consider the implications of NME membership in their multilateral trade regime.[33] Therefore, the accession of former NMEs, namely China, to the WTO following the end of the Cold War posed significant incompatibilities.[34] To reduce negotiating costs, WTO members did not adopt a comprehensive and horizontal NME coverage scheme, but negotiated with NME applicants in an ad hoc fashion using protocols of accession.[35] The Chinese Protocol of Accession was an ambitious and far-reaching set of commitments,[36] yet China deftly negotiated. By securing treatment as an NME[37] until 2016, China

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28. *The WTO*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/thewto_e.htm (last visited Oct. 7, 2022).

29. *Id.*

30. *See Overview*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm (last visited Oct. 7, 2021) (defining purpose of WTO as opening trade to benefit everyone).

31. *Id.*

32. Petros C. Mavroidis & Merit E. Janow, *Free Markets, State Involvement, and the WTO: Chinese State-Owned Enterprises in the Ring*, 16 WORLD TRADE REV. 571, 571 (2017).

33. *See id.* at 572 (explaining drafters' improvidence was due, in part, to the Soviet Union, the only significant NME, refusing its GATT invitation).

34. *Id.* at 575 (recognizing despite GATT membership being previously composed of entirely western countries with the exception of Poland and Romania, statutory provisions relating to NMEs showed that their membership had been contemplated). Article XVII of GATT imposes a nondiscriminatory obligation and commercial considerations on state-trading enterprises (STEs). *Id.* at 574. In addition, the Interpretative Note to Article VI of GATT provides for possible deviation of treatment when dealing with NMEs. *Id.* Both provisions, defanged by case law and demanding qualifications, do not provide the comprehensive coverage required when dealing with NMEs. *Id.* at 574–75.

35. *Id.* at 575.

36. *See id.* at 576; *see also* Nicholas R. Lardy, *Issues in China's WTO Accession*, BROOKINGS (May 9, 2001), https://www.brookings.edu/testimonies/issues-in-chinas-wto-accession/ (describing China's radical economic changes as an aggressive push to gain membership in WTO).

37. *See* WAYNE M. MORRISON, CONG. RSCH. SERV., IF10385, CHINA'S STATUS AS A NONMARKET ECONOMY (NME) (2019) (stating NME treatment included WTO members utilizing

avoided precommitments to structural market-based reforms.[38] China's leveraging of the WTO members' failure to adopt an exhaustive NME coverage scheme has proven contentious and disruptive.[39] The discontent between China and its trading partners is most noticeable in the WTO's anti-subsidy policy.

This Part proceeds in three subdivisions for clarity of argument. First, Section A informs readers of basic economic theory and principles germane to subsidies and their regulation. Following this, Section B provides a brief survey of China's economic history to demonstrate the tension between China and its fellow WTO members. Lastly, Section C introduces the SCM, in particular the inclusion of "public body" in its definition of subsidy.

A. Orthodox Political Economy and Subsidies

Delaying for a moment a workable definition of "subsidy," it is useful to apprehend its placement in economic theory and modeling. The discussion on subsidies is nuanced.[40] Subsidies are not always amenable to reductive bipolarities—good versus bad, efficient versus inefficient, private versus public.[41] But whatever their classification, subsidies allocate resources,[42] which makes them disfavored in an ideal market-based economy. Markets, however, are imperfect.[43] Therefore, the more central issue in a trade agreement context is the degree of subsidy regulation.[44] A summary review of the benefits and drawbacks of subsidies will provide an adequate backdrop to the WTO's calibration of subsidy treatment.

First, subsidies expand trade.[45] Domestic producers are incentivized to increase the volume of their traded goods when subsidized.[46] The effect of the subsidy is a reduction in the global price of the subsidized good, thus benefiting

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alternative methodology for price and cost assessments on products subject to anti-dumping measures). In essence, NME status under the WTO regime permits MBEs to offset trade disadvantages via multiple determinative and enforcement mechanisms. *Id.*

38. *See* World Trade Organization, Ministerial Declaration of 10 November 2001, ¶ 15, WTO Doc. WT/L/432 (2001) (detailing protocols to China's accession to WTO).

39. See *supra* notes 6-19 and accompanying text for a discussion of the contemporary dispute over whether Chinese SOEs qualify as "public bodies" for the purpose of SCM enforcement. See *infra* notes 71–86 and accompanying text describing the CPC's strategic and financially prudent hold over vital Chinese SOEs, despite public commitments to market reforms.

40. *See* PETROS C. MAVROIDIS, THE REGULATION OF INTERNATIONAL TRADE, VOLUME 2: THE WTO AGREEMENTS ON TRADE IN GOODS 191 (2016) (noting economists' nuanced views of subsidies).

41. *See id.* ("There are so-called good and bad subsidies, subsidies that address distortions, and subsidies that are mandated by political economy—conscious governments that should not exist in the first place.").

42. *See* N. GREGORY MANKIW, PRINCIPLES OF MICROECONOMICS 9–10 (Jack W. Calhoun et al. eds., 5th ed. 2008) (describing how taxes, the opposite of subsidies, negatively affect resource allocation).

43. *See* MAVROIDIS, *supra* note 40, at 191 ("Markets, however, supply some goods and not others; 'they work well for ice cream and not so well for clean air.'").

44. *Id.*

45. *Id.* at 192.

46. *Id.* at 192–93.

consumers in importing countries.[47] As a consequence, the subsidization may raise the domestic welfare by shifting profits from foreign to domestic firms.[48]

Secondly, subsidies may correct the inability or failure of a market to allocate resources efficiently, otherwise known as market failures.[49] Externalities are a primary example of market failures.[50] Externalities occur when the economic activity of one entity impacts the well-being of a bystander, but neither is compensated for that impact of the externality.[51] A beneficial effect is known as a positive externality, while an adverse effect is a negative externality.[52] In the event of a positive externality,[53] its effects should be included in the market outcome, but traditional supply and demand likely neglects these effects.[54] This neglect leads to a market inefficiency, which results in the market failing to maximize a positive externality's social benefit.[55] Governments may use subsidies to correct the inefficient market for social optimization.[56]

Conversely, if subsidies are used as an instrument of a government's industrial policy to encourage domestic production for exportation, then the result is a profit shift from non-subsidizing to subsidizing nations.[57] Also, subsidies may be "predatory," oftentimes with the intent to drive competition out of the market.[58] "Predatory" subsidies can reduce the aggregate welfare in importing countries.[59] Another drawback occurs when subsidies are not used as market failure correctives, but for other purposes.[60] This may lead to a misallocation of scarce

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47. *Id.* at 193.

48. This welfare shifting rationale is a central plank of strategic trade theory. *Id.* at 192.

49. MANKIW, *supra* note 42, at 154.

50. *Id.* Market power is another example. *Id.* Market power, otherwise known as imperfect competition, is the ability of a single buyer or seller (or relatively few) to control market prices, which prevents equilibrium between price/quantity and supply/demand. *Id.* at 152.

51. *Id.* at 204.

52. *Id.*

53. *Id.* Taxation is the corrective for a negative externality. *See* The Economic Lowdown Podcast Series, *Externalities*, FED. RSRV. BANK OF ST. LOUIS, https://www.stlouisfed.org/education/economic-lowdown-podcast-series/episode-11-externalities (last visited Oct. 7, 2022) (describing how taxation can be used to fix a negative externality).

54. *See* MANKIW, *supra* note 42, at 204 (explaining market participants often disregard external impacts of their choices when determining their demand for or supply of a good).

55. *See id.* ("[T]he market equilibrium is not efficient when there are externalities. That is, the equilibrium fails to maximize the total benefit to society as a whole."). Put another way, the demand for a good that produces a positive externality does not commensurately reflect the value to society of that good. *Id.* at 207. This occurs because the social value is greater than the private value, so consequently, the market produces a smaller quantity than is socially desirable. *Id.* at 207–08.

56. *Id.* at 207.

57. *See* MAVROIDIS, *supra* note 40, at 192–93 (explaining strategic trade theory favors subsidies as a way to shift profit from foreign to domestic firms).

58. *Id.* at 193.

59. *See id.* (reducing aggregate welfare because local producers cannot compete, so they forfeit prospective profit, resulting in higher consumer prices for lack of competition).

60. *See* Benedict J. Clements & Ian Parry, *Subsidies: Some Work, Others Don't*, IMF (Sept. 2018), https://www.imf.org/external/pubs/ft/fandd/2018/09/what-are-subsidies-basics.htm

labor and capital that undermines growth or perpetuates market inefficiencies.[61] In addition, subsidies can contribute to societal and environmental harm when used to support certain industries, such as fossil fuels.[62]

The benefits and drawbacks of subsidies are refracted in the divergent economic approaches of MBEs and NMEs.[63] Their foundational divergence lies not in achieving resource allocation optimization, but rather in determining *who* allocates resources.[64] Generally, NMEs operate under socialist and communist economic principles, which dictate that the economy requires central planning because only governments can organize economic activity that promotes economic well-being for the entire country.[65] Therefore, government officials are the central planners as they are theoretically better positioned to efficiently allocate economic resources.[66]

Contrarily, a market economy is defined as "an economy that allocates resources through the decentralized decisions of many firms and households as they interact in markets for goods and services."[67] In other words, MBEs replace central planners with private actors to optimize resource allocation.[68] The distinction between MBE and NME resource allocation is paramount because the SCM's anti-subsidy provisions require the subsidizing entity to be either a "government" or "public body" to reflect this resource allocation paradigm.[69] In adopting this paradigm, it is clear why the potential inclusion of China in the WTO's multilateral trading regime—which aims to eliminate obstacles to free trade for the development of international comity—generated global apprehension.[70]

(reasoning subsidies are also a drain on government coffers).

61. *See id.* ("Propping up petroleum prices, for example, may artificially keep firms afloat in energy-intensive sectors and damp investment in alternative energy. Producer subsidies in agriculture, which increase prices received by farmers above prices for imported food products, also reduce incentives for improving efficiency.").

62. *See id.* at 56–57 (explaining how fossil fuel subsidies may conflict with environmental objectives like reducing health complications caused by air pollution and meeting international climate commitments).

63. MANKIW, *supra* note 42, at 9–10.

64. *Id.*

65. *Id.* at 9; *see also* Mavroidis & Janow, *supra* note 32, at 571 (synonymizing NMEs and centrally planned economies).

66. *See* MANKIW, *supra* note 42, at 9 (discussing role government officials in communist countries had in allocating economy's resources).

67. *Id.*

68. *See id.* at 9–10 (explaining private actors' decisions are guided by price and self-interest).

69. SCM, *supra* note 18, art. 1.1(a)(1).

70. See *supra* notes 6–19 and accompanying text describing the contemporary dispute over whether Chinese SOEs qualify as "public bodies" for the purpose of SCM enforcement. See *infra* notes 71–86 and accompanying text describing the CPC's strategic and financially prudent hold over vital Chinese SOEs, despite public commitments to market reforms.

B. China's Economic Model Prior to WTO Accession

The current Chinese economic regime is unique. Following the dissolution of the Union of Soviet Socialist Republics (USSR) and the end of the Cold War, Western liberalism and market-based economics were championed as the "final form of government."[71] However, this *cri de coeur* did not prove prescient as China began developing a novel economic approach, popularly known as state capitalism.[72] Although the exact form of the "China model" is vigorously debated, it is agreed that a distinct feature of China's state capitalist regime is the state as the dominant economic actor.[73]

Under the CPC's central planning system, SOEs were the main economic unit of the Chinese economy.[74] At their peak in 1965, SOEs accounted for approximately 90% of gross industrial production[75] and were completely owned by the state.[76] SOEs were simply a means for the CPC to implement its own decisions on production planning and resource allocation.[77] In 1978, then-leader Deng Xiaoping inaugurated a series of market-based reforms to globally integrate the country following Mao Zedong's economic isolation policy.[78] Colloquialized as the "Open-[D]oor Policy," a salient objective was SOE reformation.[79]

However, SOE reform was not premised on a complete transition to an MBE.[80] Rather, "[t]he primary goal of market-oriented reforms . . . [was] to build a

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71. *See* Francis Fukuyama, *The End of History?*, NAT'L INTEREST, Summer 1989, at 3, 3–4 (1989) ("What we may be witnessing is not just the end of the Cold War, or the passing of a particular period of post-war history, but the end of history as such: that is, the end point of mankind's ideological evolution and the universalization of Western liberal democracy as the final form of human government.").

