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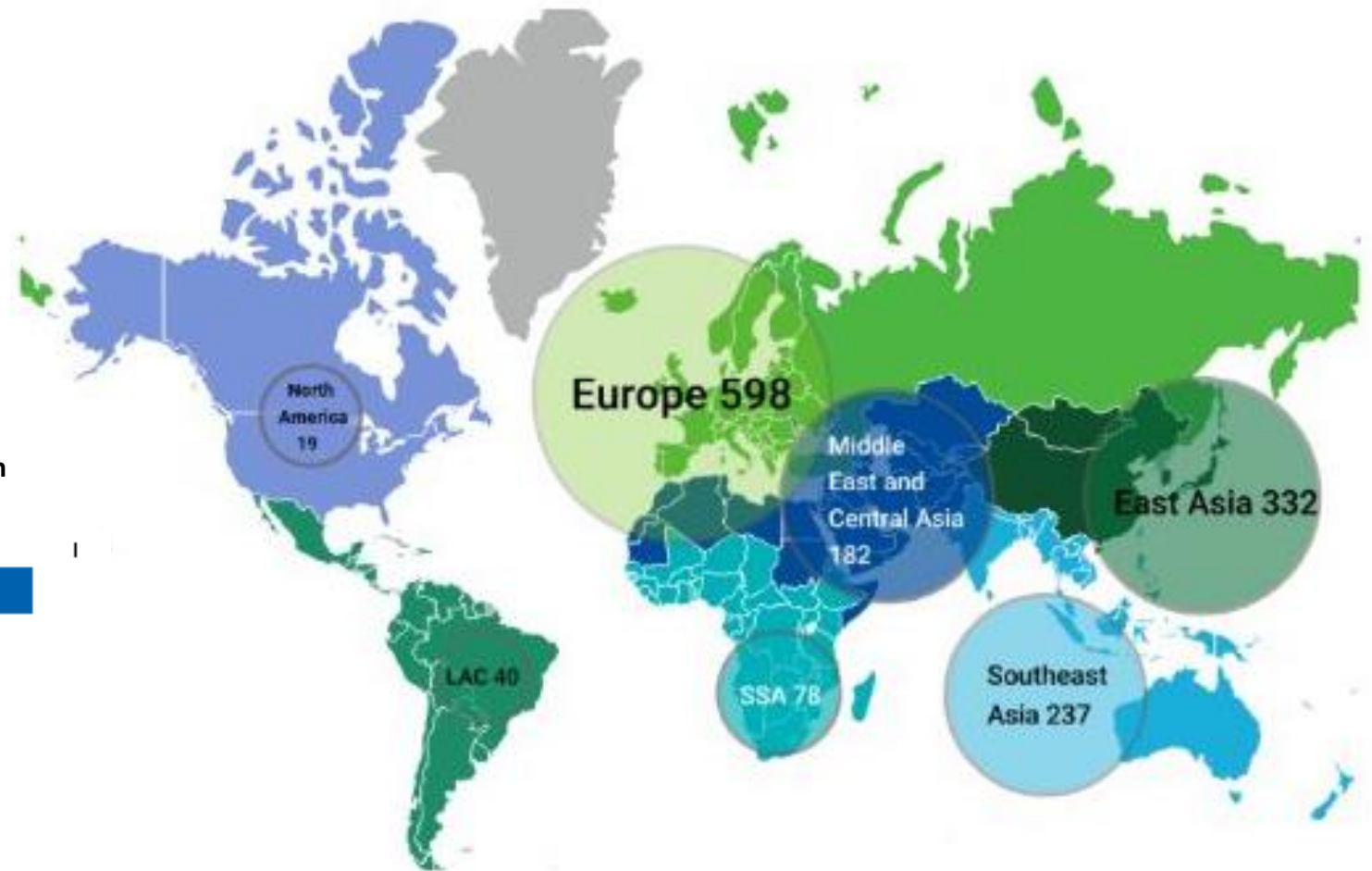
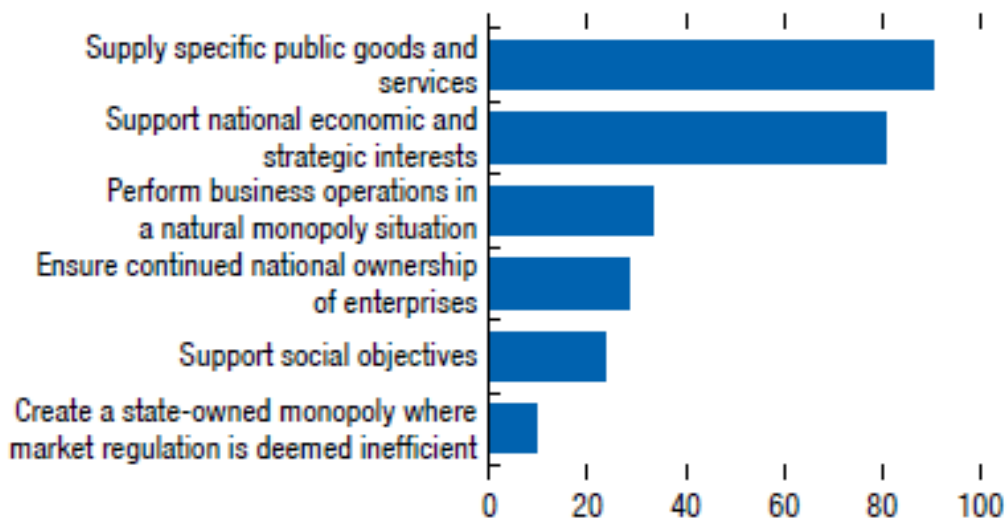
Introduction to State Trading Enterprises

