

Structural Challenges of CPTPP Non-Commercial Aid Provisions for Chinese SOE

Desafios estruturais das disposições de auxílio não comercial da CPTPP
para empresas estatais chinesas

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ABSTRACT

The issue of state-owned enterprise (SOE) subsidies has been a hot topic in the international community in recent years, and countries have paid close attention to it. The non-commercial aid rules are stipulated in Chapter 17 of the CPTPP, which powerfully fills the original trade rules gap of state-owned enterprise subsidies, and when it comes into effect on December 30, 2018, it profoundly affects the progress of state-owned enterprise subsidies in relevant member countries. China should actively carry out the reform of state-owned enterprises, reasonably utilize the exceptional provisions of the CPTPP agreement, improve the relevant information disclosure mechanism, and adapt to the new changes in international economic and trade rules in a proactive manner.

KEYWORDS: CPTPP; Non-commercial assistance provisions; challenge; Subsidies for state-owned enterprises

RESUMO

A questão dos subsídios às empresas estatais (SOE) tem sido um tema quente na comunidade internacional nos últimos anos, e os países têm prestado muita atenção a ela. As regras de auxílio não comercial estão estipuladas no Capítulo 17 do CPTPP, que preenche de forma poderosa a lacuna das regras comerciais originais dos subsídios às empresas estatais e, quando entrar em vigor em 30 de dezembro de 2018, afetará profundamente o progresso dos subsídios às empresas estatais nos países membros relevantes. A China deve realizar ativamente a reforma das empresas estatais, utilizar razoavelmente as disposições excepcionais do acordo CPTPP, melhorar o mecanismo de divulgação de informações relevantes e adaptar-se às novas mudanças nas regras econômicas e comerciais internacionais de forma proativa.

PALAVRAS-CHAVE: CPTPP; Provisões de assistência não comercial; desafio; Subsídios para empresas estatais.

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SUMMARY:

THE REALITY OF STATE-OWNED ENTERPRISES SUBSIDIES REGULATION NECESSARY;1.1 THE MAINTENANCE OF FAIR COMPETITION IN INTERNATIONAL TRADE;1.2 PREVENTING MARKET DISTORTIONS AND RESOURCE MISUSE;1.3 ABSENCE OF UNIFORM RULES FOR STATE-OWNED ENTERPRISE SUBSIDIES;2.CHARACTERISTICS OF THE CPTPP NON-COMMERCIAL ASSISTANCE PROVISIONS;3.IMPACT OF CPTPP NON-COMMERCIAL ASSISTANCE PROVISIONS ON CHINESE STATE-OWNED ENTERPRISES AND COUNTERMEASURES;3.1 RATIONALIZATION OF THE SCOPE OF THE SUBJECT NON-COMMERCIAL ASSISTANCE;3.2 INTRODUCTION OF AN INFORMATION DISCLOSURE SYSTEM FOR STATE-OWNED ENTERPRISES;3.3 IMPLEMENTING NECESSARY STATE-OWNED ENTERPRISE REFORMS IN A SELECTIVE MANNER

On September 16, 2021, China formally applied for membership in the Comprehensive and Progressive Trans-Pacific Partnership (hereinafter referred to as CPTPP), which is a more important step in the process of participating in the global and dynamic economic and trade governance process following the signing of the Regional Comprehensive Economic Partnership (RCEP). Currently, China is in the process of communicating and consulting with members in accordance with the accession procedure. However, the special chapter on “State-owned enterprises” in the CPTPP poses multiple challenges to China's current system of regulating State-owned enterprises, with the provision on non-commercial assistance being of particular concern.

