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ARTICLE

Special Issue: The Resurgence of the State as an Economic Actor–International Trade Law and State Intervention in the Economy in the Covid Era

Interplay of Competition Law and Free Trade Agreements in Regulating State-Owned Enterprises

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Abstract
State-Owned Enterprise (SOEs) are business entities owned by governments. Unlike private enterprises which operate on profit-motivation, SOEs often act on motives different from profit-making such as fulfilment of governmental or political purposes. Due to this peculiar feature, activities of SOEs sometime are disruptive of competitive market. In order to regulate activities of SOEs so that international market would not be unduly disturbed, GATT: Article XVII states that SOEs shall operate on a profit-motive in international trade. More recently, CPTPP (Comprehensive and Progressive Agreement on Trans-Pacific Partnership) and other FTAs include chapters devoted to the regulation of SOEs which provide that Contracting Parties ensure that their SOEs act on profit-motive so as not to cause disruption to the international market. On the other hand, competition laws of trading nations provide rules for prohibiting abusive conducts of dominant enterprises and this includes the prohibition of abuses by SOEs. However, applications of those two sets of regulations (GATT and CPTPP on one hand and competition laws on the other) are made independently from each other without being coordinated. This article surveys details of regulation of SOEs under CPTPP as a representative example of FTAs regulation and of competition laws of nations and suggests ways in which those two sets of rules can be coordinated in order to increase the effectiveness of legal disciplines imposed on SOEs' activities.

Keywords: State-owned enterprises (SOEs); WTO/GATT; CPTPP; competition laws; the act of state doctrine; the sovereign immunity; the foreign government compulsion doctrine; OECD's Competition Committee; ICN (International Competition Network)

A. Introduction

SOEs (state-owned enterprises) are enterprises owned by the government. Conducts of SOEs are not always motivated by profit-seeking and often based on political considerations. For this reason, they sometime engage in conduct disruptive to market order such as predatory practices (e.g., selling at unduly low prices, offering tender in public procurement at prices below cost of production to acquire contracts) and abuses of their dominant position vis-a-vis customers.

On the international scene, the framers of the GATT (General Agreement on Tariffs and Trade) 1947 were not unaware of the dangers of SOEs' conduct, which might have negative impacts on international trade order, and incorporated Article XVII (the provision for state-trading entities) within the GATT framework. More recently, negotiators of FTAs (free trade agreements) regarded that some disciplines of SOEs conduct are essential to maintain the orderly trade among their participants and incorporated chapters in FTAs. Among such FTAs, the CPTPP (Comprehensive and

Progressive Agreement for Trans-Pacific Partnership 2018) has Chapter 17, which offers the most comprehensive regulation of SOEs and has served as a prototype of the regulation of SOEs in FTAs that have subsequently come into existence—such as USMCA (Agreement between the United States, the United Mexico and Canada, 2020) and EU/Japan EPA (Japan-EU Economic Partnership Agreement, 2021). Those agreements have chapters of State-Owned Enterprises, i.e., in USMCA, Chapter 22 and in Japan-EU EPA, Chapter 13. These subsequent agreements show slight changes in the details, as touched on later, but, in general, they are modelled after the CPTPP.

Another dimension of regulating conducts of SOEs is found in the application of competition law and policy. Competition laws are national law, rather than international law, except the case of European Union where Article 101 and 102, as well as the merger provision of TFEU, operate as supra-national anti-trust legislation. Competition laws apply to the conduct of SOEs as part of their regulation of monopolistic abuses of dominant enterprises. However, as details are explained later, the Act of State Doctrine and the Foreign Sovereign Compulsion Doctrine exempt activities of SOEs, amounting to implementation of governmental policies, from the application of competition laws. This reduces the effectiveness of competition laws in controlling activities of SOEs in international transactions.

In the first part of this article, the writer intends to analyze how SOEs are regulated by FTAs using Chapter 17 of the CPTPP as the representative example of SOEs regulation. The writer claims that the provisions of Chapter 17 on the definition of SOEs might be too narrow to apply an effective regulation on SOEs and suggests some modifications of such definition if a chance of changing it should come in future.

In the second part, the author examines the limit set by the act of state doctrine and foreign sovereign compulsion doctrine on competition laws when they attempt to apply their disciplines on conducts of SOE. The author suggests that the relationship between national competition laws and SOEs should be brought up in such international forum as the ICN (International Competition Network), in which approximately 130 competition authorities of member countries engage in continual discussion and communication with the purport of promoting international competition policy to be applied to SOEs. It is hoped that the ICN establish a special task force of a working party on SOEs and international competition policy and thereby discuss how the act of state doctrine and the foreign compulsion doctrine be modified.

The author attempts to show how the disciplines of FTAs, such as the CPTPP and the application of competition laws, can interact with each other in such a way that their regulatory effects on the conduct of SOEs would be more effective. In view of this, the author recommends that the working relationship be established among the ICN, OECD (especially its Committee of Competition), and WTO (especially the Working Party on State Trading) in order to formulate more effective sets of disciplines on the conduct of SOEs.

B. What is the Problem?

SOEs have been one of the focal points of debate among commentators of international trade and regulatory framework. As examined closely later, SOEs are owned and operated by the government of the state to which they belong. Unlike private enterprises, SOEs do not necessarily act on profit-motive but rather on directives of government or for some public purposes such as providing basic social infrastructures like public roads, highways, water and sewage systems, telecommunication network, supply of energies, and others. SOEs also engage in international trade and investment activities such as exploiting natural resources, engaging in investment activities in overseas development projects, or financing such projects.[1]

[1]For a detailed analysis of state-owned enterprises and international trade agreements, see Leonardo Borlini, *When the Leviathan Goes to the Market: A Critical Evaluation of the Rules Governing State-Owned Enterprises in Trade Agreements*, 33 Leiden J. Int'l L., 313, 334 (2020).

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When SOEs engage in international trade and investment, their activities sometime raise competitive issues with private enterprises that are their competitors. Because SOEs' activities are not necessarily motivated by profit-seeking, their business conduct may be different from those of private enterprises and disruptive to their private competitors operating in the same field. For example, when the government of a state holds bid for the construction of railways in which private bidders and an SOE participate, the SOE's offer of bid may be at a price much lower than those of private bidders because the SOE bids at a direction of the government of the country to which it belongs, and profitability is not the prime goal of such a bid. Because private bidders need to make money, they have little chance of gaining the bid in the face of competition with SOEs, which are often subsidized by the government and can ignore profitability.

In another instances, when an SOE of a country purchases products, it may take advantage of its large buying power and coerce foreign exporters to lower their prices to the point where the profit they earn is squeezed to the minimum. When an SOE engages in the export of products or services, it may sell them at prices under the cost of acquiring them in order to favor purchasers who have some connections with its mother country.

In short, SOEs can (and some sometime do) act in ways that are different from how private enterprises act, and this is because SOEs are not motivated by profitability, often subsidized by their governments, and immune from bankruptcy because their governments can come in to rescue them from financial failure if the governments regard it necessary for political or other reasons not directly associated with business consideration. Therefore, SOEs and private enterprises in international trade are not operating on a level playing field.

C. Regulatory Framework of State-Owned Enterprises

I. GATT: XVII 1947

Framers of GATT 1947 were not unaware of the possibility that SOEs raise some problems with free and fair competition in international trade. Therefore, GATT: XVII was incorporated in GATT 1947. This provision was entitled as "State Trading Enterprises" and provides: "(a) Each contracting party undertakes that if it establishes or maintains a State enterprise . . . such enterprise shall, in purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders." It continues:

> (b) The provisions of subparagraph (a) of this paragraph shall be understood to require that such enterprises shall . . . make any such purchases or sales solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale, and shall afford the enterprises of the other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales.

Although the scope of those provisions covered only exports and imports and purchase and sale of goods, it was the beginning of international disciplines on SOEs. Some of the basic concepts such as commercial consideration as the test of judging whether activities of SOEs have been incorporated in subsequent trade agreements such as CPTPP. Those provisions were adopted in GATT: 1994 without any change of the text and is now part of the WTO regime.[2]

[2]For a detailed study of GATT: Article XVII, see generally 1 The World Trade Forum, State Trading in the Twenty-First Century (Thomas Cottier et al. eds., 2001).

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II. Provisions on SOEs in Free Trade Agreements

In the past two decades, the WTO has encountered difficulties in formulating new trade agreements. The dispute settlement mechanism of the WTO had worked effectively for about 15 years, since it was established in 1995, but later some WTO Members, especially the United States, began to complain that the WTO Appellate Body overstepped the power entrusted to it by WTO Members, and the United States decided to refuse recruiting new members of the body. Since December of 2019, the WTO Appellate Body stopped its function due to the lack of quorum necessary to decide disputes. At the time of this writing, only panels are functioning.

In parallel to the decline of the WTO as the governance body of international trade, trading nations increasingly have entered into free trade agreements (hereafter referred to as "FTAs") in the form of bilateral agreements, regional agreements, or plurilateral agreements. Right now, about 350 of them are operating in the world. Some FTAs contain provisions for regulating the activities of SOEs. As of 2017, 218 out of 283 FTAs have provisions on SOEs in one way or another.[3] Because the purpose of this article is not to survey the regulation of SOEs by FTAs in general but to highlight the cooperative relationship between FTAs and competition laws in regulating SOEs, an overview and detailed analysis of the regulation of SOEs by FTAs in general is outside the scope of this article. In this article, the writer takes up one of the FTAs, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership Agreement of 2018 (hereafter referred to as CPTPP), which contains comprehensive provisions on SOEs. The CPTPP is the first FTA containing a comprehensive chapter on SOEs (CPTPP: Chapter 17) and, as touched upon earlier, has been regarded as a model for chapters on SOEs in subsequent FTAs.[4] For this reason, this article analyzes the details of key provisions in the CPTPP pertaining to the regulation of SOEs.

The Treaty on the Functioning of the European Union (TFEU), which establishes the EU, has provisions for prohibiting Member States from giving aid to their enterprises. TFEU Articles 107, 108 and 109 prohibit them from giving state aid to enterprises in order to ensure that state aid to enterprises by Member States do not distort free competition among Member States in the EU. This is probably the most complete form of regulation by an international treaty of SOEs. However, because the market integration within the EU has progressed much more than it has in international economic integration in general, the regulation exercised by the EU under the TFEU on SOEs is atypical among regulatory schemes of FTAs, and it is more appropriately likened to the regulation by authority in a national jurisdiction. For this reason, a detailed study of state aid in the EU is left to other studies except for the regulation of TFEU Article 102 on activities of SOEs (abuse of dominant position).