- 1. The Role of State-Owned Enterprises in the Global Economy**
- 2. Overview of the GATT Article XVII and related practice at the WTO.**
- 3. Rules on SOE in China's Protocol of Accession**
- 4. STE Rules in the CPTPP**

The Role of SOEs in the Global Economy (1/2)

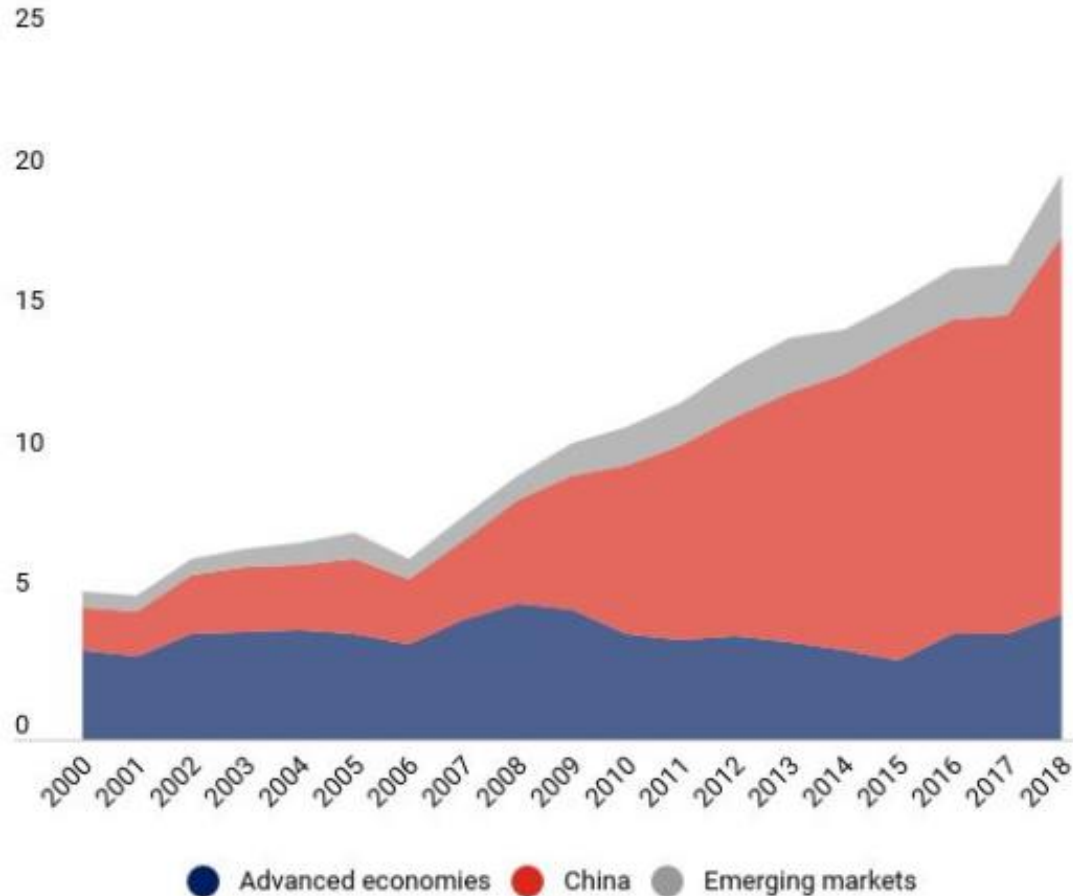
SOEs are a common instrument used by Governments across the world to ensure multiple policy objectives, such as ensuring the availability of a good or service to the population, protect national interests, etc.