The non-commercial aid provision in the CPTPP is widely recognized as a reshaping of WTO countervailing regulations. The non-commercial aid provision can be understood as a subsidy rule focusing on state-owned enterprises (SOEs), which seeks to comprehensively restrict the participation of SOEs in overseas investment and global competition through the all-encompassing regulation of SOE subsidies. However, based on the analysis of the elements of non-commercial aid, it can be seen that the non-commercial aid provisions have the characteristics of expanding the scope of subsidy subjects, simplifying the determination of subsidy specificity, and strengthening the scope of application of external benchmarks. Now that China has formally applied to join the program, it must face up to the challenges posed by the rules. According to data, the scale of overseas assets of China's central enterprises has exceeded RMB 8 trillion, and the implementation of the clause may impose compliance constraints on more than 60% of SOEs' cross-border investment projects. 2In the

2 In <http://www.sasac.gov.cn/n2588025/n2588139/c17231710/content.html>. Last access: April 29, 2025.

face of institutional challenges, we need to dialectically recognize its dual effect: on the one hand, the application of the provisions of the pressure can force the deepening of the reform of state-owned enterprises, and promote the establishment of a “competition-neutral” principle of the modern enterprise system, the practice of the average annual growth rate of 10.2% of R & D investment in state-owned enterprises during the period of 2018-2022 has demonstrated the effectiveness of the reform³; on the other hand, it may lead to the risk of doubling the number of trade disputes. According to WTO statistics, the proportion of trade remedy cases involving state-owned enterprises has climbed from 17% in 2015 to 34% in 2021.⁴ Therefore, we must prepare for rainy days, recognize the structural challenges of this clause for Chinese SOEs, and then analyze the countermeasures from a deeper level.

1. THE REALITY OF STATE-OWNED ENTERPRISES SUBSIDIES REGULATION NECESSARY

1.1 THE MAINTENANCE OF FAIR COMPETITION IN INTERNATIONAL TRADE

In today's cross-border foreign trade, state-owned enterprises play an irreplaceable and important role. Especially in emerging economies, state-owned enterprises rely on government subsidies, policy support, etc. in cross-border trade has the inherent advantages that private enterprises do not have, based on which, there are state-owned enterprises to grow and the country's rapid economic upgrading. The report of the twentieth congress of the Communist Party of China states: “We should deepen the reform of State-owned enterprises, accelerate the optimization of the distribution and structural adjustment of the State-owned economy, improve the modern enterprise system with Chinese characteristics, promote entrepreneurship, accelerate the construction of world-class enterprises, build a unified national market, deepen the reform of factor marketization, and build a high-standard market system.”

³ In

<http://www.sasac.gov.cn/n4470048/n32559362/n33033563/n33033575/n33062467/c33070531/content.html>. Last access: April 29, 2025.

⁴ In

https://www.wto.org/search/search_e.aspx?search=basic&searchText=Trade+Remedies+Statistics&method=pagination&pag=0&roles=%2Cpublic%2C. Last access: April 29, 2025.

When SOEs are involved in international trade and investment activities, their behavior is more likely to be subject to concerns and questions from all sides. Given the close links between SOEs and the government, SOEs involved in international trade and investment that receive subsidies directly or indirectly from the government can be challenged for disrupting fair competition in the marketplace. In addition, SOEs are more likely to have financial advantages over private companies, such as better prices and easier access to goods or financing services. Although China has implemented extensive market-oriented reforms in recent years, and has gradually reduced subsidies to SOEs, the OECD's "China's Markets: A Guide for the Private Sector," published by China's Ministry of Economic Affairs and the Ministry of Commerce, has not yet been published. However, the OECD Economic Surveys of China still consider that SOEs enjoy various forms of preferential treatment, such as tax breaks and exemptions.⁵ In order to maintain fair competition in international trade, it is particularly important to regulate subsidies to state-owned enterprises. By regulating subsidies of state-owned enterprises, it can ensure that enterprises of all countries enjoy equal competition opportunities in international trade, so as to maintain the stability and sustainable development of international trade order.

