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Government support and state enterprises in industrial sectors

An overview

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Note from the Secretariat

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Acronyms and abbreviations

AML:	Anti-Monopoly Law
BTU:	British thermal units
CAI	Comprehensive Agreement on Investment
CNBM:	China National Building Material Company
CPTPP:	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CRRC:	China Railway Rolling Stock Corporation
CSSC:	China State Shipbuilding Corporation
FTA:	Free-Trade Agreement
M&As:	Mergers and acquisitions
MOFCOM:	Ministry of Commerce
NCA:	Non-commercial assistance
PSO:	Public service obligation
PTA:	Preferential trade agreement
SABIC:	Saudi Basic Industries Corporation
SAMR:	State Administration for Market Regulation
SASAC:	State-owned Assets Supervision and Administration Commission of the State Council
SCM:	WTO Agreement on Subsidies and Countervailing Measures
SE:	state enterprise
SEC:	Saudi Electric Company
SMIC:	Semiconductor Manufacturing International Corporation
SOE:	state-owned enterprise
STE:	State trading enterprise
USMCA	United-States-Mexico-Canada Agreement

Executive Summary

Enterprises owned, -invested, -controlled, or -influenced by the state are playing a growing role in global supply chains and capital markets. While state enterprises (SEs) have long been found in services industries, their size and influence appear to be on the rise in manufacturing as well. The world's largest producers of steel, aluminium, rolling stock, ships, and cement are, for instance, state-owned enterprises, which compete internationally through cross-border trade and investment.

State ownership may not in and of itself be problematic. Yet, poorly governed SEs and a wider regulatory environment favouring them can raise important competition and trade concerns. Recent work on industrial subsidies undertaken by the OECD has shed light on the relationship between the state and its enterprises, as well as on the participation and conduct of SEs in global supply chains. This work has notably found SEs to be large recipients of government support, be it in the form of government grants, below-market borrowings, tax concessions, and below-market energy inputs. Additionally, SEs have at times acted as vehicles for the provision of government support to other firms, such as where state utilities provide below-market energy inputs to energy-intensive plants or state banks provide below-market loans to manufacturing firms.

These findings raise four main transparency issues concerning state ownership and subsidies. First, not only can countries differ in how they define SEs, but they also vary in their disclosure of the extent of government ownership of industrial assets. Large investments by government funds and other intermediaries can exacerbate the problem by further densifying and lengthening the ownership chain between the government and industrial companies. Second, SEs may benefit from a wide range of government support and regulatory privileges, which can prove difficult to detect. Third, the issues raised by government support do not concern only companies that are majority-owned by governments, but also large industrial firms with lower thresholds of ownership, with particularly high levels of support for firms with 25%-50% state ownership. Fourth, the provision of government support through SEs as intermediaries can make it harder for trading partners to identify measures or policies of concern, as well as creating further ambiguity around the nature of government entities and the global scale of industrial subsidies.

At the multilateral level, there is no WTO agreement or provision specifically tailored to address the potential trade distortions caused by subsidies to and by SEs and their conduct. Although the SCM Agreement disciplines domestic subsidies, it might not capture certain forms of support granted to and through SEs. Furthermore, WTO Members' lack of transparency with respect to their subsidies may contribute to hindering efforts to identify such support. Countries are increasingly seeking to remedy some of these gaps in the context of their preferential trade agreements (PTAs), several of which contain disciplines on SEs. This report thus examines the extent to which approaches followed in current PTAs can be useful in tackling the issues identified above, with a view to informing future plurilateral or multilateral discussions on these matters. Any such discussions could also benefit from ongoing efforts in the OECD through, for example the revision of the *Guidelines of Corporate Governance on State-Owned Enterprises* to promote the principles of transparency, efficiency, as well as good governance and operations of SEs.

Government support and state enterprises in industrial sectors

The evolving landscape of state enterprises in industrial supply chains

1. Enterprises in which the state is a large investor are playing a growing role in global supply chains and capital markets. It is estimated that the public sector[1] holds at least 14% of global stock-market capitalisation and more than 50% of shares in nearly 10% of the world's largest listed companies (De La Cruz, Medina and Tang, 2019[1]). While many of these companies operate in services industries that were long shielded from competition (e.g. banking, energy & utilities, transport, and telecommunications), several others play leading roles in industrial supply chains and compete internationally through cross-border trade and investment. For example, the world's largest steelmaker by production volume in 2021 was the China Baowu Group, a company that is 90% owned by China's State-owned Assets Supervision and Administration Commission (SASAC). The third largest global steelmaker, Ansteel, is likewise majority-owned by the SASAC, as are Chinalco, CRRC, CSSC, and CNBM[2], which are, respectively, the world's largest producers of aluminium, rolling stock, ships, and cement. In aerospace, Airbus – a company that is 26% owned by the governments of France, Germany, and Spain – has become the world's largest producer of civilian aircraft. As these examples illustrate, government ownership in manufacturing is far from trivial.
2. In view of the weight of state enterprises (SEs) in the global economy, the OECD has conducted a substantial amount of work looking at these enterprises from the standpoint of competition, trade, and investment policy. As will be discussed further below, depending on the focus, this work has looked at a range of relationships between companies and the state, from majority ownership and formally-defined state-owned enterprises (SOEs), through to forms in which the government has other levels of investment, including more indirectly (e.g. through shell entities or incorporated government funds).
3. Much of the work to date has revolved around OECD legal instruments. The *OECD Guidelines on Corporate Governance of State-Owned Enterprises* (OECD, 2015[2]) serve in particular as a reference point for governments to manage more effectively their responsibilities as company owners, thus contributing to making state-owned enterprises (SOEs) more competitive, efficient, and transparent. More recent contributions include a voluntary transparency and disclosure standard for internationally active SOEs and their owners (OECD, 2021[3]), as well as an *OECD Council Recommendation on Competitive Neutrality*[3], which seeks to ensure a level playing field between SOEs and private companies. The OECD has also conducted analytical studies reviewing the policy implications of the participation of state enterprises in global trade (Kowalski

[1] "Public sector" is understood in this specific case as direct ownership of companies by central governments, local governments, public pension funds, state-owned enterprises, and sovereign wealth funds. Of these investors, central and local governments are the largest, having accounted in 2017 for 56% of all public-sector holdings in listed equity (De La Cruz, Medina and Tang, 2019[1]).

[2] CRRC stands for the China Railway Rolling Stock Corporation, CSSC for the China State Shipbuilding Corporation, and CNBM for the China National Building Material Company.

[3] See https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0462 (accessed on 15 June 2022).

et al., 2013[4]; Kowalski and Perepechay, 2015[5]; Kowalski and Rabaioli, 2017[6]), together with sectoral work looking more specifically into the role of SEs in the steel and shipbuilding industries (Daniel, Lee and Parmentier, 2021[7]; Burrai, Giua and Perepechay, 2020[8]).

4. Recent work on government support in industrial sectors undertaken by the OECD Trade Committee sheds further light on the question of state enterprises and their participation in global supply chains. Approaching the issue from the perspective of identifying the nature and scale of industrial subsidies, this work has found SEs to be relatively large recipients of government support but also vehicles for such support. Studies of government support in the aluminium (OECD, 2019[9]) and rolling-stock (OECD, 2023[10]) value chains have found that the largest subsidy recipients tend to be SEs. Both studies also documented that some support is not provided by governments directly but rather channelled indirectly through SEs, such as state utilities providing below-market energy inputs to aluminium smelters or state banks providing below-market loans to manufacturing firms. A study of government support in the semiconductor value chain (OECD, 2019[11]) likewise observed that some of the support for chipmakers had taken the form of equity offered on below-market terms by government investment funds registered as corporations. Recent studies looking at a broader set of industrial sectors to identify the scope and scale of below-market finance (borrowings and equity) (OECD, 2021[12]) and below-market energy inputs (OECD, 2023[13]) have confirmed these findings.

5. The recent work undertaken in the Trade Committee and other related projects in the OECD highlight that understanding the role of SEs is of paramount importance for current trade debates about industrial subsidies. The reverse is also true, with studies of industrial subsidies providing essential information for discussions of competitive neutrality and of the role of state enterprises as market participants. The present report aims to summarise what we know about the interplay between SEs and government support, as well as their treatment under multilateral trade rules and preferential trade agreements (PTAs), with a view to informing both future work on competitive neutrality and competition more broadly, and the trade policy agenda.

There are different views as to what constitutes a state enterprise

6. The extent to which governments own industrial assets remains uncertain and is mired in opacity, partly because governments themselves differ in their views of what constitutes a SOE. National definitions abound but reflect at times conflicting assessments as to whether companies ought to be considered state-owned, state-invested, or state-controlled, or -influenced. Some PTAs contain, nevertheless, specific provisions on SOEs and definitions that are commonly agreed among parties. Article 17.1 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) defines, for example, an SOE as "an enterprise that is principally engaged in commercial activities in which a Party: (a) directly owns more than 50 per cent of the share capital; (b) controls, through ownership interests, the exercise of more than 50 per cent of the voting rights; or (c) holds the power to appoint a majority of members of the board of directors or any other equivalent management body." Such definitions may vary across PTAs, however, including where membership in different agreements overlaps somewhat.[4]

[4] On the various definitions of SEs contained in the different PTAs, see subsection on the 'issue of defining state enterprises' below.

7. Recognising that "[c]ountries differ with respect to the range of institutions that they consider as state-owned enterprises", the *OECD Guidelines on Corporate Governance of State-Owned Enterprises*[5] define SOEs as "any corporate entity recognised by national law as an enterprise, and in which the state exercises ownership" (OECD, 2015[2]). This notably includes:

> *"enterprises that are under the control of the state, either by the state being the ultimate beneficiary owner of the majority of voting shares or otherwise exercising an equivalent degree of control. […] Also, minority ownership by the state can be considered as covered by the Guidelines if corporate or shareholding structures confer effective controlling influence on the state (e.g. through shareholders' agreements). Conversely, state influence over corporate decisions exercised via bona fide regulation would normally not be considered as control. Entities in which the government holds equity stakes of less than ten percent that do not confer control and do not necessarily imply a long-term interest in the target company, held indirectly via independent asset managers such as pension funds, would also not be considered as SOEs. […] Throughout the Guidelines, the term 'ownership' is understood to imply control."*

8. This report follows the definition of the OECD Guidelines but generally refrains from employing the phrase 'state-owned enterprise' in light of the different meanings that this phrase can carry in different legal contexts. Instead, the report uses the phrase 'state enterprise' in accordance with earlier OECD work undertaken for the Trade Committee (Kowalski and Rabaioli, 2017[6]), unless the discussion addresses legal definitions of SOEs specifically. As noted in that work (ibid), "[o]wnership, implies certain interests, rights and obligations characteristic to an owner and thus exertion of influence may be more likely. It is also directly observable. Yet, it is also clear that ownership is neither necessary for governments to influence enterprises' operations, nor does it inevitably entail such influence."

There is not enough transparency on government ownership of industrial assets

9. In addition to the lack of a common definition of SOEs, the uneven disclosure by governments of the company shares they own contributes to obscuring the true extent of government ownership of industrial assets. As noted in earlier OECD work, "comprehensive ownership data is scarce; countries that fully disclose and update key information on their state-owned enterprises are the exception rather than the norm" (Kowalski et al., 2013[4]). The recent increase in the investments of government guidance funds[6] aggravates this problem by further densifying and lengthening the ownership chain between the government and industrial companies. In the case of semiconductors, for instance, successive investment rounds by China's central and sub-national government funds have – through a dense network of holding companies and shell entities – significantly increased government ownership of Chinese semiconductor firms, even though many such firms may not meet China's definition of SOEs (Box 1).

5 Henceforth "the OECD Guidelines".

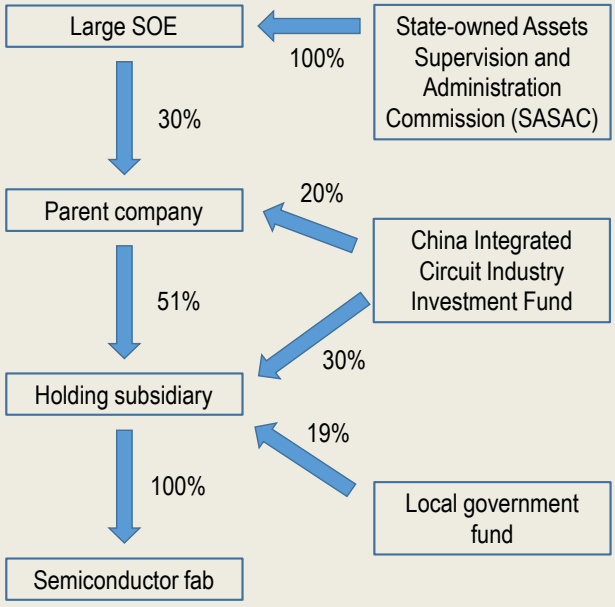
6 Government guidance funds are state-backed funds established by central or local authorities that seek to mimic venture-capital funds and private-equity investors, with the aim of channelling funding toward priority industries to accelerate their development (Noble, 2018[51]).

Box 1. Government guidance funds and ownership of semiconductor fabs[1] in China

The Chinese Government has since 2014 played a decisive role in co-financing through equity injections the construction of new semiconductor fabs in the country. This usually happens through complex ownership structures that involve local and central government funds, as well as certain SOEs (Figure 1). The China Integrated Circuit Industry Investment Fund is the foremost example, having in its first funding round received investments from China's Ministry of Finance (36%); the China Development Bank (22%); China Tobacco, a state enterprise under the State Council (11%); Shanghai Guosheng, an investment holding of the Shanghai municipality (9%); Wuhan Financial Holdings, the investment arm of the Wuhan municipality (5%); China Mobile (5%); and Beijing E-Town International Investment & Development (10%), an investment corporation of the Beijing municipality. Together, state-related entities provided nearly 98% of all of the Fund's financial resources.

Recipients of the funding from government guidance funds include some of China's largest semiconductor companies and their subsidiaries. Examples include the Semiconductor Manufacturing International Corporation (SMIC), which had less than 15% of its shares owned by government-related investors back in 2004 but saw this percentage increase to more than 45% by 2018, led by the China Integrated Circuit Industry Investment Fund and Datang Telecom, a company owned by the SASAC. Another example is Jiangsu Changjiang Electronics Technology, a leading provider of chip assembly, testing, and packaging services, which went from private ownership to partial government ownership (25-30%) following investments by the China Integrated Circuit Industry Investment Fund and SilTech Semiconductor, a subsidiary of SMIC.

Figure 1. Stylised ownership structure of new semiconductor fabs in China, % of shares



Note:
1 'Fabs' is the common denomination for semiconductor manufacturing facilities or fabrication plants.
Source: OECD (2019[11]).

10. Although it can be difficult to obtain comprehensive data on the ownership structures of industrial firms and the identity of their beneficial owners, more granular information can still be collected through corporate disclosures, such as annual reports and bond prospectuses. Using this approach for the largest firms by sales or production volumes for each of 13 key industrial sectors, an OECD study of below-market finance found that governments own a large proportion of global assets in shipbuilding, aluminium, steel, and aerospace & defence (Table 1) (OECD, 2021[12]). Government ownership was also found to be significant in key sectors such as automobiles, cement, chemicals, and rolling stock, thus indicating that governments continue to have direct involvement in production and investment decisions affecting a sizable portion of manufacturing activities.

Table 1. Governments own a large proportion of assets in shipbuilding, aluminium, steel, and aerospace & defence

Sector	Total book value of assets in 2018 (USDmn)	Percentage of assets held by governments
Aerospace and Defence	860,335	28.9%
Aluminium	446,126	55.5%
Automobile	3,234,765	13.4%
Cement	393,035	15.2%
Chemicals	1,354,185	19.9%
Glass and Ceramics	140,675	0.4%
Rolling stock	140,527	20.4%
Semiconductors	961,208	7.0%
Shipbuilding	208,166	67.4%
Solar photovoltaic panels	44,225	5.5%
Steel	823,348	44.0%
Telecommunications network equipment	374,598	4.1%
Wind turbines	82,376	6.1%

Note: The sample is described in OECD (2021[12]) and comprises more than 300 large manufacturing firms. The table above does not show the global amount of corporate assets in any given sector but only the assets of the firms covered by the sample. Note that the focus on manufacturing leaves out certain primary sectors that may have relatively large government ownership (e.g. natural-resource extraction and power generation).
Source: OECD (2021[12]).