Objectives of SOEs in Central, Eastern and Southeastern European Countries



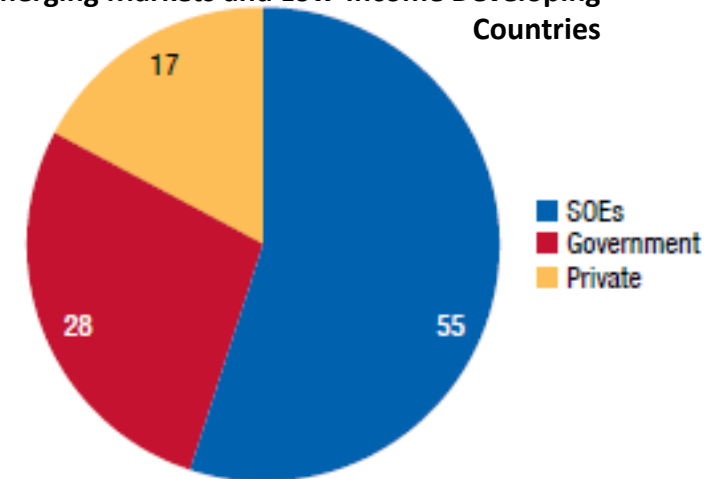
The Role of SOEs in the Global Economy (2/2)

Share of SOE assets among the World's 2,000 largest firms.
(Percent of assets of largest firms)



They also have an important role in the Global Economy. Assets owned by SOEs are worth USD 45 trillion, equivalent to half of global GDP (IMF). They undertake 55% of the total infrastructure investment in emerging and developing economies.

SOEs' Share of Infrastructure Investments in Emerging Markets and Low-Income Developing Countries



What are SOEs and STEs?

The OECD defines SOEs as *“any state-owned corporate entity recognised by national law as an enterprise”*. This includes joint stock companies, limited liability companies and partnerships limited by shares. Statutory corporations, with their legal personality established through specific legislation, are also considered as SOEs if their purpose and activities are of a largely commercial nature.

State-Trading Enterprises differ slightly from SOEs. The WTO defines STEs as *“governmental and non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, **including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports.**”*

Why is it so important to regulate STEs?

The WTO and STEs: Key Obligations (1/3)

The WTO does not forbid STEs. The existing rules aim to ensure that STEs:

- Operate on the basis of commercial considerations and in a non-discriminatory manner;
- Do not erode or nullify the value of negotiated tariff concessions;
- Do not serve to implement otherwise WTO-inconsistent measures, such as quantitative restrictions or subsidies; and
- Are fully notified to the WTO on a regular basis.