72. *See* IAN BREMMER, THE END OF THE FREE MARKET 4–5 (1st ed. 2010) ("In this system, governments use various kinds of state-owned companies to manage the exploitation of resources that they consider the state's crown jewels and to create and maintain large numbers of jobs. They use select privately owned companies to dominate certain economic sectors.").

73. *Id.* at 5; *see also* Abby Johnston & Catherine Trautwein, *What Is the China Model? Understanding the Country's State-Led Economic Model*, PBS (May 17, 2019), https://www.pbs.org/wgbh/frontline/article/china-trade-war-trump-tariff/ (summarizing various frameworks used to explain China's economic model).

74. *See* Ligang Song, *State-Owned Enterprise Reform in China: Past, Present, and Prospects*, *in* CHINA'S 40 YEARS OF REFORM AND DEVELOPMENT: 1978-2018, at 345 (Ross Garnaut et al. eds., 2018) (describing role of SOEs in China's economic reform process).

75. Shigeo Kobayashi et al., *The "Three Reforms" in China: Progress and Outlook*, JAPAN RSCH. INST., Sept. 1999, at 1, 6, https://www.jri.co.jp/english/periodical/rim/1999/RIMe199904threereforms.

76. Song, *supra* note 74, at 349.

77. *See id.* at 346 (describing government's prominent role in production planning and resource allocation, and SOEs' comparatively minor role in production, workforce, and spending decisions).

78. Johnston & Trautwein, *supra* note 73, at 3; *see also* Kobayashi et al., *supra* note 75, at 1 (noting policy shift may have been motivated by government's recognition that incomes for Chinese citizens were so low compared to other Asian economies that it threatened the future of the communist regime).

79. *See* Kobayashi et al., *supra* note 75, at 1 (explaining the Open Door Policy triggered massive inflows of foreign investment, technology, and management practices).

80. Song, *supra* note 74, at 345.

socialist market economy with the state-owned sector as a leading sector."[81] The first phase of reform (1978–92), focused on granting SOEs embryonic autonomy and participation in the market.[82] After fulfilling state output quotas, SOEs could formulate production planning, decide input purchases, and control the use of retained profits.[83]

Eventually, they could adopt market-orientated schemes, but despite these reforms, SOEs struggled.[84] In response, the second phase (1992–2003), known as *gaizhi* or "restructuring," focused on rationalization.[85] During *gaizhi*, the government cemented its control over financially successful and often larger SOEs, while less profitable and typically smaller SOEs were subject to privatization schemes.[86] This plan alleviated the government from financially dependent SOEs while maintaining a strong public sector led by the state.[87]

The third stage of reform (2003–13) saw the emergence of the "modern enterprise system."[88] Under the modern enterprise system, the State Assets Supervision and Administration Commission of the State Council (SASAC) was created to further consolidate control over SOEs.[89] Specifically, the SASAC supervises the *yang qi*, or "central" enterprises,[90] which are the bedrock corporations of the Chinese economy.[91] The SASAC's mantra is "grasping the large, letting go of the small."[92] In other words, by retaining centralized authority over the central SOEs, the Chinese government "maintain[s] disproportionate control over profits, investments, and the national economy."[93]

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81. *Id.*

82. *See id.* at 349 (explaining primary objective of the first phase of the reform program was to increase SOE productivity, output, and profitability).

83. *Id.*

84. *See id.* 350–51 (recording at least 12% drop in SOE profit rate and increasing number of loss-making enterprises).

85. *Id.* at 351–52.

86. *See id.* at 352 ("About 500 to 1,000 large SOEs were retained, while all other enterprises were restructured through sale or lease. The economic logic behind this policy was that the large firms performed much better than the smaller firms and had greater importance in the economy. While *gaizhi* served as a euphemism for privatisation, it was carried out in different forms, including through employee shareholding, public offerings (which did not change the state's control rights with internal restructuring measures such as debt–equity swaps), open sales, bankruptcy, leasing and joint ventures with foreign enterprise.").

87. *Id.*

88. *Id.* at 356.

89. *See* XIANZHI ZHANG, ENTERPRISE MANAGEMENT CONTROL SYSTEMS IN CHINA 20 (Emmie Yang & Niels Peter Thomas eds., 2014) (describing formation of SASAC as an amalgamation of pre-existing ministries and administrative bureaus).

90. Song, *supra* note 74, at 356.

91. *See* MIKAEL MATTLIN, THE CHINESE GOVERNMENT'S NEW APPROACH TO OWNERSHIP AND FINANCIAL CONTROL OF STRATEGIC STATE-OWNED ENTERPRISES 7 (2007), https://helda.helsinki.fi/bot/bitstream/handle/123456789/8271/129312.pdf?sequence=1&isAllowed=y (explaining corporations in the *yang qi* have been identified based on their profits, corporate investments, and presumed importance to China's future economy).

92. Song, *supra* note 74, at 356.

93. *See id.* (noting declining number of SOEs directly controlled by government).

The fourth stage of reform (2013–present) is a renewed push by the State Council for mixed-ownership,[94] but these attempts to separate the government from central SOEs have been gradual and relatively unsuccessful.[95] The four phases of SOE reform, both prior to and after China's WTO accession, reveal the internal tension of China's membership in the WTO's multilateral free trade regime premised on privatized resource allocation. The SCM is a locus of this paradigmatic tension.

C. The SCM and "Public Body"

The SCM was one of nearly sixty agreements deliberated and drafted during the Uruguay Round negotiations.[96] Alongside the agreement establishing the WTO, the body's founding umbrella agreement, the SCM, was signed at the Marrakesh ministerial meeting in April 1994.[97] Effective on January 1, 1995,[98] the SCM "addresses two separate but closely related topics: multilateral disciplines regulating the provision of subsidies, and the use of countervailing measures to offset injury caused by subsidized imports."[99]

The first topic, subsidy regulation, delineates what sorts of subsidies are subject to discipline.[100] As discussed earlier, subsidy treatment is nuanced,[101] so the SCM provisions only apply to "specific" subsidies, or those that are specifically provided to an enterprise, industry, or group of enterprises or industries.[102] In line with the political economy consensus,[103] "[t]he basic principle is that a subsidy that distorts the allocation of resources within an economy should be subject to

94. *Id.* at 361.

95. *See id.* at 364 (detailing small number of SOEs included in pilot programs and modest, or complete lack of, financial performance improvement among SOEs as compared to private enterprises).

96. The Uruguay Round was the largest trade negotiation ever conducted and represented the biggest reform in the international trading regime since GATT. *The Uruguay Round*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (last visited Dec. 22, 2021). The negotiating lasted nearly eight years, covering all international trade issues, and ultimately resulted in the creation of the WTO, the successor to GATT. *Id.*

97. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.

98. *Trade Guide: WTO Subsidies Agreement*, *supra* note 12.

99. *Agreement on Subsidies and Countervailing Measures ("SCM Agreement")*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/scm_e/subs_e.htm (last visited Oct. 20, 2021) [hereinafter *Agreement on Subsidies*].

100. SCM, *supra* note 18, art. 1–8.

101. See *supra* notes 40–44 and accompanying text for an explanation of subsidy nuance.

102. SCM, *supra* note 18, art. 1.2, 2.1. There are four types of "specificity" delimited in the SCM: enterprise-specificity is met when a government targets a particular company or companies for subsidization; industry-specificity occurs when a government targets a particular sector or sectors for subsidization; regional specificity transpires when a government targets producers in specified parts of its territory for subsidization; prohibited subsidies involve a government targeting export goods or goods using domestic inputs for subsidization. *Agreement on Subsidies*, *supra* note 99.

103. See *supra* notes 45–62 and accompanying text for a discussion of literature regarding the permissibility of subsidies.

discipline."[104] Specific subsidy coverage is further divided into two general categories: "prohibited" subsidies and "actionable" subsidies.[105] The distinction, *inter alia*, is that prohibited subsidies—namely export and import subsidies—are by definition prohibited.[106] Contrariwise, actionable subsidies are not per se prohibited, but challengeable.[107] However, to challenge an actionable subsidy, the complainant must offer proof of "adverse effects."[108]

The second topic, ameliorating injuries caused by subsidized imports, provides a remediation regime for WTO members who allege that another member is providing a specific subsidy, either prohibited or actionable.[109] Members have two options for redress.[110]

First, a country can use the WTO's dispute settlement procedure to seek the withdrawal of the subsidy or the removal of its adverse effects.[111] This process begins by the complainant member requesting a consultation with the allegedly subsidizing member.[112] If no "mutually agreed solution" is achieved, then the matter is referred to the DSB for the establishment of a panel.[113] The panel then reviews the matter and renders a final report.[114] If the panel determines that there is a subsidy, then it will recommend its withdrawal.[115] Adverse determinations are appealable to the WTO Appellate Body (AB).[116] If the subsidizing member does not comply with the withdrawal recommendation within six months of either a panel or AB report, then the DSB can authorize complainant members to apply commensurate countermeasures.[117]

Alternatively, a country can initiate its own investigation, ultimately charging extra duty, known as a countervailing duty, on subsidized imports that are hurting

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104. *Agreement on Subsidies*, *supra* note 99.

105. SCM, *supra* note 18, pt. II, III.

106. *Id.* art. 3.1–3.2; *Anti-Dumping, Subsidies, Safeguards: Contingencies, Etc.*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm (last visited Oct. 25, 2021) [hereinafter *Anti-Dumping, Subsidies, Safeguards*].

107. *Agreement on Subsidies*, *supra* note 99.

108. SCM, *supra* note 18, art. 5. Adverse effects are either injury to a member's domestic industry, nullification or impairment of GATT benefits and concessions, or serious prejudice to the interests of another member. *Id.* at (a)–(c).

109. *See* SCM, *supra* note 18, art. 4, 7 (discussing remedies for Members with reason to believe that prohibited subsidies were granted by other Members, and remedies for Members with reason to believe that any subsidy referred to in Article 1 resulted in injury to its domestic injury respectively).

110. *See Anti-Dumping, Subsidies, Safeguards*, *supra* note 106 (discussing how WTO agreement regulates effects of subsidies); *see also Agreement on Subsidies*, *supra* note 99 ("The creation of a system of multilateral remedies that allows Members to challenge subsidies which give rise to adverse effects represents a major advance over the pre-WTO regime.").

111. *Agreement on Subsidies*, *supra* note 99.

112. SCM, *supra* note 18, art. 4.1–3, 7.1–3.

113. *Id.* art. 4.4, 7.4.

114. *Id.* art. 4.6, 7.5.

115. *Id.* art. 4.7, 7.5.

116. *Id.* art. 4.8–9, 7.6–7.

117. *Id.* art. 4.10, 7.9.

domestic producers.[118] This unilateral approach to subsidy remediation imposes onerous procedural and substantive regulations that must be complied with before applying a countervailing duty.[119]

Whichever remedial route is taken by an injured member, redress is not available unless a subsidy has been deemed to exist.[120] To that end, the SCM provides a definition of "subsidy."[121] Notwithstanding the skeptical attitude exhibited towards subsidies in the creation of the GATT and WTO, there was never an official definition of "subsidy" until the SCM.[122] Borrowing heavily from the findings of the 1950 GATT Panel on Australia–Ammonium Sulfate,[123] the SCM definition provides that a subsidy exists where there is "a financial contribution by a government or *public body* within the territory of a [m]ember . . . and a benefit is thereby conferred."[124] The impetus for this Comment is the SCM's

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118. *Anti-Dumping, Subsidies, Safeguards*, *supra* note 106.