11. Most governments retain ownership stakes in large services providers in network industries such as power generation and transmission (e.g. EDF, Hydro Québec, and the Tennessee Valley Authority), air and rail transport (e.g. Air New Zealand, Deutsche Bahn, and the Korea Railroad Corporation), postal services (e.g. Australia Post, Correos de Chile and Japan Post), or telecommunications (e.g. Telenor and Telia). In manufacturing industries, however, large government stakes are less common and concentrated in a few jurisdictions. For top firms in the industrial sectors covered in this report,[7] the majority of companies that are at least 25% owned by government entities are based in China (64% of such firms), followed by countries of the Gulf Cooperation Council[8] (8%), India and Indonesia (3% each), and France, Italy, Korea, and Norway (2% each). This explains why the discussion in this report has a relatively large focus on China.

7 See OECD (2021[12]) for a description of the sample.

8 Member countries of the Gulf Cooperation Council (GCC) are Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates.

12. The COVID-19 pandemic and the Russian Federation's[9] large-scale aggression against Ukraine may result in larger state ownership of firms as some governments responded to the two crises by offering fresh equity to troubled companies with weak balance sheets (UNCTAD, 2021[14]). This has notably been the case of certain services providers, such as in the air transport sector, which was greatly affected by travel restrictions and sanitary measures adopted during the pandemic (Christiansen and Sultan, 2020[15]). More recently, the energy crisis caused by the war in Ukraine prompted Germany's Federal Government to rescue energy utility Uniper in the summer of 2022 by offering loans to the company and acquiring 30% of its shares, and in December taking over 99% of the company.[10]

13. Although these rescue efforts are taking place in an emergency context and do not obey a logic of long-term implication of the government,[11] countries should, nonetheless, aim to be as transparent as possible about their ownership of companies and the resulting implications for competitors. While government equity can be an important and useful tool in a crisis, the "accidental" state ownership to which it gives rise requires careful management if it is not to result in ongoing market distortions (OECD, 2021[16]). One way to achieve this is to design emergency support so that it is transparent, proportional (with the scale of the problem support is meant to solve), time-limited (government should plan for an exit), and targeted (toward those that most need it in order to minimise windfall effects) (OECD, 2020[17]).

What are the concerns about state enterprises in industrial supply chains?

State enterprises often receive advantages over other firms

14. At a broad level, the participation of SEs in industrial supply chains raises concerns that these enterprises may not operate on a level playing field with private competitors. These and similar concerns have given rise to the concept of 'competitive neutrality', which the OECD (2015[18]) defines as a principle according to which all enterprises, public or private, domestic or foreign, face the same set of rules, and where government's contact, ownership or involvement in the marketplace, in fact or in law, does not confer an undue competitive advantage on any actual or potential market participant. The *OECD Recommendation of the Council on Competitive Neutrality* (OECD, 2021[19]) (hereafter "the Recommendation") further provides the main principles that governments should follow in order to ensure competitive neutrality is maintained, both between state-owned and privately-owned enterprises, and between different privately-owned enterprises.

15. Although competitive neutrality is a broad concept, which requires a careful consideration of rules, advantages, and disadvantages affecting the different market players, a key concern for governments arises from SEs as active market participants. Their presence, as well as the way they are treated by the state, can indeed constitute an important source of distortion to the level playing field. State ownership can lead to

9 Henceforth "Russia".

10 See www.bundesregierung.de/breg-de/aktuelles/uniper-takeover-2128422 (accessed on 16 February 2023).

11 It should also be noted that most instances of government equity infusions resulting from the COVID-19 pandemic or Russia's aggression against Ukraine have concerned to date companies in services sectors (e.g. transport, tourism, and energy utilities) rather than manufacturing firms. A notable exception is Italian steelmaker ILVA, which received in 2021 an equity infusion from state-owned Invitalia.

competitive-neutrality distortions through several kinds of interventions and measures providing government support to SEs.

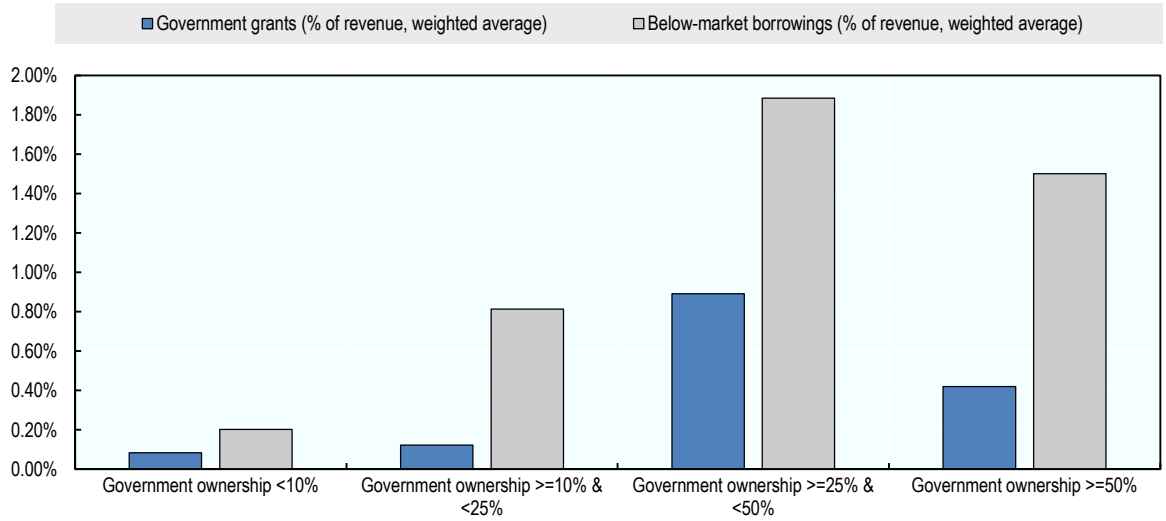
16. To the extent that SEs obtain relatively more subsidies than private competitors, then this could constitute an important source of distortions to competitive neutrality. As explained in (OECD, 2015[18]) and work undertaken in the OECD Trade Committee (OECD, 2021[12]), subsidies can take many forms, such as direct government grants, tax concessions, debt forgiveness, loan guarantees, below-market interest rates, soft budget constraints, etc. Governments can also subsidise SEs by granting them privileged access to inputs (e.g. land, infrastructure, and energy); or by purchasing from them (or forcing others to purchase from them) at above-market prices or through non-commercial terms that reduce or eliminate risk or costs for the subsidised SE.

17. OECD work indicates that large industrial firms in which governments are important shareholders would appear to receive relatively more support in the form of government grants and below-market borrowings[12] (Figure 2). This is particularly the case for firms in which the state owns more than 25% of the shares. Although it would seem that firms with 50%+ state ownership obtain relatively less in grants and below-market borrowings than firms with 25%-50% state ownership, it should be noted that the former group may benefit from other forms of support. Indeed, several of the firms with 50%+ state ownership are based in the Persian Gulf region and obtain large amounts of support in the form of below-market energy inputs through administered prices for electricity and natural gas (OECD, 2023[13]). Although Figure 2 does not include estimates for income-tax concessions (for comparability reasons), firms with 25%+ government ownership were also the largest recipients of tax concessions as a share of their revenue: 0.44% of annual revenue, against 0.31% for firms with less than 25% government ownership.

18. While manufacturing SEs may be relatively large recipients of subsidies, there are other, more indirect, forms of government interventions in the market that can also favour SEs. This may involve tilting the level playing field through the legal framework and its enforcement, in areas such as competition law, public procurement, and the broader regulatory environment, including bankruptcy law.

[12] Below-market borrowings consist in the provision of debt financings – normally by state banks or other government-related financial institutions – at contractual terms that are more favourable than those offered in the market. See OECD (2021[12]) for a more detailed discussion.

Figure 2. Large industrial firms in which governments are important shareholders would appear to receive relatively more support



Note: Data are expressed relative to the sales revenue of the firms covered in (OECD, 2021[12]) over the period 2005-19. The sample covers more than 300 large manufacturing groups and their subsidiaries in 13 key industrial sectors. The graph above does not include tax concessions since these are less comparable across countries and sectors than other forms of support. Below-market equity returns are not included either since their estimates are less precise and only concern certain specific sectors (e.g. semiconductors and aerospace & defence).
Source: OECD (2021[12]).

19. Countries should not only adopt neutral competition laws, but also maintain neutrality in their enforcement (OECD, 2021[19]). Departing from this principle can involve exempting SEs from competition law, a weaker enforcement of such rules, including a differential use of sanctions, or, more generally, a more lenient treatment of SEs compared to private enterprises, domestic or foreign, by competition authorities. This can include using the merger-control framework, also with regard to establishing jurisdiction over transactions, to favour domestic SEs or disadvantage foreign entities.

20. Unequal treatment can also emerge where government regulations are not ownership-neutral, thus benefitting SEs to the detriment of private undertakings. One such example is an explicit or implicit preferential treatment with respect to the application of bankruptcy regulations. A second example can be found in the area of public procurement, where SEs might enjoy preferential access or benefit from information asymmetries and discriminatory practices in selection criteria, to the detriment of private entities. In particular, the legislation, the terms of the tender, or the implementation of the procurement process itself can favour specific entities, such as SEs, over others. This has important consequences for competition, and consequently for efficiency and the attainment of value for money. Even in competitive markets, the misuse of selection criteria can be a powerful means of restricting the number of participants on a discriminatory base, or even to allow a pre-selected bidder to win the tender. Badly designed public procurement regulations and tenders, or their strategic use, can therefore be a major source of unequal treatment of market participants.

21. Subsidised SEs may also be able to submit abnormally low bids in internationally competitive tenders. While low-price strategies in competitive tendering are not inherently anti-competitive, predatory bidding arising from distortive practices – such as a company offering dumped prices with a calculated loss or receiving government

support[13] – may undermine trade and potentially infringe on competition law. Predatory bidding by SEs whose price and costs are distorted by state-backed financing have, in recent years, raised concerns among policy makers and industrial stakeholders alike (Alexandersson and Hultén, 2006[20]).[14] There have been allegations in relation to rolling stock (Cory, 2021[21]; OECD, 2023[10]) and large-scale infrastructure projects (e.g. telecommunications, railways, highways, and energy) that some SEs may have sought to enter third-country markets by offering unrealistically low bids. State-supported underbidding does not only distort trade and competition but may also affect the public buyer and consumers should this strategy give rise to supply delays, lower quality, higher prices,[15] and deteriorated supply (Alexandersson and Hultén, 2006[20]).

22. SEs may also be used as facilitators or instruments for forcing foreign partners to transfer technology.[16] This may prove a particularly salient issue where the state owns technology-oriented companies that rely intensively on intellectual property. The obligation for foreign carmakers to enter into a joint venture (JV) with Chinese SEs, together with high import barriers on imported cars and parts[17], may have, for instance, contributed to improving the offering and profitability of Chinese state-owned carmakers (OECD, 2021[12]). Even absent foreign-investment restrictions, regular transfers of technology taking place under voluntary and mutually agreed terms may be compromised where the state has a large role in the economy, notably through stakes in companies competing or partnering with foreign firms (Andrenelli, Gourdon and Moïsé, 2019[22]). Concerns may specifically arise about the protection of information provided to government bodies for approvals or licensing if the government also happens to be invested in a market competitor. State support for outbound investment in support of industrial policy goals can be problematic too, such as where governments encourage, facilitate, or direct investment in, and acquisition of, foreign companies and assets by domestic SEs to obtain cutting-edge foreign technologies and intellectual property (Andrenelli, Gourdon and Moïsé, 2019[22]) [DAF/INV/WD(2020)14].

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13 Communication from the European Commission, *Guidance on the participation of third-country bidders and goods in the EU procurement market (2019/C 271/02)*. See also www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Fusionskontrolle/2020/B4-115-19.pdf?__blob=publicationFile&v=5 (accessed on 28 July 2022).

14 See in particular the EC's Public Consultation on the White Paper of the Foreign Subsidy Tool.

15 Instead of lowering prices for public buyers, subsidised bidding can eventually lead to higher prices as it might force more efficient competitors to leave the market.

16 Forced technology transfers commonly occur in situations where the owner of a technology (e.g. an investor or licensor) is required to transfer technology to access a foreign market or be permitted to operate under the same conditions as local firms (Andrenelli, Gourdon and Moïsé, 2019[22]).

17 Along with import quotas and high import tariffs (amounting to 80%-100%) on automobiles and parts, Chinese authorities used to limit foreign ownership in JVs to 50%, thus giving Chinese partners significant control and bargaining power. The government also required all JVs to localise at least 40% of their parts and components and to transfer knowledge and establish joint technical centres to train Chinese workers (Sims Gallagher, 2006[53]). These investment restrictions are being gradually lifted and import tariffs have since been lowered.

Government support and favourable treatment of SEs can distort domestic competition and international trade

23. The various ways in which governments treat their SEs differently from other competitors can lead to distortions to competition, both at the domestic level and internationally. When SEs, as a result of their ownership, obtain unfair advantages that their domestic or international competitors do not have, for example in the form of subsidies or broader government support, competitive neutrality cannot be maintained and competition on merit is not ensured (e.g. an SE increases its market share vis-à-vis its private competitors due to a privileged access to inputs). Overall, as highlighted in the Recommendation, non-neutral application of competition law and measures that can enhance a SE's performance vis-à-vis other market participants can unduly prevent, restrict, or distort competition in domestic markets (OECD, 2021[19]) (Box 2).

Box 2. The ILVA State Aid Case

Following a number of complaints from competitors, the European Commission (EC) opened in 2016 a formal investigation into five support measures granted to steelmaker company ILVA by the Italian Government[1] in 2015. At the time of the investigation, ILVA had been under the extraordinary administration of Government-appointed commissioners since June 2013.

The investigation confirmed that ILVA obtained an undue advantage from two of the five measures, in breach of EU state-aid rules. In particular, the EC found that a state guarantee on a EUR 400 million loan and a EUR 300 million public loan were granted on below-market terms, placing ILVA in a better condition than its EU rivals, which would have to restructure or finance their operations at their own expense, at less advantageous market conditions. The EC determined the presence of a selective economic advantage by assessing whether any private market operator would have agreed to the guarantee or the loan, at the same conditions as those granted by Italy, in particular considering ILVA financial difficulties at the time.[2]

In order to remove the distortion to competition created by the aid and ensure a level playing field, ILVA was thus charged with the repayment of the illegal aid.

Notes:
1. See https://ec.europa.eu/commission/presscorner/detail/en/IP_17_5401 (accessed on 23 August 2022).
2. For more details on the EC's assessment and decision, see https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2018:253:FULL&from=EN (accessed on 23 August 2022).
Source: EC case SA.38613, https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38613.

24. When a SE is subjected, even partially, to a different, more favourable, set of laws or regulations, whether in the area of bankruptcy, procurement, competition, or elsewhere, the SE and its rivals ultimately do not compete on a level playing field. Moreover, unequal treatment of SEs under competition law might allow SEs to increase their market power, as well as to implement strategies and conducts leading to the abuse of such power, for instance by using cross-subsidisation between their different activities to charge predatory prices, or by leveraging a legal monopoly into a competitive market where they are also active (OECD, 2015[23]).