1.2 PREVENTING MARKET DISTORTIONS AND RESOURCE MISUSE

The main reason why subsidies by State-owned enterprises in China have long been criticized by developed countries is the lack of effective subsidy rules and the abuse of subsidies. Economic policy subsidies adopted to promote rapid economic growth are, in most cases, contrary to the purpose of maintaining a level playing field. In China, there are still real problems in the field of subsidies, such as distortion of competition, endogeneity crisis, adverse selection and local protection. (Wang Yongfu and Bi Jinping ,2020) Therefore, regulating subsidies for State-owned enterprises can prevent market distortion and resource mismatch and improve the efficiency of resource utilization.

1.3 ABSENCE OF UNIFORM RULES FOR STATE-OWNED ENTERPRISE SUBSIDIES

Before the CPTPP was reached, few international economic and trade agreements involve the regulation of subsidies for state-owned enterprises, the reason is that, as a state-owned enterprise

⁵ OECD Economic Surveys, China 2019, at <https://www.oecd-ilibrary.org/economics/oecd-economic-surveys-china-2019-eco-surveys-chn-2019-en>. Last access: April 29, 2025.

subsidies in the problem of difficulties, some state-owned enterprises hold the economic lifeline of the country is unwilling to limit the policy support for state-owned enterprises, which directly leads to state-owned enterprise subsidies in the negotiations on the relevant agreements to avoid talking about the problem. Therefore, in the international trade in goods agreement involving state-owned enterprises, often in the trade remedy chapter to take indirect regulation, agreed to apply the 《SCM Agreement》, in this way, will face the “state-owned enterprises constitute the 《SCM Agreement》 in the public institutions” this controversial issue. The lack of uniform rules on subsidies by state-owned enterprises makes it difficult to regulate subsidies by state-owned enterprises in international economic and trade activities, and easily leads to the generalization of subsidies and countervailing measures by state-owned enterprises.

2. CHARACTERISTICS OF THE CPTPP NON-COMMERCIAL ASSISTANCE PROVISIONS

The rules on non-commercial assistance are an important institutional innovation and differ significantly from the relevant provisions in the WTO's 《SCM Agreement》. In order to help us better understand the innovation of the CPTPP rules, the following is a brief comparison between the CPTPP non-commercial assistance and the 《SCM Agreement, and to identify the links and differences between the two.

Compared with the SCM Agreement, the CPTPP non-commercial aid rules have the following three main features: first, the expansion of the subject of subsidies. The applicable subjects of subsidies include the receiving subject and the providing subject, and the SCM Agreement emphasizes the governmental nature of the subsidies provided by the providing subject, while the non-commercial aid rules expand the providing subject of subsidies from the governmental subject to the market subject including state-owned enterprises by blurring the commercial attributes of the state-owned enterprises and the public attributes. Second, the requirement of “conferring a benefit” is omitted. In short, a benefit is an advantage that is not normally available in a fair market. (Cao Jianming and He Xiaoyong ,2011) While the SCM Agreement requires subsidies to satisfy both the “existence of government financing” and the “conferring of a benefit” requirements, the omission of the “conferring of a benefit” requirement in the case of non-commercial assistance is tantamount to

a relaxation of the “conferring of a benefit” requirement. The omission of “granting a benefit” in the case of non-commercial aid is equivalent to relaxing the threshold for recognizing non-commercial aid. (Mao zhenzhen,2017)Thirdly, the field of application is expanded to the field of trade in services and investment, while the SCM Agreement is limited to the field of trade only. (Chen Yao ,2021)Among them, in the dispute settlement mechanism, the determination of subsidies involves a large amount of materials and evidence, compared with the dispute settlement mechanism of the WTO, the CPTPP dispute settlement mechanism only has a limited secretarial function, and the obtaining of materials and evidence for the determination of subsidies will become a difficult point in the operation of the CPTPP dispute settlement mechanism.