III. Competition Law

There are approximately 130 states in the world where competition law is enforced in one way or other.[5] All competition laws in the world have provisions for prohibiting monopolization, abuse of dominant position by market dominant enterprise, and unfair business practices. When the conduct of SOEs constitutes monopolization, abuse of dominant position, or unfair business practices, the enforcement authorities of the state in which such conduct takes place can proceed against and prohibit it. In this respect, competition laws are also concerned with the regulation of SOEs. However, the difference between GATT: XVII and SOE provisions in FTAs on one hand and

[3]World Bank Group, Handbook of Deep Trade Agreements, 480–481 (Aaditya Mattoo et al. eds., 2020).

[4]Jaemin Lee, *Trade Agreements' New Frontier — Regulation of State-Owned Enterprises and Outstanding Systemic Challenges*, 14 Asian J. WTO Int'l Health L. Pol'y. 33, 72, at 36–37 (Mar. 2019).

[5]Except for EU competition law where the EU competition law and those of Member States apply side-by-side, competition laws are generally national law and, in principle, apply within the limit of their jurisdictional scope. For an overview of competition laws of the world, see David J. Gerber, Competition Law and Antitrust: A Global Guide (2020).

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competition laws on the other is that, whereas, in the former, it is the Member of GATT: XVII or Contracting Parties of FTAs that are obligated to deal with problematic conduct of SOEs and secure that such conduct would not take place, in the latter, it is the national competition authority which proceeds against SOEs engaging in such conduct directly and prohibits them within the scope of their jurisdictions. In this respect, there is a difference between GATT: XVII/FTAs in the modes in which they handle the problems. Nonetheless, both of them are aimed at moderating and taming conduct of SOEs and, therefore, have a common ground.

D. A Critical Analysis of the Definitions of SOEs in FTAs—With Emphasis on the CPTPP

Definitions of SOEs contained in FTAs are important because whether or not the disciplines on SOEs apply depends on how SOEs are defined. This article will take up the CPTPP as a typical example of the definition of SOEs and see how effective the definitions of SOEs are.

I. Profit Seeking

CPTPP: 17:1 (10) defines a state-owned enterprise as an "enterprise that is principally engaged in commercial activities in which a Party [Contracting Party] (a) directly owns more than 50% of the share capital; (b) controls, through ownership interests, the exercise of more than 50% of the voting rights; or holds the power to appoint a majority of members of the board of directors or any other equivalent body."[6]

CPTPP: 17:1 (1) defines commercial activities as "activities which an enterprise undertakes with orientation toward profit-making and which result in the production of a good or supply of a service that will be sold to consumer . . . at prices determined by the enterprise." The footnote to this provision states that "activities undertaken by an enterprise which operate on a non-profit basis or on a cost-recovery basis are not activities undertaken with an orientation toward profit-making." CPTPP: 17:4 states that Contracting Parties secure that their SOEs act in accordance with commercial considerations in sales of goods and services.

It is clear from the above that the CPTPP defines SOEs as enterprises: (a) owned by government and (b) principally engaged in profit-seeking activities. Similar definitions are adopted in USMCA and EU/Japan EPA. GATT: XVII: 1 (b) states: "such enterprise [SOE] shall . . . make any purchases or sales solely in accordance with commercial considerations . . ."

It seems clear from the above that the CPTPP's definition of SOEs is modeled, at least in part, after GATT: XVII: 1 (b).

The purpose of the CPTPP is that the Contracting Party ensure that its SOE not engage in activities that are divergent from profit-seeking activities, such as selling products or services at unduly low prices, and disrupt the market order in which private enterprises of other Contracting Parties compete with them. It is aimed at such practices of SOEs as abuses of their dominant position afforded by assistance from their governments in engaging in coercing private enterprises of other Contracting Parties to sell goods or services to them at unduly low prices contrary to the market principle. In short, the aim of the CPTPP's provisions of SOEs is to secure that SOEs of its Contracting Parties do not engage in anticompetitive practices such as predatory activities or abusive conducts by utilizing their dominant positions.

The above definitions of SOEs seem to raise some problems of interpretation viewed from a competition policy standpoint. A problem arises that a business entity not engaged in profit-making can, and actually does, act in ways that disrupt or distort market order. By defining SOEs as entities principally engaged in commercial activities, the scope of SOEs activities covered by the

[6]Comprehensive and Progressive Agreement for Trans-Pacific Partnership: sice.org./Trade/TPP/CPTPP/English/CPTPP_Index_e.asp.

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disciplines of SOEs in the CPTPP is limited to profit-making activities engaged in by SOEs. What happens, then, if an SOE takes the form of an entity not engaged in profit-seeking? Is it outside the scope of the definition of an SOE escaping the disciplines provided in the CPTPP? There are many business entities not engaged in profit-making but yet act in anti-competitive ways. Examples include, for instance a federation of farmer's cooperatives, which is dominant in the purchase of fertilizers, coercing distributors not to deal with competing trading companies or a federation of dominant farmers' cooperatives prohibiting its member cooperative from independently buying products outside the federation.[7] If the government of a state owns a SOE in the form of a federation of farmers' cooperative, which is not engaged in profit-making, is it outside the scope of CPTPP's disciplines? In medical field, large hospitals with dominant positions in the medical field can abuse their large buying powers and beat down the price at which they purchase medical supplies from distributors of them.[8] In those instances, entities acting anti-competitively are non-profitmaking entities but possess large market power to engage in activities which disrupt or distort competition as much as entities engaged in profit-making activities.

The framers of the CPTPP Chapter 17 must have speculated that the core of evils of SOEs' activities stemmed from the tendency of SOEs for neglecting profit-seeking and engaging in activities which disrupt market order—such as unduly low bid prices and other abnormal business conduct which private enterprises seeking profit would not engage in for the fear of losing market. They must have thought that the conduct of SOEs would be tamed if they were required to care for profit-seeking and would refrain from activities that are destructive of orderly market. The problem, however, is that the requirement that SOEs seek profit will have the effect of narrowing the scope of the definition of SOEs to profit-seeking activities, and yet even non-profit business entities can, and often do, act in ways disruptive of market order as the experiences in enforcement of competition law and policy teach us. It seems to the writer that the framers of CPTPP Chapter 17 aimed at the wrong target and missed the real enemy.

The purpose of CPTPP Chapter 17 devoted to the regulation of SOEs seems to ensure that activities of SOEs are moderated so that these activities do not unduly disrupt competitive order. However, in order to accomplish this purpose, it is not only not necessary to require that SOEs engage in profit-seeking but also sometimes it may even be counter-productive in relation to the very purpose of this chapter.

Here, the writer would like to introduce definitions of enterprises in competition laws in major jurisdictions. In the United States, Sections 1 and 2 of the Sherman Act, which is regarded as the basic antitrust statutes, state that the subject of application is "person" and "combination of persons". In the EU, Articles 101 and 102 of the TFEU apply to "undertaking" and "combination of undertakings". In Germany, the Law against Restraint of Competition (GWB) applies to "Unternehmen" which means undertaking.[9] In Japan, the Antimonopoly Law applies to " entrepreneur" (Jigyosha). Article 2–1 of the Japanese Antimonopoly Law defines entrepreneur as an entity engaged in commerce, industry or other businesses, whether profit-making or

[7]*See, e.g., Gottrup-Klim v. Dansk Landbrugs Grovvaraeselskab AmbA*, 1994 E.C.R. I-5641, 1996 4 C.M.L.R. 191. For details of the concept "undertaking" in the EU Law, see VAN BAEL & BELLIES, COMPETITION LAW OF THE EUROPEAN COMMUNITY, at 17–18 (5th ed. 2010) ("Even the fact that an entity lacks profit motive does not exclude it from the scope of the EC competition rules provided that it is engaged in some sort of economic activity."). *See also* ARIEL EZRACHI, THE EU COMPETITION LAW: AN ANALYTICAL GUIDE TO THE LEADING CASES, at 1–2 (7th ed. 2021). In United States antitrust laws, agricultural cooperatives are exempted from their application under the authority of the Capper-Volstead Act of 1922, 15 U.S.C. § 17. However, the exemption does not apply if activities of farmers' cooperatives involve monopolization, boycott, predatory practices, refusals to deal, unfair rebates, discriminatory activities, coercing members and so on, *see* 2 AMERICAN BAR ASSOCIATION ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 1318–24, (8th ed. 2017).

[8]U.S. Dep't J. & Fed. Trade Comm'n, *Statements of Antitrust Enforcement Policy in Health Care* (1996) is a set of guidelines outlining how U.S. antitrust laws apply to activities of big hospitals in dealing with suppliers and to measures taken by suppliers to counteract buying powers of hospitals.

[9]GWB stands for "Gesetz gegen Wettbewerbsbeschraenkungen," which means "Law against Restraints of Competition."

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non-profitmaking. "Other businesses" are interpreted to include economic activities, whether profitmaking or non-profitmaking, in which entrepreneur(s) engage in offering and receiving goods, services, or other economic benefits and thereby act as an autonomous actor of a transaction in market.[10]

The broad definition of the subject of Competition Law in competition laws of major jurisdictions—such as person, undertaking, and entrepreneur—is purported to cover all forms of business entities—whether profitmaking or non-profitmaking, publicly owned or privately owned, and incorporated or not incorporated—as long as such an entity transacts business in the market as an independent actor.

In light of the above discussion, the writer would like to submit that provisions of the CPTPP regarding the definition of SOEs be reviewed in near future with the view to modify it to include a broader scope of business entities. In the writer's view, Article XVII of the GATT, which is intended to control activities of SOEs in export and import trade, has the same problem because this article is also aimed at preventing SOEs from abusing conduct in export and import. Therefore, a revision of Article XVII of the GATT should be considered also.

II. SOEs Are Not Fit for Profitmaking

In private companies such as joint-stock company owned by private stockholders, management is accountable to stockholders to seek profit and maximize dividends to them and the value of the enterprise, and management is rewarded by stockholders with a high bonus when their profitmaking is successful. A SOE, however, is accountable to the government, who is its owner, and the government generally does not expect it to make profit but to perform activities for public purposes. Therefore, a SOE has little reason for being profitable and there is not much incentive to profit-seeking for SOE. Moreover, if a SOE is to seek profit, it diverts management resources from non-profitable areas of business to profitable ones, and the non-profitable areas will be neglected. For example, a public entity owned by a government and entrusted to supply water to inhabitants will concentrate its effort to keep up good facilities in profitable areas, such as densely populated areas, and neglect less lucrative areas—such as mountains, remote islands, and other area that is difficult to reach. A similar proposition applies to public transportation, broadcasting, telecommunication, medical services and so on. In those areas where market tends to fail, profitmaking enterprises are not suitable to guarantee universal services that need to be provided regardless of whether it is profitable or not. It is indeed such areas where the market fails and SOEs have the role to play.