25. A weak, or unfair, enforcement of competition law can also lead to distortions when SEs are involved in mergers and acquisitions. In particular, the assessment of market concentration involving SEs can raise a number of challenges, both procedural and substantive, which, if not appropriately addressed, could lead to significant distortions to the level playing field by favouring the establishment of domestic giant SEs. If such

giants compete with foreign entities, this can further distort competition dynamics at the international level (Box 3). Conversely, jurisdiction over specific transactions can be used by governments to disadvantage selected SEs' competitors, often foreign.

Box 3. Consolidation of state enterprises in China

The creation of the SASAC in 2003 by China's State Council saw an acceleration in the consolidation of SEs within specific sectors through mergers and acquisitions (M&As). This followed a first wave of consolidation in the 1990s that sought to promote large SEs in strategic, capital-intensive sectors under the official slogan of '*zhuada fangxiao*' ('grasp the large, letting go off the small'). Merger-driven consolidation of SEs gained further momentum following the announcement of the 'Made in China 2025' initiative in May 2015 (Song, 2018[24]; O'Connor, 2018[25]; Lardy, 2019[26]), as well as the issuance in September 2015 of a guideline by the Chinese State Council that called for M&As, with a view to creating large central SEs.

Against this background, larger SEs have emerged in China in recent years in various industrial sectors. Between 2015 and August 2022, there have been at least 15 M&As in sectors such as steel, aluminium, rolling stock, shipbuilding, and rare earths. Eight of these transactions took place in the steel sector. Large, central SEs resulting from this consolidation wave include Chalco, the China Baowu Group, China National Building Material, the China Shipbuilding Group, and China Rare Earths (see Annex A).

The economic objectives pursued by Chinese authorities through these transactions appear to be three-fold. First, the government is reportedly seeking to improve SE performance by reining in excess industrial capacity and reducing debt levels through the consolidation of state assets, as well as attenuating competition among SEs (Leutert, 2016[27]; O'Connor, 2018[25]). Second, the Chinese authorities may aim to protect SEs on the verge of bankruptcy and their employees by merging them with healthier SEs, thereby potentially allowing for the transfer of assets at inflated prices from the former to the latter SE. Third, the government is aiming to create 'national champions' with larger scale and streamlined operations that can compete internationally (ibid). This latter consideration has raised particular concerns abroad, prompting a debate as to whether other countries ought in turn to create their own national champions to compete against China's giant SEs in global markets.

This merger-driven consolidation of SEs could raise competition concerns domestically and abroad: the recent merger of three rare-earth SEs leading to the creation of China Rare Earth in December 2021 could result in the consolidated entity controlling 70% of China's rare-earth output, in a market already dominated by China.[1] Downstream industries dependent on access to these critical inputs (e.g. electric vehicles) could experience significant price increases if the merger translates into larger market power.

The M&As reported in Annex A were all notified to China's MOFCOM, and since 2018 to the State Administration for Market Regulation (SAMR), consistent with China's Anti-Monopoly Law (AML). All were cleared unconditionally. It bears mentioning, however, that, in other jurisdictions such as the EU,[2] a merger between two entities that have a common state ownership may not be considered as a merger between two independent economic entities but rather as an internal restructuring. Such an approach may explain why MOFCOM and, since 2018, the SAMR, unconditionally approved all mergers between SOEs.

Notes:
1. See, for example, https://rhg.com/research/china-pathfinder-q4-2021-update/ (accessed on 3 August 2022).
2. See Section 1.7 of the Commission Consolidated Jurisdictional Notice under Council Regulation 139/2004/EC on the control of concentrations between undertakings, 16 April 2008, OJ C 95/1. Note that various PTAs contain a similar provision.

26. Where distortions to competition have effects beyond the domestic market, they can also affect trade flows.[18] Trade distortions can happen where government support enables SEs to prevent foreign competitors from entering their domestic market (thus impairing import competition and hindering market access) or where it allows SEs to displace foreign competitors in other markets (export competition). In severe cases, government support to SEs may go as far as to displace foreign companies in their home markets through predatory pricing. In all three situations, the support that governments offer to their SEs has the effect of harming foreign competition and distorting trade flows.[19]

27. The tight integration of global markets and the complexity of industrial supply chains implies that the trade distortions caused by support for SEs and other firms may not materialise in expected ways, but could instead be felt indirectly by competitors or benefit firms based in third countries. A major channel of trade distortions in heavy industry has been excess capacity, notably due to government support to SEs enabling them to over-invest in or maintain capacity that would otherwise not be economically viable.[20] The existence of this capacity over and beyond what market conditions would normally warrant can exert downward pressures on global prices and depress the profits of foreign competitors. Faced with lower profits or outright losses, producers that do not benefit from government support may respond by exiting the industry, while subsidised producers can keep operating at a loss until global capacity adjusts to meet demand (OECD, 2021[12]). Eventually, the presence of zombie SEs in the market – that is, SEs that are not economically viable but kept alive through government support – can discourage new entrants and thwart the growth of incumbents, with negative consequences for both trade and competition.

28. In the end, whether one looks at competitive distortions in domestic or international markets, government support and other favourable treatment for SEs are a cause for policy concern. The harm to competition, domestic and foreign, denies consumers the benefits of lower prices or greater product variety and hinders innovation efforts. Public perceptions that international trade is 'unfair' due to government support can also erode popular support for open markets (OECD, 2021[28]). This, in turn, can push other countries to retaliate in a downward spiral of tit-for-tat, to the detriment of economic integration and prosperity. Eventually, resources are misallocated, resulting in inefficiencies and slower growth in living standards.

SEs can also be providers of government support

29. Another concern stemming from the participation of SEs in industrial supply chains relates to the role that some of these companies play as providers of support themselves. This is, for example, the case where state banks offer industrial companies loans at below-market terms and conditions, or where state utilities provide companies with energy inputs at below-market prices. In this situation, state banks or utilities can act as conduits for governments' industrial policies, often with negative consequences for the

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18 There are in practice similarities and a degree of overlap between distortions to competition and trade, so that "[u]ltimately, open and competitive global markets are underpinned by open and competitive domestic markets, and vice-versa" (OECD, 2021[28]).

19 There is a large theoretical literature looking at trade distortions caused by subsidies in a context of imperfect competition, including Brander and Spencer (1985[54]) and Venables (1994[55]).

20 This discussion concerns *structural* excess capacity, which refers to excess capacity that is due to subsidies and other forms of government support. *Cyclical* excess capacity, on the other hand, results from normal fluctuations in the business cycle. Both concepts are distinct from redundancy capacity as a risk-management strategy.

profitability of these SEs. While private, profit-seeking companies would normally operate on commercial principles and charge customers market-consistent prices to the benefit of their shareholders, some SEs might be charging below-market prices as per government instructions but at the cost of lower profit. State banks, for example, stand to earn less profit and incur greater risks when charging lower interest rates, just like state utilities stand to earn less profit (or make losses) when charging below-market tariffs for their electricity.

30. Instances where SEs serve to channel government support to industrial producers highlight how governments can also at times treat the companies they own worse than private competitors, which constitutes another deviation from competitive neutrality. Yet this can also tilt the playing field downstream in favour of those companies that are able to benefit from the lower prices charged by certain SEs (which can themselves be SEs or private firms). It is therefore here necessary to consider the different forms and modalities of government intervention along the supply chain in order to understand their full implications for competition and trade (Box 4).

31. The potential of SEs to play a dual role as both providers and recipients of support can, meanwhile, generate greater opacity over the scale and scope of this government support. This is because the intermediation of government support through SEs as providers severs the direct link between policies and the subsidies they generate. The addition of one layer or intermediary in the chain can thus obscure the involvement of governments into markets by giving support the appearance of a regular commercial transaction between two independent parties. This has important consequences for trade, as it hides the extent of government support benefitting competing firms, can make it harder for trade partners to identify the policies to challenge, and creates further ambiguity around the nature of government entities. This problem is exacerbated by the lack of transparency on government investment in firms. It also underscores the need for countries to have an adequate policy framework governing their state ownership of companies.

Box 4. When governments use SEs to provide support to their manufacturers

It is fairly common for governments to impose public service obligations (PSOs) on the companies they own, or otherwise ask of them that they pursue non-commercial objectives in the public interest. This can result in additional costs and lower profits for these companies, for which they are sometimes compensated. PSOs and similar obligations are generally found in network services such as telecommunications, electricity distribution, rail transport, or postal services.

The provision of government support by SEs to manufacturers presents a different situation, however. In this case, the obligation imposed by the government on its SEs to offer preferential rates or prices to all or a subset of local manufacturers serves to reduce the latter's costs and confers them an undue competitive advantage over foreign competitors.

The example of Saudi Aramco, Saudi Arabia's large state-owned oil and gas company, is telling in that regard. The company noted in its bond prospectus dated 1 April 2019:

"certain of the Company's downstream products sold in the Kingdom [of Saudi Arabia] are sold at regulated prices mandated by the Government. The regulated prices often have been lower than the prices at which the Company could otherwise have sold such refined products. As a result, prior to 2017, the downstream business incurred losses in its operations. As at 1 January 2017, the Government implemented an equalisation mechanism to compensate the Company for revenue directly foregone as a result of compliance with

the mandates related to crude oil, kerosene, diesel, heavy fuel oil and gasoline, with equalisation compensation recorded as other income related to sales."

In addition to the petroleum products mentioned above, Saudi Aramco is obliged by royal decree to sell its natural gas (methane) at fixed, regulated prices. These prices were set at USD 0.75 per million British thermal units (BTU) prior to 2016, and were then increased to USD 1.25 per million BTU.

Electricity, natural gas, and other fuels account for a sizable portion of the costs incurred by energy-intensive industries such as cement, petrochemicals, fertilisers, and metals. The provision of energy inputs at below-market prices can therefore confer producers in these industries with a significant advantage over competitors.

In a 2011 note on the Saudi cement sector, financial services provider Aljazira Capital found that:

"Saudi cement companies receive natural gas at a subsidized rate of USD 0.75/mmbtu from state-owned Saudi Aramco. […] Cement industry in Saudi Arabia operates at the highest gross margin and net profit margin in the world. This is despite having the lowest price realizations after the UAE in the GCC. Saudi Arabia commands low realizations due to its reduced cost of production, thanks to the availability of fuel at cheap rates. Saudi Arabian cement companies enjoy cheap natural gas (at USD0.75 per mmbtu, about one-fifth the international market price) and availability of majority of raw materials from local mines."

Likewise, credit-rating agency S&P Global mentioned in its December 2019 assessment of the Saudi Basic Industries Corporation (SABIC) that:

"SABIC's key strength is the strong profitability of its Saudi operations, which enjoy access to gas-based feedstock at prices well below the global market average […] SABIC benefits from very high ongoing support in that the government sets the price of the gases SABIC uses as feedstock in the production of petrochemicals, fertilizers, and steel in Saudi Arabia. This has a strong positive influence on SABIC's profitability […]."

Finally, on electricity tariffs, the Saudi Electric Company (SEC) noted in a bond prospectus dated 15 September 2020:

"[E]lectricity tariffs in the Kingdom [of Saudi Arabia] are not set by SEC and, as a result, may not reflect commercial or market terms, including any increases in the SEC Group's cost of production […] The electricity tariff in force in the Kingdom had remained largely unchanged from 2000 and 2010. In July 2010, a revised tariff structure was implemented, with further revisions taking place effective as of January 2016 and January 2018. The current electricity tariff reflects […] a flat rate tariff for industrial and health and education users of SAR 0.18 per KWh. […] All natural gas and liquid fuel (comprising diesel, light crude oil and heavy fuel oil) consumed by the SEC Group's generation plants is supplied by Saudi Aramco under long-term arrangements whereby Saudi Aramco supplies fuel to the SEC Group at prices set by the Government, which are currently below the market price for such fuel."

In summary, natural gas is in this case sold by a SE (Aramco) at below-market prices to another SE (SEC), which then sells its electricity at below-market tariffs to industrial users, who can either be SEs themselves or private firms. As a result, these downstream industrial users enjoy a significant cost advantage over their competitors that is not rooted in better products or their innovation efforts, but in the government's energy subsidies.

Source: (OECD, 2023[13]).

Government ownership itself is not necessarily a problem if it is well governed

32. SEs' governance structures and ownership arrangements can vary greatly across jurisdictions and industries, and so do the justifications for state ownership. However, it is generally considered that given the risks stemming from state ownership – related for example to management incentives, efficiencies, costs and financing, the coexistence of commercial and non-commercial objectives, and competitive neutrality distortions –, state ownership can and should be exercised only in the interest of the general public (OECD, 2015[29]).

33. State ownership as such does not automatically imply that a government subsidy is being provided. State ownership may, therefore, not necessarily be problematic in and of itself. However, significant concerns can emerge if it is not transparent or properly governed and if the broad regulatory environment is not able to ensure competitive neutrality. Indeed, in order to reduce the risks stemming from state ownership one important element is the existence of a rigorous SE corporate governance framework, in line with international practices.

34. The *OECD Guidelines on Corporate Governance of State-Owned Enterprises* (OECD, 2015[29]) provide an internationally agreed benchmark for how governments can manage more effectively their ownership functions and responsibilities, with the aim of making SEs more transparent, efficient, and competitive. The Guidelines also lay down a set of good practices for the legal, regulatory, and institutional framework for SEs, in line with the G20/OECD Principles of Corporate Governance (OECD, 2015[30]).[21]

35. The recommendations contained in the Guidelines cover seven main areas, deemed key in order to minimize the possible risks and distortions associated with state ownership. These include the rationales for state ownership and the state's role as an owner, SOEs in the marketplace, the equitable treatment of shareholders and other investors, stakeholder relations and responsible business, disclosure and transparency, and the responsibilities of the boards of SOEs.

36. Although good SOE governance should encompass various key areas, as shown in the Guidelines, there are several aspects of particular relevance in order to ensure that government ownership does not distort the level playing field by creating advantages for state companies.

37. A first aspect relates to disclosure and auditing rules. SOEs should apply international standards of corporate disclosure, including for SEs' public-interest activities, and observe the same accounting, compliance, and auditing standards as listed companies. This would notably help ensure that some of the support that SEs receive from governments is made transparent, but also enable analysis to evaluate the relative performance of SEs in the marketplace. Second, when SEs are involved in commercial transactions these should be market-based so that fair competition is ensured. For this purpose, and as reported in the Guidelines, "there should be a clear separation between the state's ownership function and other state functions that may influence the conditions for state-owned enterprises", in particular when an SE carries out commercial activities, as well as public-policy objectives. Finally, in order to ensure that SEs pursue profitability in their commercial activities, they should be required to earn rates of return that are in line with those of comparable private entities. This would also help address the issue of SOEs as providers of support described in the previous section.

[21] Note that the OECD Guidelines were undergoing a revision at the time of writing. This follows an earlier revision that took place in 2015.

38. In addition to internationally accepted instruments, such as those of the OECD, over the years some countries have developed well-established practices at the domestic level to maintain competitive neutrality, as well as to improve both public services and SEs' financial performance. Box 5 illustrates this by looking at the two examples of Australia and Norway.

Box 5. The corporate governance of SEs: the examples of Australia and Norway

Australia

With the Competition Principles Agreement from 1995, enhanced by the 2006 Competition Infrastructure Reform Agreement, Commonwealth, state, and territory governments committed to implement competitive-neutrality regimes (Commonwealth of Australia, 2017[31]). Australia is currently considered to have one of the most complete competitive-neutrality frameworks among OECD countries (OECD, 2012[32]).

Australia's Competitive Neutrality Policy details how the Commonwealth will apply competitive neutrality rules to significant businesses, which include all Government Business Enterprises (GBEs) and their subsidiaries, other share-limited trading companies, and all designated business units (for more details see (Commonwealth, 1996[33])). As of 2020, there were nine GBEs in Australia.[1]

The implementation of the Competitive Neutrality Policy revolves around several areas, namely: organisational structure of the business entity, taxation neutrality, debt neutrality, rate of return requirements, regulatory neutrality, and full-cost pricing principles. Oversight arrangements and a complaints mechanism are also in place. On debt neutrality, the Competitive Neutrality Policy notes, for example, that "[m]arkets confer borrowing cost advantages on government owned entities as a result of explicit government guarantees and perceptions of implicit government support. Debt neutrality will be achieved by subjecting identified organisations to similar borrowing costs to those faced by private sector businesses" (ibid). The Policy also requires that "[a]ll Commonwealth organisations identified as engaging in significant business activities will be required to earn commercial returns at least sufficient to justify the long-term retention of assets in the business, and to pay commercial dividends (ie, equivalent to the average for their industry) to the Budget from those returns" (ibid).

