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Regulating Chinese SOEs under the WTO System:

Analysis on Legal Effects of GATT/WTO Rules over SOEs in China

WTO와 중국의 국유기업: 중국 국유기업에 대한 GATT/WTO 규범의 법적 효과 분석을 중심으로

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Abstract

Regulating Chinese SOEs under the WTO System: Analysis on Legal Effects of GATT/WTO Rules over SOEs in China

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This research examines the function of GATT/WTO rules applied on Chinese state-owned enterprises after China's accession to the WTO. The question was raised on the increasingly advancing Chinese SOEs during the past decade, despite the existence of disciplines in the WTO containing anti-competitive behavior by the member countries. The purpose of this thesis is to gauge the applicability of established WTO disciplines to the diverse Chinese SOE activities home and abroad. At the outset, it is imperative to take a look at the existing GATT/WTO rules that addresses or could be applicable to Chinese SOEs. Such provisions were found in the GATT 1994, Agreement on Subsidies and Countervailing Measures, and General Agreement on Trade in Services. Next, the following case studies from the dispute settlement cases related to Chinese SOEs are provided to analyze the legal effects of the disciplines. It was verified from the studies that several problems have prevented GATT/WTO rules from applying. First, the

members taking countervailing measures on products from China may encounter difficulties during the investigation due to lack of transparency. Most of the time, the investigating country would fail to explicitly determine China's SOE subsidies in the current situation. Second, highly relevant provisions were disregarded by the complainant members and the adjudicators. Third, in respect of service sector where member itself makes commitments on each sector, Chinese government protecting its sectors with majority of SOEs seems possible. Therefore, the relevant discussions should be made in the WTO negotiations. However, in situation where current Doha Round is mostly suspended, and prospects for future negotiation are unclear, regulating discriminatory activities by the SOEs in China may be possible through bilateral or multilateral Agreements. Also, TPP containing extensive and specific requirements on SOEs may present models to other negotiations.

Keywords : WTO, China, State-owned Enterprise (SOE), General Agreement on Tariffs and Trade, Agreement on Subsidies and Countervailing Measures, General Agreement on Trade in Services

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Abbreviations

AA	Agreement on Agriculture
CCP	Chinese Communist Party
CUP	China Union Pay
CVD	Countervailing Duty
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
IPO	Initial Public Offering
KORUS FTA	Korea-US FTA
LIBOR	London Interbank Offered Rate
MFN	Most Favored Nation
RMB	Renminbi
SASAC	State-owned Assets Supervision and Administration Commission
SCM	Subsidies and Countervailing Measures
SOCB	State-owned Commercial Bank
SOE	State-owned Enterprise
STE	State Trading Enterprise
TPP	Trans-Pacific Partnership
USDOC	United States Department on Commerce
USTR	United States Trade Representative
WTO	World Trade Organization

Chapter I. Introduction

When majority of socialist countries including the Soviet Union enforced an extensive economic reform so called the "shock therapy" in the 1990s, China underwent a gradual reform known as "crossing the river by feeling the stones." During the reform, China initiated marketization and privatization, reaching status that 95% of total retail price are determined by the market in 1999.[1] Premier Zhu Rongji's State-owned enterprise (SOE) reform from late 1990s also depleted the number of SOEs; 40% decrease from 1995 to 2002, while the number of central SOEs fell from 198 in 2004 to 108 in 2015.[2]

Despite to dramatic reform, China has the largest state-owned sector in the world,[3] and they might not be pure commercial entities even though they are engaging in commercial activities due to their ownership status.[4] Nevertheless, China's SOEs are rapidly growing in its size, occupying considerable number of upper ranks among the world enterprises. Such

[1] See Lardy (2004).
[2] See OECD (2009), SASAC (2003), SASAC (2015).
[3] See Miner (2016).
[4] See Zheng (2014).

results of large Chinese SOEs have become nuisance to trading partners as intimidating competitors inside and outside of China.[5] John Jackson noted that "China's government-owned, or state-operated or owned, enterprises are big challenge to the system."[6] The problem is that Chinese government actively provides subsidies during the reform, and such reform-driven subsidies may be discrepant to other member's interests.[7] In respect that WTO rules were developed based upon a premise of a market economy, WTO does not present particular economic system or obligations on the ownership basis.[8] However, there are several relevant WTO rules that can possibly regulate SOEs in China, which partially implicated in the dispute settlements related to Chinese state sectors. Then how could Chinese SOEs succeeded after 15 years of WTO accession, and what kind of functions did GATT/WTO system carry out to the Chinese SOEs activities in legal aspects?

Next chapter will be on current status of Chinese SOEs. Statistics and numbers are shown, along with ownership structure to find out the definition of SOE. Types and conditions of subsidies or preferential treatments provided in China are also presented. In chapter 3, GATT/WTO

[5] See Gang and Hope (2013).
[6] See Jackson (2003).
[7] See Qin (2004).
[8] Ibid.

rules related to Chinese SOEs are given in 3 aspects; rules on subsidies, disciplines which directly address SOEs, and rules in the service sectors. Subsequently, case study will be done through the dispute settlement cases in the following chapter to draw significant findings.

Chapter II. Current Status of State-owned Enterprises in China

2.1. Chinese SOEs among the International Players

Although enterprise reform has deepened since few decades ago, China's state-owned enterprises still seems to be the dominant among the national champions. It is also the vanguard of the Chinese firms that compete with international companies including the United States. In the 12th five-year plan from 2011 to 2015, Chinese government commits to carry out reforming SOEs to adopt corporate system, and encourages to advance into the global market, as known as 'Go Global (*zou chu qu*)' strategy, after strengthening its competitiveness.[9]

Since few years ago, Chinese enterprises have occupied the Fortune 500 rankings. Among the 500 enterprises in the list of year 2014, 98 were

[9] English version of the twelfth five-year plan can be found in the webpage of British Chamber of commerce in China. (http://www.britishchamber.cn/content/chinas-twelfth-five-year-plan-2011-2015-full-english-version)

Chinese and the top 12 were state-owned.[10] Table 1 shows the twelve top Chinese SOEs by rankings, and the ranks in the Fortune 500 are marked by the company's gross revenue.

<Table 1> Chinese State-owned Enterprises among Fortune 500 (2014)

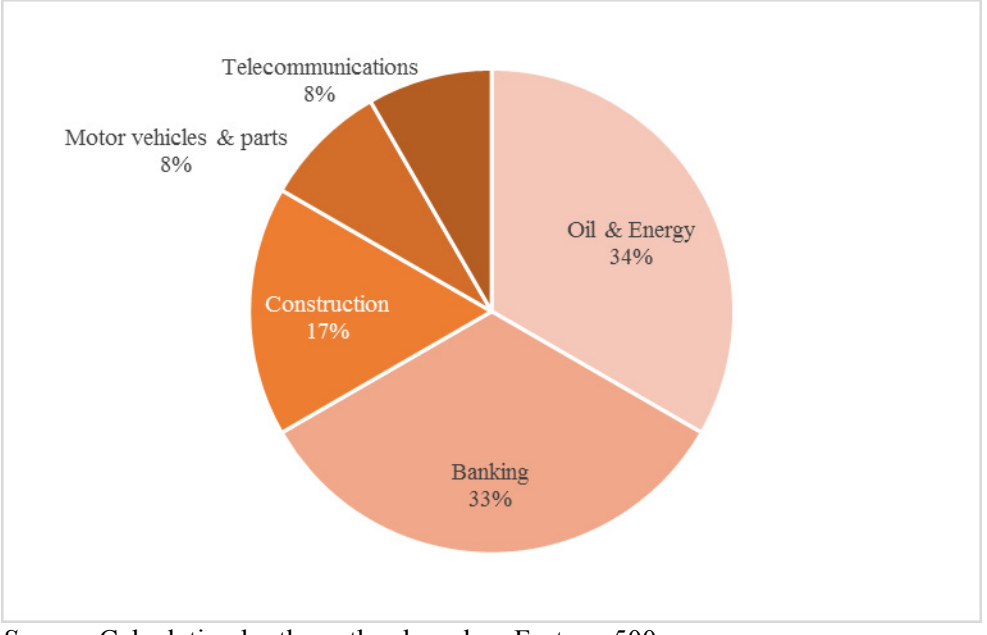
No.	Company	Rank	Revenue	Sector
1	Sinopec Group	2	$446.8 bil.	Oil
2	China National Petroleum (CNPC)	4	$428.6 bil.	Oil
3	State Grid	7	$339.4 bil.	Energy
4	Industrial & Commercial Bank of China (ICBC)	18	$163.2 bil.	Banking
5	China Construction Bank	29	$139.9 bil.	Banking
6	Agricultural Bank of China	36	$130 bil.	Banking
7	China State Construction Engineering (CSCEC)	37	$129.9 bil.	Construction & Real estate
8	Bank of China (BOC)	45	$120.9 bil.	Banking
9	China Mobile Communications	55	$107.5 bil.	Telecommunications
10	SAIC Motor	60	$102.2 bil.	Motor vehicles & parts
11	China Railway Engineering	71	$99.5 bil.	Railway construction
12	China National Offshore Oil (CNOOC)	72	$99.2 bil.	Oil

Source: Fortune 500.

[10] Hong Kong firms are included in the Chinese enterprises.

Top three enterprises are engaging in the oil and energy sectors, followed by banks, constructions, service sectors that are not financial, and motor vehicles. Sinopec group marked the second among the highest gross revenue in the world. Figure 1 shows the largest Chinese state-owned companies in the rankings by sector. It indicates that other than oil and energy, size of the enterprises that fall under service sector is considerable.

<Figure 1> Share of Fortune 500 Chinese State-owned Enterprises by Sector (2014)



Source: Calculation by the author based on Fortune 500.

Meanwhile, in the list from Forbes Global 2000[11] in the year 2015, the Chinese state-owned banks have ranked top four in the world as seen in table 2. Among the 25 companies in the list, every Chinese enterprises are SOEs, and every SOEs are Chinese. The value of Assets of the biggest SOEs in China surpasses the ones in the US.

<Table 2> Top 25 Enterprises in the Forbes Global 2000

(Unit: billion USD)

Rank	Company	SOE	Country	Sales	Profits	Assets	Market Value
1	ICBC	o	China	166.8	44.8	3,322.0	278.3
2	China Construction Bank	o	China	130.5	37.0	2,698.9	212.9
3	Agricultural Bank of China	o	China	129.2	29.1	2,574.8	189.9
4	Bank of China	o	China	120.3	27.5	2,458.3	199.1
5	Berkshire Hathaway	x	United States	194.7	19.9	534.6	354.8
6	JPMorgan Chase	x	United States	97.8	21.2	2,593.6	225.5
7	Exxon Mobil	x	United States	376.2	32.5	349.5	357.1
8	PetroChina	o	China	333.4	17.4	387.7	334.6
9	General Electric	x	United States	148.5	15.2	648.3	253.5
10	Wells Fargo	x	United States	30.4	23.1	1,701.4	278.3
11	Toyota Motor	x	Japan	252.2	19.1	389.7	239.0
12	Apple	x	United States	199.4	44.5	261.9	741.8
13	Royal Dutch Shell	x	Netherlands	420.4	14.9	353.1	195.4
14	Volkswagen Group	x	Germany	268.5	14.4	425.0	126.0
15	HSBC Holdings	x	United Kingdom	81.1	13.5	2,634.1	167.7
16	Chevron	x	United States	191.8	19.2	266.0	201.0
17	Wal-Mart Stores	x	United States	485.7	16.4	203.7	261.3
18	Samsung Electronics	x	South Korea	195.9	21.9	209.6	199.4
19	Citigroup	x	United States	93.9	7.2	1,846.0	156.7
20	China Mobile	o	China	101.1	17.7	209.0	271.5
21	Allianz	x	Germany	128.4	8.3	979.0	82.0
22	Verizon Communications	x	United States	127.1	9.6	232.7	202.5
23	Bnak of America	x	United States	97.0	4.8	2,114.1	163.2
24	Sinopec	o	China	427.6	7.7	233.9	121.0
25	Microsoft	x	United States	93.3	20.7	174.8	340.8

Source: Forbes Global 2000 for the rankings, country, sales, profits, assets, market value and OECD for the ownership status.