In light of the above discussion, the author would argue that an attempt to require SOEs to engage in profit-seeking activities is not only unrealistic but also a *de facto* denial of the business organizations called state-owned enterprises. Article XVII:1 (b) of the GATT requires WTO Members to secure that their SOEs engage in export and import trade only in accordance with commercial considerations, which mean activities based on profit-motivation. This provision is less problematic than CPTPP: 17:1 (10) because Article XVII of GATT deals with export and import trade only, and if activities of SOEs are limited to profit-seeking activities, this would not have a widespread impact on activities of SOEs generally. Yet CPTPP: 17:1 (10) covers every type of SOE, whether they are engaged in export/import or any domestic businesses, including those where activities focused only on profit-seeking activities would produce negative impacts on the population which is dependent on their services—such as public utilities like power companies, telecommunications entities, operation of water supply system, and so forth. Therefore, it is the sense of the author that any definition which limits activities of SOEs to only profit-seeking activities and denies non-profit-seeking activities will simply not be implemented.

[10] *See*, on this subject and on the Japanese Antimonopoly Law, Akira Inoue, Antitrust Enforcement in Japan (2nd ed. 2019).

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III. Suggested Definition of SOE and Economic Activities

In light of the above discussion, the writer would like to submit, as an example, the following definitions of SOEs and economic activities in which they engage.

> A State-Owned Enterprise is an undertaking, whether profitmaking or non-profitmaking, directly or indirectly owned or controlled by a government through the ownership of voting stocks or shares, through the power to appoint directors, interlocking directorate, or any other ways regardless of the form in which it exists which is engaged in economic activities.
>
> Economic activities mean those in which an undertaking or undertakings engage in manufacturing, selling, financing, or any other economic activities continually and regularly in market as an independent actor in a transaction.
>
> Other activities include any profitmaking and non-profitmaking activities as long as the undertaking(s) doing such activities act as independent enterprises in market.

There should be a definition of anticompetitive activities of SOEs. The writer would suggest that there should be a provision that Contracting Parties should secure that SOEs under their jurisdictions and supervision do not engage in anticompetitive activities.

Anticompetitive activities can be defined as any activities of SOEs which received non-commercial finance and any other forms of aid given by the government which cause adverse effects on the economy of other Contracting Parties or a substantial injury to a domestic industry of other Contracting Parties.

The purpose of the above recommended definition of SOEs is to formulate a definition of SOEs which is comprehensive enough to encompass all activities of SOEs including profit-seeking and non-profit-seeking activities with the purpose of catching all anti-competitive activities of SOEs that disrupt market order and protect legitimate interests of private competitors.

IV. Government Ownership

SOEs are entities owned and controlled by governments. CPTPP: Article 17.1 (19) defines:

> State-owned enterprise is an enterprise principally engaged in commercial activities and in which the Party (a) directly owns 50% or above of its stocks, (b) owns more than 50% of voting rights through the ownership of shares or (c) the right to appoint the majority of members of executive board or equivalent management body.[11]

From the above, it is clear that the meaning of a SOE is: (a) direct ownership of 50% of stocks, (b) ownership of more than 50% of voting rights through the ownership of shares, or (c) ownership of the right to appoint more than one-half of the members of executive board or equivalent body. (a), (b), and (c) are connected with the conjunction "or," and it is clear that, as long as one of the three is satisfied, there is a SOE. Curiously, no indirect ownership or shares is provided for.

A glance at this definition of a SOE makes one question whether this definition may be not too lenient or too lax. Under some circumstances, the ownership of less than 50% of stocks or shares is sufficient to control the entity concerned. For instance, if a government holds 20% of stocks or shares of an entity, the government can control the entity if other stockholders are widely spread and no other holder holds more than 10 or 15% of the stock. Also, the government holding 30% of the stock of Entity A may enter into a coalition with Entity B which holds 30% of the stock of Entity A. By this coalition, the government and Entity B agree that they act together in exercising

[11] sice.org./Trade/TPP/CPTPP/English/CPTPP_Index_e. asp.

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the voting rights. Then the government with less than 50% of the stock can effectively control Entity A.

The CPTPP lists the power of appointing the majority of the board of directors or any organ vested with the power of management of an entity as a test for control. However, the CPTPP has no provision for an inter-locking directorate whereby incumbent government officials occupy the managerial position in the entity which the government intends to control. Nor does it have any provision for an ex-official who recently resigned from government post occupying the managerial position in the entity. However, an inter-locking directorate can be as effective as the ownership of stocks or shares in an entity for the government to control it.

In addition to those, the CPTPP does not provide for indirect ownership. In the business world, companies own and control subsidiaries through indirect ownership of stock. If, for example, a government owns an intermediary agent and this agent owns a company, the government can as effectively control it as it can if it directly owns it. USMCA: 22:1 provides: "State-owned enterprise means an enterprise . . . in which a Party: (a) directly or indirectly owns more than 50% of the share capital . . . ."[12] In this respect, therefore, the USMCA makes a progress compared with the CPTPP as regards the concept of control. If the omission of a provision for indirect ownership in the CPTPP is inadvertent, it should be revisited and readdressed on appropriate occasion. Likewise, Article 13.1 (h) of Japan-EU EPA states that an SOE is an entity where the government (i) directly owns 50% or (ii) indirectly own voting rights of an entity. Those examples show that the framers of those agreements must have studied the content of Chapter 17 of the CPTPP and were aware that there was problem in the provisions of SOEs in the CPTPP and made those improvements.

In light of the above discussion, the writer would like to suggest the following improvements if an opportunity for revising the CPTPP will come in the future. The word "stocks" and "shares" should be replaced by "voting rights" because stocks and shares include voting and non-voting stocks/shares, and the latter is irrelevant and may lead to misinterpretation. Several stages of ownership should be established: e.g., the ownership of voting rights of (i) 50% or above, (ii) 20% or above and within the third in ranking of ownership alone, and (iii) 10% or above and within the third in ranking of ownership. If the ownership amounts to (iii), related factors, among others, such as the ranking of ownership, comparison between the rates of ownership among shareholders, and the degree of dispersion of ownership among the shareholders should be taken into account.

The following suggestions should be made in relation to the interlocking directorate. The power of a government to appoint the majority of the members of the corporate decision-making body such as board of directors should be included. Concurrent holding of the majority of the posts, such as a decision-making body by government officials, can qualify for the interlocking directorate. Also, the holding of the majority of the posts of such a decision-making body by ex-government officials within 2 years after their retirement from the government should serve as a test for deciding the interlocking directorate.

V. Territorial Reach of Regulation

There is no specific provision in the CPTPP on the territorial reach of the regulation of SOEs. However, there are detailed provisions on the criteria to judge whether activities of a SOE cause an adverse effect on the economy of other Contracting Parties and substantial injury to their industries in the CPTPP: for example, Articles 17.7 and 17.8. An analysis will be made on adverse effects and injury later in this article. Judging from these provisions, there are three categories of activities of SOEs that come under the CPTPP regulation.

[12]United States-Mexico-Canada Agreement: https:ustr.gov.

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Situation I: Activities of a SOE of Party A, which received non-commercial assistance from Party, A causes injury to activities of enterprises of Party B in the market of Party A. For example, a SOE assisted by Party A engages in below-cost selling of a commodity and thereby prevents sales of competing products by enterprise of Party B.

Situation II: Activities of a SOE of Party A, which received non-commercial assistance from Party A, causes injury to activities of enterprise of Party B in the market of Party B. For example, a SOE engages in below-cost selling of a commodity in the market of Party B, thereby preventing sales of enterprises of Party B in that market.

Situation III: Activities of a SOE of Party A, which received non-commercial assistance from Party A, in the market of non-party. For example, a SOE of Party A received non-commercial assistance from Party A and engages in below-cost selling, causing injury to activities of enterprise of Party B in the market of the non-party.

There seem to be no problem with Situations I and II because all of the activities and the adverse effects and injury occur within the Contracting Parties of the CPTPP. With regard to Situation III, there may be a problem.

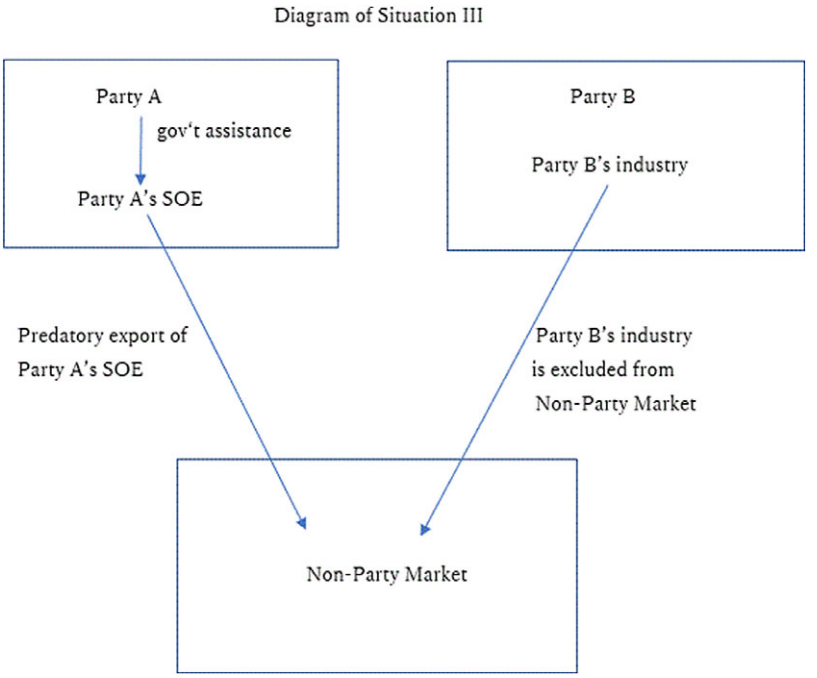

Diagram of Situation III.

In Situation III, if activities of Party A's SOE in exporting products amount to dumping or subsidized export from Party A to the market of Non-Party, the antidumping or anti-subsidy authority of Non-Party can take appropriate measures against them in accordance with its antidumping law or anti-subsidy law. However, whether or not to take such measures is entirely up to the discretion of the authority in the Non-Party, and the Non-Party is not obligated to do anything about them under the CPTPP because it is not a Contracting Party to it. The government of Party B can request the government of the Non-Party under Article 14 of the Antidumping Agreement to initiate an antidumping proceeding on behalf of Party B and take appropriate measures. However, here again, the Non-Party is under no obligation to take such measures. Therefore, the only remedy available in the CPTPP in this regard is that Party B requests Party A to take

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measures to secure that its SOEs refrain from activities that harm the interest of the industry of Party B in the market of the Non-Party.