119. *See Agreement on Subsidies*, *supra* note 99 (imposing substantive requirements such as determination of subsidized import, injury to domestic industry, and causal link as well as procedural rules regulating standing, preliminary investigations, undertakings, sunsets, and judicial review).

120. *Cf.* SCM, *supra* note 18, art. 1, 4, 7 (explaining how remedies are available only when a prohibited subsidy has been granted or a subsidy results in an injury to a Member).

121. *Id.* art. 1.

122. Until the WTO was established in 1995, there was no agreed-upon definition of "subsidy" in the multilateral trading system. *See* MAVROIDIS, *supra* note 40, at 200–01. That is despite the fact that multiple provisions in GATT—which, as stated, predated the WTO—specifically dealt with subsidies. *Id.* Negotiators at the 1961 Working Party report on *Operation of the Provisional Article XVI* found that not only was it not necessary to come to an agreed-upon definition, it was not possible because the definition would likely encompass measures not intended to be included. *Id.* Similarly, the negotiators at the 1979 Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade failed to incorporate a definition of "subsidies" despite dealing extensively in the subject matter. *Id.* Mavroidis notes, however, that the term subsidy was intended to cover government action, not private actions. *Id.*

123. The 1950 GATT Panel on Australia–Ammonium Sulfate is credited with the first working definition of "subsidy." *Id.* at 201. Australia had been providing subsidies on ammonium sulfate and sodium nitrate because it had determined them necessary during World War II. *Id.* Chile obtained a 0% tariff duty on ammonium sulfate, and Australia later removed its subsidy from sodium nitrate. *Id.* However, it did not remove its subsidy from ammonium sulfate, which resulted in a decline in Chile's ammonium sulfate exports to Australia. *Id.* Chile brought an action against Australia under GATT mechanisms, but a threshold question was the proper definition of "subsidy" in light of statutory silence. *Id.* The panel provided the following definition, which the SCM adopts: "the type of subsidy which [the GATT] was intended to cover was the financial aid given by a government that confers a benefit to a specific recipient" (note the absence of the SCM's "public body"). *Id.*

124. SCM, *supra* note 18, art. 1.1(a)(1) (emphasis added). Art. 1.1 defines a "financial contribution" exhaustively, including when "(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 there is any form of

specific addition of "public body" to its definition.

III. THE "GOVERNMENT CONTROL" STANDARD

Despite the historic definition of "subsidy" in the multilateral trading regime, it is not without errors and omissions. Foremost, "public body" is not defined in the SCM.[125] Moreover, there is no other relevant definition or guideline in any other WTO document.[126] There is a related concept, "public entity," stipulated in the Annex on Financial Services of the General Agreement on Trade in Services (GATS), but this definition is disfavored in its applicability to "public bodies."[127] Undeniably, governments such as the United States, Mexico, or the People's Republic of China are subject to the SCM's anti-subsidy regime,[128] but the meaning of "public body" has proven controversially elusive.[129] Its meaning was possibly deducible by its pairing with "government," but the WTO's relevant drafting history does not clarify this placement.[130]

Further, semantically, the "or" separating "public body" from "government" in SCM Article 1.1(a)(1) indicates a disjunctive relationship.[131] Intuitively, "public body" occupies a conceptual space between "private" and "government," but the DSB has struggled to delineate this position.[132] Alas, the definition of "public body" is inconsistent[133] and prone to political pressures when confronting Chinese SOE subsidization.[134] Through an examination of this jurisprudence, and a proper synthesis thereof, the international trading community can properly address the complications arising from Chinese SOEs. A propitious launch point into this entanglement is *Korea*, where "public body" was broadly defined.[135]

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income or price support in the sense of Article XVI of GATT 1994." *Id.* art. 1.1(a)(1)(i)–(iv), 1.1(a)(2).

125. SCM, *supra* note 18; *see also* MAVROIDIS, *supra* note 40, at 203–07 (discussing extant caselaw regarding definition of "public body").

126. Ahn, *supra* note 20, at 62.

127. *See* MAVROIDIS, *supra* note 40, at 203–05 (describing potential inapplicability of GATS "public entity" definition because it regulates financial services, not subsidies); *see also Korea*, *supra* note 22, ¶ 7.47 ("Furthermore, we question the relevance of the *GATS Annex on Financial Services* to an interpretation of Article 1.1(a)(1) of the *SCM Agreement*.").

128. *See* MAVROIDIS, *supra* note 40, at 203 ("The term 'government' is not defined in the SCM agreement. Contextual arguments would support the view that it covers federal, state, or provincial authorities.").

129. Ahn, *supra* note 20, at 62.

130. *See id.* at 61–62 ("[M]embers compromised to cover 'not just a government but also any other body which possibly could be used by the government to channel or generate a financial contribution to prevent easy circumvention of subsidy disciplines.").

131. SCM, *supra* note 18, art. 1.1(a)(1).

132. Ahn, *supra* note 20, at 61–62.

133. *See id.* at 67 ("WTO jurisprudence on public body has continued to be confusing and convoluted due to the incongruity between panels and the AB.").

134. *See, e.g.*, *id.* at 65 (describing unexpected AB agreement with panel on its determination that Chinese SOE was a "public body" following systemic crisis, which saw United States block reappointment of AB Member).

135. *See Korea*, *supra* note 22, ¶ 7.23–7.111 (discussing disputes concerning definition of a "public body").

A. The Foundation: Korea – Measures Affecting Trade in Commercial Vessels

In 2002, after consultations failed to result in a "mutually satisfactory resolution," the European Communities (EC) requested the establishment of a panel to resolve its dispute with the Republic of Korea (Korea).[136] Some of the world's largest and most influential economies intently observed the consequential proceedings.[137] At issue in the dispute were the EC's allegations that Korea had been providing unlawful subsidies to its commercial shipbuilding industry since January 1997.[138]

The thrust of the EC's complaint was that the payments and loans disbursed by the Export-Import Bank of Korea (KEXIM) constituted prohibited and/or actionable subsidies in violation of the SCM.[139] Specifically, the allegations focused on KEXIM's practice of providing export subsidies through its advance payment refund guarantees (APRG) and pre-shipment loans (PSL).[140] These subsidizations were provided to Korean shipyards,[141] which allowed the Korean shippers to export capital goods with financing at preferential rates to the disadvantage of competitor shippers,[142] namely a "significant suppression or depression of prices for EC ships worldwide."[143] As required by the SCM, the panel needed to make a "public body" determination to resolve whether Korea was illegally subsidizing its commercial shipping industry.[144]

After its "financial contributions" determination, the panel proceeded to its "public body" determination.[145] The panel began its analysis with a presentation of the parties' arguments.[146] The EC proffered a tripartite evaluation: (1) statutorily allocated government control over decision-making; (2) pursuit of public policy objectives; and (3) benefits from access to state resources.[147] Korea contended that KEXIM was not a public body, reasoning that an organization is only a public

136. *Id.* ¶ 1.2–1.3.

137. *See id.* ¶ 1.9 (noting China, Japan, Mexico, Norway, Chinese Taipei, and the United States reserved their third-party rights).

138. First Written Submission of the European Communities, *Korea—Measures Affecting Trade in Commercial Vessels*, ¶¶ 1–2, WTO Doc. WT/DS273/R (Dec. 22, 2003), https://trade.ec.europa.eu/doclib/docs/2005/april/tradoc_122724.pdf [hereinafter EC Complaint].

139. *Id.* ¶ 14.

140. *Id.* In addition to the APRG and PSL, the EC alleged that KEXIM provided workout plans, restructuring plans, and tax concessions. *Id*. ¶ 44.

141. *See Korea*, *supra* note 22, ¶ 2.1 (listing some of the shipyards to which subsidizations were provided). Given the primacy of shipping in the global trading infrastructure, *Korea* was monumental. As of 2016, the Korean shipyards involved in this case were some of the largest in the world. *The World's Largest Shipyards as of 2016, Based on TEU Capacity in Order Book*, STATISTA, https://www.statista.com/statistics/489031/largest-shipyards-worldwide-based-on-teu-capacity-in-orderbook/ (last visited Nov. 1, 2021).

142. *Korea*, *supra* note 22, ¶ 2.1.

143. EC Complaint, *supra* note 138, ¶ 40.

144. SCM, *supra* note 18, art. 1.

145. *See Korea*, *supra* note 22, ¶ 7.31 (ruling KEXIM's regulatory regime did provide for financial contributions).

146. *Id.* ¶ 7.31(b).

147. *Id.* ¶ 7.32.

body "when it acts in an official capacity, or is engaged in governmental functions."[148] Specifically, Korea moved to define "public" as "acting in an official capacity on behalf of the people as a whole; as a public prosecutor."[149]

As a threshold matter, the panel ruled that a public body determination is a separate legal inquiry from "benefit," undercutting Korea's request for such a joint inquiry.[150] Thus, "the question whether an entity is a public body should not depend on an examination of whether that entity acts pursuant to commercial principles."[151] For the panel, there were market uncertainties present in a commercially defined determination that compelled it to "maintain a clear distinction between the concepts of benefit and financial contribution / public body."[152] This bright line demarcation was the necessary logical divorce for the establishment of the "governmental control" standard, which provides that "[t]he SCM Agreement envisages a more straightforward approach, based on a clear distinction between public and private bodies. On the basis of this clear distinction, one may establish with relative certainty whether or not an entity is a public body . . . ."[153]

Accordingly, the panel concluded:

> In our view, an entity will constitute a "public body" if it is controlled by the government (or other public bodies). If an entity is controlled by the government (or other public bodies), then any action by that entity is attributable to the government, and should therefore fall within the scope of Article 1.1(a)(1) of the *SCM Agreement*.[154]

Importantly for the panel, Article 1.1(a)(1) of the SCM provides that "a financial contribution by a government or any public body" be referred to throughout the SCM as "government."[155] The panel pragmatically interpreted the disjunctive "or" in Article 1.1(a)(1) in light of the object and purpose of the SCM.[156] With this standard pronounced, the panel proceeded to explain its methodology: What does it mean to be "controlled by the government"?[157] The methodology is clumsily provided, but criteria are nonetheless extractable.[158]

The first and primary consideration is ownership. Following its determination

148. *Id.* ¶ 7.37.

149. *Id.*

150. *Id.* ¶ 7.44.

151. *Id.* Otherwise, the cart would come before the horse. Korea argued that an entity cannot be a public body if it engaged in market activities on commercial terms. *Id.* But this would result in a definition of public body subject to the whims of the market, the very same whims that would result (or at least be contributed to) by the entity's participation in the market in the first place. *Id.* Succinctly put by the panel, "one day the entity could provide financing on market terms and constitute a 'private' entity, whereas on the next day it could make cash grants and then constitute a 'public' body." *Id.* ¶ 7.45.

152. *Id.* ¶ 7.46.

153. *Id.* ¶ 7.49.

154. *Id.* ¶ 7.50.

155. SCM, *supra* note 18, art. 1.1(a)(1).

156. *Id.*

157. *Korea*, *supra* note 22, ¶ 7.50.