[11] The methodology to calculate the rankings is to consider the sales, profits, assets and market value. For more information, see http://www.forbes.com/sites/andreamurphy/2015/05/06/2015-global-2000-methodology/#66457ccc4193

Clearly, Chinese SOEs have dramatically grown in its size, considering that many state sectors were debt-ridden by bad performance before the SOE reform by the Chinese Communist Party until recently. Now, large SOEs seem to be "the backbone of China's going out strategy" as the Minister of Commerce Chen Deming has indicated in a 2011 conference.

Yet, there are concerns on such Chinese state sector along with China's aggressive policy to integrate their enterprises into the global economy. In 2014, the OECD Secretary-General Angel Gurria delivered a speech[12] at a dinner with the foreign business community in Beijing expressing that the 'Go Global' strategy rouses some concerns regarding favored status of SOEs in China. In addition, the opaque business practices by the state enterprises are impeding fair competition to the trading partners.

Among the 500 and above Chinese enterprises currently listed on the foreign stock markets, about 200 are state-owned. Firms that are listed or going through IPO could be deemed as market-driven. However, the role of the SOEs is to carry out Party policies under their protection through monopolies, subsidies, and privileges,[13] while the state is acting as a shareholder.

[12] Full text of the remarks can be found in http://www.oecd.org/china/china-go-global.htm

[13] See McGregor (2012).

2.2. Structure and Ownership of Chinese SOEs

State-owned entities in China were steadily changed in its ownership status, numbers and performances since the Chinese economic reform. Chinese Communist Party (CCP)'s "state capitalism" was the basis of rapid economic growth over the past three decades. SOEs were the means to achieve party policies, just as other authoritarian countries in East Asian countries such as Singapore, Malaysia, or South Korea and Taiwan before democratization.[14] However, the privileged state sectors that were not based on profit-making were soon afflicted with high debt, pushing the party leadership to carry out SOE reform from the 1980s.

SOE reform was undertaken through three phases. First, from the mid-1980s to the mid-1990s was the period of initiating the reform. In 1984 after the Third Plenary Session of the 12th CCP Central Committee, SOE ownership and management rights were separated allowing SOEs to gain their autonomies. However, the reform was at the testing level and was lack of efficiency.[15] During the second phase, former premier Zhu Rongji enforced the full-out reform from 1998 on the underperforming SOEs to become merged, reorganized, or go bankrupt under the policy of "grasp the

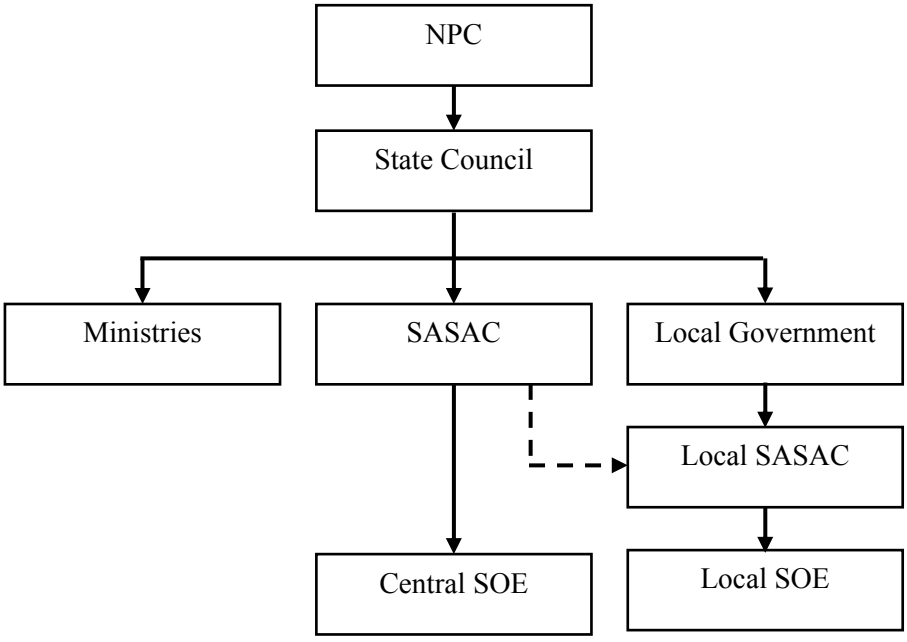
[14] See Cho (2009).
[15] See KIEP 북경사무소브리핑 (2014).

big and release the small (*zhua da fang xiao*)." Big state-owned companies that were to grasp were under tight control of the state, while the small companies to be released were subject to privatizing, restructuring or closing down. The Third phase of the reform was started with the Third Plenary Session of the 16th CCP Central Committee in the late 2002. The party leadership decided to reinforce the mixed-ownership of SOEs and developed a state property management system, following an establishment of the State-owned Assets Supervision and Administration Commissions (SASAC) in 2003 under the State Council.

Figure 2 shows the organization of SASACs and the central and local state enterprises which they supervise. State Council under the National People's Congress serves as a holding company for the central SOEs, while it also supervises and controls local level SASACs which are in charge of SOEs in the provincial, city or district area.[16] Such reforms have corporatized SOEs in both central and regional level, institutionalizing SOEs to be subject to various related laws and regulations.

[16] See Deng et al. (2011).

<Figure 2> Relationships of SASACs and the SOEs in China



Source: Deng et al. (2011).

Under such reforms targeting SOEs, the number and structure of state entities has changed over the period. Table 3 and 4 addresses the number of SOEs in recent years compared to other type of ownerships in China. SOEs only take 3.4 percent among China's business corporations when calculated by holding status, and 1.9 percent by status of registration in year 2012.

<Table 3> Number of Chinese Business Entities by Holding Status

		Total number of enterprises	State-holding	Collective-holding	Private-holding	Hong Kong, Macao and Taiwan-holding	Foreign-holding	Others
2012	Number of entities	8,286,654	278,479	271,295	6,552,049	101,518	109,103	974,210
	Share	*100.0%*	*3.4%*	*3.3%*	*79.1%*	*1.2%*	*1.3%*	*11.8%*
	Annual growth rate	*13.0%*	*6.3%*	*0.4%*	*13.1%*	*6.4%*	*5.9%*	*20.5%*
2011	Number of entities	7,331,200	261,944	270,139	5,792,102	95,382	102,989	808,644
	Share	*100.0%*	*3.6%*	*3.7%*	*79.0%*	*1.3%*	*1.4%*	*11.0%*
	Annual growth rate	*12.5%*	*4.9%*	*0.2%*	*13.0%*	*6.3%*	*4.7%*	*18.2%*
2010	Number of entities	6,517,700	249,600	269,600	5,126,400	89,700	98,400	684,000
	Share	*100.0%*	*3.8%*	*4.1%*	*78.7%*	*1.4%*	*1.5%*	*10.5%*

Source: National Bureau of Statistics of China, various years.

<Table 4> Number of Chinese Business Entities by Status of Registration

		Total Number of Enterprises	State-owned Enterprises	Collective-owned Enterprises	Cooperative Enterprises	Joint Ownership	Limited Liability Corporations	Share-holding Corporations Ltd.	Private
2012	Number of entities	8,286,654	159,644	183,870	74,697	13,585	1,090,375	138,698	5,917,718
	Share	*100.0%*	*1.9%*	*2.2%*	*0.9%*	*0.2%*	*13.2%*	*1.7%*	*71.4%*
	Annual growth rate	*13.0%*	*2.1%*	*-1.7%*	*2.1%*	*1.4%*	*18.9%*	*7.6%*	*12.6%*
2011	Number of entities	7,331,200	156,323	187,065	73,159	13,399	917,113	128,954	5,254,870
	Share	*100.0%*	*2.1%*	*2.6%*	*1.0%*	*0.2%*	*12.5%*	*1.8%*	*71.7%*
	Annual growth rate	*12.5%*	*1.6%*	*-2.7%*	*1.9%*	*3.1%*	*18.6%*	*8.2%*	*12.2%*
2010	Number of entities	6,517,700	153,800	192,300	71,800	13,000	773,300	119,200	4,683,900
	Share	*100.0%*	*2.4%*	*3.0%*	*1.1%*	*0.2%*	*11.9%*	*1.8%*	*71.9%*

Source: National Bureau of Statistics of China, various years.

However, the numbers that are shown in the statistics includes unsighted share by the state. The CCP's policy "grasp the big and release the small" have mixed up state ownership into various types of status, ending up the state ownership also remaining in the numbers in the collective or joint ownership. Furthermore, as a result of the reform, the remaining SOEs are the largest in its size. These companies mainly monopolize in the sectors such as natural resource and infrastructure, or important sectors such as real estate, construction and car manufacturing.[17]

As a result, the share of each state-holding and state-owned entity only reflects pure state-ownership among China's corporations. The official definition of the enterprises by the National Bureau of Statistics of China is as table 5.[18] It shows that state ownership is limited to entities which entire assets are held by the state. In fact, even China's ministries and agencies have different definitions over SOE.[19] Therefore, the exact proportion of SOE roles in the Chinese economy are hard to measure, while OECD expects the share of SOEs in China's biggest firms that plays key roles in

[17] Ibid.
[18] For detailed information on SOE ownership, see Gang, Fan and Nicholas C. Hope. 2013. "The Role of State-Owned Enterprises in the Chinese Economy." *China US Focus*, and Lardy, Nicholas R. 2014. *Markets over Mao: The rise of private business in China*: Peterson Institute for International Economics.
[19] See McGregor (2012).

the economy were the highest among 23 OECD and 6 BRIICS countries.[20]

<Table 5> Definition of Each Enterprise Type by Ownership

Enterprise Type	Ownership
State-owned Enterprises	Entire assets are owned by the State.*
Collective-owned Enterprises	Assets are collectively owned.
Cooperative Enterprises	Independent operation, accounting, management and distribution with capitals from employees and certain proportion from the outside.
Joint Ownership Enterprises	Joint investment by two or more enterprises of the same or different ownership. It includes State joint ownership, collective joint ownership, joint State-collective enterprises etc.
Limited Liability Corporations	Investors holding limited liability depending on the share of investment. It includes solely State-funded limited liability corporations.
Share-holding Corporations Ltd.	Registered capital are divided into equal shares and raised through issuing stocks.
Private Enterprises	Invested, established or controlled by natural persons based on profit-making using employed labor.

Note: *Solely State-funded corporations in the limited liability corporations not included.
Source: National Bureau of Statistics of China.

Following such definition by the National Bureau of Statistics, the data

[20] See Kowalski et al. (2013).