Norway

As of 2019, the Norwegian State had direct ownership, managed by a ministry, in 73 companies (Norwegian Ministry of Trade, 2019[34]). The framework regulating the state's exercise of ownership is based on generally accepted principles for corporate governance, detailed in the state's ten principles for good corporate governance, and has remained unchanged for the past two decades, with broad political consensus and high regard at the international level.

SEs are divided into three categories, depending on the state's ownership and goal and the rationale for state ownership. This mainly distinguishes companies with public-policy goals and companies competing on the market for profit. The state's expectations of its SEs are clearly set out in relation to goals and strategies, resources and organisation, incentives, responsible business conduct, performance and risk management, the board's work, and transparency and reporting. For more details see (Norwegian Ministry of Trade, 2019[34]) and (Norwegian Ministry of Trade and Industry, 2008[35]).

In the case of companies with commercial objectives, Norway's Ownership Policy notes, for instance, that "[t]he return on the capital invested is therefore a central concern in the state's management of its ownership interests. Pursuant to the state's financial management regulations, target rates of return shall be set for companies in which the state has an ownership interest. By target rate of return is meant the owner's expectations of a return in the form of dividend and appreciation in value of its capital investment" (ibid).

Note:1. See www.finance.gov.au/government/government-business-enterprises (accessed on 2 September 2022).

39. Although the governance of SEs is still largely considered a national affair undertaken with domestic considerations in mind, it has "important cross-border ramifications and should be considered within the context of highly integrated international markets and production networks, as well as overlapping jurisdictions and legal frameworks" (Kowalski et al., 2013[4]). In other words, the governance of SEs can generate cross-border spillovers that ought to be internalised by countries, preferably in an international setting.

40. Presumably, the degree to which the governance of SEs affects trade partners is a function of two parameters: (i) the extent to which countries adhere to best practices in the area of corporate governance and the governance of SEs in particular; and (ii) the extent of government ownership in specific markets. Some countries may, for instance, have a poor framework governing their SEs but companies that are small enough not to influence competition in individual markets, in which case the implications for trade partners are likely modest. By contrast, other countries may have both a poor framework governing their SEs and extensive state ownership of corporate assets, so that the trade implications are presumably important. In still other cases, countries may have extensive state ownership of corporate assets but also adhere to best practices in governing their SEs, which could imply minimal trade implications, if any. Hence any trade effect caused by the participation of SEs in global trade cannot be considered independently from the way in which countries manage their SEs.

Policy considerations for governments and other stakeholders

41. Good governance of SEs is key to maintain a level playing field between private and state firms, and thus ensure that government ownership remains compatible with fair and effective competition. To foster such good governance may require that countries draw on different tools at various institutional levels. The previous section already noted the important role that domestic legislation and institutions play; this section focuses on action at the international level.

42. At the multilateral level, governments should ensure that international rules effectively capture the various forms of government support and other distortionary measures benefitting SEs (or granted through SEs). In this respect, the WTO rulebook does not address the potential trade issues posed by SEs through a specific agreement or provision.[22] The WTO deals with some of these issues in the context of a range of specific disciplines, notably the Agreement on Subsidies and Countervailing Measures (SCM Agreement) – which regulates subsidies bestowed by a government or 'public body' to specific undertakings manufacturing goods causing adverse trade effects – and the plurilateral Agreement on Government Procurement (GPA). The WTO also allows

[22] Note that under Article XVII:1(a) and (b) of the GATT 1994, Members must ensure that the operations of State trading enterprises are conducted in a manner consistent with the general principles of non-discrimination. While the concept of 'State trading enterprises' (STEs) had remained undefined under the GATT 1947, the Uruguay Round negotiators clarified the concept by introducing a 'working definition' of STEs under the Understanding on the Interpretation of Article XVII. According to the provision, '[g]overnment or non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports.' This definition is narrower than the concept of SE as it limits STEs to enterprises that are granted 'exclusive or special rights or privileges'. Statutory marketing boards, export marketing boards, regulatory marketing boards, fiscal monopolies, canalising agencies, or foreign trade enterprises may be, amongst others, deemed STEs.

selected issues pertaining to SEs to be raised on an *ad hoc* basis as Members negotiate specific protocols of accession with acceding Members (Mavroidis and Janow, 2017[36]). Yet, apart from China's Protocol of Accession, which includes a few provisions on SOEs, as well as Viet Nam's,[23] other Accession Protocols (e.g. Russia and the Gulf countries) largely do not have specific provisions related to SOEs,[24] despite the relative prevalence of state-run entities or sovereign wealth funds in these countries (ibid).

43. By disciplining subsidies causing adverse trade effects and requiring WTO Members to notify their subsidies on an annual basis before the SCM Committee,[25] the SCM Agreement is an important instrument for dealing with the trade and competition distortions stemming from the involvement of SEs providing or benefitting from subsidies. In this respect, the WTO subsidy discipline defines 'subsidies' as financial contributions provided by a government or any *public body* within the territory of a Member[26] and confer a benefit. Although the concept of 'public body' remains undefined in the text of the Agreement, it can be seen as having been drafted with a view to capturing *inter alia* entities other than national and subnational governments, which are controlled by the government.[27] Despite this, gaps exist such that the SCM Agreement may not capture all government support granted to and through SEs (OECD, 2021[12]; OECD, 2023[13]).

State enterprises as providers of government support under multilateral trade rules

44. Although SEs may be important providers of or vehicles for government support, it is unclear whether these practices are covered by the WTO subsidy discipline as interpreted by the Appellate Body. In *US-Anti-Dumping and Countervailing Duties (China)*, the Appellate Body held that a 'public body' is "an entity that possesses, exercises or is vested with governmental authority."[28] The Appellate Body held *inter alia* that majority state-ownership is insufficient to demonstrate that the entity is a 'public body' under Article 1.1(a)(1) of the SCM Agreement. Instead, a complaining

23 See Annex B of the report.

24 That said, upon its accession to the WTO in 2011, Russia committed that producers and distributors of natural gas in Russia (including Gazprom, as well as independent producers, such as Rosneft and Novatek) "would operate within the relevant regulatory framework, on the basis of normal commercial considerations, based on recovery of costs and profits" (WTO, 2011[59]; USTR, 2022[60]).

25 Article 25 of the SCM Agreement.

26 Article 1.1(a)(1) of the SCM Agreement. The provision indicates that both government and 'public bodies' must be referred to as 'government'. Hence, the conduct of an entity classified as a 'public body' under the SCM Agreement is attributable to the government.

27 In *Korea-Commercial Vessels*, the panellists considered that any entity controlled by the government (or other public bodies) is a 'public body' and, by the same token, its action must be attributable to the government in question. The panel specified that government ownership of the entity in question is "highly relevant" and may often constitute a determinative factor to conclude on the presence of a government control. Panel Report, *Korea-Commercial Vessels*, WT/DS273/R, adopted 11 April 2005, para 7.50, 7.353, and 7.356. Along the same lines, see Panel Report, *EC-Large Civil Aircraft*, WT/DS316/R, adopted 1 June 2011, para 7.1359.

28 Appellate Body Report, *US-Anti-Dumping and Countervailing Duties (China)*, WT/DS379/AB/R, adopted 25 March 2011, para 317. The Appellate Body upheld its interpretation some years later: Appellate Body Report, *US-Countervailing Measures on Certain Hot-rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 19 December 2014, paras 4.31-4.55.

WTO Member before the WTO dispute settlement system or a national investigating authority in a countervailing investigation must bring evidence of a set of circumstantial evidence showing the core features of the entity and its relationship with the government. The presence of formal links with the government, the existence of legal instruments, the exercise by the entity of governmental functions or meaningful control may serve, amongst others, to demonstrate that the entity 'possesses, exercises, or is vested with governmental authority'.[29] This might affect Members' ability to successfully show the existence of a 'public body' in relation to government support taking the form of, for example, below-market finance or below-market energy.

45. The Appellate Body reading has proven to be a matter of debate since its outset (Woznowski, Depayre and Cartland, 2012[37]; Miranda and Sánchez Miranda, 2020[38]).[30] The Appellate Body's interpretation could potentially complicate efforts to address subsidies provided by or through SEs. The notion of 'public body' might, for instance, fail to capture specific funds providing support, especially where they have complex joint-ownership structures involving local and central governments as well as certain SOEs (Box 1). In this respect, several WTO Members recently expressed their concern with respect to the Appellate Body's construction. In January 2020, for instance, the Trade Ministers of the United States, Japan, and the European Union stated that "the interpretation of 'public body' by the WTO Appellate Body in several reports undermines the effectiveness of WTO subsidy rules."[31] They added that finding that the entity 'possesses, exercises or is vested with governmental authority' is unnecessary to determine that a given entity is a public body.

The opacity of firms' ownership structure in the context of the WTO transparency rules

46. Since 1995, Members' overall compliance with their notification obligations has remained "chronically" low[32], thus hampering the appropriate enforcement of the WTO subsidy rulebook. While new mechanisms to guarantee governments' conformity with their obligation to notify subsidies (as recently proposed by some WTO Members) may certainly help,[33] it may not suffice to ensure that subsidies bestowed through SEs are notified to the SCM Committee. In that regard, the debate around the notion of 'public body' may have implications for WTO Members' compliance with their subsidy notification obligation. Members' determination as to whether a given measure amounts

29 Appellate Body Report, *US-Anti-Dumping and Countervailing Duties (China)*, paras 318, 319, 345, 346. In paragraphs 318 and 346 of its Report, the Appellate Body, however, specified that there may be no need to rely on and bring evidence of such formal indicia in the event of "an express delegation of authority in a legal instrument."

30 See, for instance, WT/DSB/M/294, 9 June 2011, paras 97, 103, 106-107, 109, 113, 114, 117, 119, and 127; WT/DSB/M/354, 16 February 2015, paras 1.22, 1.31, and 1.32. In a more recent Appellate Body report, one member of the Appellate Body division drafted a dissenting opinion, qualifying the Appellate Body's attempt to define the term 'public body' as "an entity that possesses, exercises or is vested with governmental authority" as an "original mistake." See Appellate Body Report, *US-Countervailing Measures (China) (Article 21.5)*, WT/DS437/AB/RW, adopted 15 August 2019, para 5.245.

31 See the 'Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union' (14 January 2020), available at: https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158567.pdf (accessed on 11 August 2022).

32 See, for instance, the statement of the chair of the SCM Committee in G/SCM/M/113, 25 February 2021, para 96.

33 See on this point OECD (2023[39]).

to a specific subsidy, and thus must be subject to notification, indeed depends upon whether they consider a specific entity to be a 'public body'. Members may have diverging views as to what constitutes a 'public body', hence hindering consistent notifications across the WTO membership of subsidies bestowed by public bodies (OECD, 2023[39]). At this juncture, WTO transparency rules do not appear to address the ownership structures of firms in which governments have invested.

47. Enhanced recourse to the counter-notification mechanism of Article 25.10 of the SCM Agreement, as used several times by the United States between 2011 and 2017, could contribute to addressing the transparency deficit regarding government support provided to and through SEs, although a second-best option compared to greater transparency by notifying Members themselves (OECD, 2023[39]). In addition, along with the substantial research capacity that such a counter-notification process could entail, WTO Members may experience difficulties in determining the ownership structure of certain firms and in detecting certain forms of non-notified government support provided by SEs. Tracing and mapping the government ownership of companies can prove a difficult exercise since such information is not always readily available, especially where government stakes are indirect and involve a chain of entities masking the government's beneficial ownership of industrial producers (OECD, 2019[11]).

48. Beyond the difficulties attached to collecting information on the ownership status of firms, proving the provision of support through SEs, such as state financial institutions or state energy companies, could render the preparation of counter-notifications and subsidy challenges particularly complex. The nature of the relationship between the government and its SEs, notably evidence of the existence of any legislation, policy plans, or written instructions directing SEs to offer support to industrial companies, may often remain opaque. The fact that SEs providing support may be owned and controlled by local authorities (e.g. states, provinces, and municipalities) only exacerbates these issues. Central and federal governments may themselves experience difficulties in reporting support measures provided by sub-national authorities to the SCM Committee (Collins-Williams and Wolfe, 2010[40]),[34] especially where the decision of a locally owned SE does not stem from a policy of the central or federal government.

Potential multilateral solutions to better discipline SEs' trade distortive practices

49. In the long-term, developing specific rules at the multilateral or plurilateral level for governing SEs may prove a necessary yet ambitious response to address the potential trade and competition issues posed by subsidies provided to and by SEs, as well as government interventions favouring SEs. Apart from revamping WTO subsidy rules, WTO Members could consider separate rules covering the governance of SEs and its implications for trade and international competition. Such a specific international trade instrument dedicated to SEs could include (i) rules governing SEs participation in the marketplace and (ii) transparency requirements to tackle the opacity of SEs' ownership structures, portfolio value, and financial performance, as well as certain forms of support provided through SEs.[35]

[34] Certain governments have often advanced their complex administrative structures to justify the difficulties they face when preparing their notifications to the SCM Committee.

[35] To some extent, the imposition of rate-of-return requirements could theoretically address in whole or in part the question of support provided through or by SEs. This is because extending a loan at below-market interest rates or selling electricity for less than market-consistent tariffs would result in lower financial returns for SEs.

50. Work to develop this instrument would not need to start from scratch, but could draw, for example, on the standards contained in the *OECD Guidelines of Corporate Governance of State-owned Enterprises* (OECD, 2015[2]) and any future revisions thereto,[36] as well as the SOE rules developed domestically and in those PTAs that contain specific rules on SEs. As an illustration, the CPTPP, the Economic Partnership Agreement between the European Union and Japan, and the Agreement between the United States, Mexico and Canada (USMCA) all contain specific SE rules relating to *inter alia* transparency, non-commercial assistance, as well as commercial considerations and non-discrimination principles. Although they only apply to SEs from participating countries, they notably offer possible ways for disciplining support provided by SEs themselves. Wider applicability may nonetheless necessitate that countries converge toward a unified set of rules and definitions relating to SEs. In this respect, the following section offers an overview of the discipline on SEs contained in the PTAs signed between the 1950s and 2022, their similarities, and differences, as well as the extent to which the disciplines envisaged in the different PTAs could address the gaps in existing multilateral trade rules in relation to SEs.

51. Achieving greater coverage and wider applicability of the rules governing SEs could suggest the need for a multilateral solution. Yet, given the difficulties that might arise in trying to garner consensus beyond like-minded countries, WTO Members (or a subset thereof) could focus initially on improving transparency regarding the extent of government ownership and the support provided to and by SEs. This might help to better diagnose the issues at stake and hence help countries reach a consensus on specific disciplines for SEs.

52. Members could, in this respect, endeavour to expand specific WTO transparency provisions, e.g. by broadening the scope of the notification obligation contained in Article 25.1 of the SCM Agreement or the information request procedure under Article 25.8.[37] The obligation imposed on WTO Members to notify their subsidies could be complemented with an obligation to notify a list of their SEs, which would be regularly updated. Such a transparency obligation can already be found in the CPTPP, as well as in PTAs signed by the United States and Australia.[38] Furthermore, Article 25.8 of the SCM Agreement currently only allows WTO Members to request information on the subsidies granted or maintained by another Member. Similar to what is already

[36] See, for example, the recent proposal of the United States for revising the OECD Guidelines [DAF/CA/SOPP/RD(2022)9].