The WTO and STEs: Key Obligations (2/3)

Article XVII sets the main obligations of the parties with regards to STEs. Those are:

Non-discrimination: “[STEs] shall, in its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment [...] make any such purchases or sales solely in accordance with commercial considerations,* including price, quality, availability, marketability, transportation and other conditions of purchase or sale” Art. XVII:1.

No quantitative restrictions: The Interpretative Note to Articles XI, XII, XIII, XIV, and XVIII, all of which deal in whole or in part with quantitative restrictions (Art. XI of the GATT), states that: “Throughout [these] Articles, the terms ‘import restrictions’ or ‘export restrictions’ include restrictions made effective through State trading operations”.

The WTO and STEs: Key Obligations (3/3)

Preservation of tariff concessions: GATT Articles II:4 and XVII:3 deal with concessions relating to market access. Article II:4 of GATT 1994 sets that any monopoly of the importation of any product covered in a GATT Schedule **shall not result in protection which is on the average in excess of the amount of protection provided for in that Schedule.**

Transparency: Art. XVII:4 specifies that *“Members shall notify [...] the products which are imported into or exported from their territories by enterprises of the kind described in paragraph 1 (a) of this Article.”*

Analysis of Article XVII:1(a) of the GATT

Objective of Article XVII:1(a)

Subparagraph (a) of Article XVII:1 recognizes that Members may establish or maintain State enterprises or grant exclusive or special privileges to private enterprises, but requires that, if they do so, such enterprises must, when they are involved in certain types of transactions, comply with a specific requirement - **to act consistently with certain principles contained in the GATT 1994.**

Subparagraph (a) seeks to ensure that a Member cannot, through the creation or maintenance of a STE or the grant of exclusive or special privileges to any enterprise, engage in conducts that would be condemned as discriminatory under the GATT 1994 if these were undertaken directly by the Member itself. In other words, subparagraph (a) is an 'anticircumvention' provision

Key case law: Appellate Body Report, Canada – Wheat Exports and Grain Imports

Analysis of Article XVII:1(a) of the GATT

“State-trading enterprises”:

There is no unified definition of what an STE is. The Understanding on the Interpretation of Article XVII of GATT 1994 includes a “working definition”:

- (i) a governmental or non-governmental entity, including marketing boards;
- (ii) the granting to the enterprise of exclusive or special rights or privileges; and
- (iii) a resulting influence, through the enterprise's purchases or sales, on the level or direction of reports or exports.

Analysis of Article XVII:1(a) of the GATT

“State-trading enterprises”:

The Working Party on State Trading Enterprises has developed an illustrative of existing activities in which STEs are involved:

- Statutory marketing boards
- Export marketing boards
- Regulatory marketing boards
- Fiscal monopolies
- Canalizing agencies
- Foreign trade enterprises
- Boards or corporations resulting from nationalized industries

Analysis of Article XVII:1(a) of the GATT

“General principles of non-discriminatory treatment”:

The Panel considers that this general principle of non-discrimination includes at least the provisions of Articles I – Most-Favoured Nation – and III – National Treatment – of the GATT.

The determination of the consistency or inconsistency of an STE's conduct with Article XVII:1 will involve an examination of both **differential treatment and of commercial considerations**.

However, the Interpretative Note to Article XVII:1, which allows a State trading enterprise to charge different prices for its sales of a product in different markets, provided this is done for commercial reasons, to meet conditions of supply and demand in export markets.

*Key case law: Panel Report, Korea – Various Measures on Beef
Appellate Body Report, Canada – Wheat Exports and Grain Imports*

Analysis of Article XVII:1(b) of the GATT

“solely in accordance with commercial considerations”:

A panel inquiring whether an STE has acted solely in accordance with commercial considerations must undertake this inquiry with respect to the market(s) in which the STE is alleged to be engaging in discriminatory conduct.