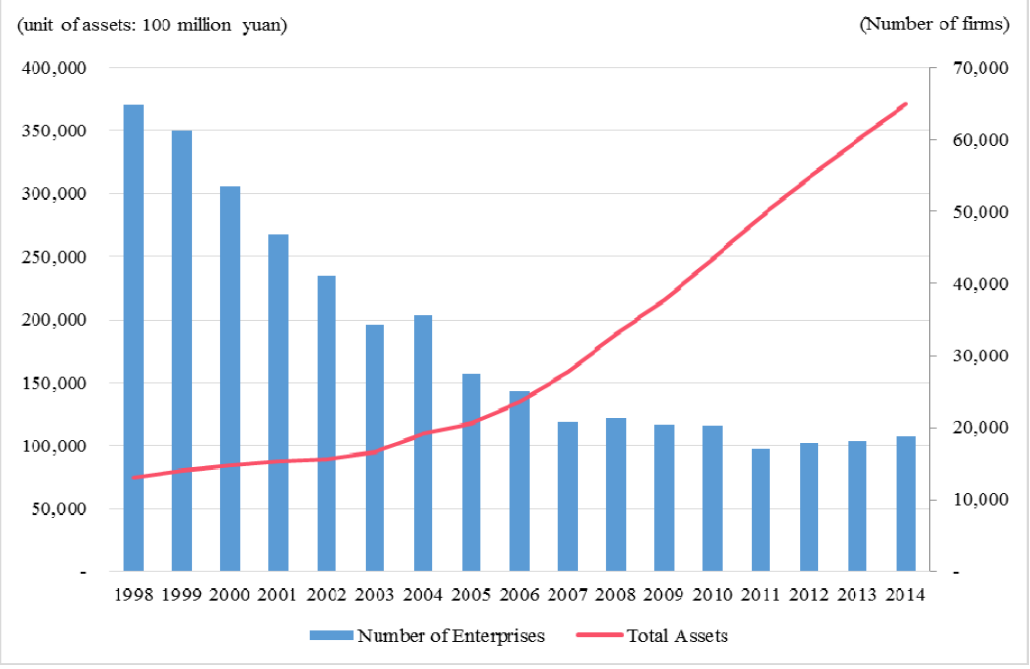
show that the numbers of SOEs are falling over the years while the size of the total state enterprises are growing significantly as shown in table 6 and figure 3. It is expected that the steady decrease of the firm numbers are due to the full-fledged reform from the late-1990s, while the increasing assets attributes to the party policy to narrow down the SOEs to the largest ones.

<Table 6> Number, Assets and the Performance of State-owned and State-holding Industrial Enterprises

Year	Number of Enterprises	Total Assets (100 million yuan)	ROA
1998	64,737	74,916	N/A
1999	61,301	80,472	6.77
2000	53,489	84,015	8.43
2001	46,767	87,902	8.17
2002	41,125	89,095	8.71
2003	34,280	94,520	10.09
2004	35,597	109,708	11
2005	27,477	117,630	11.87
2006	24,961	135,153	12.92
2007	20,680	158,188	13.79
2008	21,313	188,811	11.77
2009	20,510	215,742	11.29
2010	20,253	247,760	13.63
2011	17,052	281,674	13.69
2012	17,851	312,094	12.77
2013	18,197	342,689	11.93
2014	18,808	371,309	11.31

Source: National Bureau of Statistics of China, various years

<Figure 3> Number and Assets of State-owned and State-holding Industrial Enterprises



Source: Calculation by the author based on China Statistical Yearbook, various years.

Also, state-owned commercial banks are intimately associated with non-financial SOEs. China's state ownership on banks are the highest among major economies. The four major state-owned banks which are Bank of China, Industrial and Commercial Bank of China, Construction Bank, and

Agricultural Bank of China hold 43 percent of China's financial assets.[21] State-owned banks at times are funding source to non-financial SOEs on non-commercial basis. Other than preferential loans, they also provide nonperforming bad loans to SOEs for bailout. Detailed state-owned bank supports to the SOEs would be handled in the following part.

When accessing to the WTO, China committed to open its service industry including the banking sector. As a consequence, Chinese political leaders have been endeavored for sector reform for improving its competitiveness.[22] However, in terms of market opening, there has been some violation on the commitments which will be further analyzed in Chapter IV of this thesis.

2.3. Subsidies and Preferential Treatments to SOEs

Several studies have analyzed that state enterprises were favored by the government. For example, Andrew Szamonsszegi and Cole Kyle listed state support to the SOEs by viewing the evidence from the U.S. regulatory filings. According to the report, state support included subsidies and

[21] Meanwhile, banks owned by foreign ownership hold less than 2 percent. See Walter, Carl E, and Fraser JT Howie. 2011. *Red capitalism: The fragile financial foundation of China's extraordinary rise*: John Wiley & Sons.
[22] See Dobson and Kashyap (2006).

preferential treatments to SOEs such as favorable tax rates, granting funds or capital injections, limiting competition to favor national champions, preferential access to production inputs and capital, providing access to low-cost capital, and making purchases from or sales to related entities.[23] There were also supports from state-owned banks to non-commercial SOEs. These behaviors include providing favorable interest rates, debt forgiveness, or providing non-performing loans to un-creditworthy SOEs.[24]

Of such favorable treatment from the government, the most primary vigilance of the WTO would be granting subsidies that has the possibility to distort trade. China has signed on certain commitments at the point of WTO accession related to subsidies that were deemed to be granted in the middle of the economic reform from state capitalism toward market economy. There are several subsidy report to the WTO that China has submitted or investigated by others: the list that China submitted in the Accession Protocol of China, the list that China reported to the WTO in 2006, 2011 and 2015 according to Article XVI:1 of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures (SCM)[25] and the

[23] See Szamonsszegi and Kyle (2011).
[24] Ibid.
[25] Part of the text of the Article 25.10 in the SCM Agreement notes, "*[m]embers agree that, without prejudice to the provisions of paragraph 1 of Article XVI of GATT 1994, their notifications of subsidies shall be submitted not later than 30*

list that the US submitted twice to the WTO after investigating alleged subsidy programs the China has omitted in the previous notification.

First, the Accession Protocol of China Annex 5A includes listed 24 subsidy programs that were implemented in the point of accession in 2001. Among the 24 subsidies, number 1 and 2 shows the "subsidies from central budget provided to certain state-owned enterprises which are running at a loss," and the "subsidies from local budget provided to loss making state owned enterprises" respectively. The form of subsides were grant and tax forgiving. Other than ones that were provided to SOEs, the form of subsidies appears to be such as priority in obtaining loans and foreign currencies, preferential tariff rates or income tax rate, exemption or alleviation of income tax, and loans.[26]

Second, the first report from China to the WTO according to Article XVI:1 of the GATT and Article 25 of the SCM Agreement was in 2006. The period of this report covered 2001-2004, and included 78 lists of subsidies. On the 2006 report, the programs on state-owned enterprises were deleted compared to the list on the Accession Protocol along with some preferential treatments on exports or domestic market development. In the meantime, preferential treatment on foreign-funded enterprises has been

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June of each year."

[26] WTO (2001).

considerably added and elaborated.[27]

The 2011 report shows 93 subsidies list that covers form 2005 to 2008. The form of subsidy is shown as either preferential tax or financial appropriations. 30 of the programs was financial appropriations, 63 was preferential tax.[28]

The most recent report from China was on October 2015, covering from 2009 to 2014. Among 86 subsidy programs, 42 were preferential treatments and 44 were financial appropriations.[29] The number of lists reported has fallen for the first time since the accession, though the sincerity of the report are doubted by other member countries, especially the US.

The USTR has pointed out the lack of transparency of China in submitting relevant subsidy program as requires in the WTO. As a consequence, USTR has submitted nearly 200 subsidy programs which regarded that China has failed to notify in 2011.[30] What is to be worthy of

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[27] WTO (2006).
[28] WTO (2011).
[29] WTO (2015).
[30] SCM Agreement Article 25.10 notes that "*[a]ny member which considers that any measure of another Member having the effects of a subsidy has not been notifies in accordance of GATT 1994 and this Article may bring the matter to the attention of such other Member. If the alleged subsidy is not thereafter notifies promptly, such Member may itself bring the alleged subsidy in question to the notice of the Committee*." For the USTR press release in October 2011, see "United States Details China and India Subsidy Programs in Submission to WTO" (https://ustr.gov/about-us/policy-offices/press-office/press-releases/2011/october/united-states-details-china-and-india-subsidy-prog)

notice in the two submission of the subsidy list in 2011 and 2014 is that the form of subsidies are categorized into prohibited subsidies and actionable subsidies according the SCM Agreement. Also, the list classifies subsidization from the central and local government.[31] Considering that China has inactively reported its subsidy program before the attention of the US, and the two reports by China in 2011 and 2015 was submitted in succession of USTR's assessments, the urging to meet the WTO obligation seem to be effectual.

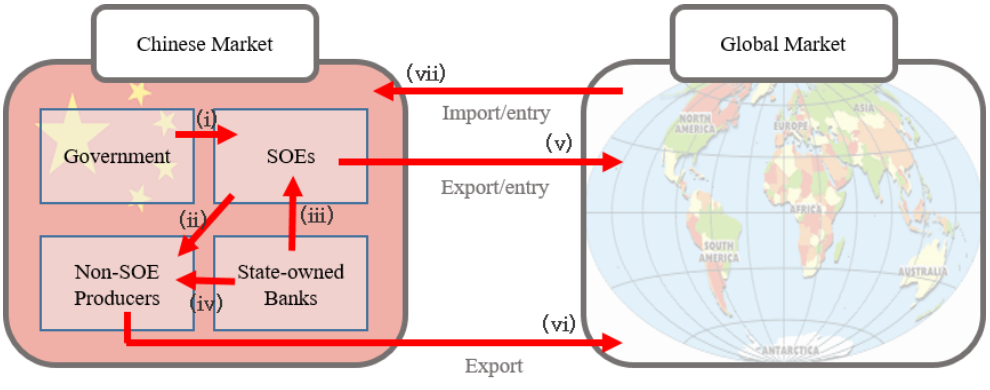
However, still the Chinese government is passive in notifying its subsidization policies following requirements by the Article XVI of GATT and the SCM Agreement. Submitted lists also failed to include every program as seen in USTR's reports. Moreover, the list submitted by China lacks specificity for other member countries to refer to.[32]

[31] WTO (2011).
[32] See 박월라 et al. (2011).

Chapter III. GATT/WTO Rules Related to Chinese SOEs

Economic impact of the operations by state-owned enterprises can exist in various ways both in and out of China. The WTO discipline does not specifically provide whether the rules applicable to SOEs are for domestic or exporting markets. However, it is predictable through the rulings from dispute settlement cases. Presences of Chinese SOEs in the context of international trade can be seen as figure 4.

<Figure 4> Presences of Chinese SOEs in the International Trade



The possibilities are (i) when the government directly grants subsidies or gives preferential treatments, (ii) when SOEs provide inputs to non-SOE producers, (iii) when state-owned banks provide loans to SOEs, (iv) when state-owned banks provide loans to non-SOE producers, (v) when SOEs directly exports to or enter into foreign markets, (vi) when the non-SOE producers exports the products made by SOE inputs, and (vii) when foreigners export to or enters into the Chinese market. In the following parts, relevant GATT/WTO rules will be reviewed, and then the jurisprudence of the related dispute settlement cases will show the implications of each presence of SOEs in and out of China.

3.1. Agreements Related to SOE Subsidies

The provisions that address state activities that might distort trade can be found in both GATT/WTO Agreements and the Accession Protocol of China. First, the SCM Agreement presents the cases that subsidies are deemed to exist. According to Article 1.1(a)(1), a subsidy is deemed to exist when there is a "financial contribution" by a government or any "public body." Financial contribution refers to a direct transfer of funds, foregoing government revenue, or government provision of goods and services other

than general infrastructure or purchases goods. Entrusting or directing to a private body to carry out such functions also can be financial contribution in the context of the Article. State-owned enterprises have high possibility to be fall under "public bodies" under Article 1.1(a)(1) of the SCM Agreement. Currently, clear definition of the "government or any public body" is absent. The "government" includes not only central but also local level governments, while "public body" may include wholly state-investment or public entity over 50% of government share.[33] However, i) if the entity performs public business even though the government share is under majority, ii) or performing commercially with major state-ownership, iii) or when the government controls considerably on the entity then the criteria of the "public body" suggests insufficient definition to make a decision to apply Article 1.1(a)(1).[34] In this case, the "public body" status needs to be considered under case-by-case analysis.