[37] WTO Members have the procedural right under Article 25.8 SCM to request in writing additional information on the nature and extent of a subsidy granted or maintained by another Member. By virtue of the same provision, they may also require an explanation of the motives underpinning an absence of notification in respect of a specific domestic measure. According to Article 25.9 SCM, Members must provide a comprehensive answer as soon as possible and must give additional information, should the requesting Member formulate follow-up questions. Note that expanding the scope of Article 25.8 might necessitate answers in writing although Article 25.9 of the SCM Agreement does not require answers in written form. Since 2011, the United States has led efforts to systematise the procedure under Article 25.8 and 25.9 of the SCM Agreement by requiring written questions and answers, as well as by setting specific timelines for the submission of answers. See also, G/SCM/W/583, 15 October 2021 in which Canada, the EU, Japan, and the United States propose to streamline the written procedure under Article 25.1 of the SCM Agreement to allow meaningful discussions during the SCM Committee meetings.

[38] See sub-section below 'PTAs transparency obligations differ but are converging' and Table 3.

permitted under specific PTAs, such as the CPTPP[39] and other PTAs signed by the United States, Australia, the European Union, and the United Kingdom, the information request procedure could be expanded, allowing WTO Members to ask information about the ownership and voting structure of specific companies located in another Member, as well as their organisational and management structures.[40] Obtaining more in-depth information on government ownership, government investments into companies, and government control or influence over specific enterprises, be it through their Board of Directors or any other equivalent management body, or through their decisions, could improve understanding of the extent of government presence within or influence over firms.

53. Should WTO Members expand Article 25 of the SCM Agreement to enhance knowledge on state ownership, investment, control, or influence, they should take account of the fact that SEs and 'subsidies' are two different concepts. It is notable that the provision of subsidies by an SE to other market participants, whether state-owned or not, can only be accomplished by virtue of government ownership, investment, control or influence. Yet, it would still be necessary to prove that an enterprise owned, invested, controlled, or influenced by a government is a recipient or provider of subsidies.

54. WTO Members could also enhance the information request procedure of Article 25.8 of the SCM Agreement to obtain details about individual loans and equity transactions involving SEs. Specific information on individual loans and equity transactions would enable Members to assess the consistency of these transactions with market conditions. However, governments themselves may have difficulties in obtaining information on the terms and conditions of a loan or equity transaction (e.g. size, duration, risk profile, currency, and jurisdiction) provided to or by their SEs as such information is often confidential. Moreover, Members would only formulate such requests for information request if they are already aware of the existence of the financial transactions in question. Yet information on individual loan or equity transactions is very difficult to access.

55. International organisations such as the OECD could help in the process by providing countries with data and analysis in relation to state investments and government support. This could involve the collection of more and better firm-level data on government support organised according to firms' ownership status. In the context of its work on government support in the semiconductor value chain, the OECD has, for instance, investigated the individual ownership structure of several major semiconductor firms in large chip-producing economies (namely China, Europe, Japan, Korea, Chinese Taipei, and the United States), with a view to mapping each economy's semiconductor 'eco-system' and the role that the state plays therein (OECD, 2019[11]). In this respect, planned work by the OECD could provide further empirical evidence concerning the nature, scale, and implications of government ownership and subsidisation in the manufacturing sector. This work may notably analyse the differential treatment between private and state enterprises in terms of the government support they receive, as well as the overall level of debt of state enterprises as compared to private ones. The OECD could also explore the potential link between the support that SEs receive and their productive capacity and financial performance, with a view to better understanding trade implications.

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39 Article 17.10(3) CPTPP.

40 For further information on the right to request various types of information in the different PTAs, see Table 3 below.

56. More broadly, international organisations could support governments' efforts to exchange views on the various SOE rules included in some of their PTAs, with the aim of converging on common principles laying the ground for a possible future trade agreement governing SEs. For this purpose, the OECD has mapped and classified the provisions disciplining SEs included in PTAs signed between the 1950s and December 2022.[41] The following section presents the findings of this empirical exercise. It discusses which issues of concern related to SEs these provisions may address and their potential limitations. The insights drawn from this work could inform future plurilateral or multilateral discussions in terms of what governments would need to consider should they decide to remedy existing gaps in multilateral trade rules. Any such discussions would supplement ongoing efforts in the OECD (e.g. through the revision of the *Guidelines of Corporate Governance on State-Owned Enterprises*) and the efforts of Parties to certain PTAs to promote the principles of transparency, efficiency, as well as good governance and operations of SEs.[42]

The treatment of state enterprises under Preferential Trade Agreements

57. Since the creation of the WTO, the number of PTAs has significantly increased while the substantive obligations they cover has expanded beyond matters addressed in the WTO (Orefice and Rocha, 2014[41]; Mattoo, Rocha and Ruta, 2020[42]). In many cases, governments have not only agreed to be bound by more stringent disciplines than those negotiated in the WTO, but they have also negotiated new disciplines on a wide range of policy areas, thereby broadening the range of issues governed in their preferential trade relations. This includes, for example, provisions relating to investment, procurement, electronic commerce, competition policy, state-owned enterprises, and the environment.

58. In the last two decades, rules on competition and SEs incorporated into PTAs have grown, reflecting recognition by governments and trade negotiators that anti-competitive behaviour, support provided to and through SEs, as well as certain practices and conduct of SEs may constitute important behind-the-borders barriers to trade. Disciplines on SEs aim to ensure a level playing field between private and state enterprises of all Parties to the PTA,[43] (Rubini and Wang, 2020[43]). Disciplines governing SEs contained in PTAs vary. This has an effect on the ability of the agreements to guarantee fair competition conditions within the markets concerned. Some PTAs contain provisions regulating the conduct of SEs, hence making sure that they do not behave in a discriminatory fashion or in a manner inconsistent with

41 This OECD study complements the work of other international organisations, such as the World Bank, which has inventoried the provisions on SEs in 283 agreements signed between 1957 and early February 2016 to assess the vertical depth of PTAs (Rubini and Wang, 2020[43]). For further details on the different methodology between the two studies, see below.

42 A few PTAs, such as the CPTPP, the Australia-Peru FTA, or the USMCA envisage the organisation of international seminars, workshops, or any other appropriate forum, with a view to "sharing technical information and expertise related to the governance and operations of state-owned enterprises." The CPTPP goes even further by establishing a Committee on State-owned enterprises and designated monopolies to develop "cooperative efforts, as appropriate, to promote the principles underlying the disciplines contained in this Chapter in the free trade area and to contribute to the development of similar disciplines in other regional and multilateral institutions in which two or more Parties participate."

43 Parties to a PTA are the countries or regional organisation, which have signed the agreement.

commercial considerations. Other PTAs include in addition subsidy rules that apply to SEs only, with a view to ensuring equal conditions of competition within the market of each Party. Governments do not, however, traditionally seek through their PTAs to require a Party to privatise its SEs; indeed, most of the PTAs containing disciplines on SEs include a provision expressly recognising the right of governments to establish or maintain SEs. Also, albeit with one exception,[44] none of the PTAs currently in force incorporate an obligation on governments to reduce the aggregate ownership and influence they have on enterprises. Instead, PTAs with disciplines on SEs regulate the conduct of SEs, as well as, in some cases, the relationship between the government and its SEs. It is notable that preferential trade rules on SEs have emerged following the accession of China to the WTO and increased after some governments started weighing up the challenges posed by the pervasive presence in China of subsidisation to, through, and by SEs (Wu, 2016[44]; Bhala, 2017[45]; Gao and Zhou, 2022[46]). In that regard, PTAs with SE disciplines in place could serve as a laboratory for the various approaches to regulating SEs and could lead to the emergence of a form of convergence across a critical mass of countries for developing new trade rules on SEs (Wu, 2016[44]).

State enterprises under Preferential Trade Agreements: data collection and overview

59. Against this background, this section focuses on the various provisions disciplining SEs that are contained in PTAs currently in force. It analyses the content of such provisions, notably (i) the substantive obligations imposed on SEs and on governments in their relationships with SEs; (ii) the transparency obligations on governments with respect to their SEs; and (iii) any possible exemptions from such rules. On the basis of this analysis, this section then examines the extent to which these disciplines may contribute to addressing the issues pertaining to the involvement of SEs in industrial sectors identified earlier in the report,[45] identifying their strengths and potential limitations. In undertaking this analysis, this report does not claim to offer any authoritative interpretation of the relevant disciplines. Instead, it aims to shed a more general light on the remaining gaps and what steps that could be taken to remedy those gaps, with a view to informing future plurilateral or multilateral discussion on these issues.

60. This analysis is based on information collected on all PTAs currently in force,[46] including their dates of signature and entry into force, and the Parties to the agreements. For this purpose, it relied on the WTO database of regional trade agreements[47] although the information was cross-checked with certain national or supra-national websites, notably those of Australia, Canada, China, Japan, the United States, the European Union,

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44 Article 12.3(2)(f) US-Singapore FTA requiring Singapore to "continue reducing, with a goal of substantially eliminating, its aggregate ownership and other interests that confer effective influence in entities organized under the laws of Singapore, taking into account, in the timing of individual divestments, the state of relevant capital markets."

45 Note that the disciplines on SEs contained in the different PTAs apply to all SEs located in the Parties to the agreements and not only to SEs in the manufacturing sector. The present report, however, focuses on whether the disciplines on SEs in PTAs contribute to addressing the trade and competition issues in relation to SEs involved in industrial sectors, which previous OECD reports aimed at measuring government support in various industrial sectors have identified.

46 This includes PTAs that have preliminarily entered into force, such as the Comprehensive Economic and Trade Agreement between the European Union and Canada (CETA), as well as PTAs that have entered into force albeit not for all Parties to the agreement.

47 See http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx (accessed on 9 February 2023).

and the United Kingdom. A total of 367 PTAs[48] were identified as being in force. Zooming in on SEs, information was compiled on whether and how SEs are defined across the various PTAs, the various provisions establishing a discipline on SEs, and where those provisions could be located within the PTA. This includes whether disciplines on SEs are contained in a distinct chapter dedicated to SEs or whether they are incorporated into the chapter on competition policy, albeit within a specific provision dedicated to SEs.

61. For the purposes of this analysis, a PTA contains disciplines on SEs when it establishes a specific framework regulating the conduct of SEs and, potentially, the relationships of governments with their SEs. It deems PTAs containing at least one of the following three provisions to have an SE discipline in place, namely: **(i)** the obligation for SEs to act 'in accordance with commercial considerations' (the '**commercial considerations' obligation**); **(ii)** the obligation for SEs to accord non-differential treatment when purchasing and selling goods or services (the **non-discrimination obligation**); **(iii)** the **prohibition of non-commercial assistance** provided by governments or SEs to SOEs when causing adverse trade effects.[49] Other, supplementary obligations often accompany these three main obligations.[50] Moreover, on some occasions, Parties have agreed to be bound by some transparency obligations with respect to their SEs. That said, both these supplementary provisions, and the SE transparency provisions for which this study has also collected information, complement the main provisions regulating SEs and do not appear as stand-alone obligations.

62. By contrast, for the purposes of this study,[51] a PTA is not considered to include disciplines on SEs when it only contains either of the two following obligations, namely: (i) a general obligation for Parties to the agreement to comply with the principle of non-discrimination when applying competition laws,[52] or (ii) an obligation to treat all

[48] This number covers PTAs, which have recently entered into force, although they have not yet been notified to the WTO. In addition, Protocols to a PTA adding a new chapter on 'competition policy' or 'state-owned enterprises' have been counted as separate agreements to reflect, notably in Figure 3 and Figure 5, their date of entry into force. Four instances were found in this respect, namely the upgrade protocol to the China-Singapore FTA, the upgrade protocol to the China-New Zealand FTA, the protocol amending the China-Chile FTA, and the protocol amending the Singapore-New Zealand Closer Economic Partnership.

[49] Note, as explained below, that the CPTPP, the Australia-Peru FTA and the USMCA contain disciplines on non-commercial assistance to SOEs provided by governments or by SEs. These agreements thus distinguish between SOEs and SEs. Hence, although this report uses the term SEs, it refers to SOEs when the Agreements under discussion contain two separate definitions of SOEs and SEs.

[50] These obligations concern the obligation for Parties to the agreement to enforce laws and regulations in a consistent and non-discriminatory manner, including with respect to SEs, the obligation to ensure the independence and impartiality of bodies regulating SEs, as well as the obligation for SEs to act in a manner consistent with the Party's obligations under the agreement when exercising a regulatory, administrative, or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges. See also on this point, subsection on 'favouritism and regulatory privileges'.

[51] Notwithstanding this definition, relevant data on such provisions was collected. See Figure 5.

[52] The exact coverage of such a generic obligation remains unclear as it may only relate to the obligation to apply competition laws without distinction on the basis of nationality.

enterprises equally under competition laws, irrespective of their ownership status.[53] In that regard, this analysis has adopted a conservative approach[54] by classifying as disciplines on SEs only the inclusion of specific rules tailored to the issues to which SEs give rise. That is, although the application of general competition laws to SEs may contribute to addressing some of the distortions caused by the conduct and practices of SEs, such provisions do not lay down a framework specifically regulating SEs. Similarly, the analysis has not categorised as disciplines on SEs the general provision prohibiting Parties to an agreement to adopt or maintain any measures with respect to public undertakings that is contrary to the provisions of the chapter on competition policy.[55] The rationale for this conservative approach is that too broad a categorisation would not give sufficient weight to frameworks imposing substantial obligations on both SEs and governments in their relation with SEs. That said, given their general relevance to the issue, such measures are discussed separately in subsection on 'favouritism and regulatory privileges' below.

63. Although there are important differences across agreements, the analysis finds that approximately 70 of the 367 agreements currently in force, i.e. around 20%, contain disciplines on SEs according to the above methodology. While PTAs with such disciplines were scarce until the end of the 1990s, they emerged in the first years of the 2000s and started to gradually increase over time, although with some important year-on-year fluctuations. That said, notwithstanding this increase, agreements that do not contain any discipline on SEs have remained prevalent. Between 2013 and 2019, however, the number of all PTAs newly in force declined, the number of PTAs with SE disciplines entering into force every year remained broadly stable. The years 2020 and 2021 were notable exceptions, when many PTAs undertaken by the United Kingdom following its withdrawal from the European Union entered into force (Figure 3). Overall, the EU27 has the most PTAs in force, about one-third of which include SE disciplines. A similar proportion of UK's PTAs to date contain SE disciplines. While the United States has the same number of agreements with and without disciplines on SEs, Canada is noteworthy by having included such disciplines in almost all their PTAs (Figure 3). It is worth noting that the extent of such disciplines varies across the different PTAs. While Figure 3 and Figure 4 do not reflect these differences, the analysis below explaining the extent to which disciplines on SEs contribute to addressing the issues related to SEs, take account of such differences.

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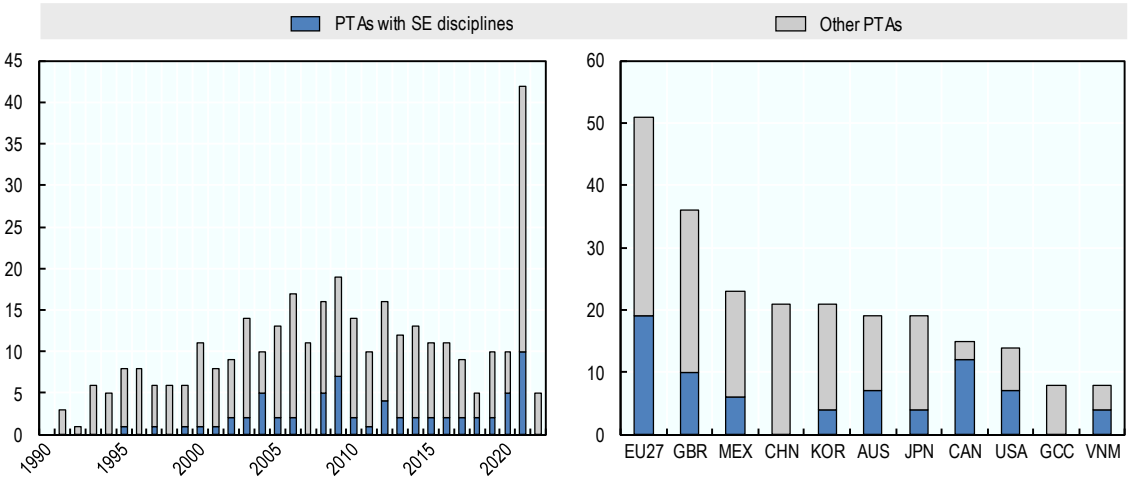
53 Some PTAs formulated such an obligation as an obligation to treat private and public enterprises equally under competition laws, without, however, offering a definition of public enterprises.