158. The panel compacts its determination in one paragraph. *Id.*

that KEXIM was a "public body," the panel wrote that this was "evidenced *primarily* by the fact that KEXIM is 100 per cent owned by [Korea] or other public bodies."[159] Given KEXIM's 100% ownership structure, it is probative to review the panel's subsidiary "public body" determinations to delimit a possible range of ownership percentages satisfactory for government control.[160] Only minorly helpful, the panel determined that the Industrial Bank of Korea (IBK) was a "public body" based on 95% government ownership.[161] Notwithstanding its minimal help in creating a satisfactory ownership range, the determination does provide useful instruction as to the appropriate *weight* of the criterion. In so determining, the panel stated that government ownership is "highly relevant and arguably determinative."[162]

The panel next considered KEXIM's management structure, of which the EC made prime mention in its written submission.[163] Specifically, KEXIM's operations were presided over by a president whose appointment and dismissal were left to the discretion of the President of Korea.[164] In addition, upon KEXIM's President's recommendation, the Korean Minister of Finance and Economy had appointment and dismissal authority over KEXIM's Deputy President and Executive Directors.[165] Moreover, KEXIM's implementation of its annual Operation Program was contingent upon ministerial approval.[166]

As with government share ownership, it is salutary to review the panel's scrutiny of the other entities' managerial relationships. For the Korea Development Bank (KDB), government control was found because Korea "appoint[ed] the Governor, Vice Governor, Directors and Auditors of the KDB," "approve[d] its annual operation plan," and "ha[d] an oversight role with respect to its operations."[167] Likewise, for the IBK and the Korea Asset Management Corporation (KAMCO), "the Operations Manual itself must contain detailed provisions regarding the operations of the IBK."[168] Similarly, KAMCO's "government-appointed officials on the Management Committee [were] responsible *inter alia* for formulating KAMCO's operational policy and service

159. *Id.* (emphasis added). As of 2002, Korea owned 51.6% of KEXIM, the Bank of Korea (BOK) 42.8%, and the Korea Development Bank (KDB) the remaining 5.6%. *Id.* ¶ 7.33.

160. Unhelpfully, the panel concluded that the Korea Asset Management Corporation (KAMCO) was a "public body" because Korea owned 100%. *Id.* ¶¶ 7.351, 7.353. However, the panel was more straightforward in its weight of this criterion, stating that it is "highly relevant to and often determinative of government control." *Id.* ¶ 7.353. Similarly, the KDB was ruled a "public body," but once more unhelpfully as Korea owned 100%. *Id.* ¶ 7.172.

161. *Id.* ¶ 7.356.

162. *Id.*

163. *See id.* ¶ 7.32 (explaining KEXIM is a public body because it was created and operated on the basis of a public statute granting Korea control over its decision making).

164. *Id.* ¶ 7.50.

165. *Id.*

166. *Id.* The Operation Program provided detailed direction on the allocation of KEXIM financing. *Id.* ¶ 7.52. Essentially, it listed KEXIM's "basic directions," which "necessarily ha[d] an impact on the day-to-day operations." *Id.* ¶ 7.53.

167. *Id.* ¶ 7.172.

168. *Id.* ¶ 7.356.

plan."[169]

Third, the panel considered KEXIM's "perception."[170] KEXIM perceived itself as a "special governmental financial institution," while Korea described it as an "export credit *agency*."[171] The phrase "export credit agency" is generally considered for *official* purposes and the term "agency" suggested an agent-principal relationship between KEXIM and Korea.[172] Lastly, the panel considered the EC's public-policy-objective argument.[173] The panel was ambivalent about the consideration's practicability, arguing that "[a]lthough a public policy objective or creation through public statute *might* also be indicative of the public nature of an entity, this may not always be the case" and that "privatization of a company might be finalized through a public statute."[174] In other words, the mere exercise of governmental power *à la* legislative prerogatives—if sufficient to satisfy the public status of an entity—would automatically result in the entity being a "public body."

In summary, the *Korea* panel articulated a broad yet incomplete definition of "public body" premised on a government's share ownership, appointment power, and governmental oversight to reflect the SCM's object and purpose. Moreover, the "perception" criterion is very practical, considering the pervasiveness of SOEs in the global economy.[175] Despite *Korea*'s foundational importance, an examination of a subsequent case applying the standard is a useful complement in comprehending the precise benchmarks.

B. Refinement: United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China (Panel-China)[176]

Panel-China is a logical next step for two reasons: It offers not only a refinement of the "government control" standard, but also a natural prelude to the

169. *Id.* ¶ 7.353.

170. *Id.* ¶ 7.54. The panel did not apply the "perception" criterion to the other entities. *Id.* ¶¶ 7.353–57.

171. *Id.* ¶ 7.54 (emphasis added).

172. *Id; see also* RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006) ("Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.").

173. *Korea*, *supra* note 22, ¶ 7.55.

174. *See id.* ("For example, the fact that a private philanthropist may pursue public policy objectives should probably not cause that person to be treated as a 'public body.'").

175. *See State-Owned Enterprises*, INT'L FIN. CORP. (July 2018), https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+cg/topics/state-owned+enterprises (stating state-owned enterprises account for large swaths of economic activity in key economic sectors, up to 40% of domestic output in some countries); *see also State Owned Enterprises (SOE)*, CORP. FIN. INST. (Oct. 6, 2022), https://corporatefinanceinstitute.com/resources/careers/companies/state-owned-enterprise-soe/ (stating SOEs are a common economic unit globally, especially in China, New Zealand, South Africa, and the United States).

176. Panel Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WTO Doc. WT/DS379/R (Mar. 25, 2011) [hereinafter *Panel-China*].

divergent "vested authority" standard articulated by the AB on appeal.[177] In *Panel-China*, China challenged the anti-dumping and countervailing duties imposed by the United States on four Chinese imports.[178]

In ruling that the relevant Chinese SOEs were "public bodies," the panel rejected China's contention that an SCM "public body" determination required automatic application of the five-factor test derived from *Korea*: (1) government ownership; (2) its presence on the entity's board of directors; (3) its control over the entity's activities; (4) the entity's pursuit of governmental policies or interests; and (5) whether the entity is created by statute.[179] Emphatically, the panel saw "no basis in the SCM Agreement on which to conclude that consideration of these particular five factors (or any other specific factors) is a legal prerequisite for a valid finding that an entity is controlled by a government and thus a public body."[180]

Next, the panel went beyond *Korea* and analogized government control to the financial concept of a "controlling interest," which requires at most 50% plus one share of voting stock.[181] the panel concluded that there existed "no legal error . . . in giving primacy to evidence of majority government-ownership."[182] Notably, it explained:

> We see no reason to consider that the concept that "control" of a company resides with its majority owner . . . would be inapplicable to government-owned companies . . . . As such, we consider that, on its own, majority government ownership is clear and highly indicative evidence of government control, and thus of whether an entity is a public body . . . .[183]

Korea and *Panel-China* provide an articulatable "government ownership" standard, which is important to adduce so that it can be later scrutinized in the development of this Comment's proposed standard. First, the bedrock of the "government control" standard is government share ownership. To both panels, majority government share ownership was a sufficient indicium of managerial control to establish government control. So much so, in fact, that *Panel-China* extended *Korea*'s "highly relevant and arguably determinative"[184] weight to a near dispositive nature by implying a very low share-ownership threshold.[185]

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177. Appellate Body Report, *United States—Countervailing Duty Measures on Certain Products from China*, WTO Doc. WT/DS437/AB/RW (July 16, 2019).

178. *See id.* ¶ 1.5, n.7 (including circular welded carbon quality steel pipe, pneumatic off-the-road tires, light-walled rectangular pipe and tube, and laminated woven sacks).

179. *Panel-China*, *supra* note 176, ¶ 8.125

180. *Id.*

181. *Id.* ¶ 8.134. The lowest percentage *Korea* discussed was 95%, which is unhelpful in developing an adjudicative range. *Korea*, *supra* note 22, ¶ 7.356.

182. *Id.* ¶ 8.136.

183. *Id.* ¶ 8.135. However, the panel did hedge in saying that "public body determinations are to be made case-by-case," such as the rare case "in which a government-owned entity was completely insulated (e.g., by law) from any government involvement in, or influence over, its operations, such that the entity was not controlled by the government." *Id.* ¶ 8.136.

184. *Korea*, *supra* note 22, ¶ 7.356.

185. *Panel-China*, *supra* note 176, ¶ 8.134.

There are supplemental considerations in addition to share ownership that are indicative of government control, the first being the government-board relationship.[186] For the *Korea* panel, a suggestive indicium of government control is whether the government has appointment and dismissal authority over the entity's officers, especially its high-level officers, such as the president, deputy president, or executive directors.[187] This may also be shown by evidence that an entity's day-to-day operations are controlled pursuant to government approval of business plans or operation programs.[188] Third is the entity's perception, namely its self-descriptive language and whether this indicates a principal-agent relationship between it and the government.[189]

C. Regional Approaches: CPTPP and USMCA

The WTO is a multilateral trading regime, ergo its primary concerns are multilateral.[190] Such an international ambit necessarily overshadows regional approaches to international trade law.[191] However, outside the WTO, the international community codifies multiple trade understandings using a variety of instruments.[192] In particular, regional trade agreements (RTAs) are instructive in delineating national and regional attitudes towards SOEs.[193] A careful examination of two RTAs, the Comprehensive and Progressive Agreement for the Trans-Pacific Partnership (CPTPP) and the United States-Mexico-Canada Agreement (USMCA), provides an important critique of the broad definitions of SOEs. This inherent and possibly irreconcilable tension between global and regional considerations is an animating force in incorporating RTA SOE treatment into this Comment's proposed standard.

1. CPTPP: The Pacific and SOEs

The CPTPP is an extensive free trade agreement regulating the transpacific economy.[194] The agreement succeeded the Trans-Pacific Partnership (TPP),[195]

186. *Id.* ¶ 8.18.

187. *Korea*, *supra* note 22, ¶ 7.50.

188. *Id.* ¶¶ 7.51–53.

189. *Id.* ¶ 7.54.

190. See *supra* notes 28–31 and accompanying text on WTO's global writ.

191. *Id.*

192. *See Trade Agreements*, INT'L TRADE ADMIN., https://www.trade.gov/trade-agreements (last visited Nov. 10, 2021) (listing, *inter alia*, free trade agreements, suspension agreements, bilateral investment treaties, and intellectual property rights agreements as sources of international trade law); *see also Regional Trade Agreements and the WTO*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/region_e/scope_rta_e.htm (last visited Nov. 10, 2021) ("As of June 2016, all WTO members now have an RTA in force.").

193. *See Regional Trade Agreements and the WTO*, *supra* note 192 (defining RTAs as any reciprocal trade agreement between two or more partners, which do not necessarily belong to same region).

194. *See, e.g.*, *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)*, AUSTL. GOV'T DEP'T OF FOREIGN AFF. & TRADE, https://www.dfat.gov.au/trade/agreements/in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership (last visited Dec. 27, 2021) (entering into force for

which was derailed after its primary author, the United States, withdrew.[196] In fact, and particularly relevant to this Comment, the United States spearheaded TPP negotiations as a regional (and arguably global) countermeasure to China.[197] Similarly to the WTO and the USMCA, the CPTPP drafters sought to strengthen existing anti-subsidy disciplines by expanding the definition of SOEs.[198]

As an instrument intended to constrain Chinese economic expansionism, the CPTPP designates an entire chapter to SOEs.[199] The CPTPP contains a notable semantical development that does away with the term "public body," instead solely defining "state-owned enterprises."[200] In contrast to the indeterminate "public body" and its conceptual difficulty evidenced by WTO jurisprudence, a "state-*owned* enterprise" summons *Korea*'s and *Panel-China*'s focus on government ownership.[201]

The elimination of "public body" creates a clear standard for SOE determinations.[202] Under the CPTPP, an entity qualifies as an SOE if a government either (1) directly owns more than 50% of share capital, (2) exercises more than 50% of voting rights, or (3) has board majority appointment power.[203] CPTPP drafters almost certainly considered codifying *Korea*'s government ownership standard given Article 17's emphasis on mere majority ownership and board appointment power, but it limits its considerations to strict thresholds, namely 50%.[204] However, a petitioner need only demonstrate one of the provided criteria to establish a SOE.[205]

Another addition is the CPTPP's "Transparency" article.[206] Responsive to the burdensome discovery implications of *AB-China*'s and *India*'s evidentiary requirements, CPTPP drafters specified several disclosure requirements for a

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Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore, and Vietnam).