CPTPP Chapter 17 has no provision for the territorial reach of its regulation. The above explanation is nothing but the envisaged scope of the application of CPTPP provisions drawn from the interpretation of provisions in CPTPP: Chapter 17 regarding injury to domestic industries and adverse effects inflicted on industries and the economy of a Contracting Party by activities of SOEs which belong to another Contracting Party. The author believes that this wide applicability is unique to Chapter 17 of CPTPP.

Involved in Situation III is that SOEs' activities of one Contracting Party and their adverse effects on the economy and injury to industries of other Contracting Parties are brought about in the territory of the Non-Party. In Situation III, the effect of activities of Party A's SOEs to exclude activities of enterprises of Party B occur in the territory of the Non-Party. The fact that activities of enterprises of Party B are excluded in the market of the Non-Party and such exclusion causes damages to the economy of Party B or injures to industries of Party B may well be of no concern to the Non-Party. It may be that enterprises and consumers in the Non-Party welcome inexpensive products or services coming from Party A's SOEs. In any event, it should be decided by the government and people of the Non-Party whether activities of SOEs in its territory are desirable and acceptable or repugnant and should be repelled. Whatever the effects caused by activities of Party A's SOEs in its own territory may be, it belongs to the realm of the government of the Non-Party to decide what policies should be applied to the activities of SOEs in its own territory. An exercise of extraterritorial jurisdiction on the part of Party A in prohibiting its SOEs from engaging in activities in the territory of the Non-Party may be deemed as unjustifiable intrusion into the domestic affairs of it. Therefore, prior consultation between the governments of Party A and the Non-Party is necessary before the government of Party A proceeds to take measures to the activities of its own SOEs within the territory of the Non-Party and reach an understanding regarding the measures that Party A takes on its own SOEs.

E. Regulation of Activities of State-Owned Enterprises Under CPTPP and Competition Law – Overlapping and Divergent Jurisdictions

I. Commonality of Objectives and Divergent Modes of Regulation

In regulating activities of SOEs, both the CPTPP and competition law share the common objectives to tame abusive conduct of SOEs and maintain the order in the market. However, there is difference in the modes of regulation of SOEs between the CPTPP and competition law. The CPTPP is an international agreement entered into between 11 contracting parties and, therefore, its disciplines apply to the governments of the CPTPP. The Contracting Parties are obligated to secure that SOEs, which belong to their respective jurisdictions, conduct their activities in the ways provided for in it. It is only through the regulation of the government of each contracting party that their SOEs' activities are regulated. Each contracting party of the CPTPP must implement the content of the CPTPP in its own territory by whatever means suitable to the regulation.

There are about 130 countries in the world where competition law is enforced in one form or another, and all of them, except for EU competition law, are national (domestic) legislation. These competition laws, almost without exception, contain the following 4 components: the prohibition of (a) restrictive agreements (cartels), (b) monopolization or abuse of dominant position, (c) mergers & acquisitions, and (d) vertical restraints. Sometimes vertical restraints are subsumed in a broader category of restrictive agreements. Among them, cartels are generally irrelevant to our purpose, and mergers & acquisitions are largely irrelevant except for some rare situations where a SOE assisted by a government takes over other enterprises by offering unduly high prices for stocks and assets of the acquired enterprise in exclusion of competing private enterprises intending to acquire such enterprise.

Monopolization, or abuse of dominant position, entails exploitative activities of a dominant enterprise in the market—such as unduly refusing to deal (boycott), engaging in bundling products

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(tie-in or tying arrangements), and predatory pricing. It also entails an abuse of a dominant position in the market—such as a powerful manufacturer coercing its distributors and retailers to not deal with its competitors, imposing coercion on its competitors to not competing with it by threatening them with cutthroat competition if they dare to refuse its request, or unduly refusing to sell or buy commodities from customers if they would not go along with harsh conditions imposed on them.

Vertical restraints are covenants in agreements between a party positioned in the upstream of transaction (such as manufacturer) and another party positioned in the downstream of it (such as distributors or retailers). A powerful manufacturer may impose on distributors or retailers the restriction that they should not handle competing products of its competitors, or a dominant retailer (supermarkets etc.) may impose the condition that manufacturers only supply a commodity to it in exclusion of other retailers. In some jurisdictions, vertical restraints are included in the category of monopolization or abuse of dominant position. In many jurisdictions, conduct that falls under vertical restraints coincides with acts that come under the regulation of monopolization or abuse of dominant position.[13]

SOEs assisted by non-commercial aid by its government can easily engage in practices such as the above illustrated and, if they do, their conducts are subject to the disciplines of competition law. However, the fact that such practices of SOEs, as above, have been made possible by the assistance of its government does not, in itself, constitute illegality under competition law. Such activities are subject to prohibition under competition law regardless of whether these have been made possible by the assistance of the government or the malefactor could have been able to do by its own dominant position in the market.

It should also be noted that the conduct of SOEs amounting to violations of competition law may be immune from its disciplines by virtue of the act of state doctrine. The act of state doctrine has been adopted by competition authority of many states to immunize conduct of enterprises which amounts to implementation of government policies. A close analysis of the act of doctrine in major jurisdictions will be made later.

It is safe to say, however, that the jurisdiction of the CPTPP and that of competition law overlap, at least in part, and aim at the common purpose of maintaining the fair and open competitive market where both SOEs and private enterprises can operate as competitors on equal footing.

II. Activities of SOEs Subject to CPTPP Regulation

The regulation of activities of SOEs, as contained in Chapter 17 of the CPTPP, is applicable to SOEs' abusive conduct, made possible by assistance of the government to which the SOE in question belongs in the form of non-commercial assistance. Non-commercial assistance is defined in CPTPP: Article 17:1 (6) as assistance by the government solely for the reason that the recipient is owned and controlled by the government and the following items are enumerated:

> "(i) direct transfer of fund or potential transfers of funds or liabilities, such as: (A) grants or debt forgiveness; (B) loans, loan guarantees or other types of financing on terms more favorable than those commercially available to that enterprise; or (C) equity capital inconsistent with usual investment practice, including for the provision of risk capital, of private investors; or (ii) goods, services other than general infrastructure on terms more favorable than those commercially available to that enterprise . . . ."

[13]In the Japanese Antimonopoly Law, both monopolization and unfair business practices are included in the same category and many conducts covered by monopolization are also regarded as included in the category of unfair business practices. The difference between them is that, in the former, the conduct in question restrains competition substantially whereas, in the latter, competition tends to be impeded. The difference between them is that of degree but not of kind. Unfair business practices are regarded as preliminary stage of monopolization in incipiency. However, often this distinction is subtle and almost indistinguishable. See, for detail, Inoue, *supra* note 10.

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Non-commercial assistance signifies a loan given to a SOE by the government at an interest rate lower than market interest rates, or bounty, or any other kind of economic assistance given by the government on the business terms more favorable than those available in the market if such an SOE seeks to obtain equivalent benefit. Also, non-commercial assistance suggests that it is financial assistance given by the government to its SOE for the sole reason that it is owned and controlled by it in terms of finance—such as providing transfer or funds, giving a loan, and affording equity capital on conditions more favorable than those that the SOE can obtain in market.

CPTPP: Article 17.4: 1 states that Contracting Parties shall ensure that their SOE's conduct complies with the following principles:

> SOEs must act in accordance with commercial considerations in purchasing and selling goods and services.
>
> (a) SOE must accord goods and services of enterprises of other Contracting Parties (i) treatment no less favorable than treatment than it accords to goods and services provided by its enterprise, by enterprise of other Contracting Party or by enterprise of non-party . . . [14]

CPTPP: Article 17.4: 2 (d) states:

> Each Party shall ensure that each of its designated monopolies . . . (d) does not use its monopoly position to engage in, directly or indirectly, including through its dealings with its parent, subsidiaries or other entities the Party or the designated owns, anticompetitive practices in a non-monopolized market in its territory that negatively affect trade or investment between Parties.[15]

CPTPP: Article 17.4 1 provides that Contracting Parties ensure that SOEs under their respective supervision do not engage in discriminatory practices by making use of non-commercial assistance against other Party's enterprises in purchasing and selling goods and services. CPTPP: Article 17.4 1 indirectly prohibits conduct of SOEs amounting to discrimination against goods and services of other Parties. However, CPTPP: Article 17.1 1 does not further specify in detail the subsets of discriminatory practices that come under its purview. The scope for conduct to which the disciplines of CPTPP: Article 17.1 1 apply is left to interpreters to decide.

On the other hand, CPTPP: Article 17.4 2 (d) specifically defines that a designated monopoly of a Contracting Party should not engage in utilizing its monopoly position in the area where it does not have a monopoly. This provision envisages the situation where, for example, a SOE of a Contracting Party is given statutory monopoly in telephone and telecommunication and, at the same time, engages in diverse activities such as selling telephone machines and other electronic devices. In this situation, the state monopoly in telephone and other telecommunication business can use its monopoly profit to finance predatory pricing activities such as below-cost selling of telephone machines and other electronics devices in which it does not have a monopoly and competing private companies engage in contest in selling them.

III. Adverse Effects and Substantial Injury

CPTPP: Article 17.6 1 stipulates that Contracting Parties ensure that their SOEs do not cause adverse effects on the interests of Other Contracting Parties and substantial injury to industries of Other Contracting Parties. Therefore, conduct of SOEs come under the prohibition of CPTPP:

[14]Comprehensive and Progressive Agreement for Trans-Pacific Partnership(CPTPP), Mar. 8, 2018, art 17.4:1, www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/index.aspx?lang=eng.

[15]*Id.* at art. 17.4:2.

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Article 17 if these conducts cause adverse effects on the interests of other Contracting Parties or inflicts substantial injury to industries of other Contracting Parties.

Adverse effects are defined in CPTPP: Article 17.7 as:

- Replacement and prevention of import into the market of the Party giving assistance to its SOE by production and sale of goods by the SOE aided by non-commercial assistance.
- Undercut, suppression, and depression of prices of goods offered by enterprises of other Party by the offering of the price by the SOE assisted by non-commercial assistance in the market of the Party giving such assistance, in the market of the other Party, or in the market of a non-party.
- Replacement and prevention of sale of services by enterprises of the other Party by the offering of services provided by an SOE assisted by non-commercial assistance given by a Party.

In short, adverse effects occur if, by non-commercial assistance given by a Party, a SOE which received such assistance engages in the sale of goods or services at prices that undercut prices offered by competing enterprises of other Parties, competing sale of like products or services of competing enterprises of other Parties are replaced from or prevented entry into the market of the Party giving such assistance, the market of other Parties, or the market of a non-party.