54 In a previous study on disciplines of SEs under PTAs, Rubini and Wang had found that 77% of the 283 PTAs studied contained some kind of disciplines on SEs. The authors took a broader approach with respect to what disciplines on SEs cover, hence including general provisions on e.g. competition, subsidies, transparency, or corporate governance not specifically geared towards SEs. Furthermore, their study incorporates any references to STEs, public or designated monopolies, including under provisions governing the agriculture or services sector (Rubini and Wang, 2020[43]).

55 Note that the OECD has nonetheless collected information on the inclusion within PTAs of a similar provision.

Figure 3. PTAs with SE disciplines have increased over time, with the EU and Canada accounting for most



Note: Members of the Gulf Cooperation Council (GCC) include Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates; only PTAs that entered into force after 1990 are shown in the left graph.
Source: OECD research.

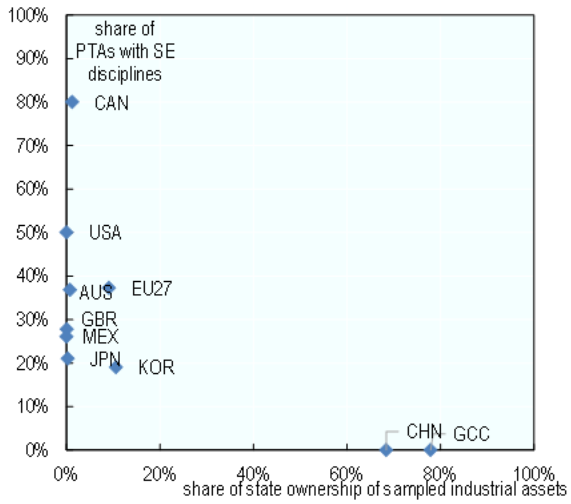
64. On the contrary, PTAs by other countries largely do not include disciplines on SEs. Despite the high level of government ownership shares in the GCC countries, there are no PTAs concluded by the GCC, nor by any of the GCC countries individually, that contain disciplines on SEs Figure 4. Similarly, China has not, at this juncture, ratified any PTAs containing specific disciplines on SEs, although the Comprehensive Agreement on Investment (CAI) signed by China with the European Union in December 2020, whose ratification has been suspended, contains a comprehensive definition of SEs, as well as substantive and transparency obligations in relation to SEs.[56] The absence of any provisions regulating both the relationships between the Chinese authorities and its SEs, as well as the behaviour and practices of SEs in China, stands in contrast with the magnitude of government ownership in various industrial sectors Figure 4. By contrast, some countries, notably Viet Nam, have recently entered into PTAs involving rules on SEs, despite still having a sizeable number of SEs across their economy (Dang, Nguyen and Taghizadeh-Hesary, 2020[47]). Since 2018, Viet Nam has entered into three PTAs which regulate SEs, namely the CPTPP, the EU-Viet Nam Trade Agreement, and the UK-Viet Nam FTA. Hence, although both China and Viet Nam have made specific commitments with respect to SEs under their respective Protocol of Accession to the WTO Annex B, to date there are no SE disciplines in force within the PTAs it has ratified since acceding to the WTO.[57] PTAs involving China have, however, increasingly integrated provisions related to the adequate enforcement of competition laws within each Party's territory (Gao and Zhou, 2022[46]).[58]

[56] Note also that China also submitted a formal application to join the CPTPP on 16 September 2021.

[57] China has signed 16 FTAs since 2001 when it entered the WTO with Hong Kong, China, Macau, China, ASEAN, Chile, Pakistan, New Zealand, Singapore, Peru, Costa Rica, Iceland, Switzerland, South Korea, Australia, Georgia, Mauritius, and as part of the Regional Comprehensive Economic Partnership.

[58] For further details, see sub-section below on 'favouritism and regulatory privileges'.

Figure 4. Countries with higher state ownership of sampled industrial assets tend to have fewer SE disciplines in their PTAs



Note: Members of the Gulf Cooperation Council (GCC) include Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates. The figure focuses on manufacturing sectors, thus leaving out certain primary sectors that may have relatively large government ownership (e.g. agriculture and natural-resource extraction), as well as services.
Source: OECD research; the share of state ownership of sampled industrial assets is based on data collected for (OECD, 2021[12]). The sample covers more than 300 large manufacturing groups and their subsidiaries in 13 key industrial sectors. In this respect, the figure does not show the global amount of corporate assets in the different sectors but only the assets of the firms covered by the sample.

65. The following discussion is organised across five main themes, identified in previous OECD work as constituting the main issues related to SEs, namely: (i) the definition of SEs; (ii) government support for SEs; (iii) provision of support by SEs or through SEs acting as intermediaries; (iv) regulatory privileges benefitting SEs; and (v) transparency in relation to government ownership structures and government support.

The issue of defining state enterprises

66. While the PTAs containing disciplines on SEs normally offer a definition of the term, there is no harmonised definition of SEs across PTAs.[59] Based on the data collected for this report, four categories of definitions can be identified. Table 2 gives an overview of the various definitions encountered by replicating the wording traditionally used in the PTAs concerned, as well as specifying their different versions. This table, while not offering an exhaustive list, shows the different nuances in the definitions and the determining factors used under each category of definitions to conclude that an enterprise is a SE. The exact coverage of these definitions, and hence their possible limits, is subject to different interpretations in the academic literature (Miner, 2016[48]; Nemoto, 2019[49]; Matsushita and Lim, 2020[50]; Gao and Zhou, 2022[46]). However, the objective of this sub-section is not to discuss the possible advantages and limitations of these definitions. In this sense, Table 2 only serves as a tool for better understanding

[59] Note that many PTAs refers to SOEs. Some agreements, such as the CPTPP, the Australia-Peru FTA, and the USMCA have a definition of SE and SOE, with the substantive obligations primarily applying to SOEs. The report uses the phrase SEs in accordance with earlier OECD work undertaken for the Trade Committee.

which elements within the definition of SEs may contribute to remedying the issues identified thus far by the OECD.

Table 2. The definitions of state enterprises differ across preferential trade agreements

	The traditional wording used in the different PTAs	Additional information on existing variations of the definition
Category A **State enterprise** means:	"[E]nterprise that is owned or controlled through ownership interests by a Party"	**Category A** may, at times, be complemented by a footnote indicating that: 'For greater certainty, ownership, or control through ownership interests, may be direct or indirect' In at least one identified case, the definition of **Category A** includes an additional element: state enterprise may be owned or controlled through ownership interests by the central or a regional government of a Party.
Category B **State-owned enterprise** means:	"[E]nterprise that is principally engaged in commercial activities in which a 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 (c) holds the power to appoint a majority of members of the board of directors or any other equivalent management body"	State enterprise is defined separately from SOEs as an enterprise "owned or controlled through ownership interests by a Party."
Category C **State-owned enterprise** means:	"[E]nterprises that is principally engaged in commercial activities and in which a Party: (a) directly or indirectly owns more than 50% of the share capital; (b) controls, through direct or indirect ownership, the exercise of more than 50% of the voting rights; (c) holds the power to control the enterprise through any other ownership interest, including indirect or minority ownership; or (d) holds the power to appoint a majority of members of the board of directors or any other equivalent management body."	Indirect ownership under paragraph (a) refers to instances where a Party "holds an ownership interest in an enterprise through one or more state enterprises of that Party. At each level of the ownership chain, the state enterprise – either alone or in combination with other state enterprises – must own, or control through ownership interests, another enterprise." It is considered that a Party holds the power to control the enterprise under paragraph (c) if "through an ownership interest, it can determine or direct important matters affecting the enterprise, excluding minority shareholder protections." Establishing control under paragraph (c) follows a case-by-case approach, taking account of all relevant legal and factual elements (e.g. the power to determine or direct commercial operations, including major expenditures or investments; issuances of equity or significant debt offerings; or the restructuring, merger, or dissolution of the enterprise). State enterprise is defined separately from SOEs as an enterprise "owned or controlled through ownership interests by a Party."

	The traditional wording used in the different PTAs	Additional information on existing variations of the definition
Category D **State-owned enterprise** means:	"[E]nterprise that is engaged in commercial activities in which a Party: (a) directly owns more than 50% of the share capital; (b) controls directly or indirectly through ownership interests, the exercise of more than 50% of the voting rights; (c) holds the power to appoint a majority of members of the board of directors or any other equivalent management body; or (d) has the power to legally direct the actions or otherwise exercises an equivalent degree of control in accordance with its laws and regulations."	Various versions of paragraph (d) could be found, namely *inter alia*: (1) can exercise control over the strategic decisions of the enterprise; (2) has the power to exercise control over the enterprise. For the establishment of control, all relevant legal and factual elements must be taken into account on a case-by-case basis (3) holds the power to control the enterprise through any other ownership interest, including indirect or minority ownership.

Note: In most cases, SEs must be mainly engaged in 'commercial activities', namely activities whose main object is the production of a good or supply of a service, which will be sold in the relevant market in quantities and at priced determined the enterprise and are undertaken with an orientation toward profit-making.
Although it is not reflected in the table, the EU-China CAI also contains a Category D definition. The agreement does not, however, expressly refer to the concept of SEs and instead refers to 'covered entities'. These 'covered entities' are subject to specific disciplines further explained below. Importantly, the agreement specifies that the listing of 'covered entities' is "for the purpose of defining the scope of application of this sub-section and does not presume its existence in either Party." See Article 3bis(1)(a) and (b) CAI.
Source: Authors' elaboration

67. The definition of SEs, notably its material scope, negotiated by Parties to a PTA is pivotal as it determines the reach of the obligations imposed on both SEs and governments in their relationships with SEs, and of the provisions placing obligations of transparency on governments. An overly broad definition risks capturing situations that do not involve control or influence of the state over an enterprise. On the contrary, too narrow a definition may fail to capture trade distortive practices of both:

    (i) governments in their relationships with enterprises, in which they have important, albeit not a majority of, ownership shares, or over which they have control or influence; and;

    (ii) enterprises, which by virtue of their state ownership, be it direct, indirect, or by virtue of the state presence through investment, control, or influence, provide support to other state or private enterprises through subsidies and discriminatory actions or measures.

68. Taking into account some of the gaps in multilateral trade rules that have been identified with respect to government support to and through SEs (OECD, 2021[12]; OECD, 2023[13]; OECD, 2023[39]), the following discussion reflects on the three main elements that countries may wish to take account of when considering the definition of SEs. In this sense, it does not aim to offer any authoritative interpretation of the different definitions of SEs used in the PTAs, nor to determine whether a definition might be better suited to address the gaps referred to above. Instead, it is designed to inform future plurilateral or multilateral discussions on this issue.

69. First, a definition of SEs laying down a presumption that an entity with direct majority government ownership – that is, direct ownership of more than 50% of the share capital – is and SE would capture instances where enterprises with 50%+ state ownership receive or provide government support, or are being used as a channel to support other enterprises. A definition including such a presumption would be distinct from a

definition requiring evidence of 'governmental authority', such as the concept of 'public body' as interpreted by the Appellate Body.[60] While the former definition would suffice to prove that an entity in which the state directly owns 50% or more of the entity's share capital constitutes a SE, the notion of 'public body' as construed by the Appellate Body calls for additional evidence, beyond majority ownership, to prove that an entity "possesses, exercises, or is vested with governmental authority."[61] It is, however, notable that the presumption referred to above would not permit to consider as an SE an entity which is indirectly owned or which is controlled by a government. Ways to capture firms with indirect ownership or government control are discussed further below.

70. Second, a definition that integrates direct and indirect ownership of the share capital would cover situations where government ownership is disseminated across various public entities, namely where the government owns an enterprise through various entities, be they governmental agencies, sub-central authorities, SEs, designated monopolies, or investment holdings. Moreover, while the ownership or control of an enterprise by the government may occur horizontally, through so-called cumulative ownership (namely the accumulation of shares in the hands of different state entities), or it may occur vertically through a chain of ownership. Along these lines, the OECD has encountered in its work complex ownership structures involving, both at the horizontal and vertical levels, a chain of entities, including local and central government funds, as well as SOEs, thereby masking the government's beneficial ownership of industrial producers (Figure 1).[62] Evidence of opaque ownership structures often used as a means to channel government support (Box 1) has highlighted the importance of enhancing transparency with respect to investments by governments in entities.

71. Third, other factors than share ownership might prove relevant to define SEs. In this respect, the OECD has found that the presence of government ownership in firms above 10% yet below the 50% threshold can be particularly pervasive in certain countries (OECD, 2021[12]). This suggests that it might be useful to capture instances where entities with mixed public and private ownership act in practice on behalf of the government, which has the capacity to exercise control or influence over such entities. Likewise, given the finding of the OECD in previous work that large industrial firms with lower thresholds of ownership receive significant government support notably for firms with 25%-50% state ownership (Figure 2), it might prove relevant to insert a definition, which is not limited to entities that are majority-owned by governments. For this purpose, it is useful to take account of factors such as *inter alia* (i) the voting structure of an entity, e.g. covering cases where the government exercises less than 50% of the voting rights; (ii) government ownership of special shares or voting rights; (iii) power over the organisational and management structures of the entity, such as the power to appoint a majority of members of the board of directors or another management

60 Appellate Body Report, *US-Anti-dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011.

61 Ibid, para 317. There is no clear guidance with respect to the adequate range of evidence needed. For further discussion on this interpretation, which is contested, see above and OECD (2023[39]).

62 For an illustration of complex government ownership chain, see also Annex 12-A of the US-Singapore FTA.

body; and (iv) capacity or ability to exercise control over the strategic policy and business decisions of an enterprise.[63]

72. In sum, it may be useful for a definition of SEs to reflect the fact that ownership, control, or influence can be exerted directly or indirectly through multiple linkages. These linkages may go beyond ownership shares and include, among others, voting rights, as well as the presence of government representatives within an entity's management bodies. A definition of SEs that envisages both complex government-ownership structures, direct or indirect, and the ability to exercise governmental control or influence over an entity could better reveal the extent of government involvement in an industry. It may crucially shed light on the scale of government involvement in a sector, such that the government favours or supports enterprises it directly or indirectly owns, or otherwise controls or influences *de facto*. Moreover, such a definition could importantly capture more hidden forms of government support, involving state-owned, -invested, -controlled, or -influenced entities used as intermediaries or where the SE is acting according to governmental directives, policies, or objectives.

Substantive obligations related to SEs under PTAs and key issues of concern within the multilateral trading system

Treatment of SEs as recipients of support under PTAs

73. Recent OECD work has drawn attention to the scale of government support received by SEs in various manufacturing sectors, be it in the form of government grants, below-market borrowings, or below-market energy inputs Figure 2 and (OECD, 2023[13])[TAD/TC(2022)3/FINAL]. Government support that is limited to or predominantly received by SEs may significantly distort markets and prejudice competitive neutrality. Moreover, it may have important trade implications by enabling unsustainable state firms to remain in operation, potentially driving out private, innovative firms through excess capacity and suppressed prices. Although the current WTO subsidy disciplines applies to private and state enterprises without distinction, multilateral trade rules directed at regulating subsidies provided specifically to SEs would have the merits to offer WTO Members specific legal tools to deal with a trade issue, which has proven to be a systemic concern among trading partners.[64]

74. In this respect, a handful of PTAs with disciplines on SEs lay down specific rules on a Party's direct or indirect provision of government support – referred as to 'non-commercial assistance' (NCA) – to its SOEs.[65] While the first PTA to include such provisions was the CPTPP, two other agreements, namely the Australia-Peru FTA and the USMCA, have integrated disciplines on NCA causing adverse trade effects.