195. *See id.* (providing that CPTPP incorporates nearly all TPP provisions).

196. *See The U.S. Can't Be Smart on China Without Talking Trade*, BLOOMBERG (Oct. 4, 2021, 8:00 AM), https://www.bloomberg.com/opinion/articles/2021-10-04/u-s-should-rejoin-cptpp-trade-pact-to-counter-china (discussing how the United States ultimately withdrew from the CPTPP after continually dismissing it as a means of countering China).

197. *Id.*

198. *What Does the CPTPP Mean for State-Owned Enterprises*, GOV'T OF CAN. (Sept. 12, 2018), https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/sectors-secteurs/state_owned-appartenant.aspx?lang=eng.

199. *See* CPTPP, *supra* note 24, ch. 17 (describing scope and authority of SOEs in CPTPP).

200. CPTPP, *supra* note 24, art. 17.1.

201. *See generally Korea*, *supra* note 22; *Panel-China*, *supra* note 176.

202. *Compare* CPTPP, *supra* note 24, art. 17.1 (providing express criteria for SOE), *with Korea*, *supra* note 22, ¶ 7.37 (describing that Korea finds a public body where it takes part in governmental functions or acts in an official capacity), and *Panel-China*, *supra* note 176, ¶ 8.134 (defining public body as a government-controlled entity).

203. CPTPP, *supra* note 24, art. 17.1.

204. *Korea*, *supra* note 22, ¶¶ 7.44, 7.50; CPTPP, *supra* note 24, art. 17.1.

205. CPTPP, *supra* note 24, art. 17.10.

206. *Id.*

solicited party.[207] Upon request, a party "shall" disclose: its ownership shares and those cumulatively owned through other interests; a description of the entitlements belonging to voting shares, if possessed; and numerous financial and otherwise public information.[208] These compelled disclosures provide significant information that is helpful for an SOE determination.[209]

In summary, CPTPP participants in the transpacific economy desired a "government ownership" standard adopted from *Korea* and *Panel-China* with sufficient disclosure guarantees to avoid nettlesome discovery issues generated by *AB-China* and *India*. Nevertheless, the CPTPP's inflexible standard contrasts with the USMCA, which borrowed nearly verbatim the CPTPP's Article 17 language but drafted a more practical standard to address the myriad ownership structures in the global economy.

2. USMCA: North America and SOEs

To modernize trade relations, the USMCA replaced the North American Free Trade Agreement (NAFTA), entering into force on July 1, 2020.[210] The USMCA contains a new chapter specifically covering SOEs, unlike NAFTA,[211] which is itself a notable addition given that NAFTA was in force prior to the ascendancy of Chinese SOEs.[212] Specifically, the USMCA provides "new" SOE subsidy disciplines and rules that are "WTO Plus" in their protections.[213]

The USMCA's treatment of SOEs is certainly "WTO Plus."[214] Its drafters intended the prevention of SOE-caused trade distortions, mirroring the WTO's position.[215] Following the paradigm set forth in the CPTPP, the USMCA does not mention the term "public body."[216] Rather, the USMCA expansively defines SOE to cover "*any* government ownership" of an entity that confers control, including minority stakes.[217] Specifically, the USMCA specifies an SOE as an enterprise of

207. *Id.* art. 17.10(3)(a)–(f).

208. *See id.* (including entity's annual revenue, total assets, financial reports, third-party audits, and domestic immunities and privileges).

209. *Id*.

210. *United States-Mexico-Canada Agreement*, OFF. OF THE U.S. TRADE REPRESENTATIVE, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement (last visited Nov. 9, 2021).

211. Agreement Between the United States of America, the United Mexican States, and Canada, ch. 22, Nov. 30, 2018, OFF. OF THE U.S. TRADE REPRESENTATIVE, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between [hereinafter USTR].

212. *See* Peter Bondarenko, *North American Free Trade Agreement*, BRITANNICA, https://www.britannica.com/event/North-American-Free-Trade-Agreement (last visited Sept. 15, 2022) (confirming NAFTA entering into force in 1994); *see also* Lin et al., *supra* note 3 (discussing Chinese SOEs' steady ascendency since 1978).

213. USTR, *supra* note 211, ch. 22.

214. *Id.*

215. *Id.*

216. USMCA, *supra* note 25, ch. 22.

217. *See* USTR, *supra* note 211, ch. 22 (emphasis added) (noting USMCA's coverage includes golden shares); *see also* Rajeev Dhir, *Golden Share*, INVESTOPEDIA (Aug. 19, 2021),

which a government either (1) directly or *indirectly* controls 50% or more of share capital, (2) exercises more than 50% of voting rights, (3) holds the appointment power of a board majority, or (4) exercises power to control the enterprise through *any* other ownership interest—essentially a catchall clause.[218] Any one of these conditions is sufficient to establish an entity as a SOE and trigger anti-subsidy disciplines.[219]

The USMCA adds two important criteria: indirect 50% share capital control and the "any ownership-control" catchall phrase.[220] These two additions significantly expand the CPTPP's "government ownership" standard, particularly the catchall.[221] The catchall is redolent of *AB-China*'s actual control demonstration but lessens the substantive requirement by the showing of a sufficient ownership interest, which *India* rejected after *AB-China* hinted at it.[222] This substantive lessening provides a workable synthesis of *Korea* and *AB-China*.[223] This approach to SOE determinations is only further accomplished with its incorporation of the CPTPP's transparency protocols.[224]

More so than the CPTPP, the USMCA's catchall phrase raises similar evidentiary demands as in *AB-China* and *India*[225] because the challenger cannot rely on bright-line share ownership or appointment power. Instead, the record must show that the minority interest confers control over the enterprise.[226] Under the USMCA, a petitioner must demonstrate that a "[p]arty holds the power to control the enterprise if . . . it can determine or direct important matters affecting the enterprise."[227] This approach requires a case-by-case evaluation of "all relevant legal and factual elements."[228]

To that end, the USMCA adopted the CPTPP's "Transparency" provision.[229] The provision is identical to that of the CPTPP but of far greater operational value under the USMCA scheme.[230] The "relevant legal and factual elements" required for the USMCA's "minority-control" threshold are deducible if the disclosure

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https://www.investopedia.com/terms/g/goldenshare.asp (explaining golden shares grant special voting rights and veto power to a shareholder over certain changes to a company and governments historically issued them during periods of privatization to retain control over important entities and sectors of their economies).

218. USMCA, *supra* note 25, art. 22.1.

219. *Id.*

220. *Id*.

221. *Id.*

222. *See infra* notes 319–28 and accompanying text for a description of *India's* heightening of burden.

223. *Korea*, *supra* note 22; *AB-China*, *supra* note 26.

224. USMCA, *supra* note 25, art. 22.10.

225. *See infra* notes 328–33 and accompanying text for a discussion of *AB-China's* and *India's* evidentiary burden.

226. USMCA, *supra* note 25, art. 22.1, n.8.

227. *Id.*

228. *See id.* (identifying examples of those legal and factual elements, which include direct control over major spending, investments, mergers or dissolution of an enterprise).

229. *Id.* art. 22.10.

230. CPTPP, *supra* note 24, art. 22.10; USMCA, *supra* note 25, art. 17.10.

requirements are faithfully satisfied.[231] Moreover, this is a promising remedy to *AB-China*'s and *India*'s discovery demands. In summary, the USMCA provides a modern albeit regional standard to SOE determinations that broadens the CPTPP's SOE eligibility while operationalizing its disclosure requirements.[232]

D. A Critical Appraisal of the Government Ownership Standard

Korea's and *AB-China*'s "government ownership" standard is premised primarily on government share capital ownership, typically a majority stake.[233] This model presumes that a majority stake is sufficient to confer government (or its subsidiary holding interests) control over the entity.[234] There are secondary indicia of control—the government-board relationship, appointment power, and perception—but ownership is crucial.[235] This standard certainly has the positive attributes of consistency, feasibility, and foreseeability, but it produces an inflexibility that is subversive of the WTO's multilateral writ by not accommodating the many NMEs in the WTO. A critical analysis of SOE-reliant economies—both in developed and developing countries—reveals the concerns over a too solidly bright-line approach.

The international trade community is acutely aware of the sensitive treatment needed for developing countries.[236] As such, developing countries are granted "special and differential treatment," the provisions of which are integral to WTO agreements.[237] The SCM provides such protections, ranging from exemptions, phase-outs, and terminable countervailing duty investigations.[238] However, all the protections (besides the exemptions) are finite phase-outs or expire upon "development."[239] Therefore, the WTO's thirty-five least developed countries (LDCs) would be subject to the same anti-subsidy regulations after finalized phase-outs,[240] which may disproportionately impact their economies because of their

231. USMCA, *supra* note 25, art. 22.1, n.8.

232. The USMCA significantly amends the CPTPP SOE coverage by limiting the CPTPP's many exceptions, such as those for sovereign wealth funds and SOE provisions for government-specific purposes. *See US & Multilateral Trade Policy Developments*, WHITE & CASE (Nov. 2018), https://www.jetro.go.jp/ext_images/theme/wto-fta/news/pdf/w_c_monthly_report-201811.pdf (discussing special and differential treatment provisions for developing countries in WTO agreements).

233. *Korea*, *supra* note 22, ¶ 7.356; *Panel-China*, *supra* note 169, ¶ 8.134.

234. See *infra* notes 199–204 and accompanying text for a discussion of the CPTPP's participants' desire for an expanded "government ownership" standard.

235. See *infra* notes 214–21 and accompanying text for discussion of the USCMA's participants' desire for an expanded "government ownership" standard.

236. *Special and Differential Treatment Provision*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm (last visited Dec. 28, 2021).

237. *See id.* (citing WTO Agreement, GATT, GATS, and TRIPS as main legal provisions protective of developing countries).

238. *See Agreement on Subsidies, supra* note 99 (noting three categories of developing country members).

239. *Special and Differential Treatment Provision*, *supra* note 236.

240. *See Least-Developed Countries*, WORLD TRADE ORG.

reliance on SOEs for economic development.[241]

Typically, SOEs are the "sole" provider of key public services, such as water, electricity, transportation, telecommunications, and postal services.[242] Moreover, they contribute significantly to government revenue.[243] For example, for a subset of LDCs in sub-Saharan Africa, SOEs on average account for 21% of public sector liabilities, 34% of assets,[244] and nearly 20% of the total non-agricultural economic activities.[245] Their existence is "crucial" for economic development in these countries,[246] but a bright-line "public body" methodology, indifferent to "economic realities," may leave such economies especially vulnerable.

On the obverse of "economic realities" is the realization that SOEs are prevalent in developed countries as well.[247] The introduction to this Comment detailed the extensive economic influence of Chinese SOEs,[248] but SOE influence is hardly localized to China. SOEs are often cited as the "driver" behind international capital markets, with an estimated 13-22% of global market capitalization.[249] Surprisingly, most SOE listings are in emerging markets,[250] with 10% of the world's largest firms being state-owned across thirty-seven different countries with $3.6 trillion in joint sales.[251]

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https://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm (last visited Dec. 28, 2021) (listing Afghanistan, Angola, Bangladesh, Benin, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Democratic Republic of the Congo, Djibouti, Gambia, Guinea, Guinea-Bissau, Haiti, Lao People's Democratic Republic, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Myanmar, Nepal, Niger, Rwanda, Senegal, Sierra Leone, Solomon Islands, Tanzania, Togo, Uganda, Yemen, and Zambia as LDCs).