Another basis for deciding whether subsidy exists is to see if a 'benefit' is conferred by the subsidy. Therefore, an investigating authority in a member country that poses countervailing measures to the imported goods would calculate the amount of benefits to the subsidy recipient. Article 14 of the SCM Agreement elaborates the benchmarks in calculating the benefit

[33] See 안덕근 (2003).
[34] Ibid.

conferred for the CVD investigating authorities. Article 14(d) provides that a benefit is considered to be conferred when the provision of goods or services or purchase of goods by a government is made "less than adequate remuneration or the purchase is made for more than adequate remuneration." Here, the "adequacy" is determined by market conditions such as price, quality, availability or marketability. Meanwhile, for the government loans, Article 14(b) prescribes that the difference between the amount that the firm pays on the government loan and the amount the firm would pay on a commercial loan in the market is considered as benefit conferred.

Article 2.1 of the SCM Agreement also provides whether SOE provisions can be seen as subsidies by assessing the specificity of the provision. A subsidy defined in Article 1 is subject to prohibited or actionable subsidies and countervailing measures only if the subsidy is specific. Article 2 provides the principles to decide whether a subsidy is specific. A subsidy is deemed specific when the granting authority or the legislation that the authority follows explicitly limits access to a subsidy to certain enterprises (*de jure* specificity). Even though the subsidy appears not to be specific, if the subsidy is in fact specific, it may be considered specific

after reviewing certain factors[35] (*de facto* specificity).

Second, besides the SCM Agreements, the Accession Protocol of China also includes relevant rules on SOE subsidies. The Protocol and the certain paragraphs in the Report of the Working Party on the Accession of China is 'an integral part of the WTO Agreement,' and the rules are also covered by the DSU, thus available in the dispute settlement procedure.[36] During the period of China preparing for accessing to the WTO in the 1990s, SOEs were large in its number and played much more important role in the economy compared to the present. As a result, the Protocol contains several provisions related to SOEs including ones relevant to subsidies.[37]

In paragraph 10.3 of the Protocol and paragraph 234 in the Working Party Report, China committed to eliminate all export and import substitution subsidies and export subsidies on agricultural products. In contrast to the permission of maintenance of agricultural export subsidies

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[35] According to Article 2.1(c), such factors are "*use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy.*"

[36] Article 1.2 of the Accession Protocol of China notes that "*[t]he WTO Agreement to which China accedes shall be the WTO Agreement as rectified, amended or otherwise modified by such legal instruments as may have entered into force before the date of accession. This Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement.*"

[37] See Qin (2016).

under the WTO Agreement on Agriculture,[38] China's export subsidy on agricultural products were entirely prohibited.

Generally, developing country or transition economic country members are allowed for exemption of certain WTO rules on subsidies under SCM Agreement Article 27 and 29. However, China committed to give up such preferential treatments when accessing to the WTO. At the point of China's accession to the WTO, one of the most contentious issues were allowing China the preferential treatment to the developing or transition economic countries in terms of subsidies.[39] Paragraph 171 of the Working Party Report states that "China stated his intention to reserve the right to benefit from the provisions of Articles 27.10, 27.11, 27.12 and 27.15 of the SCM Agreement, while confirming that China would not seek to invoke Articles 27.8, 27.9 and 27.13 of the SCM Agreement." The articles which China foregone includes provisions allowing developing country members to take subsidy measures including subsidies on privatization programs.

As of applying Article 1.2 and 2 of the SCM Agreement to the SOE subsidies, paragraph 10.2 of the Accession Protocol states that "subsidies

[38] Article 1(f), 15.2 and 9(iv) of AA points that member countries are granted an "implementation period," which is 6 years from the WTO commencement for the developing countries, and 10 years for developing countries. The outlays for export subsidies should be reduced to 64% for the developed countries and 76% for the developing country members.
[39] See 송영관 and 안덕근 (2012).

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." What is noticeable is that compared to specificity provisions in the SCM Agreement, it decides that a subsidy is specific to the recipients on the ownership basis.[40]

In reaction to China steadily growing in its trade volume and trade surplus, many WTO member countries are taking countervailing measures to the imported Chinese products. It is on the account of China's central and local governments still utilizing subsidies or preferential treatments under the "state capitalism." China had undergone a gradual reform transferring to a market economy with socialist feature remained. Therefore, member countries that are taking CVD measures find themselves difficult to decide precise market situations in China.[41]

3.2. Provisions Directly Regulating SOEs/STEs

There are no provisions in the GATT/WTO Agreements that directly refer to literally "state-owned enterprises." Instead, Article XVII of GATT 1994

[40] Ibid.
[41] See 안덕근 et al. (2015).

provides that "state-trading enterprises (STEs)" may create serious obstacle to trade, thus it is subject for limitation. According to Article XVII:1, state-trading enterprises shall act in accordance with non-discrimination principles and should be guided in their decisions solely on commercial considerations. Definitions on STEs are provided in the WTO *Understanding on the Interpretation of Article XVII*. Paragraph 1 of the Understanding states that "[g]overnmental and non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports."[42] WTO is not discouraging members from establishing or maintaining STE but prohibiting potentially distorting effects on trade from the operations. This definition includes the following 3 features. First, the agent that established the enterprise does not matter whether it is governmental or non-governmental.[43] Second, such agent should be involved in the operation of the imports and exports by the

[42] Imports for government use is not subject to this clause. Trading for government procurements are regulated under the Agreement on Government Procurement for the member countries which accessed into. Yet, mainland China is not a party member of the GPA.

[43] See 박형래 et al. (2011).

enterprise.[44] Lastly, such agent should be bestowed exclusive or special rights by the state.[45]

Current rules on state trading enterprises provide that ownership is not a standard for determining whether an entity falls under Article XVII but the extent to which the entity is entitled or authorized by the government. What matters in the state trading issue is the exclusive rights and the impact of such rights on the trade.[46]

Member countries are also obliged to notify state trading to the WTO. Article XVII:4 specifies that the contracting parties are required to notify the products being trade by the STE and the import mark-up on the product. However, China has neglected in notifying to the WTO, reporting 3 lists from the accession to date.[47]

Accession Protocol of China and the Working Party Report also contains state-trading regulations. Paragraph 6.1 of the Protocol presents that "China shall ensure that import purchasing procedures of state trading enterprises are fully transparent, and in compliance with the WTO Agreement, and shall refrain from taking any measure to influence or direct

[44] Ibid.
[45] Ibid.
[46] See McCorriston and MacLaren (2002b).
[47] Report of Working Party on State Trading Enterprises by China can be found in 2002, 2003 and 2015.

state trading enterprises as to the quantity, value, or country of origin of goods purchased or sold, except in accordance with the WTO Agreement." Notification requirement is also stated in the paragraph 6.2 in the Protocol. China is required to provide full information on the pricing mechanisms for the exported goods by the STE.

Provision that directly addresses "state-owned enterprises" can be found in the paragraph 46 and 47 of the Working Party Report of the Accession Protocol. Paragraph 46 states that:

> "The representative of China further confirmed 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, including on the quantity, value or country of origin of any goods purchased or sold, except in a manner consistent with the WTO Agreement."

This provision extends the requirements that are written in the Article XVII of GATT in several parts. First of all, while Article XVII confines regulations to trading activities, paragraph above requires all state-owned and state-invested Chinese enterprises to secure non-competitive activities regardless of import or export.[48] Second, paragraph 46 states that "all state-owned and state-invested enterprises would make purchases and sales based solely on commercial considerations." It is distinct from Article XVII in the GATT which the members are obliged to follow commercial considerations in the scope of non-discriminatory treatment principles.[49] Paragraph 46 does not provide whether the commercial considerations are limited to non-discriminatory treatment. Lastly, compared to subparagraph (c) of GATT Article XVII:1 which states that member countries should act in accordance with non-discriminatory treatment and commercial considerations, paragraph 46 of the Working Party Report prohibits the Chinese government from direct or indirect influence on "commercial decisions on the part of state-owned or state-invested enterprises."

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[48] See Qin (2004).

[49] In the *Canada-Wheat* case, the Appellate Body interpreted subparagraph (b) of Article XVII as it "depends upon" subparagraph (a) rather than an independent clause. Therefore, "commercial consideration" must be in the scope of non-discrimination principles under Article XVII of GATT. See Appellate Body Report. 2004. Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain. WT/DS276/AB/R.

The following paragraph 47 of the Working Party Report also specifies that state-owned and state-invested enterprise's government procurement should not be commercial or for non-governmental purposes. All of the above provisions include intention of the WTO that SOEs should not behave as government agencies rather than private enterprises.[50]

3.3. Structural Limitations in the Service Sector

According to World Bank, China committed to one of the most rapid opening of its service market when joining the WTO.[51] China committed during the accession to entirely open its state-owned banking sector by 2006. "Nevertheless, China's service sector policies remain more restrictive than those in many developing countries and much more so than in the high-income countries, in all sectors except transport."[52] Rules for service sectors are covered by General Agreement on Trade in Services (GATS), and the member countries commit to open its specific sectors on their "schedule."

A relevant provision in GATS to prohibit non-competitive behavior of

[50] See Qin (2016).
[51] See World Bank (2013).
[52] Ibid.

state-owned enterprises in service industries may be Article VIII, which is a rule on monopolies and exclusive service suppliers. Article VIII:1 states that monopoly supplier of a service shall act in a manner consistent to Most-Favored-Nation (MFN) treatment under GATS. Article VIII:2 requires monopoly suppliers without monopoly rights or specific commitments to compete in the market without abusing its status, and Article VIII:5 prohibits members from authorizing or establishing a small number of suppliers or preventing competition among the suppliers. However, as the provisions has not been cited before the dispute settlement body, effects of Article VIII of GATS to significantly stem abusive practices by SOEs are under question.[53]

Limitations on the current GATS system in terms of regulating SOEs in the service industry can be found. First, GATS Rules mostly depend on specific commitments undertaken by members, and it gives exemptions for the rules to be weakened.[54] Where the members take commitments on the sectors and the modes of supply, members are able to protect their national champions including SOEs.[55] Under GATS, members are not obliged to open the whole service sector but to make commitments on a positive list

[53] See Bergsten et al. (2014).
[54] See Mattoo (1997).
[55] See Kowalski et al. (2013).

basis to allow certain sectors. Therefore, a government may protect their core industries with majority state ownership.

Second, since GATT disciplines can be subject to service sectors, relevant GATT provisions on SOEs or STEs may be applicable on state-owned service providers. However, according to paragraph 2 of *Ad* Article XVII, the term "goods" in the provision does not include purchase or sale of services. It suggests that purchase and sale of service products by SOEs are not covered by Article XVII of GATT.[56] In GATS Agreement, there is no provision that addresses market activities in ownership basis. GATS Article VIII provides behaviors of monopolies and exclusive providers but does not refer to ownership reflecting that the rules are market structure based view rather than ownership based.[57] Accordingly, structural loopholes may exist when it comes to regulating abuse of SOEs in the service sector under current WTO system, especially providing subsides or preferential treatments by the government.

[56] See Mattoo (1997).
[57] See Qin (2004).

Chapter IV. Case Studies from the WTO Dispute Settlements

Dispute Settlements took place up to date relevant to Chinese SOEs can be largely classified into two; disputes regarding trade remedy issue and disputes concerned with service sectors. Representative cases on trade remedy issue was the United States – Countervailing Duty Measures on Certain Products from China (*US – Countervailing Measures*, DS437) case and the United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China (*US – Anti-Dumping and Countervailing Duties*, DS379) case which both were claimed by China on anti-dumping or countervailing measures taken by the US on certain import products from China.