The SCM Agreement follows the principle of neutrality of ownership, and the design of the system is based on functions and authorization, supplemented by control. It is not set up to focus on ownership, but rather to practice “encouraging private investment” and “depoliticization” without defining any economy. Because of the wide scope for interpretation of the norms, there have been many disputes in subsequent dispute settlement cases, the most widespread of which has been over public institutions. In the Korea Merchant Marine case (WT/DS273/AB/R), the panel adopted the “government control theory”, holding that “controlled by the government or other public institutions” was the main criterion for recognizing a public institution, mainly in terms of its shareholding structure, day-to-day operation, appointment and dismissal of personnel, annual business plan and so on. The “government control theory” considers “controlled by the government or other public organizations” to be the main criterion for identifying public organizations, mainly in terms of shareholding structure, daily operation, appointment and dismissal of personnel, and annual business plan.⁶ The “government control theory” focuses on ownership, with the first tier examining the “ownership” of the enterprise, and then considering other elements such as the enterprise's shareholding, voting rights, and the right to appoint and remove personnel, based on the fulfillment of the first tier. From the definition of non-commercial assistance to state-owned enterprises, we can see that the CPTPP regulation of state-owned enterprises has gone beyond the broad control theory, not only abandoned the WTO principle of ownership neutrality, to “ownership” as the core, but also through the combination of equity + voting rights + the right to appoint and remove personnel, but also strengthened the review of the functions of the enterprise. This definitional model is in the

⁶ In https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds273_e.htm. Last access: April 29, 2025.

broader sense of the term “ownership”. This definitional model is an expansion of the scope of the subject matter under the broader theory of government control. This expansion of the definition broadens the scope of the subject of the subsidy to include nearly the vast majority of Chinese state-owned enterprises (SOEs), affects the development of SOEs' overseas trade, and may lead to the abuse of countervailing measures. Non-commercial aid adopts a “strengthened” version of the government control doctrine, behind which the United States and other Western countries have created an unfavorable presumption against Chinese SOEs. However, the non-commercial aid provision focuses only on the economic benefits of the enterprise and ignores the social benefits of commercial SOEs. Unlike public welfare enterprises, commercial SOEs are burdened with the double pressure of economic and social benefits. These SOEs, because of their ownership attributes, are burdened with heavy public service obligations. Especially since the outbreak of the new coronary pneumonia epidemic, state-owned enterprises have played an important role in protecting people's livelihood, stabilizing growth and resisting risks. Both commercial SOEs and public welfare SOEs play an irreplaceable role in the smooth and healthy development of China's economy.

3. IMPACT OF CPTPP NON-COMMERCIAL ASSISTANCE PROVISIONS ON CHINESE STATE-OWNED ENTERPRISES AND COUNTERMEASURES

Non-commercial assistance clauses will not only play a pivotal role in the future development of international economic law, but will also have a far-reaching impact on the development of Chinese state-owned enterprises (SOEs). Looking ahead, Chinese SOEs are likely to face frequent countervailing investigations involving such clauses, and related disputes will emerge frequently. Chinese SOEs will face unprecedentedly fierce international competition, and their stability and development will be seriously threatened. How to adequately deal with non-commercial assistance, a trade protection tool permitted under some RTAs, to effectively protect the security of SOEs and to maintain a fair trade order, is an important issue that should be of particular concern to China's SOE community, the legal community and the academic community.