241. Korin Kane & Hans Christiansen, *State-Owned Enterprises: Good Governance as a Facilitator for Development*, COHERENCE FOR DEV. (Apr. 2015), https://www.oecd.org/development/State-owned%20enterprises_CfD_Ebook.pdf.

242. *See id.* at 3 (describing low income countries' use of SOEs as a development strategy in absence of private-sector economic involvement).

243. Robert Imbert et al., *Government Support to State-Owned Enterprises: Options for Sub-Saharan Africa*, PUB. FIN. MGMT. BLOG (July 9, 2020), https://blog-pfm.imf.org/pfmblog/2020/07/-government-support-to-state-owned-enterprises-options-for-sub-saharan-africa-.html.

244. *Id.*

245. Sara Sultan Balbuena, *State-Owned Enterprises in Southern Africa: A Stocktaking of Reforms and Challenges* 7 (OECD Corp. Governance, Working Paper No. 13, 2014), https://doi.org/10.1787/5jzb5zntk5r8-en.

246. Kane & Christiansen, *supra* note 241, at 1–2.

247. *Id*.

248. See *supra* notes 1–5 and accompanying text for a discussion of the the economic clout of Chinese SOEs.

249. Anica Nerlich et al., *Listing State-Owned Enterprises in Emerging and Developing Economies: Lessons Learned From 30 Years of Success and Failure*, WORLD BANK GRP. 5 (2021), https://documents1.worldbank.org/curated/en/984431624443117178/pdf/Listing-State-Owned-Enterprises-in-Emerging-and-Developing-Economies-Lessons-Learned-from-30-Years-of-Success-and-Failure.pdf.

250. *Id.* at 13.

251. Max Büge et al., *State-Owned Enterprises in the Global Economy*, WORLD ECON. F. (May 2, 2013), https://www.weforum.org/agenda/2013/05/state-owned-enterprises-in-the-global-economy/; *see also* INT'L MONETARY FUND, FISCAL MONITOR: POLICIES TO SUPPORT PEOPLE

The top five countries are China, Russia, Indonesia, the United Arab Emirates, and Malaysia,[252] the respective second, eleventh, sixteenth, thirty-fourth, and thirty-eighth largest GDPs in the international economy.[253] With the inclusion of two more emerging markets economies, India and Saudi Arabia, SOEs account for one-third of the largest firms.[254] Moreover, SOEs are among the largest corporations in several advanced economies: France, Italy, and Norway.[255] Importantly, the government ownership metric used to determine SOE eligibility for these financial statistics was 50.01%, the quintessential "government ownership" threshold.[256]

Lastly, the CPTPP's and USMCA's regional approaches to SOEs illuminate further the inherent tension among advanced, emerging, and developing economies of WTO members. The trans-American and transpacific economies are mainly composed of countries who eschew SOE participation.[257] Ending 2012, the United States and Mexico had only forty-nine SOEs between them at a $9.5 billion valuation.[258] Similarly, five of the major CPTPP members—Australia, Japan, Chile, New Zealand, and Mexico—have a combined eighty-five SOEs between them at a $212.8 billion valuation.[259]

Both agreements' unfavorable language towards SOEs is predictably reflective of their economic realities. Strategically, these agreements are intended as regional economic countermeasures to China and the conduct of their SOEs, especially the CPTPP.[260] In fact, China could not comply with its CPTPP obligations if admitted "without changing its policies on state-owned enterprises."[261] That is precisely the point of these regional and strategic trade agreements adopting the inflexible "government ownership" standard, but the WTO's concerns are global, not regional. Therefore, the CPTPP and USMCA do not offer a viable approach for confronting SEO-reliant economies because SOE-reliance is simply too entrenched and prevalent in the global economy to be inadequately accommodated.

The WTO's mission to ensure that 98% of global trade flows "smoothly, predictably, and freely"[262] is a titanic task because of the various economic

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DURING THE COVID-19 PANDEMIC 49 (2020) (noting SOE assets among the world's 2,000 largest firms doubled over the last decade).

252. Büge et al., *supra* note 251.

253. *GDP (Current US$)*, *supra* note 1.

254. INT'L MONETARY FUND FISCAL MONITOR: POLICIES TO SUPPORT PEOPLE DURING THE COVID-19 PANDEMIC, *supra* note 251, at 48–49.

255. *Id.*

256. *Id.*

257. ORG. FOR ECON. COOP. & DEV., THE SIZE AND SECTORAL DISTRIBUTION OF SOES IN OECD AND PARTNER COUNTRIES 12–13 (2014).

258. *Id.* at 13.

259. *Id*. at 12–13.

260. *See The U.S. Can't Be Smart on China Without Talking Trade*, *supra* note 196 (discussing CPTPP's origin as a countermeasure to China).

261. *Id.*

262. *The WTO*, *supra* note 28.

modalities of its 164 members.[263] Its primary activities are "negotiating the reduction or elimination of obstacles to trade" and "agreeing on rules governing the conduct of international trade."[264] This requires accommodation of members that rely on SOEs for economic development.[265] The WTO cannot ignore economic realities if it is to faithfully discharge its organizational duties, despite market-based economics being its ideological foundation.[266]

Consequently, the "government ownership" standard's bright-line methodology raises two interdependent systemic issues for the WTO: the reliance of many of its members on SOEs and conformity with liberal market-based economics devoid of dominant state actors. The "government ownership" standard is an unsustainable synthesis of these two considerations. The standard's adherence to government share capital ownership, even minority interests under the RTAs, is anathema to SOE-reliant WTO members.

IV. THE "VESTED AUTHORITY" STANDARD

A. The Foundation: AB-China

As is its affirmative right, China appealed the *Panel-China* decision to the AB.[267] The first of five claims of error lodged by China was the "public body" determination rendered in *Panel-China*.[268] As it did during *Panel-China*, the international community paid close attention to the proceedings, with eleven of the fourteen third parties filing their own opinions.[269] This diligence proved clairvoyant as *AB-China* provoked international controversy by its establishment of the "vested authority" standard.[270]

The AB began its analysis with China's argument.[271] China provided extensive reasoning for its position,[272] but relevant to this Comment was *Panel-China*'s misapplication of the ordinary and dictionary definition of "public"[273] and its refusal to consider the International Law Commission's (ILC) Articles on state

263. See *supra* notes 236–56 and accompanying text for a discussion of the many economic forms of WTO members.

264. *Overview*, *supra* note 30.

265. *Id*.

266. *See id.* (explaining market opening as one of WTO's founding and guiding principles).

267. *AB-China*, *supra* note 26, ¶ 1.

268. *Id.* ¶ 20.

269. *See id.* (identifying Argentina, Australia, Bahrain, Brazil, Canada, European Union, India, Japan, Kuwait, Mexico, Norway, Saudi Arabia, Turkey and separate customs territory of Taiwan, Penghu, Kinmen, and Matsu as third parties); *see also* Ahn, *supra* note 20, at 63 (noting controversy in WTO system caused by *AB-China*).

270. Ahn, *supra* note 20, at 63.

271. *AB-China*, *supra* note 26, ¶ 279.

272. *Id.* ¶¶ 21–44. China also contended that the United States Department of Commerce's (USDOC) "public body" determinations must be reserved because the USDOC applied the erroneous "government control" as set forth in *Panel-China*. *Id.* ¶¶ 42–44.

273. *Id.* ¶¶ 21–34.

attribution.[274] While confronting and re-deploying China's own arguments, the United States requested the AB to reaffirm the "government control" standard.[275]

Similar to *Korea*'s threshold decision to conduct separate "public body" and "benefit" inquiries,[276] *AB-China* offered a syntaxial foundation for the establishment of its standard. Recall that SCM Article 1.1(a)(1) states that "a financial contribution by a *government or any public body* . . . " is to be referred to throughout the SCM as "government."[277] However, the AB did not adopt *Korea*'s statutory interpretation[278] of this collective "government" in dismissing *Panel-China*'s view that the collective term was "merely a device to simplify the drafting."[279] To the contrary, *AB-China* took the collective to indicate a common meaning.[280] The AB wrote:

> When Article 1.1(a)(1) stipulates that "a government" and "any public body" are referred to in the *SCM Agreement* as "government", the collective term "government" is used as a superordinate, including, *inter alia*, "any public body" as one hyponym. Joining together the two terms under the collective term "government" thus implies a sufficient degree of commonality or overlap in their essential characteristics that the entity in question is properly understood as one that is governmental in nature . . . .[281]

Just as *Korea's* decision was a necessary logical divorce for its "government control" standard,[282] *AB-China*'s collectivization of "government" and "public body" was a necessary logical union for its creation of the "vested authority" standard.[283]

The AB next had to define the collective "government," the definition of which would be the methodological determinant for a "public body."[284] The AB used the dictionary definition of "government" to mean "continuous exercise of authority over subjects; authoritative direction or regulation and control."[285] In so

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274. *See id.* ¶¶ 35–41 (citing *Draft Articles on Responsibility of States for Internationally Wrongful Acts,* U.N. Doc. A/56/10 (2001), *reprinted in* [2001] 2 Y.B. Int'l L. Comm'n 26, U.N. Doc. A/CN.4/SER.A/2001/Add.1).

275. *Id.* ¶¶ 128–50.

276. *Korea*, *supra* note 22, ¶ 7.44.

277. SCM, *supra* note 18, ¶ 1.1(a)(1) (emphasis added).

278. *AB-China*, *supra* note 26, ¶ 288. In fact, the AB emphatically rejected *Korea's* interpretation of the disjunctive "or" in the SCM 1.1(a)(1). *Id.* ¶ 289. The AB considered *Korea's* use of the drafting history as "speculation" and not consonant with treaty interpretation principles. *Id; see also* Vienna Convention on the Law of Treaties, art. 32, May 23, 1969, 1155 U.N.T.S. 331., 8 I.L.M. 679 (stating that recourse to drafting history may be used as a supplementary means of treaty interpretation).

279. *Panel-China*, *supra* note 176, ¶ 8.66.

280. *AB-China*, *supra* note 26, ¶ 288.

281. *Id.*

282. See *supra* notes 150–54 and accompanying text for a discussion of the changes made.

283. *AB-China*, *supra* note 26, ¶ 288, at 111–12.

284. *Id.* ¶ 290.

285. The AB used the sixth edition of the *Shorter Oxford English Dictionary*. *Id.* ¶ 290, n.198.

doing, it adopted its prior definition in *Canada-Dairy* to conclude that the essence of government is that it "enjoys the effective power to regulate, control, or supervise individuals, or otherwise restrain their conduct, through the exercise of lawful authority."[286] Whether a contested entity possesses this functionality is the crux of the determination; accordingly, the AB opined:

> [T]his meaning is derived, in part, from the *functions* performed by a government and, in part, from the government having the *powers* and *authority* to perform those functions . . . . This suggests that the performance of governmental functions, or the fact of being vested with, and exercising, the authority to perform such functions are core commonalities between government and public body.[287]

With the meaning of "government" established and supported by its consideration of the ILC's Articles,[288] along with its admonishment that the "precise contours and characteristics of a public body are bound to differ from entity to entity," *AB-China* instructed future determinations to focus on the "core features of the entity concerned, and its relationship with government in the narrow sense."[289]

First, and arguably dispositive, is whether a government statute explicitly vests the public body with governmental authority.[290] If such a statute does not exist, then sustained and systemic de facto exercises of governmental functions may be sufficient evidence of vested authority.[291] "[M]ere formal links between an entity and government," such as *Korea*'s dispositive majority ownership position, are not sufficient.[292] In fact, *AB-China* implicitly repudiated *Korea*'s reasoning, arguing that majority ownership is not even sufficient to establish meaningful control, let alone vested authority.[293] Only when "the formal indicia of governmental control are manifold" may majority ownership suffice.[294]

The outcome of *AB-China* is clear: the repudiation of *Korea* and the articulation of a new "vested authority" standard.[295] But what is government authority for the purposes of the SCM? *AB-China* did not apply its own standard to the Chinese SOEs involved, but it provided instructions: It employed Article

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286. *Id.*; *see also Legal Effect of Panel and Appellate Body Reports and DSB Recommendations and Rulings*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c7s2p1_e.htm (last visited Oct. 7, 2022) (describing nonbinding nature of AB materials and corresponding lack of stare decisis, as is standard in international law).