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63 This is broadly consistent with the definition contained in the *OECD Guidelines on Corporate Governance of State-Owned Enterprises*. For such a definition, see above.

64 See Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States, and the European Union, 14 January 2020, https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158567.pdf (accessed on 13 February 2023).

65 The term SOEs is used as the disciplines distinguish between SOEs and SEs: the agreements prohibit non-commercial assistance to SOEs provided by governments or SEs causing adverse effects. While the definition of SOEs under the three agreements concerned corresponds to either Category B or C, SEs are defined as enterprises "owned or controlled through ownership interests by a Party."

75. These agreements regulate the provision of NCA, that is assistance limited to certain SOEs[66] bestowed directly or indirectly by governments to specific enterprises.[67] The concept of NCA covers various forms of governmental financial contributions.[68] For an NCA to be prohibited, the NCA must cause 'adverse effects to the interests of another Party'.[69] In addition, the USMCA prohibits outright, without the need to show adverse effects,[70] three types of subsidies when bestowed to SOEs (i) loans or loan guarantees to uncreditworthy SOEs, (ii) non-commercial assistance to an SOE that, namely is insolvent or on the brink of insolvency without a credible restructuring plan, and (iii) conversion of the outstanding debt to equity when inconsistent with the usual investment practice of a private investor.[71] The USMCA is thus far the only PTA containing a prohibited subsidy category exclusively directed at SOEs. In recent years, there have been other plurilateral and bilateral efforts endeavouring to deal with subsidies to non-financially sustainable enterprises, although these do not specifically target SEs. (Box 6).

76. By regulating government support granted to SOEs, the CPTPP, the Australia-Peru agreements, and the USCMA have the **merits** of giving their Parties the legal tools to address NCA. They may notably permit a Party to collect evidence on alleged NCA through a request for information directed at another Party[72] and, potentially, to formulate a request for consultations under the agreement dispute settlement mechanism. In other words, although the SCM rules apply to subsidies received by all enterprises, irrespective of their ownership status, the transparency and adjudicatory mechanisms in place under certain PTAs targeting support benefitting specifically SEs

66 The agreements draw from the concept of *de jure* and *de facto* 'specificity' under the SCM Agreement by specifying that non-commercial assistance is considered to be limited to certain SOEs when access to the assistance is expressly limited to certain SOEs, when the assistance is provided to a limited number of SOEs or used predominantly by certain SOEs, or when a disproportionately large amount of the assistance is provided to certain SOEs. Instances where a Party favours certain SOEs by using its discretion in the provision of assistance are also deemed to be considered as "limited to certain SOEs".

67 Indirect provision of NCA refers to situations where a government directs or entrusts a private entity to provide support. This is similar to Article 1.1 of the SCM Agreement.

68 Similar to the SCM definition of 'financial contribution', the concept of NCA includes: (i) direct transfer of funds or potential direct transfer of funds or liabilities (e.g. grants, debt forgiveness and preferential loans, guarantees and equity investment). and (ii) the supply of goods or services on terms more favourable than those commercially available. The USMCA includes a third category, which also tracks the SCM Agreement, namely (iii) the purchase of goods on terms more favourable than those commercially available to the enterprise. This presumably covers situations where the government provides support by purchasing the goods manufactured by a SE with a view to commercial resale inconsistent with market considerations. That is, in line with other PTAs with disciplines on SEs do, the USMCA does not apply this provision on SEs to government procurement.

69 Article 17.6 CPTPP; Article 16.6 Australia-Peru FTA; and Article 22.6 USMCA.

70 The concept of prohibited subsidies comes from the SCM Agreement, which envisages two types of prohibited subsidies deemed *per se* specific and causing adverse effects, namely export subsidies and import substitution subsidies. See Article 3.1(a) and (b) SCM.

71 Article 22.6(1) USMCA.

72 As explained below, Parties to these agreements are entitled to request information on any policies or programmes adopted or maintained by the Party providing for non-commercial assistance.

and granted by governments or SEs, may facilitate their efforts to assemble evidence, as well as to increase the incentives of a Party to a PTA to inquire into such support measures.

Box 6. Other bilateral and plurilateral efforts to address the issue of government support to non-financially sustainable enterprises.

The PTAs, which the European Union concluded with Korea in 2010, as well as with Japan and Singapore in 2018 also contain a prohibited subsidy category for subsidies bestowed to non-financially sustainable enterprises. However, the category does not target subsidies to and by SEs; it concerns only subsidies by governments or public bodies to all enterprises. The EU-Japan Economic Partnership Agreement, for instance, prohibits (i) arrangements "whereby a government or a public body is responsible for guaranteeing debts or liabilities of an enterprise, without any limitation regarding the amount or duration of such guarantee"[2] and (ii) "subsidies for restructuring an ailing or insolvent enterprise without the enterprise having prepared a credible restructuring plan."[3]

More recently, in January 2020, the three Trade Ministers of Japan, the European Union, and the United States agreed, in the context of their discussions on how to strengthen WTO rules on industrial subsidies, to expand the prohibited subsidy category, which they consider as currently "insufficient to tackle market and trade distorting subsidisation existing in certain jurisdictions."[3] The Ministers specified that new types of prohibited subsidies must be added to the SCM Agreement, namely "(a) unlimited guarantees; (b) subsidies to an insolvent or ailing enterprise in the absence of a credible restructuring plan; (c) subsidies to enterprise unable to obtain long-term financing or investment from independent commercial sources operating in sectors or industries in overcapacity; (d) certain direct forgiveness of debt."[4]

Notes:
1. This provision limits the prohibition to instances where a government or a public body guarantees the debts or liabilities of an enterprise without any limitation as to the amount or duration of the guarantees. By contrast, a governmental guarantee of an enterprise's debts or liabilities that is limited in time or duration would not fall under the prohibition.
2. Article 12.7 EU-Japan Economic Partnership Agreement. See also Article 11.7 EU-Singapore Free Trade Agreement and Article 11.11 EU-Korea Free Trade Agreement.
3. Joint Statement on Trilateral Meeting of the Trade Ministers of Japan, the United States, and the European Union, (14 January 2020), available at https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158567.pdf (accessed on 20 March 2023).
4. ibid.
Source: Authors' elaboration.

77. Notwithstanding the merits of the provisions on NCA in offering governments legal tools to constrain government support to SEs causing adverse trade effects, Parties to PTAs containing disciplines on NCA may have difficulties in determining that assistance to SOEs is non-commercial. In the case of the USMCA, for example, Parties may encounter difficulties in evaluating the health of the SOEs of another Party or in assessing whether a private investor would have accepted the debt-to-equity swap of a SOE. More broadly, there may be limits to the scope of the disciplines on NCA as the exact reach of the disciplines depends upon the definition of SEs contained in the PTA concerned,[73] the forms of assistance concerned, and the potential inclusion of exemptions from the rules. It is notable in this respect that the forms of assistance

[73] See above on the fact that the material scope of the definition on SEs contained in the different PTAs determines the scope of the provisions disciplining SEs.

envisaged under the PTA provisions do not include tax concessions, be they in the form of tax credits or tax exemptions. In addition, most of the provisions on NCA do not yet apply to sub-central SEs.[74] This exclusion may be problematic if subsidisation in a given country occurs not only at the central, but also at the sub-central level where sub-central jurisdictions (e.g. states, provinces, counties, or municipalities) have the authority to grant support to companies (OECD, 2019[11]).

Treatment of SEs as providers of support under PTAs

78. Earlier OECD work found that much support is channelled through SEs acting as intermediaries (e.g. state banks, government guidance funds, and state utilities), thus confirming the need to focus on SEs not only as recipients of support, but also as providers of support (OECD, 2021[12]; OECD, 2023[13]). The present analysis of existing PTAs has found that they may impose three different types of obligations on SEs to regulate their behaviour or practices and discipline their conduct in relation with downstream or upstream companies. The first obligation **prohibiting SEs to provide non-commercial assistance** to other SOEs causing adverse effects contained in a few PTAs regulates subsidisation occurring between SEs at different levels of production or in different markets. The obligations to **act 'in accordance with commercial considerations'**, as well as of **non-discrimination**, which are more commonly found in PTAs, apply to SEs in their relationships with both state and private enterprises.[75] Unlike the first obligation, these two latter obligations are not specifically geared towards the provision of government support by or through SEs although support granted by SEs to downstream or upstream firms, where inconsistent with commercial considerations, may be captured by the 'commercial considerations' obligation. Only the CPTPP, the Australia-Peru FTA, and the USMCA combine provisions related to both the first obligation prohibiting NCA and the second cluster of obligations.

79. **First**, the provisions on NCA to SEs described above also apply to instances where SEs themselves provide support, as opposed to governmental authorities. In other words, PTAs containing such provisions should capture cases where certain SEs act as intermediaries to provide support to other SEs. Importantly, none of the PTAs concerned require that a SE providing support possesses, exercised, or is vested with governmental authority, hence avoiding – at least partly –[76] the issue posed by the concept of 'public body' as construed by the WTO Appellate Body.

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74 See, for instance, Article 22.9 and Annex 22-D USMCA. Furthermore, the provisions on NCA do not apply to non-conforming activities of SEs that a Party lists in its Schedule. Note, however, that Article 17-14 and Annex 17-C(a) CPTPP, as well as Article 22.14 and Annex 22-C USMCA require the Parties to begin further negotiations within six months of the date of entry into force of the Agreement with a view to extending the application of the obligations imposed on SEs listed in, respectively, Annex 17-D and Annex 22-D to the activities of sub-central SEs. See also Article 16-14 and Annex 16-C(1) Australia-Peru FTA.

75 Note that the obligation to act 'in accordance with commercial considerations' and the 'non-discrimination' obligation are also contained in the CAI concluded between China and the European Union. See Article 3bis(3) CAI.

76 The provisions on NCA envisaged under the different PTAs only concern support provided by governments or SEs to other SEs. It does not, therefore, cover cases where a SE supports a private firm. For this purpose, however, the other two obligations traditionally found in PTAs regulating the conduct of SEs, namely the 'commercial considerations' obligation and the non-discrimination obligation of non-discrimination apply to SEs in their relationships with both state and private enterprises. Yet, with respect to support bestowed by SEs to other enterprises, these two obligations

80. The disciplines related to the provision of NCA by SEs to SOEs contained in the CPTPP, the Australia-Peru FTA, and the USMCA would seem to deal with a wide range of government support channelled through SEs acting as intermediaries, such as grants, debt forgiveness, preferential loans and guarantees on terms more favourable than those commercially available, equity investment inconsistent with what private investors can offer, as well as the provision of goods or services on more favourable terms than those commercially available.[77] The disciplines would, for instance, capture situations where a state bank or state financial institution provides below-market financing or where a state utility supplies electricity or gas at below-market rates to energy-intensive state manufacturing firms. Similarly, such a discipline may deal with instances involving the selling of inputs (e.g. steel, aluminium, cement, etc.) at below-market prices by a state industrial firm to a SE manufacturing downstream products.[78] In the case of the USMCA,[79] support provided by an SE through the purchase of goods on terms more favourable than those commercially available to the SE manufacturing the good is also covered.

81. As a **second avenue** for dealing with support and, more broadly, unfair advantages bestowed by an SE, PTAs may impose an obligation on SEs to **act 'in accordance with commercial considerations'**. While provisions on non-commercial assistance can only be found in a few agreements, such an obligation appears more widespread across the different PTAs with discipline on SEs, notably in recent FTAs signed by the European

may have a narrower material scope than the prohibition to provide NCA causing adverse effects to the interests of another Party.

77 As mentioned above, the concept of NCA contained in the CPTPP, the Australia-Peru FTA, and the USMCA includes (i) direct transfer of funds or potential direct transfer of funds or liabilities (e.g. grants, debt forgiveness, and preferential loans, guarantees, and equity investment), and (ii) the supply of goods or services on terms more favourable than those commercially available. Under the USMCA, NCA also covers the purchase of goods on terms more favourable than those commercially available to the enterprise.

78 While the OECD has previously identified cases of below-market financing and below-market energy involving, respectively, state financial institutions and state energy utilities (OECD, 2021[12]; OECD, 2023[13]), it has proved more difficult thus far to collect evidence of cases of a chain of subsidisation between SEs manufacturing upstream and downstream goods, although links between certain enterprises could be found, such as the existence of a strategic co-operation agreement between Chinese central SE Baowu Steel and the state-owned rolling stock manufacturer China Railway Rolling Stock Corporation (OECD, 2023[10]).

79 See FN 77.

Union[80] and the United Kingdom.[81] Only the CPTPP and the USMCA combine provisions related to both the first and second obligations.

82. While the obligation contained in PTAs may be related to from the WTO obligation imposed on STEs[82] to act solely 'in accordance with commercial considerations',[83] it has a broader scope. More specifically, it is a stand-alone obligation, which – as opposed to the Article XVII:1 GATT 1994[84] – is not tied to the discriminatory behaviour of the enterprise. Indeed, a Party is to ensure that its SE does not *de jure* or *de facto* act inconsistently with considerations, for example, of price, quality, availability, marketability, transportations and other terms and conditions of purchase or sale,[85] which a privately-owned enterprise in the relevant business or industry would normally take account of in its commercial decisions. In other words, the obligation regulates the behaviour of SEs in its relationships with firms, notably downstream customers or upstream suppliers, without any need to show that it acted in a non-discriminatory fashion. The 'commercial considerations' obligation imposed on SEs may cover a wide range of situations, spanning over, amongst others, the sale of goods or services at below-market price, the purchase of good or service at price above the market price, and the provision of below-market financing.

83. A **third** type of obligation imposed on SEs within PTAs is a **non-discrimination obligation**. It is the most common obligation contained in PTAs, although its scope varies. More specifically, it usually requires that SEs accord treatment no less favourable:

(i) in their purchase of goods or services, to a good or service supplied by an enterprise of another Party than to a like domestic good or service; and

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80 While the text of the Trans-Pacific Partnership was the first agreement to impose this obligation on the SEs of all Parties to the Agreement, the PTA between Canada and the European Union, the Comprehensive Economic Trade Agreement, is the first agreement which has entered into force with such an obligation. Various EU PTAs have subsequently incorporated this obligation. Agreements negotiated earlier during the 1990s and the 2000s, primarily by the United States, limited such an obligation to designated monopolies, thus requiring any privately-owned monopoly designated by a state or government monopoly to act solely 'in accordance with commercial considerations' when purchasing or selling its monopoly goods or services (Sylvestre Fleury and Marcoux, 2016[56]).

81 Other FTAs involving an obligation for SEs to act 'in accordance with commercial considerations' are the USMCA, the CPTPP and the earlier US-Singapore FTA, although the obligation applies to Singaporean SEs only.

82 For a definition of STEs and its distinction from the concept of SEs, see above FN 22.

83 Article XVII:1(b) GATT 1994. Note that the adverb 'solely' attached to the obligation imposed on STEs to act 'in accordance with commercial considerations' is not present in PTAs including such an obligation on SEs. It is not clear whether the absence of this term weakens such an obligation by allowing governments to derogate from their obligations, arguing that "commercial considerations do not need to be solely market driven" (Sylvestre Fleury and Marcoux, 2016[56]).

84 In *Canada-Wheat*, the Appellate Body found that the obligation imposed on STEs to "make […] purchases or sales solely in accordance with commercial considerations" under Article XVII:1(b) is not a separate or independent obligation from the non-discrimination requirement contained in Article XVII:1(a) GATT 1994. Appellate Body Report, *Canada-Whea*t, WT/DS276/AB/R, adopted 27 September 2004, paras 89-91.