3.1 RATIONALIZATION OF THE SCOPE OF THE SUBJECT NON-COMMERCIAL ASSISTANCE

The principle of competitive neutrality has its origins in national “neutrality” regimes and has undergone a complex evolution from “neutrality” to “tax neutrality” to “competitive neutrality”. It has undergone a complex evolution from “neutrality” to “tax neutrality” to “competitive neutrality”. At the beginning, it started from the political attitude of the state to maintain “neutrality” between the belligerent countries, then scholars transplanted it to the field of taxation to form “tax neutrality”, and then “competitive neutrality” was recognized at the legislative level for the first time. For the first time, the principle of competitive neutrality has been recognized at the legislative level. The connotation of the principle of competitive neutrality should not take into account the ownership status of enterprises, and in the field of subsidies, only consider whether the subsidy behavior is neutral, whether it really distorts the market, and destroys the balance between subsidies and countervailing rules. This necessarily includes, among other things, the neutrality of the object of the subsidy, the neutrality of the method, and the neutrality of the criteria for granting the subsidy. However, the non-commercial assistance provisions have imbalances such as adopting the ownership + equity + control criteria to define SOEs, simplifying the review elements of subsidy exclusivity, and reinforcing the application of external benchmarks, which will greatly limit the development of SOEs.

The non-commercial assistance provisions simplify the elements of subsidy recognition and broaden the scope of subsidy recognition, making it easier for SOEs to fall under the regulation. The scope of the subject of non-commercial assistance is considered too broad. The non-commercial assistance clause prohibits not only the Government from providing non-commercial assistance to State-owned enterprises, but also prohibits State-owned enterprises from providing non-commercial assistance to other State-owned enterprises, and the scope of regulation is too broad. Once a commitment is made, it will pose a serious challenge to the supervision of State-owned assets and the reform and development of State-owned enterprises in China. China's Countervailing Provisions of the People's Republic of China (hereinafter referred to as “Countervailing Provisions”) are formulated on the basis of the Foreign Trade and Economic Cooperation Law and mainly with reference to the framework and content of the SCM Agreement. (Yuan guhao, 2003) With regard to State-owned enterprises, the Law of the People's Republic of China on State-owned Assets of Enterprises defines

them as State-funded enterprises, and article 5 sets out the categories of State-owned enterprises. With respect to SOEs, the Law of the People's Republic of China on State-owned Assets of Enterprises defines them as state-funded enterprises, and Article 5 sets out the categories of SOEs. Article 2 of the Measures for Financial Management of Overseas Investment by State-owned Enterprises defines state-owned enterprises more clearly as a kind of enterprises for which the State Council and local governments are the main contributors of capital and for which they have the responsibility of contributors, and, at the same time, because this kind of enterprise uses state-owned assets for investment, it is subject to the supervision of state-owned assets supervision and management agencies. However, the relevant laws and regulations on the definition of state-owned enterprises are still not clear and specific enough, only from the identity of the contribution to make a determination, not from the business behavior to make a determination. (Liu xiangdong, 2022) Therefore, most of the subsidies of state-owned enterprises will fall into non-commercial assistance, and state-owned enterprises face the threat of a large number of countervailing investigations.

First of all, in terms of legislation, a clear definition of State-owned enterprises should be made, taking commerciality as the starting point. At the same time, taking into account the special functions of SOEs, it is possible to separate SOEs with social service functions from those engaged in commercial activities, and to require SOEs engaged in commercial activities to participate independently in market competition. Alternatively, the transparency review power of the European Commission can be borrowed to require SOEs to independently assume responsibility for their commercial and public service behaviors by setting up different accounts. (Tang jing, 2014) Secondly, when conducting negotiations, China can consider drawing on the practices of other members to rationally utilize the exceptionality provisions to reduce, to a certain extent, the adverse impact of high standards in the agreement. Vietnam, Malaysia, Brunei, etc. also have state-owned enterprises and have accepted the non-commercial assistance provisions. Can refer to the practice of Vietnam, according to the state-owned enterprises chapter in article 17.9 of the provisions of articles 17.4 and 17.6 for the list of country-specific exceptions, the list of general exceptions for all state-owned enterprises, but also for the specific state-owned enterprises of the special exceptions, and so on.⁷ China should exclude to the maximum extent possible SOEs with strategically important functions

⁷ In <https://www.mfat.govt.nz/assets/Trade-agreements/TPP/Annexes-ENGLISH/Annex-IV.-Viet-Nam.pdf>. Last access: April 29, 2025.

and SOEs in sensitive sectors, such as those supplying raw materials, energy, semi-finished products, and upstream products, and strive for appropriate transitional provisions wherever possible.