Cases related to service sector can be seen as including China – Certain Measures Affecting Electronic Payment Services (*China – Electronic Payment,* DS413) case and China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual

Entertainment Products (*China – Publications and Audiovisual Products*, DS363) case. WTO does not indicate in the report on these two cases that the companies involved were SOEs, but practically, majority of Chinese SOEs were the ones that were claimed.

4.1. Issues Related to Subsidies and Countervailing Duties

4.1.1 Interpretation of "Public Body"

In both *US – Countervailing Measures* and *US – Anti-Dumping and Countervailing Duties* cases, one of the core issues was defining whether SOEs or state-owned commercial banks (SOCBs) that provided inputs or financial assistance on certain products exported to the US were "public bodies" under Article 1.1(a)(1) of the SCM Agreement. In the *US – Anti-Dumping and Countervailing Duties* case, China claimed with regard to the countervailing measures taken by the US on certain products from China on the basis that SOEs which provided inputs were "public bodies," that this determination by the DOC were inconsistent with Article 1.1(a)(1) of the

SCM Agreement. Also, China claimed that DOC determination regarding certain SOCBs providing loans, that such SOCBs are "public bodies," were inconsistent with the same provision. China contented that such state enterprises and banks should be regarded as private bodies in that there is no such evidence that these entities were authorized by the government.

First, in interpreting "public body" under Article 1.1(a)(1), the Panel noted that "a financial contribution by a government or any public body within the territory of a Member" is a situation under sub-paragraph (iv) which "a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out." Based on this provision, the Panel established three possible actors in entrusting or directing financial contribution by the government: "government," "public bodies," and "private bodies."[58] The Panel stated that "government" and "public body" are "functionally equivalent," and that "public body" is an entity vested by a government in purpose of exercising government functions.

According to the Panel, "public body" has a broader meaning than "government" or "government agency," and in the context of Article 1.1(a)(1), definition of "public body" extends to entities controlled by a government, not only ones vested with or exercising governmental

[58] Panel Report, United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS379/R, para. 8.54.

authority.[59]

The Appellate Body, however, reversed the Panel's decision on such definition. The Appellate Body stated that the term "government" under Article 1.1(a)(1) has two uses: a narrow sense within the phrase "government or any public body," and a collective sense within the phrase "collectively to a government or any public body." Under Article 1.1(a)(1), 'government' and 'public body' was written as 'government' in the SCM Agreement, while the collective meaning of 'government' is used as superordinate including 'public body.' As a consequence, the Appellate Body pointed that "[j]oining 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 and whose conduct will, when it falls within the categories listed in subparagraphs (i)-(iii) and the first clause of subparagraph (iv), constitute a 'financial contribution' for purposes of the SCM Agreement."[60]

In addition, regarding to the panel's decision that the "public body" under Article 1.1(a)(1) means an entity "which is controlled by the

[59] Ibid. para. 8.94.
[60] Appellate Body Report, United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS379/AB/R, para. 284.

government," the Appellate Body noted that the Panel or the investigating authority should have examined the relationship of the entity in question and the government in a narrow sense, but the Panel failed to provide the meaning of "control." Thus, it concluded that deciding the entity in question as a public body in a sense of government control would be insufficient.[61] Based on such examinations, the Appellate Body reversed the Panel's decision on the definition of "public body."

Second, regarding four countervailing measures by the US,[62] DOC determined that the SOEs which provided inputs to the providers were "public bodies" based on the "rule of majority government ownership." Meanwhile, DOC found that relevant SOCBs in the OTR investigation were also "public bodies." China contended that DOC determinations were based on "*per se* majority ownership test," and that DOC did not conduct the "five-factor analysis" test.[63] These factors are: "(i) government ownership; (ii) the government's presence on the entity's board of directors; (iii) the

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[61] Ibid. paras. 319-320.

[62] The measures were on circular welded carbon quality steel pipe, light-walled rectangular pipe and tube, laminated woven sacks, and certain new pneumatic off-the-road tires. Each abbreviations are marked as CWP, LWR, LWS and OTR in the WTO reports.

[63] During the countervailing duty investigation in the *Korea – DRAM* case, USDOC uses five-factor analysis test to find whether relevant entity is a "public body." Such analysis were first introduced based on the *Neterlands – Fresh Cut Flowers* case in 1987 and *Canada – Pure Magnesium and Alloy Magnesium* case in 1992.

government's control over the entity's activities; (iv) the entity's pursuit of governmental policies or interests; and (v) whether the entity is created by statute." However, Panel noted that there is "no basis in the SCM Agreement on which to conclude that consideration of these particular five factors is a legal prerequisite for a valid finding that an entity is controlled by a government and thus a public body in the sense of the Article 1.1."[64] Regarding legal question whether input providing SOEs are owned by the government can be sufficient evidence of government control, Panel said 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 for purposes of SCM Agreement," therefore found "no legal error, in analyzing whether an entity is a public body."[65]

However, the Appellate Body reversed the Panel's decision, reasoning that *per se* ownership cannot be a sufficient evidence to determine whether an entity is controlled or authorized to perform governmental function by a government. Thus, the Appellate Body found that USDOC failed to verify that the entity in question is a "public body" within *per se* ownership test.[66]

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[64] Panel Report, United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS379/R, paras. 8.124-126.
[65] Ibid. paras. 8.133-136.
[66] Appellate Body Report, United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS379/AB/R, para.

Third, China appealed that the DOC determinations also violated Articles 10 and 32.1 of the SCM Agreement[67] as it is inconsistent with Article 1.1(a)(1). The Appellate Body found that "where it has not been established that the essential elements of the subsidy definition in Article 1 are present, the right to impose a countervailing duty has not been established and this, as a consequence, means that the countervailing duties imposed are inconsistent with Articles 10 and 32.1."

Meanwhile, regarding DOC determination in the OTR investigation that relevant SOCBs are "public bodies," panel found that "the undisputed record evidence shows that the government owned the large majority share of the SOCBs, and exercised significant control over their operations," and thus "constitute a sufficient basis for its public body determination."[68] The Appellate Body also upheld the Panel's decision.

Following the case above, in 2012 China once again challenged on the 12 countervailing duty measures taken by the US on certain imported Chinese products. In the *US – Anti-Dumping and Countervailing Duties*

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[67] SCM Agreement Article 10 requires member countries to impose countervailing duties in accordance with Article VI of GATT 1994, and Article 32.1 states that "*[n]o specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.*"

[68] Panel Report, United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS379/R, paras. 8.139-143.

case, interpretation of "public body" was again a key issue. China contended that USDOC determination that certain SOEs are "public bodies" is inconsistent with the rulings in the previous *US – Anti-Dumping and Countervailing Duties* case, thus violated Article 1.1(a)(1). Accordingly, Panel concluded that DOC cannot decide SOEs in question as public bodies on the basis that majority of the entities are government owned or controlled by the government. Also, the US did not contest that it applied an ownership based analysis in determining SOEs as public bodies.[69]

Guided by the previous Appellate Body decision, the panel stated that "critical consideration in identifying a public body is the question of authority to perform governmental functions." Therefore, "an investigating authority must evaluate the core features of the entity in question and its relationship to government, in order to determine whether it has the authority to perform governmental functions." However, the Panel rejected China's claim that an authorization by the government to perform governmental function reflects government in a narrow sense. Rather, the panel found that following the Appellate Body decision in earlier disputes, ownership or matter of control are not sufficient to decide certain SOEs as

[69] Panel Report, Unites States-Countervailing Duty Measures on Certain Products from China, WT/DS437/R, para. 7.63.

"public bodies," but further examination is needed.[70] Such decisions by the adjudicative bodies implies that multilateral approach such as "five-factor test" is necessary in determining if SOEs or SOCBs practically function as "public bodies."[71]

4.1.2 Benchmarks Used to Calculate the Amount of Benefit Conferred

Article 14 of the SCM Agreement states how to calculate the benefit conferred from a financial contribution. Such calculation is accordance to commercial "benchmarks" through comparison of certain markets or government action. In the *US – Anti-Dumping and Countervailing Duties* case, the Panel categorized relevant issue into two: first, the USDOC rejection of in-country price as a benchmark, and second, the actual benchmark that it selected.[72] These issues were on SOE or government provided inputs or land-use rights, and the preferential loans by SOCBs.

First of all, on the China's claim that the USDOC rejection of in-country

[70] Ibid. paras. 7.64-72.

[71] See 안덕근 et al. (2015).

[72] Panel Report, United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS379/R, para. 10.13.

price, determining that it is distorted on the basis that majority of the input providers were SOEs violated Article 14(d) of the SCM Agreement, Panel said that majority of government providers in providing inputs may be a key evidence of market distortion. Panel stated that the DOC provided "strong circumstantial evidence" in findings of SOE dominance in the relevant market. Also, Panel found that the investigation was based on a case-by-case analysis.[73] The Appellate Body also upheld the panel's decision.

Second, on the USDOC determination that Chinese SOCB provided subsidies in form of Renminbi-denominated loans, and that one of the producers under investigation was provided US dollar loans from SOCB, the Panel noted that "the basic task in calculating a benefit from a government loan is to determine whether, when an investigated entity borrows from the government, the terms are better-than-commercial."[74] In this regard, the Panel found that basis for DOC to reject in-country loans were sufficient, in that Chinese government performed dominant role in the market. On appeal, the Appellate Body upheld the Panel's decision.

USDOC rejected Chinese SOCBs' Renminbi loans interest rate, on the basis that in-country market was distorted. Instead, it used a proxy interest

[73] Panel Report, United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS379/R, paras. 10.48-61.
[74] Ibid. para. 10.108.

rate from inflation-adjusted interest rates in 33 lower-middle-income-countries. Panel conceded the decision by the US, and also considered reasonable to rely on the World Bank grouping based on GNI per capita for income category same with China. Meanwhile, Panel rejected DOC's use of annual average LIBOR-based interest rate as a benchmark, as incomparable under Article 14(b) due to its fluctuation.

On appeal, the Appellate Body found regarding 'benchmark' under Article 14(b), that the investigating authority cannot reject government loan, determining 'non-commercial' only on the basis that it is a government loan. Instead, the investigating authority shall verify that the market interest rate is distorted by the government.[75] The Appellate Body noted that "the central issue in applying Article 14(b) is not whether a 'clear distinction' exists in the roles of government, but rather, whether there is an evidence and reasoning demonstrating that the Chinese Government, by participating in the RMB-lending market and by intervening in that market, is able to and does in fact distort interest rates."[76]

For the proxy interest rate based on regression analysis of inflation-adjusted interest rates in 33 lower-middle-income-countries by the DOC, the

[75] Appellate Body Report, United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS379/AB/R, para. 479.
[76] Ibid. para. 501.

Appellate Body reversed the Panel's decision that the benchmark is not inconsistent with Article 14(b). Legal analysis on the benchmark actually used by the US was not available due to "insufficient undisputed facts on the Panel record."[77]

In the *US – Countervailing Measures* case afterwards, recalling the earlier Appellate Body rulings in the *US – Anti-Dumping and Countervailing Measures* case that the DOC investigation on "financial contribution" was inconsistent with Article 1.1(a)(1) due to its misinterpretation of "public body," the Panel found that the benchmark DOC used were not based on whether SOEs were public bodies, but rather whether intervention of SOEs in the market was consistent with Article 14(d). Therefore the Panel held the out-of-country benchmark DOC used.[78]

However, the Appellate Body noted that the analysis should be focused on "whether or not the investigating authority at issue conducted the necessary market analysis in order to evaluate whether the proposed benchmark prices are market determined such that they can be used to assess whether the remuneration is less than adequate." Therefore, in selecting benchmarks for the purpose of Article 14(d), the investigating authority shall consider every in-country price available including the

[77] Ibid. para. 537.
[78] Ibid. paras. 7.190-194.

government-related prices.[79]

Lastly, on the four investigations at issue, the Appellate Body conducted a legal analysis regarding China's claim that USDOC determination which SOE provided input less than adequate remuneration is inconsistent with Articles 14(d) and 1.1(b). The Appellate Body found that the US violated Articles 14(d) and 1.1(b) relying on the fact that DOC determined market distortion only based on ownership or control basis, rather than impacts of SOE owned market share.[80]

Such rulings in the *US – Countervailing Measures* case imply that *per se* presence of government in the market cannot be a determination of market distortion. Moreover, to use proxy out-of-country benchmark in the countervailing investigating procedure, the investigating authority shall provide absence of comparable in-country benchmarks. Professor Julia Qin noted that "applying WTO disciplines to Chinese subsidies may encounter special problems in practice. For one thing, appropriate market benchmarks for identifying and measuring subsidies may not always be available due to the transitional nature of China's economy."[81]

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[79] Appellate Body Report, Unites States-Countervailing Duty Measures on Certain Products from China, WT/DS437/AB/R, paras. 4.55-64.
[80] Ibid. para. 4.107.
[81] See Qin (2004).