As indicia of the adverse effects, the following factors are listed: a significant change in market shares of goods and services including conspicuous increase of market share of the SOE of a Party receiving non-commercial assistance, invariability of the market share of such SOE in the situation where its market share would have decreased but for such non-commercial assistance, and slower decrease of its market share than that which would have resulted in the absence of such non-commercial assistance.

CPTPP: Article 17.8 defines injury to the domestic industry of other Parties caused by non-commercial assistance, threat thereof, and a substantial retardation of the establishment of domestic industry as a substantial injury, as opposed to an injury and serious injury. Substantial injury occurs if the effect of injury is not insignificant and not non-substantial. Under this provision, substantial injury has to be determined by the indicia such as whether the production of the SOE assisted by non-commercial assistance has increased significantly in comparison with the production of domestic industry where injury takes place. Also, whether the price offered by such an SOE undercuts the price of competing enterprises or suppresses it should be taken into account. In determining substantial injury, all relevant economic indicators such as production, sale, market share, profit, stock, employment, and so on must be considered.

It is clear that the requirements of adverse effects and substantial injury in CPTPP: Articles 17.7 and 17.8 are modeled after the adverse effects as provided in the SCM Agreement (Articles 5 and 6) and the substantial injury as stipulated in the SCM Agreement and the Antidumping Agreement (Article 3).

The definition of CPTPP on the conduct of SOEs to come under its control is focused on discriminatory practices such as those which infringe the principles of most favored treatment and national treatment. There are many other types of abusive conduct besides discriminatory practices of SOEs that have adverse effects on the economy and cause substantial injury to domestic industries of other Contracting Parties. Examples include predatory practices such as below-cost selling at extremely low prices and imposing hard conditions on other enterprises with whom SOEs deal as suppliers or purchasers. To engage in such practices by utilizing their advantageous position, made possible by non-commercial assistance of their governments, clearly causes adverse effects on the economy and substantial injury to domestic industries of other Contracting Parties regardless of whether such conduct involves discriminatory practices or simply unilateral impositions without discrimination.

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CPTPP: Article 17.4-2 (d) provides that Contracting Parties ensure that their designated monopolies under their supervision do not abuse their dominant position in engaging in anticompetitive practices in the market where they do not have monopoly position.

One example of such abuse is that a telecommunication company, bestowed with monopoly position in local and long-distance telephone, engages in below-cost sale of telephone machines in which it does not have a monopoly position by utilizing its monopoly profit in telephone as internal subsidy. This is nothing but a unilateral predatory pricing practice.

By making an analogy with this example of CPTPP: Article 17.4-2 (d), one can come up with an interpretation that conduct to be controlled by the CPTPP is not limited to discriminatory practices but can extend to unilateral conduct which tend to harm competitors or impose harsh restrictions on the freedom of other parities with whom it comes into transaction.

In view of this observation, the writer believes that the scope of the provisions of CPTPP: Article 17 include not only discriminatory practices of SOEs aided by non-commercial assistance but also exploitative and unilateral conduct which impose harsh conditions on trade partners of other Contracting Parties with whom they enter into transactions. In this respect, provisions of Article 17 of CPTPP on discriminatory practices are examples of typical abusive conduct of SOEs made possible by non-commercial assistance.

IV. Conducts Regulated by Competition Law

In competition law, there are three main areas: (a) restrictive agreements, (b) monopolization or abuse of dominant position, and (c) mergers & acquisitions. Among them, Category (c) is generally irrelevant. Conduct amounting to (a) and (b) coincide in large part with the coverage of Article 17 of the CPTPP.

Restrictive agreements involve any agreements which restrict the freedom of one or all of the parties to an agreement. Restrictive agreements imposed by a dominant party on other parties who possess less bargaining power are of great concern in controlling conduct of SOEs. Such agreements containing restrictions are often referred to as "vertical restraint agreements" because such agreements involve the relationship between suppliers and purchasers of goods and services, and SOEs sometime act as either supplier or purchaser of goods and services. When there is a difference in bargaining power between the parties, the party with less bargaining power is amenable to abusive impositions of disadvantageous conditions imposed by the stronger party. Non-commercial assistance given by the government to its SOE often bestows on the SOE a dominant position *vis-à-vis* other enterprises with whom it comes into transactions.

There are diverse restrictive agreements in which a dominant party wields the power over the weaker party. An illustrative, but not exhaustive, list includes: (a) exclusive dealing; (b) resale price maintenance; (c) a tie-in, or tying, arrangement or bundling arrangement; (d) territorial and customer allocation; and (e) beating down the purchase price. The content of each will be briefly discussed.

In exclusive dealing, the party in superior bargaining power prohibits the subordinate party from dealing with its competitors either as suppliers, such as an exclusive selling agreement, or customers, such as a sole purchase agreement. Resale price maintenance is a practice where the supplier of goods imposes the restriction on its distributors and dealers that they should not cut the price below the level as directed by the supplier.

A tie-in arrangement (or tying arrangement) or bundling arrangement ties or bundles two or more products or services and requires the purchaser to take all of them. If the purchaser refuses this condition, there will be no transaction. For example, Microsoft Company imposed conditions on its licensees of its OS "Windows" that they should also take and incorporate auxiliary

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programs, such as Internet Explorer (U.S. Case) or Microsoft Media Player (EU Case), in their PCs.[16] In territorial and customer allocation, a powerful supplier of goods or services allocates unilaterally territories on its distributors restricting activities of each distributor in the assigned territory and/or imposes on the dealers the kinds of customers to whom they can resell the products. Beating down the purchase price is the practice whereby a purchaser of goods or services with dominant position beats down or suppresses the purchase price of them when it buys them from parties with inferior bargaining position.

Parties imposing restrictive conditions, as exemplified above, usually possess a dominant position in the transaction with the other parties so that it can coerce them to accept conditions adverse to their interests. If SOEs are provided with non-commercial assistance, they are likely to possess such a dominant or superior position in relation to the other parties of transaction.

Another set of conduct subject to the disciplines of competition law is collectively referred to as predatory practices. Among the typical types of predatory practices are predatory pricing and price discrimination. The first category of predatory pricing is conduct of an enterprise wherein a powerful enterprise sets the sales price at the level below the cost of production and thereby drives out competitors from the market. How low a price must be to be considered predatory has been debated intensively among critics. It is generally agreed that sales at a price which is below the marginal cost of production is predatory because a sale at such a price produces no yield, and the sale at such a price only signifies that the predator had no intention but to drive out competitors. However, in order to meet the difficulty of calculating marginal cost, a price below the average variable cost is used as a proxy for marginal cost. Therefore, a sale at the price below the average variable cost is regarded as predatory.[17]

The second category of predatory pricing is price discrimination. Price discrimination is the pricing by an enterprise whereby it sells a product at a higher price in a geographical area where it has sufficient monopoly position or dominant position, and set at a lower price for the area, or to a customer where there is a competition in order to meet competition.[18] In this way, a dominant enterprise can drive out competitors by selling the product at a very low price in the area where there are competitors and by utilizing as a lever the extra-profit earned in the market where it has a dominant position. If such a practice is made in an international market—for example, an exporter setting the price of a commodity at a higher level in the home market and exporting the same or similar commodity at a lower price to a foreign market thereby causing a substantial injury to a domestic industry in the importing country—this is dumping as defined in the WTO Antidumping Agreement.[19]

Imposition by an enterprise in a dominant position on a weaker party to an agreement and predatory practices can be made only if the perpetrator has a monopolistic or dominant power. If such a practice is made by an enterprise without market power, it is not only ineffective at driving competitors out of the market, but also the actor will lose the market. Take, for example, predatory pricing. If an enterprise without market power or monopoly power engages in

[16]Case T-201/04, Microsoft Corp. v. Comm'n, 5 C.M.L.R. 11 (2007); Microsoft (Tying), COM/C-3/39. 530 European Commission [2019] C-36/106; *United States v. Microsoft Corp*., 253 F. 3d 34 (D.C. Cir. 2001).

[17]Phillip Areeda & Donald Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 733 (1975).

[18]For details of the law of price discrimination, *see* Milo Fowler & Lee Loevinger, *The Second Attack on Price Discrimination: The Robinson-Patman Act*, 22 WASH. U. L. Q. 153, 186 (1937).

[19]Article 2.1 of the Antidumping Agreement (Article VI of the General Agreement on Tariffs and Trade 1994) states:

> For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, art. 2.1, Apr. 15, 1994, 55 U.N.T.S. 194.

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below-cost selling of a commodity at a price which is below the average variable cost, such an enterprise is likely to go bankrupt before it is able to drive out the competitor and monopolize the market. Therefore, in order for any enterprise to gain control of the market by excluding competitors through a restrictive agreement or by predatory practices, that enterprise needs to have sufficient market power to enable it to impose hard conditions on other parties or to withstand the loss that it incurs for a certain period of time by engaging in predatory practices.

Therefore, it is generally true that such predatory practices are conducted by enterprises with sufficient market power.[20] In the field of monopolization and abuse of dominant positions, some degrees of market share are regarded as a prerequisite for the existence of a monopoly or dominant position in the market. The numerical indicator of monopoly or market power varies from jurisdiction to jurisdiction. In the EU, generally a market share of 50% is regarded as the threshold of dominance.[21] In U.S. antitrust laws, there is no set figure for proving a monopoly, but there has been no precedent in which an enterprise with less than 50% market share was condemned as monopolizing the market.[22] In Japan, guidelines on monopolization issued by the JFTC state that the market share of 50% is the threshold above which an enterprise is liable to be held as possessing market power.[23] Therefore, roughly 40–50% market share of an enterprise is regarded as the threshold for regarding such enterprise as possessing sufficient market power to enable it to act independently of market pressures.

Most, if not all, of the actions of SOEs that come under the purview of the CPTPP's disciplines seem to fall in the category of monopolization or abuse of dominant position in the U.S., Japan and the EU. In this way, the disciplines of the CPTPP and competition law complement each other. The CPTPP requires Contracting Parties to implement its provisions on SOEs and enforce rules and regulations in their respective territories moderating activities of SOEs under their jurisdictions while competition law enables competition authorities of states to impose disciplines on their activities that occur in their respective territories. The difference between competition law and the CPTPP in regulating conduct of SOEs is that, in the former, competition authority imposes disciplines on SOEs and prohibits them from doing anticompetitive activities, and in the latter, the CPTPP requires the Contracting Parties to ensure that their SOEs would not engage in abusive conduct. If the enforcement authorities of both competition law and the CPTPP cooperate with each other and the enforcement of both rules are well coordinated, one can expect that activities of SOEs will be effectively tamed.