3.2 INTRODUCTION OF AN INFORMATION DISCLOSURE SYSTEM FOR STATE-OWNED ENTERPRISES

With regard to information disclosure, Chinese SOEs still do not have a relevant system in place. Listed SOEs publish disclosures of financial fraud, connected transactions and changes in directors' and shareholders' interests to the market in accordance with the Securities Law of the People's Republic of China and the Administrative Measures for Disclosure of Information by Listed Companies. Subsidies do not fall within the scope of mandatory disclosure. Unlisted SOEs report to the State-owned Assets Management Committee in accordance with the Provisional Regulations on the Supervision and Administration of State-owned Assets of Enterprises and the Measures for Statistical Reporting of State-owned Assets of Enterprises.

Therefore, a specialized system of information disclosure for State-owned enterprises should be established on the basis of the information disclosure system for listed companies. The information disclosure system can help ensure the legitimacy and transparency of subsidies and avoid the stigmatization of subsidies by state-owned enterprises. (Tian Xiangyu, 2021) State-owned enterprises should be on a par with listed companies, fully publicize subsidy-related information, and accept the supervision of market players. Of course, the establishment of an information disclosure mechanism for SOEs should also disclose the form and amount of non-commercial aid, the names of the aid-providing subject and the receiving subject, as required by the transparency provisions of the CPTPP. Meanwhile, countervailing-related policies and laws must also follow the principle of transparency. First, policies and laws must be published in a timely manner; second, information on policies and laws published must be accurate and sufficient; third, changes in policies and laws must be published in a timely manner; and fourth, explanations of relevant policies and laws should be made public as far as possible.

3.3 IMPLEMENTING NECESSARY STATE-OWNED ENTERPRISE REFORMS IN A SELECTIVE MANNER

The call for reform of international subsidy rules has become increasingly urgent, and the non-commercial aid provisions represent, to some extent, a new trend in the evolution of subsidy rules. China's state-owned enterprise reform has been practiced many times, but the effect is not significant. Mostly because state-owned enterprises involve government subsidies, and government subsidies are the key to the stable development of state-owned enterprises, China was in a special period in the early days, state-owned enterprises were given the corresponding historical mission, the lack of corresponding norms in the operation of state-owned enterprises. Subsequently, China's economy continued to develop, and state-owned enterprises were gradually given certain powers, and were no longer completely subordinate to the government's instructions. In recent years, the reform of the state-owned enterprise system has entered a period of attack, and state-owned enterprises are more and more equipped with independent legal person forms, which is a positive trend, but the phenomenon of subsidization still exists. Therefore, subsidies should be made on an objective and neutral basis, and subsidies should be provided to eligible state-owned enterprises in order to better safeguard the fair and orderly development of the market.

The separation of government and enterprises should be gradually realized. A prominent problem in China today is the government's excessive equity ownership of state-owned enterprises. While the CPTPP avoids this point of contention by directly replacing “public institutions” with “state-owned enterprises,” the resolution of this dispute may have a significant impact on China's state-owned enterprises. Although the CPTPP avoids this point of contention and directly replaces “public institutions” with “state-owned enterprises”, the resolution of this dispute may have a greater impact on China's state-owned enterprises, and in the face of this dilemma, China must accelerate the reform of domestic state-owned enterprises. Further clarification of the definition of the government's “right to appoint” and “right to control” will help to establish more legitimate criteria for determining such rights. Therefore, China should adhere to the provisions of the Guiding Opinions on Deepening the Reform of State-Owned Enterprises with regard to commercial State-owned enterprises and public welfare State-owned enterprises, which are in line with China's actual practice and are of great significance in building a level playing field and consolidating the foundation of the market economy.

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