4.1.3 Provision of SOE Inputs by Private Trading Companies

In the *US – Anti-Dumping and Countervailing Duties* case, China claimed that even if the input providing SOEs may be public bodies, countervailing duties by the DOC where inputs produced by SOEs were purchased by the private trading enterprises are inconsistent with Articles 1.1, 10, 32.1 of the SCM Agreement, and Article VI:3 of GATT. China contented that USDOC did not provide that such private trading companies were entrusted or authorized by the government in accordance to Article 1.1(a)(1)(iv) of the SCM Agreement.

Panel first examined the term "financial contribution" under Article 1.1, and stated that in order for a subsidy to exist under Article 1, "there must be a financial contribution, as defined, and a benefit conferred thereby." However, the provision does not specify "who must be the recipient of the financial contribution and the benefit."[82] Panel considered that i) a recipient of financial contribution may be different from a recipient of benefits, and ii) according to the SCM Agreement, in following transactions after initial

[82] Panel Report, United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS379/R, para. 12.33.

government financial contribution been made, the government does not need to entrust or direct the initial recipient to make financial contribution. On such basis, Panel found that USDOC failed to provide that Chinese private trade companies were entrusted or directed by the government is not inconsistent with Article 1.1.

Next, on China's contention that the investigation method by the DOC was inconsistent with Articles 1.1 and 14(d), the Panel concluded that the method DOC used which is "to calculate the difference between the price paid by those producers to the trading companies and the applicable benchmark price," but the trading companies "in fact operate in a range of different ways," making the methodology by the US inaccurate.[83]

In the OTR investigation, the Panel considered that DOC calculated benefit conferred from the purchased inputs from the private trading companies to the tire producers. Here, the Panel decided on the DOC "to have investigated the precise role played by the trading companies, so as to ensure that its methodology did not calculate a benefit in excess of that conferred by the government provision of SOE-produced inputs." As a result, the Panel found that the US acted inconsistently with Articles 1.1 and

[83] Ibid. paras. 12.52-56.

14.[84] This issue was not brought to the Appellate Body.

4.1.4 Specificity of State-owned Commercial Bank Loans

Article 2.1 of the SCM Agreement provides the conditions for a subsidy to be specific. In the *US – Anti-Dumping and Countervailing Duties* case, China claimed to the WTO that USDOC finding in the OTR investigation that SOCB preferential lending to the tire industry was *de jure* specific. Concerning this matter, the Panel found that "a reasonable and objective investigating authority could have determined, on the basis of the evidence on the record, that the Government of China, at the central level, explicitly identified 'certain enterprises' in the sense of Article 2.1(a)[85] of the SCM Agreement for encouragement and development, and instructed the sub-central governments to implement this policy." The Panel also concluded that "a reasonable and objective investigating authority could have determined that pursuant to these same planning documents, SOCBs were instructed to provide financing to the 'encouraged' projects." On this basis,

[84] Ibid. paras. 12.57-58.
[85] As indicated in chapter 3.1, Article 2.1(a) refers to where *de jure* specificity exist.

panel found DOC determination not inconsistent with Article 2.1(a), regarding that "government authorities at all levels of government in China (central, provincial and municipal) effectuated policies to ensure the provision of loans to the OTR tire industry."[86]

Considering DOC determination that policy banks and SOCBs were guided by the planning documents of the government, the Panel found that "a reasonable and objective investigating authority could conclude on the basis of the record evidence that the SOCBs followed the policies set forth in the planning documents."[87] As a consequence, the Panel concluded that the lending by SOCBs was *de jure* specific, and inconsistent with Article 2.1(a).

On appeal, the Appellate Body upheld the panel's rulings on the basis that the Panel conducted "a proper factual analysis based on the totality of evidence, at all levels of government, on which the USDOC supported its specificity determination."[88] Therefore, it found that the Panel's decision that SOCB lending were *de jure* specific.

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[86] Panel Report, United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS379/R, para. 9.95.
[87] Ibid. paras. 9.96-105.
[88] Appellate Body Report, United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS379/AB, paras. 398-400.

4.2. Issues Related to Service Sector

As seen in Chapter 2, state-owned banks and telecommunication providers in China's service market are tremendous in its size, and continuously growing. Moreover, as China with massive population and market size moves from first and secondary industry into third, service sector in China starts to receive attention. As a consequence, trading partners are necessarily aware of China's market environment regarding service industry, in terms of competitiveness of their own enterprises. Among 24 WTO service disputes so far, 6 was over China, which 5 were cases where SOEs or state-owned banks in China were involved in.[89] The two cases – *China – Publications and Audiovisual Products* and *China – Electronic Payments* – were complained on market situation where mostly state-owned enterprises and banks were pervasive, yet in the latter case the complainants or the adjudicative body does not directly indicate state-owned enterprises or banks.

The *China – Publications and Audiovisual Products* case includes

[89] China – Measures Affecting Financial Information Services and Foreign Financial Information Suppliers (DS372, DS373, DS378) were complained by three members – US, EC, and Canada – on the monopolistic state-owned service supplier Xinhua News Agency in China, but this case has been reached an agreement and was not brought to the DSB.

largely two substantive issues related to trade or market access by foreigners. First, China was alleged that "trading rights" granted by the government were only permitted to limited Chinese SOEs, and not every domestic, foreign and individual providers. Also, the US claimed that Chinese government discriminated against individual and enterprises from abroad in terms of market access. The US contended that China was acting inconsistently with the Accession Protocol paragraph 5.1, 5.2 and 1.2 of Part I, and GATT article XI:1. The Panel found that granting trading rights in a discriminative manner is a violation under the Accession Protocol of China. On appeal, the Appellate Body upheld the Panel's decision.

Second, the US claimed on China's restricting on distribution of reading materials, audiovisual services and sound recording services. The Panel found that such measures are inconsistent with China's commitments on GATS Article XVII (National Treatment). In addition, limiting commercial presence for distribution permissive to wholly Chinese state-owned enterprises are inconsistent with commitments on GATS Article XVI (Market Access) and XVII. Similarly, in respect of limiting the distribution of imported reading materials to wholly owned SOEs, the Panel found inconsistent with GATT Article III:4. Regarding alleged limitation on distribution of films for theatrical release to two Chinese SOEs, the Panel

concluded that the US failed to demonstrate that China's regulations prohibited other distributors from receiving license for distribution. The Appellate Body upheld the panel's decision that prohibiting foreign distributors of sound recordings in electronic form is inconsistent with Schedule of Commitments, particularly with GATS Article XVII.

China's publications and audiovisual service market that were preferential to SOEs was mostly found inconsistent with the WTO disciplines, where the *China – Electronic Payment Services* case had similar rulings regarding the banking sector in China.[90] Issues were raised on several requirements; that establish the China Union Pay (CUP) as a sole supplier, or requiring for CUP cards capable in any stores, or requiring issued cards bearing CUP logo, or limiting transactions to CUP cards. The US claimed that China violated commitments on market access and national treatment under Mode 1 (cross-border) and 3 (commercial presence), in that electronic payment services fall under subsector 7.B(d) of GATS Schedule of Commitments[91].

[90] China UnionPay (CUP, *Yinlian*) that came into question is a bank card association under the People's Bank of China (PBOC) which is the central bank of China. The members include largest state-owned banks such as Industrial and Commercial Bank of China (ICBC), Agricultural Bank of China and China CITIC Bank.

[91] Subsector 7.B(d) is on "[a]ll payment and money transmission services, including credit, charge, and debit cards, travellers cheques and bankers drafts

In this regard, the Panel found that subsector 7.B(d) of the Schedule does not include market access commitment to allow Mode 1 supply by foreigners, but includes market access commitment under Mode 3 on conditions that suppliers meet certain qualifications regarding local currency business. The Panel noted that commitments on national treatment for Mode 1 and 3 were also contained in the Schedule.

Next, the Panel found insufficient of evidence on allegation that CUP monopolistically supplies across-the-board Renminbi payment card transactions, but found that CUP as a monopoly supplier on certain types – cards issued in China and used in Hong Kong, Macao, or vice versa – of Renminbi payment card transactions. In this regard, the Panel concluded that CUP violated market access commitment on Mode 3, and found no inconsistency with national treatment commitments.

For the requirements to bear CUP logo for all payment cards issued in China; to be interoperable within the network; for all terminal equipment be capable of accepting cards with CUP logo; for merchandises to post CUP logo and accept cards bearing the logo, the Panel found inconsistent with national treatment commitments on mode 1 and 3. Therefore, the Panel concluded that China failed to provide conditions of fair competition and

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(including import and export settlement)."

national treatment for foreign suppliers of the electronic payment services. As result, China implemented the DSB results and the dispute was not brought to the Appellate Body.

4.3. Summary and Implications

Back to figure 4 in chapter 3, what WTO dispute settlement cases present regarding presence of Chinese SOEs are: (i) when the government directly grants subsidies or gives preferential treatments, (iv) when state-owned banks provide loans to non-SOE producers, (vi) when the non-SOE producers exports the products made by SOE inputs, and (vii) when foreigners export to or enters into the Chinese market. Each of the implications from the adjudicative body rulings in the cases analyzed in the previous chapter can be found in table 7.

<Table 7> Jurisprudence of the WTO Rulings with Respect to Presence of Chinese SOEs

Presence of Chinese SOEs	Jurisprudence of the WTO Rulings
State support to SOEs	When calculating the benefit conferred, the fact that a government exists in the market does not mean the market price is distorted.
SOCB lending to non-SOE producers / industry	(i) SOCBs cannot be found as "public bodies" under the SCM Agreement only with *per se* ownership. Rater, a substantial evidence shall be provided. (ii) SOCB loans were found *de jure* specific to certain industry based on reasonable evidence.
Export of products produced with SOE provided inputs	(i) SOEs which provided input less than adequate remuneration cannot be found as "public bodies" only with *per se* ownership. (ii) Purchase of SOE produced input from private trading companies may be considered as conferring financial benefit when the trading companies' precise role is defined.
Import from and entry of foreign firms into Chinese market	In terms of service trade, market access and national treatment depends on the Schedule of Commitments.

Based on the jurisprudence above, three implications can be drawn. First, despite the conditions that the trading partners to take countervailing duty measures on the imported Chinese products alleged to be subsidized by the government, members would have difficulties regarding transparency of

Chinese market during the investigating process. During the dispute settlement procedures, transparency carries major significance in terms of producing evidence which gives substantial impact on the rulings.[92] China is adhering to "state capitalism" up to date, which state-owned enterprises and banks bear significant roles in the market. As a result, relations between economic units are indistinct, and statistical data showing the economy is often exaggerated or disguised. Such limitations in statistics and transparency brings challenge in regulating subsidies in China, owing to difficulties in identifying and monitoring SOEs in each level – central and local – along with state-owned financial institutions.[93] For an investigating authority to determine Chinese SOE as a "public body" under Article 1.1(a)(1) of the SCM Agreement, distinct evidence of market distortion on account of SOE activities should be provided. Therefore, enhancing transparency of SOE functions within the Chinese market, as well as China complying with the WTO notification requirements on subsidies or STEs would be prerequisite for determining SOEs as public bodies.