V. Civil Claims Against SOEs in Domestic Courts

CPTPP: Article 17.5 states: "1. Each Party shall provide its courts with jurisdiction over civil claims against an enterprise owned or controlled through ownership interests by foreign government based on commercial activities carried on its territory . . . "

This provision empowers Contracting Parties to confer on their domestic civil courts' competence to exercise jurisdiction over civil claims that arise against SOEs supported by foreign

[20]The concept "market power" is closely related to monopoly power. However, there is a subtle difference between them. Monopoly power denotes the situation where an enterprise occupies 100% of a market or close to it. Market power, on the other hand, signifies the state in which an enterprise has enough power in terms of market share or some other indicators to set its price or terms of business at will and is relatively free from competitive pressures of market. If an enterprise has monopoly power, surely it has market power. However, an enterprise can have a market power even if it is not a monopoly or dominant as long as it is powerful enough to set its own terms of business regardless of competitive pressures. For discussion of market power, *see* MARKET POWER AND THE ECONOMY (Wallace C. Peterson ed. 1988).

[21]Case C-62/86, AKSO Chemie BV v. Commission, 1991 E.C.R. I-3359 (1993). For a detailed analysis, see Sven Bode & Omar Scharifi, *Market Share and Dominant Position in the Case of Emission Trading: An Economic Analysis Based on U.S., European and Japanese Competition Law*, 2 CARBON & CLIMATE L. REV. 103, 116 (2002).

[22]*See* 1 AMERICAN BAR ASSOCIATION ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 229–32, (8th ed. 2017).

[23]*See* Guidelines on Exclusion Type Monopolization by JFTC (Japan Fair Trade Commission, 2009).

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governments. Such civil claims include an injunction to a foreign SOE to cease and desist from wrongful conduct and the recovery of damages caused by their activities to individuals and enterprises. As to which law can be invoked to bring civil suits against SOEs, it is left to each Contracting Party to decide. However, common violations of competition law, breaches of contract, laws against unconscionable conduct, torts, and government procurement law are included. It should be regarded as obligatory on Contracting Parties to declare that those laws are available in order to implement CPTPP: Article 17:5 domestically.

Because the CPTPP is binding on all the Contracting Parties, each Contracting Party is required to respect judgments rendered by civil courts of other Contracting Parties under CPTPP: Article 17.5, and civil judgments rendered by them should be recognized and enforced in all jurisdictions of the Contracting Parties.

F. The Act of State Doctrine and the Foreign Sovereign Compulsion Doctrine

I. The Similarities and Differences Between the Act of State Doctrine and the Foreign State Compulsion Doctrine

Competition law is aimed at regulating private conduct of enterprises, and activities of governments are generally outside the scope of it. In the competition laws of the United States, the EU, Japan, and other jurisdictions, the act of state doctrine is recognized according to which activities of governments are exempt from the application of competition law.[24] Under this doctrine, competition authorities have discretion on whether to apply their competition laws to activities of SOEs because, often, SOEs are instruments of the government and their activities are the execution of governmental policies.

The act of state doctrine in U.S. jurisprudence is stated in *Restatement of the Law: The Foreign Relations Law of the United States*.[25] Section 441 of *Restatement* is entitled the Act of State Doctrine and states: "(1) In the absence of a treaty or other unambiguous agreement regarding controlling legal principles, courts in the United States will assume the validity of an official act of a foreign sovereign performed within its own territory." Therefore U.S. courts generally refrain from sitting in judgment on acts of a governmental character performed in a foreign state within its own territory and applicable there. It seems that the same principle applies, *mutatis mutandis*, to acts of several States in the United States. So, activities of foreign SOEs are regarded as within the scope of the act of state doctrine if they perform governmental activities in the countries in which they have been chartered.

The foreign state compulsion doctrine excuses enterprises from liability under competition law if their activities have been compelled by foreign governments. *Restatement of the Law Fourth*, Section 442 defines foreign state compulsion as follows:

> To the extent permitted by statute, regulation, or procedural rule, courts of in the United States have discretion to excuse violations of law, or moderate the sanctions imposed for such violations, on the ground that the violations are compelled by anther state's law, if: (a) the person in question appears likely to suffer severe sanctions for failing to comply with foreign law and (b) the person in question has acted in good faith to avoid conflict.[26]

[24]For the act of state doctrine in general, see Michael Zander, *The Act of State Doctrine*, 3 Am J Int Law. 826, 852 (1959); For a comparative study of the act of state doctrine and the foreign sovereign compulsion doctrine, see M Marynizyn, *A Comparative Look on Foreign State Compulsion as a Defense in Antitrust Litigation*, 8 Competition L. Rev. 143, 167 (2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1986032.

[25]Restatement (Fourth) of The Foreign Relations Law of the United States, 303 (Am. L. Inst. 2017).

[26]*Id.* at 318.

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In other words, generally, a state may not require a person (a) to do an act in another state that is prohibited by the law of that state or (b) to refrain from doing an act in another state that is required by the law of that state.

There is similarity between the act of state doctrine and the foreign sovereign compulsion doctrine because acts commanded by a foreign sovereign are presumed to be an implementation of the policies of the foreign sovereign. However, there is a difference between them also. The act of state doctrine is concerned with the question of whether the act of an enterprise can be regarded as an implementation of the government of a state and, for this reason, should be exempted from the application of competition law. The issue here is the characterization of an act of an enterprise as implementation of government policies. On the other hand, the foreign state compulsion doctrine extenuates the liability of an enterprise under competition law resulting from an act which would otherwise be prohibited by competition law if there were no compulsion of the foreign government compelled by the foreign sovereign. Here, the issue is whether the enterprise under challenge had no choice but to act in the way it has acted under the compulsion of foreign sovereign. Sanctions that would be imposed by a foreign government do not necessarily have to be a criminal penalty under law. Administrative sanctions, such as revocation of a business license, will be sufficient to qualify conduct as under the foreign state compulsion.[27]

However, in many cases, the act of state doctrine and the foreign sovereign compulsion doctrine are two sides of the same coin because, if an act of an enterprise is an implementation of governmental policies, a non-compliance of it usually incurs a legal or factual consequence, such as penalty or sanction, imposed by government on the non-complying party. Also, if an enterprise is compelled by law, by *de facto* pressure or by any other means of governments to act or refrain from acting, this demand should signify that the policies required by the government are incorporated in such actions. Therefore, practically, these two doctrines are often almost indistinguishable.

II. Sovereign Immunity

Sovereign immunity should be distinguished from the act of state doctrine. Sovereign immunity is a principle in the international law that a sovereign cannot be made subject to the judicial process of a foreign courts. International law obliges states to recognize some form of foreign sovereign immunity.[28] However, international law does not obligate states to recognize the act of state doctrine. Sovereign immunity is a matter of the personal jurisdiction of domestic courts on a sovereign as respondent in a foreign state. The basis of this principle is that each sovereign should pay due respect to another sovereign, and courts of one state should not sit in judgment on acts of a foreign sovereign. In this respect, both the sovereign immunity and the act of state doctrine are derived from the comity that each state must give to another state. The difference is that, whereas, in the former, the standing of a foreign sovereign state in the court of another state is at issue, in the latter, the question is whether the judiciary of a state can pass upon the legitimacy of an act of another state as a matter of substantive law. The former is a question of procedural law, and the latter is that of substantive law.

In recent years, sovereign immunity has been modified to allow the commercial exceptions doctrine which makes a foreign sovereign subject to the judicial process in courts of another state if it is engaged in commercial activities.[29] For example, the U.S. Foreign Sovereign Immunities Act stipulates, among other things, that the sovereign immunities do not apply to the act of foreign sovereign if it has waived its immunity, it is engaged in commercial activities, and it has acquired

[27] *Id.* at 321.

[28] *Id.* at 307–08. *See also* Schooner Exchange v. McFaddon, 11 U.S. 116 (1812).

[29] The U.S. Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1330. For an example of application of this Act, see Sea Breeze Salt, Inc. v. Mitsubishi Corp., 899 F. 3d 1064 (9th Cir. 2018).

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rights of property in the United States.[30] Because most of activities of SOEs are of commercial nature (*acta jure gestiones*), as opposed to inherently governmental nature (*acta jure imperi*), these activities generally fall under the category of commercial activities exceptions.

III. Operations of the Act of State Doctrine and the Foreign State Compulsion Doctrine

There are two bases for the act of state doctrine: Comity or respect to foreign sovereign and the separation of powers.[31] First, each state (sovereign) is regarded as independent from others, and therefore each state is required to respect the policies of other sovereign states. A corollary from the independence of a state from others is that courts and other law enforcement agencies of a state need to pay due respect to acts of other states that occur in their territory and do not question the legitimacy of them in courts.[32] Second, under the principle of separation of powers, the judiciary of a state does not pass upon the question as to whether an act of foreign state is repugnant or unjust, and legal action should be taken against it because such judgment belongs to the realm of the executive or administrative branch of the government which is better equipped to deal with issues of this nature.[33] Therefore, the judiciary should refrain from acting in an area where it is not fit to act.[34]

In the United States, the act of state doctrine has been developed by court decisions, and yet the precise scope of it is still unclear and unsettled. In *Alfred Dunhill of London, Inc. v. Republic of Cuba*, the Supreme Court held that the act of state doctrine protects only the act of a foreign government but not necessarily that of an agent of it, thus taking a narrow interpretation of the act of state doctrine.[35] However, in *International Ass's of Machinists v. OPEC*, the Court of Appeals for 9th Cir. held:

> While purely commercial activity may not rise to the level of an act of state, certain seemingly commercial activity will trigger act of state considerations . . . [W]hen the state *qua* state acts in the public interest, its sovereignty is asserted. The court must proceed cautiously to avoid affront to that sovereign. . . [W]e find that the act of state doctrine remains available when such caution is appropriate, regardless of any commercial component of the activity involved.[36]

Involved in this case were the actions of the OPEC (Organization of Petroleum Exporting Countries)—an alliance of oil exporting countries such as Saudi Arabia, Iran, Iraq, and Libya —and the OPEC decided to jointly cut back the production of crude oil and raise international oil prices. A labor union in the United States brought an action against this organization in U.S. court and sought for the recovery of damages caused by such a cutback and by the rise of oil prices. As quoted above, the Court declared that the act of state doctrine was applicable to the acts of OPEC and exempted it from antitrust liability. In this instance, what was involved was the production and sale of crude oil which seemingly was a commercial activity. However, the Court took

[30]For details, *see* 2 American Bar Association Antitrust Section, Antitrust Law Developments 1186 (8th ed. 2017).