287. *AB-China*, *supra* note 26, ¶ 290.

288. *Id.* ¶¶ 304–16. The AB considered the ILC Articles highly instructive as an interpretative tool. *Id.* In particular, Articles 4, 5, and 8 influenced the AB's reasoning. *Id.* ¶ 305. Taken together, the ILC Articles essentially mean that the "conduct of non-State organs may be attributable to the State only where such organs exercise elements of governmental authority." *Id.*

289. *Id.* ¶ 317.

290. *Id.* ¶ 318.

291. *Id.*

292. *Id.*

293. *Id.*

294. *See id.* (describing new standard).

295. *Id.*

1.1(a)(1)(iv) of the SCM as a means of example.[296] Article 1.1(a)(1)(iv) provides that a subsidy exists when a government or public body "entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii)."[297] As such, the SCM "envisages that a public body may 'entrust' or 'direct' a private body"[298] to directly transfer funds (such as grants, loans, and equity infusions), decide taxation issues (such as collection or cancellation), or otherwise provide goods or services.[299] In conclusion, an "order to compel or command a private body, or govern a private body's actions . . . and give responsibility for certain tasks to a private body (entrustment)" is a recognizable exercise of government authority.[300]

However conceptually sound this reasoning may be, *AB-China* introduced a consequential caveat: Vested government authority may depend on the internal legal systems of WTO members.[301] To wit, the functionality qualifying an entity as a "public body" may depend on whether the WTO member's domestic law considers that functionally as that of government.[302] This qualification compounded the evidentiary hurdles established by the vested authority standard, which *India* best illustrated several years later.[303]

B. Rigidity Confirmed: India

Following the application of U.S. countervailing duties on certain exports, India requested consultations, which failed to achieve a resolution.[304] At India's plea shortly thereafter, the DSB established a panel to adjudicate[305] and, almost as a matter of course, a principal disagreement between the parties was whether India's National Mineral Development Corporation (NMDC) was a "public body."[306] India's contention relied on the recent *AB-China* ruling, arguing that the United States Department of Commerce (USDOC) erroneously focused on India's 98% shareholder position in NMDC, instead of the "carrying out of governmental functions" and the "exercise of governmental power or authority."[307] The United

296. *Id.* ¶ 293.

297. SCM, *supra* note 18, art. 1.1(a)(1)(iv).

298. *AB-China*, *supra* note 26, ¶ 293.

299. SCM, *supra* note 18, art. 1.1(a)(1)(i)–(iii); *see also AB-China*, *supra* note 26, ¶ 296 ("Taxation . . . is an integral . . . sovereign function.").

300. *AB-China*, *supra* note 26, ¶ 294.

301. *Id.* ¶ 297.

302. *Id.*

303. *See* Ahn, *supra* note 20, at 64 (detailing *India* description of a public body and its implications).

304. *See DS436: United States–Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds436_e.htm (last visited Oct. 5, 2022) [hereinafter *DS436*] (discussing consultations).

305. *Id.*

306. Panel Report, *United States–Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, ¶ 7.67–73, WTO Doc. WT/DS436/R (adopted July 14, 2014) [hereinafter *Panel-India*].

307. *Id.* ¶ 7.67.

States averred that *AB-China*'s reasoning was baseless in its establishment of the "vested authority" standard.[308]

The Panel supported the USDOC's "public body" finding because the NMDC was under the "meaningful control" of India.[309] For the panel, 98% majority ownership in addition to the fact that the NMDC "is a mining company governed by [India's] Ministry of Steel" satisfied its threshold for "meaningful control."[310] Interestingly, this "meaningful control" approach is reminiscent of *Korea*[311]:

> (i) the GOI was heavily involved in the selection of directors of the NMDC, some of whom were directly appointed by the Ministry of Steel; and (ii) the NMDC's own website stated that NMDC is under the "administrative control" of GOI. The United States also refers to evidence in the 2007 administrative review that the GOI had reported in a questionnaire response that it appointed two directors and had approval power over an additional seven out of 13 total directors.[312]

Korea's Lazarus moment proved fleeting following India's appeal to the AB.[313]

India started promisingly[314]: The AB stated that the Panel "correctly articulated" the appropriate standard when it observed that evidence that a government exercises meaningful control over an entity and its conduct may indicate that the entity possesses vested authority in exercise of governmental functions.[315] However, the Panel erred in its substantive interpretation of Article 1.1(a)(1) by construing the term "public body" to mean any entity that is "meaningfully controlled" by a government.[316] The cause of this misinterpretation was *Panel-India*'s confusion of the *substantive* standard with the *evidentiary* standard required to establish a "public body."[317] In other words, the USDOC failed to provide a sufficient showing that India possessed de facto control over the NMDC.[318]

India's significance comes from this pronounced evidentiary burden.[319] Implied by *AB-China*'s actual control approach, *India* illustrates the discovery hurdles faced by challengers attempting to satisfy their burdens of production and persuasion.[320] In rejecting *Panel-India*'s reliance on evidence of "mere formal

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308. *Id.* ¶ 7.71. Alternatively, the United States argued that the NMDC possessed the authority to perform Indian government functions, thus satisfying *AB-China*. *Id.* ¶ 7.72.

309. *Id.* ¶ 7.89.

310. *Id.* ¶ 7.81.

311. See *supra* notes 163–74 and accompanying text for a discussion of *Korea's* use of corporate governance and perception in its determination of a "public body."

312. *Panel-India*, *supra* note 306, ¶ 7.82.

313. *See India*, *supra* note 27 (discussing this appeal).

314. *See India*, *supra* note 27, ¶ 4.36 (outlining panel's decision).

315. *Id.*

316. *Id.*

317. *Id.* ¶ 4.37.

318. *Id.*

319. *See* Ahn, *supra* note 20, at 64 (discussing heightened evidentiary burden in *India*).

320. *See India*, *supra* note 27, ¶ 4.43 (discussing why NMDC is not a public body).

indicia of control"[321]—such as *Korea*'s ownership interest, corporate governance authority, and perception—*India* explicitly endorsed *AB-China*'s emphasis on evidence of *actual* government control over the entity, especially with a focus on conduct.[322]

India further heightened the evidentiary burden by emphasizing the USDOC's failure to "properly consider[] the relationship between the NMDC and the GOI within the Indian legal order."[323] Although only admonishing the USDOC for failing to "give proper consideration,"[324] which is similar to *AB-China*'s passing consideration,[325] *India* gave it prominence in the "vested authority" standard:

> [T]he question of whether the conduct of an entity is that of a public body must in each case be determined on its own merits, with due regard being had to the core characteristics and functions of the relevant entity, its relationship with the government, and the legal and economic environment prevailing in the country in which the investigated entity operates.[326]

But this "on its own merits" approach is misleading. "Due regard" for the "functions of the relevant entity" and "its relationship with the government" cannot be properly adduced *unless* "the legal and economic environment," or the domestic legal and economic regimes, is comprehended.[327] Consequently, the "vested authority" standard's "public body" determination is inextricably consigned to the internal legal regimes of WTO members, which for many is not the liberalized market-based model encouraged by the WTO. [328]

C. A Critical Appraisal of the "Vested Authority" Standard

There can be little doubt as to the near-polar difference between the "government ownership" and "vested authority" standards. In officially repudiating what it considered *Korea*'s lawlessness, *AB-China* synonymized "government" and "public body" to narrow "public body" determinations.[329] In effect, a challenger must demonstrate that the entity mirrors government by exercising "vested authority."[330] Typically, sufficient evidence includes a vesting statute or systemic de facto exercises of governmental authority, such as compulsive measures over private actors.[331] However, the AB did acknowledge the limited possibility that

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321. Id. ¶ 4.39–43.

322. *Id.* ¶ 4.37; *see also* Ahn, *supra* note 20, at 64 (articulating AB's focus on acts of control as opposed to nature of relationship between government and entity).

323. *India*, *supra* note 27, ¶ 4.43.

324. *Id.* ¶ 4.40.

325. *See AB-China*, *supra* note 26, ¶ 294 (discussing Appellate Body's interpretation of "direction").

326. *India*, *supra* note 27, ¶ 4.43.

327. *Id.*

328. See *supra* notes 236–59 and accompanying text for a discussion of differing national attitudes towards SOEs.

329. *AB-China*, *supra* note 26, ¶ 294.

330. *Id.* ¶ 310.

331. *Id.* ¶ 318.

mere indicia of control under discrete factual scenarios may be satisfactory.[332] Lastly, *AB-China* and *India* impose onerous evidentiary burdens because of the need to consider the internal legal systems of WTO members in "public body" determinations.[333]

This is not to say that the standard is without merit. It accommodates the various economic realities of WTO members and simplifies the SCM language by conflating "government" and "public body."[334] Nevertheless, the "vested authority" standard fails to adequately resolve the systemic issues raised by the "government ownership" standard. Specifically, its stringency is averse to the SCM drafters' intent, it imposes an undue evidentiary burden on challengers, and it fails to account for transparency complications in WTO disputes.

There was a proliferation of criticism upon the release of *AB-China*.[335] Apart from critiques leveled by academics, the actual drafters of the SCM—particularly Michel Cartland, Gérard Depayre, and Jan Woznowski—voiced concern over the AB's "troublesome activities," which "may . . . destroy the credibility" of the WTO dispute system."[336] They particularly criticized the AB's application of the ILC Articles as inapposite.[337] Importantly, the SCM drafters contended that the "vested authority" standard betrays their original intent and the SCM's purpose.[338] The drafters purposefully separated "public body" from "government" specifically to "cover" SOEs.[339] In their view, this "bias" in favor of SOEs embedded in *AB-China* is a potential solvent to existing subsidy disciplines.[340] Systemically, the drafters concluded that dispute settlements should reflect the "real nature" of the WTO and not be an "academic exercise."[341]

After *India*, conflict arose within the AB itself. In *United States – Countervailing Measures (China) (Article 21.5.-China)*, the AB slightly deviated from its "vested authority" standard in ruling for the United States under a "meaningful control" approach.[342] However, there was a separate opinion offered by one of the AB members specifically regarding the "public body" determination.[343] Their argument was that the "undue emphasis on [*AB-China*]"

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332. *Id.*

333. See *supra* notes 236–59 and accompanying text for a discussion of differing national attitudes towards SOEs.

334. *AB-China*, *supra* note 26, ¶ 294.

335. *See* Ahn, *supra* note 20, at 63 (discussing differing input from involved parties).

336. *Id.*; *see also* Chad P. Brown & Jennifer A. Hillman, *WTO'ing a Resolution to the China Subsidy Problem*, 22 J. INT'L ECON. L. 557, 568 (2019) (critiquing blurred line between government and private sector in wake of *AB-China*).

337. Ahn, *supra* note 20, at 63. Their contention was that the ILC articles address "intrinsically different 'internationally wrongful acts.'" *Id.*

338. *Id.* at 63–64.

339. *Id.* at 64.

340. *Id.*

341. *Id.*

342. *Id.* at 65; *accord* Appellate Body Report, *United States–Countervailing Duty Measures on Certain Products from China: Recourse to Article 21.5 of the DSU by China*, WTO Doc. WT/DS437/AB/RW (adopted Aug. 15, 2019) [hereinafter *Art. 21.5.–China*].