Second, highly relevant provisions regarding China's SOEs such as GATT Article XVII or Accession Protocol paragraph 46 were neglected throughout the dispute settlement. During the accession of China to the

[92] See Manjiao (2012).
[93] See Qin (2004).

WTO, China's economic status where SOEs were large in its numbers forced to include relevant provisions in the Accession Protocol. However, it is surprising that the members as well as WTO adjudicative bodies payed no attention to the provisions in the Protocol when judging subsidy matter related to SOEs.[94] For WTO disputes ignorance of Article XVII of GATT, some scholars indicated the problem of definition of "state-trading enterprises" and the language of the provision. The ambiguous definition of "state-trading enterprise" frustrates members to challenge it directly,[95] and the absence of judicial interpretation makes STEs subject to diverse legal interpretations.[96]

Lastly, when it comes to service sectors, liberalizing markets depending on specific commitments under GATS entails limitations as covered in chapter 3.3. Although the cases occurred in relation to China's service industries were found inconsistent with China's commitments, still Chinese government has the discretion to protect its service market with majority of SOEs by filling in the Schedule. As a consequence, the shortcoming of current WTO rules for services is that there are no rules that directly raise

[94] See Qin (2016).
[95] See McCorriston and MacLaren (2002b).
[96] See Bergsten et al. (2014).

question on subsidies in the service sector.[97] Since most of the Chinese giant banks are state-owned, such absence of subsidy rules on service may be critical weakness in regulating preferential treatments to the SOEs. Article VIII may have possibility in restriction of SOEs in China, but scholars such as Aaditya Mattoo criticize the provision in that the scope is too limited to apply.[98] Therefore, relevant discussions in the following WTO Round are necessary to be made.

However, in present situation where Doha Round is in effect lost its function, the upcoming WTO negotiations are unknown for now. Consequently, smaller bilateral or multilateral negotiations would be alternatives in effectively regulating Chinese SOEs. For example, US-Singapore FTA includes an extensive obligation related to government enterprises.[99] Other FTA Agreements such as Korea-EU FTA, KORUS FTA, Korea-Chile FTA, NAFTA, US-Australia FTA, US-Chile FTA contains specific requirements on "state enterprises" or "public enterprises."

Another current important issue for China and its state enterprises is TPP. Unlike WTO disciplines, TPP regards SOEs as units engaging in commercial activities. Moreover, Article 17.1 of TPP Agreement provides

[97] See Kowalski et al. (2013).
[98] See Mattoo (1998).
[99] Agreements are made through Article 12.3.

specific and extensive definition of SOE. Meanwhile, although TPP Agreement texts contain strengthened SOE disciplines, and the SOE chapter seems to be written with China's potential entry in mind,[100] the possibility for China to join is remote in the foreseeable future.[101] Nevertheless, TPP might present norms to other trade negotiations, urging need for regulating non-competitive environment generated by SOEs to the trading partners of China.

[100] See Miner (2016).
[101] See KIEP 북경사무소브리핑 (2015).

Chapter V. Conclusion

Chinese SOEs are explicitly growing as competitive companies among international enterprises based on various subsidies and preferential treatments from the government. Several provisions and disciplines exist in the WTO that can possibly regulate such SOEs. Examining the relevant provisions through the dispute settlement cases, it could be concluded that certain factors may deter WTO disciplines from regulating Chinse SOEs; 1) lack of transparency in the Chinese market or in the relationship between the government and the enterprises has hindered CVD measures by other members. 2) Relevant provisions that directly indicate state enterprises were neglected by the complainant members and the adjudicative bodies. 3) As concerns service sector, the GATS rule contains structural limitations in imposing WTO obligations to the SOEs, in that such obligations are based on the member's commitments. Moreover, since provision on service subsidies is absent in GATS, there are no remedy at law.

In considerations of such findings, related discussions should be made in the WTO negotiations. However, in situation where current Doha

Negotiation is mostly suspended, and prospects for future negotiation are unclear, regulating discriminatory activities by the SOEs in China may be possible through bilateral or multilateral Agreements. Also, TPP containing extensive and specific requirements on SOEs may present models to other negotiations.

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Appendix 1.
List of China's Subsidy Programme Reported to the WTO in 2015

	Title of the subsidy programme	Form of the subsidy
1	Preferential tax policies for foreign-invested enterprises	Preferential tax treatment
2	Preferential tax policies for foreign-invested enterprises engaged in energy, transportation infrastructure projects	Preferential tax treatment
3	Preferential tax policies for Chinese-foreign equity joint ventures engaged in port and dock construction	Preferential tax treatment
4	Preferential tax policies for enterprises with foreign investment recognized as high or new technology enterprises established in the state high or new technology industrial development zones	Preferential tax treatment
5	Preferential tax policies for enterprises recognized as high or new technology enterprises established in the state high or new technology industrial development zones	Preferential tax treatment
6	Preferential tax policies for high or new technology enterprises	Preferential tax treatment
7	Preferential tax policies for enterprises with foreign investment established in special economic zones (excluding shanghai Pudong area)	Preferential tax treatment
8	Preferential tax policies for enterprises with foreign investment established in the costal economic open areas and in the economic and technological development zones	Preferential tax treatment
9	Preferential tax policies for enterprises with foreign investment established in Pudong area of shanghai	Preferential tax treatment
10	Preferential tax policies for enterprises with foreign investment established in the three gorges of Yangtze river economic zone	Preferential tax treatment
11	Preferential tax policies in the western regions	Preferential tax treatment
12	Special fiscal fund to alleviate poverty	Financial appropriations
13	Preferential tax treatment for public infrastructure projects that are particularly supported by the state	Preferential tax treatment
14	Preferential tax treatment for projects for environmental protection, water and energy conservation	Preferential tax treatment

	Title of the subsidy programme	Form of the subsidy
15	Preferential tax treatment for building materials products produced with integrated utilization of resources	Preferential tax treatment
16	Preferential tax treatment for building materials products produced with integrated utilization of resources	Preferential tax treatment
17	Preferential tax treatment for products produced with integrated utilization of resources	Preferential tax treatment
18	Preferential vat on comprehensively utilized products with agricultural surplus and forestry residues as raw materials	Preferential tax treatment
19	Preferential consumption tax on comprehensively utilized and produced petroleum products	Preferential tax treatment
20	Preferential vat on electrical products produced by photovoltaic-generated power	Preferential tax treatment
21	Preferential vat on hydropower products	Preferential tax treatment
22	Preferential tax treatment for energy-saving and new energy vehicles and vessels	Preferential tax treatment
23	Preferential tax treatment for the public buses and trolleybuses purchased by urban public transportation enterprises	Preferential tax treatment
24	Preferential vehicle purchase tax on low-emission cars	Preferential tax treatment
25	Special fund for the industrialization of wind power equipment	Financial appropriations
26	Preferential tax policies for clean development mechanism	Preferential tax treatment
27	Preferential tax policies for enterprises making little profits	Preferential tax treatment
28	Preferential vat policies for enterprises that employ disabled people	Preferential tax treatment
29	Preferential income tax policies for enterprises that employ disabled people	Preferential tax treatment
30	Preferential tax treatment for imported products exclusively used by the disabled people	Preferential tax treatment
31	Preferential tax treatment for products for the disabled people	Preferential tax treatment
32	Preferential tax treatment for enterprises producing products exclusively used by the disabled people	Preferential tax treatment

	Title of the subsidy programme	Form of the subsidy
33	Preferential tax policies for the research and development of enterprises	Preferential tax treatment
34	Preferential tax policies for enterprises transferring technology	Preferential tax treatment
35	Research and development fund for industrial technologies	Financial appropriations
36	Development fund for SMEs	Financial appropriations
37	Special fund for establishment of service system for SMEs	Financial appropriations
38	Fund for promotion of coordinated development of foreign trade and economic relations among regions	Financial appropriations
39	Special fund for the development of international economy and trade	Financial appropriations
40	Fund for optimizing the import and export structure of mechanical and electrical products as well as high-tech products	Financial appropriations
41	Fund for promoting the trade of agricultural, light industry and textile products	Financial appropriations
42	Preferential tax policies for enterprises engaged in projects of preliminary processing of agricultural, forest, animal and fishery products	Preferential tax treatment
43	Fund for specialized economic cooperatives of farmers	Financial appropriations
44	Fund for subsidizing the training of rural migrant labour force	Financial appropriations
45	Subsidy fund for transforming agricultural scientific achievements and promoting technical service	Financial appropriations
46	Subsidy for promoting superior strains and seeds	Financial appropriations
47	Subsidy for purchasing agricultural machinery and tools	Financial appropriations
48	Comprehensive subsidies for agricultural inputs	Financial appropriations
49	Direct subsidy to farmers	Financial appropriations
50	Fund for agricultural comprehensive development	Financial appropriations
51	Fund for interest discount of loans for the purpose of agricultural water-saving irrigation	Financial appropriations

	Title of the subsidy programme	Form of the subsidy
52	Subsidy fund for small farmland water conservancy facilities and national key construction projects on water and soil conservation	Financial appropriations
53	Fund for disaster prevention and relief in agricultural production	Financial appropriations
54	Subsidy for prevention from and control of pest and disease in forestry	Financial appropriations
55	Subsidy fund for agricultural resources and ecological protection	Financial appropriations
56	Preferential tax policies for the imports of china grain reserves corporation	Preferential tax treatment
57	Preferential tax treatment for tea sold in the border areas	Preferential tax treatment
58	Preferential tax treatment for imported products for the purpose of replacing the planting of poppies	Preferential tax treatment
59	Preferential tax policies on imports of seeds (seedlings), breeding stock (fowl), fish fries (breeds) and wild animals and plants kept as breeds during the period of the "eleventh five-year plan" and "twelveth five-year plan"	Preferential tax treatment
60	Preferential tax treatment for endangered wild animals and plants as well as their products returned by foreign governments, by the government of hong kong sar, china or the government of macao sar, china to china	Preferential tax treatment
61	Preferential tax treatment for import of equipments	Preferential tax treatment
62	Subsidy for scrapping old vehicles	Financial appropriations
63	Preferential consumption tax on refined oil	Preferential tax treatment
64	Preferential tax policies for integrated circuit industry	Preferential tax treatment
65	Fund for research and development of integrated circuit industry	Financial appropriations
66	Fund for the development of electrical information industry	Financial appropriations
67	Fund for high technology R&D for packaging industry	Financial appropriations
68	Subsidy fund for Jintaiyang (golden sun) demonstration project	Financial appropriations

	Title of the subsidy programme	Form of the subsidy
69	Subsidy fund for energy-oriented utilization of straw	Financial appropriations
70	Subsidy fund for bio-energy and biochemical raw materials bases	Financial appropriations
71	Incentive fund for non-grain guided bio-energy and biochemical industry	Financial appropriations
72	Incentive fund for transformation of energy-saving technology	Financial appropriations
73	Promotion fund for efficient lighting products	Financial appropriations
74	Subsidy fund for the promotion of energy-saving products	Financial appropriations
75	Subsidy fund for the renewable energy-saving building materials	Financial appropriations
76	Special fund for energy conservation and emission reduction of communication and transportation	Financial appropriations
77	Subsidy fund for ship-type standardization of the main line of the Yangtze river	Financial appropriations
78	Subsidy fund for ship-type standardization of in-land river	Financial appropriations
79	Special fund for the development of circular economy	Financial appropriations
80	Subsidy fund granted by the central finance to close small enterprises	Financial appropriations
81	Special fund for the development of strategic emerging industry	Financial appropriations
82	Subsidy fund for producing goods specially needed by the ethnic minorities	Financial appropriations
83	Subsidy for household electric appliances trade-in	Financial appropriations
84	Subsidy for the sales of household electric appliances in rural areas	Financial appropriations
85	Subsidy for the sales of automobiles and motorcycles in rural areas	Financial appropriations
86	Preferential tax treatment for anti-HIV-aids medicine	Preferential tax treatment

Source: G/SCM/N/220/CHN, G/SCM/N/253/CHN, G/SCM/N/284/CHN, New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measure (2015).