"adequate opportunity ... to compete for participation in such purchases or sales“:

The second clause of subparagraph (b) refers to purchases and sales transactions where: (i) one of the parties involved in the transaction is an STE; and (ii) the transaction involves imports to or exports from the Member maintaining the STE. Thus, the requirement to afford an adequate opportunity to compete for participation in 'such' purchases and sales must refer to the opportunity to become the STE's counterpart in the transaction, not to an opportunity to replace the STE as a participant in the transaction.

Notification Requirements

WTO Members are obliged to notify all STEs in accordance with the definition provided in paragraph 1 of the WTO Understanding on Article XVII.

"Governmental and non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports."

This notification requirement, however, does not apply to imports of products for immediate or ultimate consumption in governmental use or STE, and not otherwise for resale or use in the production of goods for sale.

Notifications shall be made to the Council for Trade in Goods every two years by a proposed deadline (normally 30 June of that year). **For acceding countries, the deadlines for the submission of their notifications will be governed by their respective Protocols of Accession.**

Notification Requirements

Members identified a wide range of activities undertaken by STEs but these can be broken down into five broad categories of activities:

- ☐ Controlling or undertaking imports or exports;
- ☐ Issuing licences or permits for imports or exports;
- ☐ Determining the domestic sales prices of imports;
- ☐ Administering the multilaterally or bilaterally agreed quotas, tariff quotas or other restraint arrangements or other import or export regulations; and
- ☐ Enforcing the statutory requirements of an agricultural marketing scheme and/or stabilization scheme

Notification Requirements

I. ENUMERATION OF STATE TRADING ENTERPRISES

- A. *Identification of state trading enterprises.*
- B. *Description of products affected (including tariff item number(s) encompassed in product description).*

II. REASON AND PURPOSE

- A. *Reason or purpose for establishing and/or maintaining state trading enterprise.*
- B. *Summary of legal basis for granting the relevant exclusive or special rights or privileges, including legal provisions and summary of statutory or constitutional powers.*

III. DESCRIPTION OF THE FUNCTIONING OF THE STATE TRADING ENTERPRISE

- A. *Summary statement providing overview of operations of the state trading enterprise.*
- B. *Specification of exclusive or special rights or privileges enjoyed by the state trading enterprise.*
- C. *Type of entities other than the state trading enterprise that are allowed to engage in importation/exportation and conditions for participation.*
- D. *How import/export levels are established by the state trading enterprise.*
- E. *How export prices are determined.*
- F. *How the resale prices of imported products are determined.*
- G. *Whether long-term contracts are negotiated by the state trading enterprise. Whether the state trading enterprise is used to fulfil contractual obligations entered into by the government.*
- H. *Brief description of market structure.*

Notification Requirements

- IV. STATISTICAL INFORMATION (*SEE ATTACHED TABLES I - III*)
- V. REASON WHY NO FOREIGN TRADE HAS TAKEN PLACE (*AS APPROPRIATE*)
- VI. ADDITIONAL INFORMATION (*AS APPROPRIATE*)

TABLE I

STATE TRADING: NAME OF STATE TRADING ENTERPRISE

STATISTICAL INFORMATION, IMPORTS

Description of product(s) (including HS number(s))	Total quantity imported ¹	Quantity imported by state trading enterprise ¹	Average import price	Average representative domestic sales price	Mark-up ²	National production
1	2	3	4	5	6	7

Notification Requirements

TABLE II

STATE TRADING: NAME OF STATE TRADING ENTERPRISE

STATISTICAL INFORMATION, EXPORTS

Description of product(s) (including HS number(s))	Total quantity exported ¹	Quantity exported by state trading enterprise ¹	Average procurement price ²	Average representative domestic sales price	Average export price	National production
1	2	3	4	5	6	7

TABLE III

STATE TRADING: NAME OF STATE TRADING ENTERPRISE

STATISTICAL INFORMATION, DOMESTIC ACTIVITIES

Description of product(s) (including HS number(s))	Domestic purchases by state trading enterprise	National production	Domestic sales by state trading enterprise	National consumption
1	2	3	4	5

What's the future of the negotiations on STEs?