[31]For a summary of the case law developments in the act of state doctrine and the foreign compulsion doctrine, see a paper submitted to the OECD by the U.S. Government, OECD, Directorate for Financial and Enterprise Affairs, Competition Committee, *Competition Law and State-Owned Enterprises—Contribution from the United States*, DAF/COMP/GF/WD (2018) 55 (Nov. 22, 2018).

[32]Nacional Banco de Cuba v. Sabbatino, 376 U.S. 398 (1964).

[33]In the United States, the act of state is regarded as primarily as an aspect of the separation of powers, see Env't Tectonis v. S. Kirkpatrick Inc., 847 F. 2d 1052 (3rd Cir. 1988).

[34]Int'l Ass'n of Machinists v. OPEC, 649 F. 2d 1354 (9th Cir. 1981) (stating that the act of state doctrine is akin to the political questions doctrine which prohibits judiciary from passing upon judgment on political questions which should be decided by the legislative or executive branches of the government).

[35]Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976).

[36]Int'l Ass'n of Machinists, 649 F.2d at 1360.

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the view that the production and sale of crude oil was so crucial and essential to the core national interests of the oil producing countries that such activity should be regarded as governmental activity rather than a mere commercial activity.[37]

This rationale blurs the distinction between purely commercial activities and governmental activities in the form of commercial activities. Whenever a case arises in which the issue of the act of state doctrine is invoked, courts must take into account all of the issues, as well as the surrounding circumstances of the case, and determine whether an act, which seemingly looks commercial in nature, amounts to governmental action in substance.

In the EU, the act of state doctrine similar to that of the United States prevents the competition authority from applying Articles 101 and 102 of the TFEU.[38] The *Ladbroke Racing* Case[39] is the landmark case in the EU on the act of state doctrine. In this case, the European Court of Justice stated that EU competition law applies only to anticompetitive conduct of undertakings on their own initiative. It further stated that, if conduct is required by legislation, then the restrictions of competition are not attributable to undertakings. The act of state doctrine in the EU is not only limited to an act in pursuance of legislation or a formal act of foreign state but also can extend to the conduct of a private enterprise in question if it was unilaterally imposed by the authorities through the exercise of irresistible pressure.[40]

The EU Commission clarified its position for the applicability of the act of state doctrine on agreements on voluntary export restraints. In Franco-Japanese Ball-Bearings Case, the Japanese exporters of ball bearings entered into an agreement voluntarily to restrain the export of ball bearings to Europe under the threat of antidumping actions.[41] The EU Commission regarded that this agreement was an infringement of Article 85 of the Treaty of Rome (predecessor of Article 101 of TFEU) and imposed a fine on the Japanese exporters. The Japanese respondents argued that this restraint of export was predicated on the directive of the Japanese government to refrain from excessive competition when engaging in export to Europe and, for this reason, should be excused from the application of the EU competition law. In relation to this claim, the Commission issued the following statements:

> (a) Measures taken in pursuance of trade agreements between the Community and Japan.
>
> These are acts of external commercial policy, which is as such outside the scope of Article 85 of the EEC Treaty.
>
> (b) Measures imposed on Japanese undertakings by the Japanese authorities.
>
> These measures are also outside the scope of Article 85. However, in both cases, Article 85 could be applicable to any agreements or concerted practices additional to such agreements.
>
> (c) Measures resulting from agreements or concerted practices between undertakings which are merely authorized by the Japanese authorities under Japan Law. [42]

Such authorization, while required for measures to be lawful in Japan, would not necessarily mean that Article 85 could not apply because the undertakings concerned were free to refrain from entering into an agreement or engaging in concerted practices.

[37]There are a number of other cases decided in U.S. courts on the act of state doctrine. For an overview of those cases, see 1 American Bar Association Antitrust Section, Antitrust Law Developments 1192–201, (8th ed. 2017).

[38]On the EU act of state doctrine and the foreign sovereign compulsion doctrine, see M. Martyniszyn, *A Comparative Look on Foreign State Compulsion as a Defense in Antitrust Litigation*, 8 Competition L. Rev. 143, 167 (2012).

[39]Case C-359/95, Comm'n of the European Cmty. and French Republic v. Ladbroke Racing Ltd., 1997 E.C.R. I-6256.

[40]Case T-387/94, Asia Motor France SA v. Comm'n of European Cmty., 1996 E.C.R. II-961.

[41]1974 O.J. (L 343/19) (hereinafter The Franco-Japanese Ball-Bearings Agreement).

[42]Quoted in Van Ball & Bellis, Competition Law of the EEC 33–34 (2nd ed. 1990).

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(d) Measures resulting solely from agreements, concerted practices, or decisions by association of undertakings or in concert with the appropriate European undertakings.

These agreements of a private nature may also come within the provisions of Article 85. The Commission has expressly drawn the attention of undertakings to this point by an opinion published in the Official Journal in October 1972.

This statement of the EC Commission takes a formalistic view and states that only an act of an enterprise based on legislation or formal directive of the government is qualified as being exempt from the scope of Article 85 of the Treaty of Rome. It does not touch on the gray zone issues where conduct of an enterprise is *de facto* forced upon it by the government or any other public body. However, as examined above, the case law jurisprudence in the EU has adopted the doctrine that a *de facto* compulsion qualifies the recipient of it for exemption from the disciplines of competition law.[43]

In Japan, the Supreme Court ruled that an act of the Tokyo Municipal Government is released from competition law liability if it acted to promote the welfare of its citizens. This is the *Tokyo Government Slaughterhouse* Case.[44] Involved in this case was a sale of meat product for prices below the cost of production by the Shibaura Slaughterhouse, a part of the Tokyo Municipal Government, in order to supply the population with meat product inexpensively. This conduct was challenged by private slaughterhouses on the ground that such a sale below the cost of production amounted to predatory pricing and damaged the business of its competitors. The Supreme Court ruled that: (a) the Tokyo Municipal Government is an undertaking so far as it acts in the areas that private enterprises can engage in (and thus its standing as an undertaking in court was established) and (b) the sale at a price below the cost of production was made to supply inexpensive foods to the population as part of price policy and, therefore, it is an implementation of public policy which exonerates the Tokyo Government from the claim of committing unfair business practices.

This decision points to an act of local government rather than the central government. However, the same rule should apply, *mutatis mutandis*, to acts of the central government because both central and local governments are public bodies and constitute part of the Japanese Government.

The above reviewed decisions of courts and administrative agencies in charge of competition law calls into question whether, in invoking the act of state doctrine, the directive of the foreign government relied upon by the respondent must be a legitimate and formal decision of a foreign sovereign or its *de facto* or informal (or even unlawful) pressure will do if such a pressure is proven to be irresistible. There is also a related question of how the legitimacy of a foreign governmental act and the pressure should be proven. There are a variety of decisions in the United States which indicate, on the one hand, that the lawfulness of such foreign directive in its own state is the key factor to exonerate conduct of enterprises based on it and, on the other, those signifying that, as much as a *de facto* pressure is proven to exist, it suffices to qualify as an exemption from enterprises from the illegality under competition law.

In *Hartford Fire Insurance Co. v. California*, the Supreme Court of the United States announced that only a legal order of a foreign government qualifies the respondent in an antitrust suit to invoke the issue of comity for foreign government actions as the matter of defense to an antitrust challenge.[45] The Department of Justice, in its Antitrust Guidelines on for International Enforcement and Cooperation, takes a similar position on the Act of State Doctrine and the Foreign Sovereign Compulsion Doctrine. [46]

[43]Int'l Ass'n of Machinists, 649 F.2d at 1360.

[44]Saikō Saibansho [Sup. Ct.] Dec.14,1989, 1986(O)655, 43Saikō Saibansho Minji Hanreishū [Minshū]12, 2078.

[45]509 U.S. 764 (1993); *see also* United States v. Watchmakers of Switzerland Info. Ctr., Inc., 133 F. Supp. 40 (S.D.N.Y., 1955).

[46]Issued by U.S. Department of Justice and Federal Trade Commission, Jan. 13, 2017, at 28 *et seq.*

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However, in *Interamerican Refining Corp. v. Texas Maracaibo, Inc.*, a different concept of the Act of State Doctrine and the Foreign Sovereign Compulsion Doctrine was enunciated.[47] In this case, the Venezuelan Government ordered the defendant not to sell oil to the plaintiff. The District Court granted a summary judgment to dismiss the complaint, stating:

> When a nation compels a trade practice, firms there have no choice but to obey. Act of business become effectively acts of the sovereign . . . . Anticompetitive practices compelled by foreign nations are not restraints of commerce as commerce is understood in the Sherman Act, because refusal to comply would put an end to commerce.[48]

In fact, the Venezuelan Government never invoked law to prohibit the defendant from exporting oil to the United States. Its order was made orally and the lawfulness of such action in Venezuelan law was doubtful. However, the U.S. district court ruled that U.S. courts were not authorized to pass on the question of whether an order in a foreign state was lawful or not. What matters as far as U.S. law is concerned is whether the conduct in question of the defendant had been made under irresistible force and could not have been avoided. Although this decision has been criticized,[49] it has never been formally overruled and it can be assumed that this is still a valid precedent.[50] However, a mere approval or inaction of a foreign government does not constitute, without more, a foreign sovereign compulsion and a defense to antitrust charge.[51]

In proving the existence of foreign government compulsion, the crucial question is how to prove the foreign government compulsion. In a recent U.S. Supreme Court decision (*Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co., Ltd*, 138 S. Ct. 1862 (2018)) this was dealt with. Involved in this case is a Chinese export cartel fixing the price of vitamin products to be exported to the United States, and the U.S. purchasers brought an antitrust suit against the export cartel. The defendants argued that this cartel was directed by the Chinese Government, and it constituted a foreign sovereign compulsion. The Chinese Government filed an *amicus curiae* brief claiming that the export cartel in question was mandated by it under the authority of Chinese government. The District Court dismissed this defense on the ground that the claim of foreign compulsion was too vague to be accepted.[52]

The Court of Appeals reversed the decision and stated that a view expressed by a foreign sovereign that it compelled the conduct in question should be accepted unconditionally at its face value.[53] The Supreme Court stated, in reversing the decision of the Court of Appeals, that, although a foreign government's statement on its own policy deserves respect, U.S. courts should take into account, in deciding whether this is the conclusive evidence of act of state, the contexts in which the statement is issued—such as, inter alia, its clarity, context, and purpose, the foreign government's past positions, thoroughness, as well as the transparency of the foreign legal system.

As shown in this decision, a statement of a foreign government of its own policy and of the conduct which the foreign government compelled is important and sometimes even crucial evidence of the act of state or foreign compulsion although not necessarily conclusive in all cases.