Appendix 2.
US-Singapore FTA Article 12.5

ARTICLE 12.3 : DESIGNATED MONOPOLIES AND GOVERNMENT ENTERPRISES

1. Designated Monopolies

(a) Nothing in this Chapter shall be construed to prevent a Party from designating a monopoly.

(b) Where a Party designates a monopoly and the designation may affect the interests of persons of the other Party, the Party shall:

(i) at the time of the designation endeavor to introduce such conditions on the operation of the monopoly as will minimize or eliminate any nullification or impairment of benefits in the sense of Article 20.4.1(c) (Additional Dispute Settlement Procedures); and

(ii) provide written notification, in advance wherever possible, to the other Party of the designation and any such conditions.

(c) Each Party shall ensure that any privately-owned monopoly that it designates after the date of entry into force of this Agreement and any government monopoly that it designates or has designated:

(i) acts in a manner that is not inconsistent with the Party's obligations under this Agreement wherever such a monopoly exercises any regulatory, administrative, or other governmental authority that the Party has delegated to it in connection with the monopoly good or service, such as the power to grant import or export licenses, approve commercial transactions, or impose quotas, fees or other charges;

(ii) acts solely in accordance with commercial considerations in its purchase or sale of the monopoly good or service in the relevant market, including with regard to price, quality, availability, marketability, transportation, and other terms and conditions of purchase or sale, except to comply with any terms of its designation that are not inconsistent with subparagraph (iii) or

(iv);

(iii) provides non-discriminatory treatment to covered investments, to goods of the other Party, and to service suppliers of the other Party in its purchase or sale of the monopoly good or service in the relevant market; and

(iv) does not use its monopoly position to engage, either directly or indirectly, including through its dealings with its parent, subsidiaries, or other enterprises with common ownership, in anticompetitive practices in a non-monopolized market in its territory that adversely affect covered investments.

2. Government Enterprises

(a) Nothing in this Agreement shall be construed to prevent a Party from establishing or maintaining a government enterprise.

(b) Each Party shall ensure that any government enterprise that it establishes or maintains acts in a manner that is not inconsistent with the Party's obligations under this Agreement wherever such enterprise exercises any regulatory, administrative, or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges.

(c) The United States shall ensure that any government enterprise that it establishes or maintains accords non-discriminatory treatment in the sale of its goods or services to covered investments.

(d) Singapore shall ensure that any government enterprise:

(i) acts solely in accordance with commercial considerations in its purchase or sale of goods or services, such as with regard to price, quality, availability, marketability, transportation, and other terms and conditions of purchase or sale, and provides non-discriminatory treatment to covered investments, to goods of the United States, and to service suppliers of the United States, including with respect to its purchases or sales; and

(ii) does not, either directly or indirectly, including through its dealings with its parent, subsidiaries, or other enterprises with common ownership:

(A) enter into agreements among competitors that restrain competition on price or output or allocate customers for which there is no plausible efficiency justification, or

(B) engage in exclusionary practices that substantially lessen competition in a market in Singapore to the detriment of consumers.

(e) Singapore shall take no action or attempt in any way, directly or indirectly, to influence or direct decisions of its government enterprises, including through the exercise of any rights or interests conferring effective influence over such enterprises, except in a manner consistent with this Agreement. However, Singapore may exercise its voting rights in government enterprises in a manner that is not inconsistent with this Agreement.

(f) Singapore shall continue reducing, with a goal of substantially eliminating, its aggregate ownership and other interests that confer effective influence in entities organized under the laws of Singapore, taking into account, in the timing of individual divestments, the state of relevant capital markets.

(g) Singapore shall:

(i) at least annually, make public a consolidated report that details for each covered entity:

(A) the percentage of shares and the percentage of voting rights that Singapore and its government enterprises cumulatively own;

(B) a description of any special shares or special voting or other rights that Singapore or its government enterprises hold, to the extent different from the rights attached to the general common shares of such entity;

(C) the name and government title(s) of any government official serving as an officer or member of the board of directors; and

(D) its annual revenue or total assets, or both, depending on the basis on which the enterprise qualifies as a covered entity.

(ii) on receipt from the United States of a request regarding a specific enterprise, provide to the United States the information listed in clause (i), for any enterprise that is not a covered entity or an enterprise excluded under Article 12.8.1 (d) and 12.8.1(e), with the understanding that the information may be made public.

3. The charging of different prices in different markets, or within the same market, where such differences are based on normal commercial considerations, such as taking account of supply and demand conditions, is not in itself inconsistent with this Article.

4. This Article does not apply to government procurement.

Appendix 3.
Trans-Pacific Partnership Agreement Article 17.1 in Chapter 17 (State-owned Enterprises and Designated Monopolies)

Article 17.1: Definitions

For the purposes of this Chapter:

Arrangement means the *Arrangement on Officially Supported Export Credits*, developed within the framework of the Organization for Economic Co-operation and Development (OECD), or a successor undertaking, whether developed within or outside of the OECD framework, that has been adopted by at least 12 original WTO Members that were Participants to the Arrangement as of January 1, 1979;

commercial activities means activities which an enterprise undertakes with an orientation toward profit-making1 and which result in the production of a good or supply of a service that will be sold to a consumer in the relevant market in quantities and at prices determined by the enterprise;

commercial considerations means price, quality, availability, marketability, transportation, and other terms and conditions of purchase or sale, or other factors that would normally be taken into account in the commercial decisions of a privately owned enterprise in the relevant business or industry;

designate means to establish, designate or authorise a monopoly, or to expand the scope of a monopoly to cover an additional good or service;

designated monopoly means a privately owned monopoly that is designated after the date of entry into force of this Agreement and any government monopoly that a Party designates or has designated;

government monopoly means a monopoly that is owned, or controlled through ownership interests, by a Party or by another government monopoly;

independent pension fund means an enterprise that is owned, or controlled through ownership interests, by a Party that:

(a) is engaged exclusively in the following activities:

(i) administering or providing a plan for pension, retirement,

social security, disability, death or employee benefits, or any combination thereof solely for the benefit of natural persons who are contributors to such a plan and their beneficiaries; or

(ii) investing the assets of these plans;

(b) has a fiduciary duty to the natural persons referred to in subparagraph (a)(i); and

(c) is free from investment direction from the government of the Party;

market means the geographical and commercial market for a good or service;

monopoly means an entity, including a consortium or government agency, that in any relevant market in the territory of a Party is designated as the sole provider or purchaser of a good or service, but does not include an entity that has been granted an exclusive intellectual property right solely by reason of the grant;

non-commercial assistance means assistance to a state-owned enterprise by virtue of that state-owned enterprise's government ownership or control, where:

(a) "assistance" means:

(i) direct transfers of funds or potential direct transfers of funds or liabilities, such as:

(A) grants or debt forgiveness;

(B) loans, loan guarantees or other types of financing on terms more favourable than those commercially available to that enterprise; or

(C) equity capital inconsistent with the usual investment practice, including for the provision of risk capital, of private investors; or

(ii) goods or services other than general infrastructure on terms more favourable than those commercially available to that enterprise;

(b) "by virtue of that state-owned enterprise's government ownership or control" means that the Party or any of the Party's state enterprises or state-owned enterprises:

(i) explicitly limits access to the assistance to the Party's state-owned enterprises;

(ii) provides assistance which is predominately used by the Party's state-owned enterprises;

(iii) provides a disproportionately large amount of the assistance to the Party's state-owned enterprises; or

(iv) otherwise favours the Party's state-owned enterprises through the use of its discretion in the provision of assistance;

public service mandate means a government mandate pursuant to which a state-owned enterprise makes available a service, directly or indirectly, to the general public in its territory;

sovereign wealth fund means an enterprise owned, or controlled through ownership interests, by a Party that:

(a) serves solely as a special purpose investment fund or arrangement7 for asset management, investment, and related activities, using financial assets of a Party; and

(b) is a Member of the International Forum of Sovereign Wealth Funds or endorses the *Generally Accepted Principles and Practices* ("Santiago Principles") issued by the International Working Group of Sovereign Wealth Funds, October 2008, or such other principles and practices as may be agreed to by the Parties,

and includes any special purpose vehicles established solely for such activities described in subparagraph (a) wholly owned by the enterprise, or wholly owned by the Party but managed by the enterprise; and

state-owned enterprise means an enterprise that is principally engaged in commercial activities in which a Party:

(a) directly owns more than 50 per cent of the share capital;

(b) controls, through ownership interests, the exercise of more than 50 per cent of the voting rights; or

(c) holds the power to appoint a majority of members of the board of directors or any other equivalent management body.

국 문 초 록

WTO와 중국의 국유기업: 중국 국유기업에 대한 GATT/WTO 규범의 법적 효과 분석을 중심으로

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본 논문은 WTO에서 반경쟁적 행위를 견제함에도 불구하고 지난 10여년 간 중국의 국유기업은 지속적으로 성장한 것에 대해 의문을 제기하며, 중국의 WTO 가입 이후 중국 국유기업에 대한 GATT/WTO 규범의 효과를 고찰한다. 논문의 목적은 중국 국유기업에 대한 기존 WTO 규범의 적용가능성을 중국 국내외적으로 살펴보는 것이다. 우선 현존하는 GATT/WTO 규범 중 중국 국유기업에 적용 가능하거나 직접적으로 언급하는 조항들을 검토하였고 해당 조항들은 GATT 1994, 보조금협정, 서비스협정에서 발견할 수 있었다. 이어서 분쟁해결 사건을 통해 사례연구를 실시하여 다음과 같은 문제점을 도출하였다. 첫째, 보조금이 지급된 것으로 보이는 중국 수출품에 대해서 수입국들은 상계관세를 부과하는 것이 일반적인데, 중국 시장이나 기업, 정부 간의 투명성이 결여되는 관계로 조사 과정에서 보조금 여부를 입증하기가 어렵다는 점이다. 둘째, 중국 국유기업을 직접적으로 규제하거나 높은 관련성이 있는 조항들은 분쟁해결 과정에서 제소국이나 패널·상소기구에 의해 취급되지 않은 것을 알 수 있다. 마지막으로 서비스 분야에 관해서는 GATS 의무조항이 회원국의 구체적 약속의 형태로 규정됨에 따라 중국 정부에 의해 국유기업이 지배적인 분야의 선택적 보호가 가능하다는 것이다. 따라서 향후 WTO 협상에서는 이와 관련된 논의가 이

루어져야 할 것으로 보인다. 그러나 현재 도하라운드가 실질적인 중단 상태에 있고 앞으로의 추가 협상이 불투명한 가운데, 중국 국유기업을 규제하기 위해서는 양자·다자간 협상이 가능성이 있다. 또한 최근 중국을 둘러싸고 중요한 쟁점이 되었던 TPP는 국영기업에 관한 매우 구체적이고 광범위한 규정을 포함하고 있어 향후 중국과 진행하는 모든 협상에 규범을 제시할 것으로 예상된다.

주제어 : WTO, 중국, 국유기업, 관세와 무역에 관한 일반협정, 보조금협정, 서비스무역에 관한 일반협정

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