China's Precedent: The Treatment of SOEs in China's Protocol of Accession (1/4)

The issue of SOEs in China's attracted a lot of interest. Gary Hufbauer (1998) highlighted that:

Either China commits to privatize and liberalize its SOEs over the next decade, or the fabric of the WTO will be ripped. The operation of a giant state-owned sector, protected by numerous barriers and enjoying unusual privileges, functioning alongside private enterprise in the world trade and investment system, is bound to cause tremendous friction.

China's Precedent: The Treatment of SOEs in China's Protocol of Accession (2/4)

The Protocol's paragraph 10.2, of the section on subsidies, reads:

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

Paragraph 12.2 states that:

China shall, under the Transitional Review Mechanism, notify fiscal and other transfers between or among state-owned enterprises in the agricultural sector (whether national or sub-national) and other enterprises that operate as state trading enterprises in the agricultural sector

China's Precedent: The Treatment of SOEs in China's Protocol of Accession (3/4)

The Working Party paragraphs on SOEs and STEs, incorporated to the Protocol, state that:

China would ensure that all state-owned and state-invested enterprises would make purchases and sales based solely on commercial considerations, e.g., price, quality, marketability and availability, and that the enterprises of other WTO Members would have an adequate opportunity to compete for sales to and purchases from these enterprises on non-discriminatory terms and conditions. In addition, the Government of China would not influence, directly or indirectly, commercial decisions on the part of state-owned or state-invested enterprises.

China's Precedent: The Treatment of SOEs in China's Protocol of Accession (4/4)

Without prejudice to China's rights in future negotiations in the Government Procurement Agreement, all laws, regulations and measures relating to the procurement by state-owned and state-invested enterprises of goods and services for commercial sale, production of goods or supply of services for commercial sale, or for nongovernmental purposes would not be considered to be laws, regulations and measures relating to government procurement. Thus, such purchases or sales would be subject to the provisions of Articles II, XVI and XVII of the GATS and Article III of the GATT 1994.

One final incorporated paragraph, in the section on 'Industrial Policy, including Subsidies', addresses SOEs: China's objective was that state-owned enterprises, including banks, should be run on a commercial basis and be responsible for their own profits and losses.

Thoughts from China's Experience

Thought 1: Despite the large size of the SOE sector in China, the references to SOEs are few.

Thought 2: There might have been an overreliance on the GATT and SCM Agreement to deal with future issues.

Thought 3: There is no plan to effectively transition from an SOE-dominated economy towards a market economy one.

Thought 4: The Protocol of Accession did not grant China lenience in using subsidies to march towards privatization.

Treatment of STEs/SOEs in the CPTPP (1/2)

CPTPP - Characteristics:

- Includes both SOEs (broader definition than WTO – 50% ownership or control) and Designated Monopolies.
- Non-discrimination: SOEs and designated monopolies to provide national treatment and supplier treatment to enterprises of any CPTPP country.
- Commercial consideration: WTO definition + private sector considerations (not profit exclusively).
- Enhanced Transparency: information on the SOEs, how the state party influences their governance through information on any government appointees, share ownership, immunities, non-commercial assistance

Treatment of STEs/SOEs in the CPTPP (2/2)

CPTPP - Characteristics:

- Remedies to Non-Commercial Assistance towards (1) Adverse Effects to Interests (by displacing or impeding of domestically produced and price undercutting) and (2) Injury to Domestic Industry Discipline.
- Exceptions:
 - SOEs with turnover below 200 million SDR (USD 275 million)
 - Government Procurement;
 - Independent pension funds;
 - Actions for addressing failing/failed financial service suppliers;
 - Actions of financial service regulators (government and private) from exercising regulatory/supervisory functions;
 - Central banks performing regulatory/supervisory actions or monetary/credit/exchange rate policy; and
 - Responses to national or global economic emergency.



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Thank you!