Last, the question of whether the petitioning to the government by an enterprise to act in its favor, be it excluding competition through legislation or any other kind of governmental acts, raises antitrust issues should be touched upon. In democratic states, the right of citizens to petition its government to grant favors is generally recognized as a constitutional right. If such a petition is successful and competition is eliminated by a measure taken by the government as the result of

[47]307 F. Supp. 1291 (D. Del. 1970); *see also* Trugman-Bash v. N.Z. Dairy Bd., 954 F. Supp. 733 (S.D.N.Y, 1997).
[48]*See* Maracaibo, 307 F. Supp. at 1298.
[49]*See, e.g.,* Sabre Shipping Corp. v. Am. President Lines, Ltd., 285 F. Supp. 949 (S.D.N.Y., 1968).
[50]*See also* U.S. v. First Nat'l City Bank, 396 F. 2d 879 (2d Cir. 1968).
[51]U.S. v. Sisal Sales Corp., 742 U.S. 268 (1927); Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. (1962).
[52]In re Vitamin C Antitrust Litigation, 584 F. Supp. 2d 546 (E.D.N.Y. 2008).
[53]In re Vitamin C Antitrust Litigation, 837 F. 3d 175 (2d Cir. 2016).

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such petition, still the petition is an exercise of a constitutional right and should be allowed unless such a petition is a "sham" and merely a camouflage of otherwise illegal conduct. In *Eastern* R. R. Presidents Conf. *v. Noerr Motors Freight., Inc.*, a group of railway companies petitioned the governor of the State of Pennsylvania to veto a legislative bill which would ease restrictions on trucking companies, their competitors.[54] The trucking companies brought an antitrust action against the railway companies on the ground that the actions of railway companies constituted conspiracies to monopolize the interstate commerce in violation of Sections 1 and 2 of Sherman Act. The U.S. Supreme Court rejected this claim for the reason that the measures taken by the railway companies were nothing but petitioning the government to influence its decision by petitioning and amounted to a constitutional right of petitioning the government. This is a case where private parties petitioned the state government to procure a governmental measure granting a favor to it. However, there is no reason that this doctrine would not apply to a situation where a private party petitions the foreign government to acquire a favorable governmental measure.

However, this principle has been somewhat circumscribed by subsequent court decisions. Courts refused to recognize petitioning a government as a constitutional right in situations where, for example, a sham claim was made and false information was supplied to the government by petitioning party. Most notably in *California Motor Transport Co. v. Trucking Unlimited*, trucking companies conspired and jointly moved to prevent competing companies from acquiring a license to operate a trucking business to be granted by the state governments.[55] These companies systematically filed complaints every time when competitors filed applications to get license. The Supreme Court decided that actions of those trucking companies were merely a sham claim to cover up the conspiracy to exclude their competitors from the market and were not entitled to be exempted by the right of petitioning government. There are some court decisions propounding that sham claims and claims based on false information would not entitle the petitioners the exemption from antitrust laws.[56]

There is no reported case in the EU or Japan where the exact issue of whether petitioning the government to take a measure favorable to the petitioner and has the effect of excluding competitors from market was dealt with as a matter of competition law. However, both in Japan and the EU, the right to petition the government is generally recognized, and so the legal situation should not be different from what it is in the United States.

IV. Implications of the Act of State Doctrine

The act of state doctrine suggests that courts in a state should refrain from making judgment on the wisdom of legislation or any other acts of a foreign state. This doctrine is a corollary from the comity that each state owes to another state as mutually independent entities.

If a state is a signatory of an international agreement such as the CPTPP, it is incumbent on it to comply and respect the obligations contained in it. In view of this, a Contracting Party of the CPTPP is required to comply and incorporate the mandates of the CPTPP in its domestic regulation. Chapter 17 of the CPTPP contains detailed rules on how SOEs should behave so as not to deviate from the principles set out in it. As touched upon already, the CPTPP requires that Contracting Parties secure that their SOEs would not engage in discrimination, other predatory practices, and abuse of dominant position contrary to the principles of fair competition. Therefore, it seems that courts and competition authorities can assume that Contracting Parties of the CPTPP have adopted these principles in their domestic legislation. So far as those states are concerned, courts and competition authorities are free from the duty of weighing various

[54]365 U.S. 127 (1961)

[55]404 U.S. 508 (1972).

[56]For those cases, see ANTITRUST LAW DEVELOPMENTS *supra*, note 22, at 1299–1306.

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factors based on the act of state doctrine if the matter at issue is the conduct of SOEs of the Contracting Parties of the CPTPP.

If competition authorities deal with conduct of SOEs in situations other than those of the CPTPP Parties, they are faced with the task of considering the act of state doctrine in judging whether the conduct of their SOE amounts to an infringement of competition law or it should be exonerated. The act of state doctrine is elusive, and its scope is not precisely delineated. Therefore, courts and competition authorities face the difficult task of weighing and balancing different and sometime contradictory policies and principles. It should be emphasized that, although commercial activities of SOEs are not excluded from the scope of act of state for the mere reason that these are commercial activities, the act of state doctrine should be applied only when these activities are decided at a high echelon of the government such as the prime minister, president, a cabinet decision or, at minimum, a directive of bureau chief of a department.

G. Conclusion – International Cooperation

As analyzed above, both the CPTPP (free trade agreements) and competition law share the common objective of moderating the conduct of SOEs. The difference between them is that of the methodology that each takes, for example, that the CPTPP requires its Contracting Parties to ensure that SOEs under their respective jurisdictions conduct their businesses in conformity with the principles as enunciated in it, and competition law of nations directly imposes disciplines on anti-competitive conduct of SOEs regardless of nationality and states to which they belong.

However, the types of conduct regulated under the CPTPP and competition law of nations show striking similarities in that both are concerned with prohibiting undue discrimination and predatory practices of enterprises with dominant market powers. This leads us to enquire whether those two sets of laws and regulations can coordinate their regulatory activities and cooperate with each other in order to make the regulation more effective.

Among various types of international cooperation, the following three deserve a special attention. The first is the OECD (Organization of Economic Co-operation and Development),[57] the second is the WTO, and the third is the ICN (International Competition Network).[58] OECD's Competition Committee has made remarkable accomplishments in promoting competition policy in the international arena. OECD provides fora for debates on important international economic issues. It has published many reports and recommendations for governments on economic and industrial policies, including competition policy. Although OECD reports and recommendations are not binding on the Members, these reports and recommendations have been adopted by many governments as their guides for economic policies on important matters. Especially relevant to our purpose is the activities of its Competition Committee which specializes in the international promotion of competition policy. It has published many reports on competition policy matters of international importance, and some of them have been adopted by the Members as part of their competition laws. For a recent example, the 2019 Recommendation of the Council Concerning Effective Action Against Hard-Core Cartels should be mentioned.[59]

The writer would like to suggest that the OECD's Competition Committee establish a special working group to study the relationship between SOEs' activities and competition policy with some emphasis on the scope of the act of state doctrine in order to clarify under what conditions the act of state doctrine gives an exemption from competition law of SOEs' activities which would otherwise be held unlawful.

[57]Org. Econ. Co-operation & Development [OECD], https://www.oecd.org (last visited Jan. 15, 2023).

[58]Int'l Competition Network, https://www.internationalcompetitionnetwork.org (last visited Jan. 15, 2023).

[59]OECD, *Recommendation of the Council Concerning Effective Action Against Hard-Core Cartels* (Jan. 7, 2019) Legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0452.

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GATT 1994: Article XVII, which is part of the WTO agreements, applies to activities of SOEs in international trade, and therefore activities of SOEs and their effects on international trade are of concern to the WTO. The Working Party on State Trading Enterprises attached to the Council for Trade in Goods in the WTO is in charge of surveillance of activities of SOEs.[60] At this time, GATT 1994: Article XVII applies only to activities of SOEs in international trade, and consequently the mandate on the Working Party is limited to activities of SOEs in international trade. The writer would suggest that the mandate to this working party be expanded to cover activities of SOEs in general because many FTAs have adopted provisions on SOEs, the scope of which is not limited to SOEs activities in international trade. In view of this situation, it makes sense to incorporate in the mandate to the Working Part on State Trading Enterprises more comprehensive surveillance of SOEs. This is important in view of possible cooperation and corroboration between the Working Party on State Trading Enterprises and the Committee on Regional Trade Agreements (CRTA).

Probably the most important forum for cooperative relationship between WTO/FTAs on the one hand and competition policy on the other is the International Competition Network (ICN). The ICN was established in 2001 not as an international organization but as an international forum to promote convergence of competition laws and their enforcement among member states.[61] In 2021, 130 states and 141 competition authorities are members. The ICN is composed of competition authorities of states, practicing lawyers, business groups, and academics. Since its establishment, the ICN has been active in promoting and coordinating competition policy among the participating states and harmonizing competition rules among them. At the time of this writing, there are 5 working groups: Advocacy, Agency Effectiveness, Cartel, Merger, and Unilateral Conduct. Each group holds meetings frequently and submits the result of their research and proposals to the annual conference. The annual conference can take up such proposals and formulate recommendations for promotion of competition laws of the member states. Although such recommendations are not binding on the members, some of the important recommendations were adopted by the conference, and member governments put them into their domestic regulation.[62]

The author would like to suggest that members of the ICN establish working group on SOEs and international trade which would be commissioned to study the relationship between activities of SOEs and competition policy and law and formulate recommendations on the applicable rules on activities of SOEs in international trade, including the applicability of the act of state doctrine to their activities. Possible cooperative and collaborative relationships between the ICN and trade entities such as the WTO and FTAs should be established. As already touched upon earlier, abuse of market power of SOEs is closely related to the prohibition of monopolization and abuse of dominant position. Monopolization and abuse of dominant position are the main features of unilateral conduct of which the Working Party on Unilateral Conduct in the ICN is in charge. Therefore, a working group on SOEs might be established as a part of the Working Party on Unilateral Conduct in the ICN. In such a working group, representatives of competition authorities and trade authorities—as well as those of the WTO, FTA, and OECD—can meet together regularly and issue recommendations on important policy and enforcement principles as regarding the relationship between SOEs, competition policy, and trade policy.

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[60]https://www.wto.org/english/tratop_e/statra_e/statra_info_e.htm (last visited Jan. 17, 2023).

[61]Eleanor M. Fox, *Linked In: Antitrust and the Virtues of a Virtual Network*, 43 INT'L LAWYER. (2009).

[62]*See, e.g.*, Recommended Practices for Merger Notification & Review Procedures (2017), https://www.internationalcompetitionnetwork.org/document-library/.

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