343. See Ahn, *supra* note 20, at 66 to read the AB members' rejection of the "public body"

has "locked in a flawed interpretation that has grown more confusing with each iteration."[344] The member concluded that *AB-China* was the "original mistake" because of its insistence on vested authority at the expense of the consideration of "specific circumstances."[345] They argued that the assessment should evaluate the relationship between the entity and the government, with "vested . . . authority" being one of many considerations.[346] The member concluded:

> Whether an entity is a public body must be determined on a case-by-case basis with due regard being had for the characteristics of the relevant entity, its relationship with the government, and the legal and economic environment prevailing in the country in which the entity operates . . . . There is no requirement for an investigating authority to determine in each case whether the investigated entity "possesses, exercises or is vested with governmental authority."[347]

In addition, the "vested authority" standard imposes an evidentiary burden on the challenger that is insensitive to transparency complications.[348] Put frankly, the evidentiary burden is an "onerous" obstacle on investigating authorities, especially those scrutinizing Chinese SEOs.[349] As vested or actual control is a far more qualitative evaluation than obtaining financial records and statements, a successful discovery process for an investigating authority will likely be "burdensome and time-consuming."[350]

This discovery process would require "knowledge of government actions and documentation of what the government did, as well as when and sometimes why."[351] Obtaining this information is "extraordinarily difficult" because it is rarely publicized.[352] Challenged firms are also reluctant to provide information necessary to pursue cases whether out of privacy, fear of retaliation, or concerns over cyber-hacking.[353] As a result, there is a disincentive to investigate credible claims.[354]

The "vested authority" standard's evidentiary hurdle aggravates the preexisting lack of transparency involved in "public body" disputes. China committed to "comprehensive transparency" upon its WTO accession,[355] but for political, practical, and cultural reasons, China has been "less-than-satisfactory" in

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determination.

344. *Art. 21.5.–China*, *supra* note 342, at ¶ 5.244 (alteration in original).

345. *Id.* ¶ 5.245.

346. *Id.* ¶ 5.247.

347. *Id.* ¶ 5.248.

348. Ahn, *supra* note 20, at 64.

349. *Id.*

350. *Id.*

351. Brown & Hillman, *supra* note 336, at 570.

352. *Id.*

353. *Id.*

354. *See id.* (describing barriers to investigating credible claims).

355. Henry Gao, *The WTO Transparency Obligations and China*, 12 J. COMPAR. L. 329, 329 (2017).

its implementation of them.[356] The SCM does have a notification requirement whereby members agree to provide information on subsidies,[357] but recall that such subsidy regulation only applies *if* a subsidy exists, which requires either a "government" or "public body."[358] Therefore, Chinese SOEs are unlikely to comply with the SCM's notification requirement because the "vested authority" standard likely results in them *not* being "public bodies."[359] As a result, since there are no "specific obligations" applicable to SOEs,[360] the "vested authority" standard protects Chinese SOEs in a frustrating catch-22: A challenger needs access to SOE information for its "public body" allegation, yet transparency notifications are only triggered if the entity is a "public body."

The "vested authority" standard amplifies this conundrum. It raises the identical systemic issues as the "government ownership" standard does but exacerbates rather than obviates them. In its desire to afford accommodation for diverse economic modalities, the standard undermines the WTO's and SCM's anti-subsidy position, or the WTO's "real nature," as put by the SCM drafters.[361] In leaning too far into integration and inclusivity, it worsens the tension between MBEs and NMEs by emphasizing the NME's slow-moving economic liberalization and lack of transparency.

The "vested authority" standard aroused such conflict that even the AB's own members spoke up, with a former AB member asserting that it "effectively takes Chinese SOEs out" of the subsidy definition and neuters the WTO framework from addressing the international community's grievances.[362] In conclusion, the "vested authority" standard cannot reconcile the WTO's systemic concerns over the reliance of many of its members on SOEs and conformity with liberal market-based economics devoid of dominant state actors. Nevertheless, a workable synthesis of these two standards and their attempt to balance liberalized political economy and multilateralism is achievable.

V. CONCLUSION

Before proposing a new "public body" standard, it is important to recapitulate the systemic issues raised by SOE participation in the WTO's international trading community. The WTO's market-based economic foundation contrasts with the economic realities of many of its individual members. This crossing of wires

356. *Id.* at 353–55. Politically, China is very decentralized due to its geographical and ethnic ranges. *Id.* at 353. Practically, many Chinese officials—in part because of the decentralization—are not aware of the obligations, and culturally, there is a long-standing aversion to transparency laws in China, dating back to 513 BC. *Id.* at 354–55.

357. *See* SCM, *supra* note 18, art. 25 (explaining Committee's procedure of examining new and full notifications submitted under paragraph 1 of Article XVI of GATT 1994 and paragraph 1 of Article 25 of the Agreement on Subsidies and Countervailing Measures).

358. *See id.* art. 1.1 (defining subsidy).

359. Robert Wolfe, *Sunshine over Shanghai: Can the WTO Illuminate the Murky World of Chinese SOEs?*, 16 WORLD TRADE REV. 713, 720 (2017).

360. *Id.*

361. Ahn, *supra* note 20, at 63–64.

362. *Id.* at 67.

generates the electric divisions challenging the WTO's liberal political economy model. The SCM and its "public body" jurisprudence, as discussed in this Comment, are an illustration. This systemic strain is a necessary contour in the development of any operable "public body" test.

Secondly, the start of any analysis would be remiss if it failed to succinctly identify the demerits of its predecessors, as any new approach requires the resolution of the old's pitfalls. First, the "government ownership" standard's bright line approach rigidly conforms with the WTO's liberal market-based economic principles, but it fails to accommodate diverse economic modalities. As such, a mechanical 50.01% ownership model is not feasible. Ironically, the "vested authority" standard is similarly infeasible because of its flexibility. It fails to appreciate that the WTO is organized on liberalized market-based economics, and members are on notice of this since their membership is also an implicit accession to the WTO's economic philosophy. Therefore, the standard's incorporation of internal legal and economic regimes, as well as exacerbation of preexisting transparency issues, must be addressed.

The conceptual proposition is easily phrased: How can a "public body" test reconcile the WTO's multilateralism with its market-based economic regime? The first prong of any new standard should be transparency. This Comment presumes as much because no matter the evaluative approach, information pertaining to the relevant entity is required. In consequence, official binding transparency protocols should be adopted and enforced not as a requisite after a "public body" determination, but rather during an investigation that precedes the determination. This will raise international privacy concerns, abuse, and political resistance, but these concerns are prevalent in any legal regime. Discussed further below, a viable standard will eschew the mechanical 50.01% ownership approach[363] and will require some adequate nexus between the relevant entity and government. A challenger will need sufficient information to establish this nexus.

In this respect, the CPTPP's and USMCA's "Transparency" articles are provisional frameworks. They compel disclosure of ownership shares, voting rights, and numerous financial records, such as annual revenue, total assets, financial reports, third-party audits, and domestic immunities and privileges.[364] Despite this scope, an enlargement of the disclosure requirement to include *all* relevant information germane to the nexus between the relevant entity and government is preferable. The "any relevant information" catchall may be vulnerable to litigation, but challengers will be reminded of *AB-China* and *India* if they are impeded by prolonged discovery.

Now to the purpose behind such broad disclosure requirements: What is the new standard for "public body" determinations? The government ownership model is insufficient for a multilateral trade regime, so a remodeling of the "vested authority" approach is recommendable. In so doing, the appropriate showing should be of government *control*. Governments can evade an authority-based

363. INT'L MONETARY FUND FISCAL MONITOR: POLICIES TO SUPPORT PEOPLE DURING THE COVID-19 PANDEMIC, *supra* note 251, at 47.

364. CPTPP, *supra* note 24, art. 17.10(3).

standard by ensuring that there is no documentary evidence that the *government*, as opposed to the *entity*, authoritatively acted. This dissembling is accomplishable through informal pressures, politics, lawmaking, and numerous indirections. In contrast, a demonstration of "government control," which will *not* be premised on majority share ownership—at least dispositively—permits substantive flexibility in its consideration of the "indicia of control:" government share-ownership, appointment power, governmental oversight, perception, relevant statutes, financial records, government-entity relationships, and all other pertinent information in determining the precise relationship between the government and entity.

The "government control" standard represents a totality-of-the-circumstances approach in which control is permissibly inferable from the record. Dissimilar to the "vested authority" standard's demonstration of *actual* control, an inference of control rationally premised on a sufficient government-entity relationship is satisfactory. As stated, the "government control" standard should expressly forbid 50.01% government ownership from controlling an inquiry. As an added protection for SOE-reliant economies, there should be a ranking which prioritizes the indicia of control, with government ownership being supplementary. On the other hand, SOE-resistant economies will not raise their evidentiary concerns as they do under *AB-China* and *India* because of the binding transparency regime.

By strengthening the "government ownership" standard's substantive showing while lessening the "vested authority" standard's evidentiary burden, the "government control" standard offers a synthesis of its predecessors' merits while redressing their demerits. It provides a practical, functional, and equitable approach to "public body" determinations within the WTO framework. Importantly, it possesses the proper degree of protectionism and accommodation in confronting China's economic expansionism, particularly that of their SOEs.

Whether the "government control" standard is implementable implicates far greater systemic considerations than this Comment can survey. However, prognostications are possible for a discussion in miniature. To its advantage, the "government control" standard fairly addresses legitimate concerns over Chinese SOE conduct within the WTO regime. A reform within the WTO is a multilateral form and not unproductive unilateral action.[365] A WTO reform possesses more legitimacy than does unilateral or plurilateral action that may itself belie its own actors' suspicions of multilateralism.[366]

This newfound legitimacy may disincentivize China's regional expansionism by multilateralist accommodation. Despite the CPTPP's open hostility towards SOEs, China submitted its bid to join the regional compact.[367] CPTPP members can likely block China's admission, especially given its economic "bullying," but

365. *See* Brown & Hillman, *supra* note 336, at 573–75 (describing problems with U.S. tariffs).

366. *But see* Ahn, *supra* note 20, at 67 ("But, practically speaking, any attempt to amend the rules in a way to cripple China in the WTO system where China is the largest stakeholder will be very difficult to implement.").

367. *E.g.*, *The U.S. Can't Be Smart on China Without Talking Trade*, *supra* note 196.

China's economic clout may outweigh ideological differences.[368] For all but two members, China is the largest trading partner, so freer access to the Chinese market is an enticement.[369] For the United States and other countries alarmed by Chinese SOE behavior, multilateral reform is preferable to unilateral tariffs,[370] and reformation of the "public body" standard is one such measure. Given the widespread agreement that reformation of WTO rules is preferrable,[371] the adoption of the "government control" standard is the logical path forward.

VI. LIST OF ABBREVIATIONS

AB	Appellate Body
APRG	Advance payment refund guarantee
BOK	Bank of Korea
CPC	Communist Party of China
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
DSB	Dispute Settlement Body
EC	European Communities
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross domestic product
GOI	Government of India
IBK	Industrial Bank of Korea
ILC	International Law Commission
KAMCO	Korea Asset Management Corporation
KDB	Korea Development Bank
KEXIM	Export-Import Bank of Korea
LDC	Least developed country
MBE	Market-based economy
NAFTA	North American Free Trade Agreement
NME	Non-market economy
NMDC	National Mineral Development Corporation
PSL	Pre-shipment loan
RTA	Regional trade agreement
SASAC	State Assets Supervision and Administration Commission of the State Council
SCM	Agreement on Subsidies and Countervailing Measures

368. *See id.* (writing that Australia, Canada, and Japan could potentially block China's bid due to China's alienating economic behavior).

369. *Id.*

370. Brown & Hillman, *supra* note 336, at 577.

371. *Id.*

SOE	State-owned enterprise
TPP	Trans-Pacific Partnership
USDOC	United States Department of Commerce
USMCA	United States-Mexico-Canada Agreement
USSR	Union of Soviet Socialist Republics
WTO	World Trade Organization