85 Note that these factors are illustrative.

(ii) in their sale of goods or services, to an enterprise of another Party than to a domestic enterprise.

This obligation is another form of regulation of the conduct of SEs. While having some overlap with the two obligations previously discussed, it focuses on difference of treatment by SEs on the basis of nationality, in terms of more favourable treatment to domestic goods, services, or enterprises. In this respect, it may complement both the prohibition of NCA causing adverse effects and the 'commercial considerations' obligations. More specifically, it may permit to capture instances where an SE, acting according to governmental directives, policies, or objectives differentiates within its territory, between domestic and foreign enterprises, thus offering a competitive advantage to the former over the latter. On some occasions, however, the non-discrimination obligation does not apply to the purchase by SEs of goods or services or to both the purchase and selling of goods or services, which constitute covered investments in the territory of the Party. This exclusion may importantly affect the scope of this obligation, hence limiting its ability to capture specific distortive issues pertaining to the conduct of SEs.

84. Despite their wide coverage, the various obligations described above may have **potential limitations**. In some PTAs, most of the provisions on NCA, 'commercial considerations' obligation, and the non-discrimination obligation do not yet apply to sub-central SEs.[86] Furthermore, both the 'commercial considerations' and the non-discrimination obligation may not apply under certain PTAs to equity investment in the form of purchase or sales of shares, stocks, or other forms of equity by a SE in another enterprise.[87] Such an exemption may constitute an issue, be it in a bilateral, plurilateral, or multilateral context, if a signatory country uses equity investment by SEs as a means to support its industry. Previous OECD work has shown that this form of support has been particularly widespread in the sector of semiconductors where local governments have created government-owned guidance funds, which have taken large equity stakes in local semiconductor firms (Noble, 2018[51]; OECD, 2019[11]).

Favouritism and Regulatory Privileges

85. As noted earlier in this report, the application of different, more favourable, set of laws or regulations with respect to SEs, whether in the area of bankruptcy, procurement, competition, or elsewhere, may affect the level playing field. In this respect, a few PTAs include an express obligation on Parties to an agreement to enforce laws and regulations in a consistent and non-discriminatory manner, including with regard to SEs. These same agreements also require Parties to guarantee the independence and impartiality of bodies regulating SEs, as well as to ensure that SEs comply with the *OECD Guidelines on Corporate Governance of State-Owned Enterprises*.[88] Similarly, one PTA requires a

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[86] As mentioned above, Parties to the CPTPP and the USMCA must begin further negotiations within six months of the date of entry into force of the Agreement with a view to extending the application of the obligations imposed on SEs listed in, respectively, Annex 17-D CPTPP and Annex 22-D USMCA to the activities of sub-central SEs. See Article 17-14 and Annex 17-C(a) CPTPP and Article 22-14 and Annex 22-C USMCA.

[87] See, for instance, footnote 13 of Chapter 17 CPTPP, footnote 12 of Chapter 16 Australia-Peru FTA, and footnote 11 of Chapter 22 USMCA.

[88] See, for instance, Article 169 EU-Kazakhstan Enhanced Partnership and Cooperation Agreement, which requires Parties to the agreement to ensure that SEs "observe high standards of transparency and corporate governance in accordance with the 2005 OECD Guidelines on Corporate

Party to ensure, "including through its policy of competitive neutrality" that its central and sub-central governments do not provide any competitive advantage to any SEs simply because they are government-owned.[89] These broadly worded obligations would enable Parties to be constrained from granting any kind of more favourable treatment or regulatory privileges to an SE. Interestingly, although non-compliance with such obligations may be enforced through the dispute settlement mechanism of the PTA concerned, some countries may also have enforcement mechanisms in place at the national level and allow the government of the other Party or a person of that Party access to that system.[90]

86. While the presence of such general obligations is relatively scarce across the different PTAs containing disciplines on SEs, more specific obligations imposed on Parties to treat all enterprises equally under their competition laws are more commonly incorporated into PTAs. The analysis has identified three different types of provisions imposing an equal treatment obligation:

(i) a broadly formulated provision requesting Parties to comply with the principle of non-discrimination when applying their competition laws;

(ii) a more specific provision requiring Parties to apply their competition legislation without distinction between enterprises on the basis of ownership; and

(iii) a provision expressly referring to SEs, as defined under the PTA concerned.

As mentioned above, for the purposes of this analysis, the mere presence within PTAs of provisions laying down an obligation of equal treatment under competition laws is not sufficient for the agreements to be counted as having disciplines on SEs. That, said, information on these provisions has been collected with a view to offering a better understanding of their prevalence among PTAs. This data collection effort has permitted to capture those PTAs, which, while not necessarily containing comprehensive disciplines on SEs, still include provisions that somehow relate to the principle of competitive neutrality Indeed, the number of such agreements is higher than the number of PTAs with rules on SEs.[91]

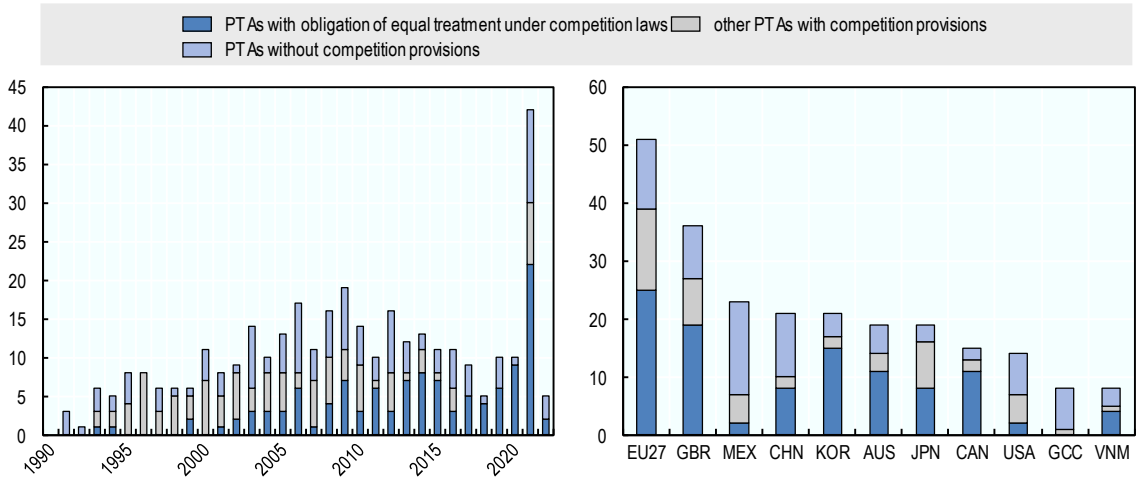
Governance of State-Owned Enterprises." In total, the OECD found 5 agreements with such an express reference to the OECD Guidelines.

89 See Article 14.4(3) US-Australia FTA imposing such an obligation on Australia only.

90 Australia has, for example, established the Australian Government Competitive Neutrality Complaints Office, which deals with complaints by any individual, organisation, or government body concerning competitive advantages enjoyed by SEs by virtue of their government ownership, inconsistent with their competitive neutrality obligations. See https://www.pc.gov.au/about/core-functions/competitive-neutrality (accessed on 12 February 2023). In this respect, it is notable that the US-Australia FTA requires the Competitive Neutrality Complaints Office to accord treatment no less favourable to complaints lodged by either the United States or persons of the United States than complaints lodged by persons or governmental authorities of Australia (Article 14.4(3)).

91 Note that among the PTAs containing an equal treatment obligation under competition laws, a subset has introduced discipline on SEs.

Figure 5. Countries have increasingly introduced an obligation requiring that enterprises be treated equally under their competition laws within PTAs



Note: Dark blue bars show PTAs including an obligation under the competition provisions to treat all enterprises equally under competition law. Such an obligation covers the three types of provisions described above, namely provisions (i) to (iii). The grey bars show other PTAs that have competition provisions but do not include such obligation, while the light blue bars show other PTAs that do not have any competition provisions. Members of the Gulf Cooperation Council (GCC) include Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates. Only PTAs that entered into force after 1990 are shown in the left graph. The spike in the overall number of PTAs newly in force in 2020 and, even more, in 2021 relates to the entry into force of the PTAs undertaken by the United Kingdom following its withdrawal from the European Union.
Source: OECD research.

87. Figure 5 distinguishes between three distinct cases, namely PTAs that include an obligation to treat enterprises equally under competition laws, PTAs with competition provisions that do not incorporate this obligation, and PTAs without any competition provisions in place. It shows that the number of PTAs including an obligation to treat all enterprises equally under competition laws[92] have followed a similar evolution to the number of PTAs with SE disciplines in place. While such an obligation remained inexistent or marginal in the PTAs that entered into force during the 1990s, it started emerging and becoming more common in the 2000s, albeit with some yearly fluctuations. As of 2014, agreements including an obligation of equal treatment have become prevalent, although there are still PTAs entering into force today that do not incorporate any competition provisions. OECD countries account for the largest share of PTAs containing an equal treatment obligation. Additionally, many of the observations found in Figure 3 (which reflects the number of PTAs with disciplines on SEs as compared to those that do contain such disciplines) also apply here. Importantly, while China has not ratified any PTAs with SE disciplines, all the PTAs that China has

[92] This category covers all PTAs that include at least one of the three different types of provisions listed above ((i) to (iii)) imposing on the Parties to the agreement an obligation to apply competition laws equally to all enterprises. In including provision (i) in its counting methodology, namely the obligation requiring Parties to comply with the principle of non-discrimination when applying competition laws, the OECD has adopted a broad approach as it is not clear whether it may cover the obligation to apply competition laws without distinction on the basis of nationality.

signed[93] or upgraded[94] since 2013 contain general competition provisions and, in some cases, an obligation to comply with the principle of non-discrimination when applying competition laws. By contrast, none of the agreements concluded by the GCC or any of the countries of the GCC individually include an obligation of equal treatment of firms under the domestic competition laws.

Transparency as a tool under PTAs to deal with opaque ownership structures and unreported support to and through SEs

88. Previous OECD work has underscored that unilateral, plurilateral, and multilateral efforts to shed light on the extent of state ownership, as well as on government measures giving a competitive advantage to firms (including SEs) are pivotal to level the playing field (OECD, 2023[39]). There are, however, multiple obstacles to systematic multilateral knowledge on these matters. One concerns WTO Members' failure to fully comply with their transparency obligations under the SCM Agreement. Others include possible disagreements as to whether an entity ought to be considered a 'public body' within the meaning of the SCM Agreement (OECD, 2023[39]), and, more broadly, the absence of specific WTO transparency provisions related to regulatory measures, or practices privileging SEs.[95] Absent top-down obligations imposed on all WTO Members to report the level of state ownership in firms, as well as the financial or regulatory advantages they may grant to such firms, consistent information across countries is lacking.

89. Some of the PTAs containing a discipline on SEs lay down transparency obligations to address these gaps. The CPTPP, which was signed in March 2018 and entered into force in December 2018[96] was, in its original form,[97] the first PTA to include a more extensive list of transparency obligations in relation to SEs. Prior to the CPTPP, a few PTAs only had introduced limited transparency rules on SEs. The US-Singapore FTA and the US-Australia FTA, for instance, which entered into force in January 2004 and January 2005, respectively, contain an obligation on each Party to make available public

93 Note that the CAI is not covered in this study.

94 In 2017 and 2018, China signed two Protocols with, respectively, Chile and Singapore to deepen the FTAs it had signed with these two countries in 2005 and 2008, notably by extending the scope of the agreements to new policy areas, including *inter alia* electronic commerce, competition, or environment, so as to better regulate measures enacted behind the borders.

95 See above.

96 Note that the agreement only entered into force in January 2019 for Viet Nam and September 2021 for Peru.

97 The text of the CPTPP was drafted during the negotiations of the Trans-Pacific Partnership (TPP), which were led by the United States (Sylvestre Fleury and Marcoux, 2016[56]).

information concerning SEs at the request of the other Party.[98] It is, however, notable that Singapore is subject to a broad notification obligation.[99]

90. Since 2018, more elaborate transparency provisions geared towards the relationship between the government and its SEs have become more common within PTAs. Their presence is directly tied to the emergence of SE disciplines in these agreements. This is notably the case of agreements concluded by Australia, the European Union, the United Kingdom, and the United States. They aim to allow parties to an agreement, and possibly other countries, to have, among other things, a better understanding of the size of state ownership within their respective territories, the financial health of SEs, the potential regulatory privileges they benefit from, and the subsidies they may receive.

PTAs transparency obligations differ but are converging

91. Despite the presence of similarities across PTAs, notably when one country has entered into several agreements containing transparency provisions, differences remain. While certain PTAs only set up a request for information mechanism, others include a wider range of obligations. The various transparency obligations, the mechanisms attached to such obligations, and the type of information required are summarised in Table 3. For each type of information required, the Table details the transparency issue related to SEs that the provision of such information may contribute to addressing.

98 Article 12.5(3) US-Singapore FTA and Article 14.8(2)(b) US-Australia FTA. However, while the provision details the evidence that the requesting Party must produce together with its request for information, it does not specify the type of public information that the Party must provide to the other Party (Willemyns, 2016[57]). Subsequent agreements such as the US-Colombia, US-Peru, or US-Chile FTAs contain a more specific obligation requiring a Party to specify the entities or localities involved, the particular goods or services and markets concerned, as well as include indicia of practices that may restrict trade or investment between the Parties.

99 Under the US-Singapore FTA, Singapore must publish on an annual basis a consolidated report detailing for each SE a wide range of information (Article 12.3(2)(g)). In more recent PTAs, such information may be obtained through a request for information mechanism. In this respect, the US-Singapore FTA is the only agreement imposing an obligation on a Party to publish this yearly comprehensive report.

Table 3. Transparency obligations in PTAs with SEs disciplines

Category of obligation	Mechanism	Type of information	Transparency issues addressed
Category 1: Mandatory notification	Provision of the information directly to another Party or publication on an official website	**1)** A list of the Party's SE	Opacity of government ownership
		2) An annual update of the list	
Category 2: Mandatory response (following a request for information)	Question/answer mechanism: provision of information at the written request of another Party	**3)** The percentage of shares or votes cumulatively owned or held in the entity by the Party, its SEs, or designated monopolies	Opacity of government ownership, including when disseminated across various entities
		4) A description of any special shares or special voting rights held by the Party, its SEs, or designated monopolies in the entity	Opacity of government ownership, including when disseminated across various entities Opacity of government control over the entity
		5) The organizational structure of the entity and its composition of the board of directors or of any other equivalent management body	Opacity of government ownership of and control or influence over the entity
		6) The government titles of any government official serving in the entity's board of directors (as an officer or member)	Opacity of government ownership of and control or influence over the entity
		7) A description of the government departments or public bodies regulating the entity, including a description of the reporting requirements imposed on the entity and the rights and practices concerning the appointment, dismissal, or remuneration of senior executives and members of its board of directors or any other equivalent management body	Opacity of government control or influence over the entity Lack of independence and impartiality of the bodies regulating SEs
		8) The entity's annual revenue and total assets over the most recent three-year period for which information is available	Difficulties to access financial information on the entity
		9) Any exemptions and immunities from which the entity benefits under the Party's laws and regulations	Regulatory privileges prejudicing competitive neutrality
		10) Information regarding any policy or programme adopted or maintained by the Party providing for non-commercial assistance	Lack of transparency as regards the provision of government support
		11) Any additional, publicly available, information concerning the entity, including annual financial reports and third-party audits	Difficulties to access financial information on the entity

Source: Authors' elaboration.

92. Table 3 shows that some PTAs require Parties to the agreement to publish a list of their SEs no later than 6 months after the entry into force of the agreement and update it on an annual basis (**Information 1 and 2** on Table 3). This obligation mainly appears in the CPTPP, as well as in PTAs signed by the United States and Australia. These PTAs, together with other PTAs, ratified notably by the European Union and the United Kingdom, grant the right to a Party to request the other Party to provide specific information regarding its SEs (**Information 3 to 11**).[100]

[100] Note that the CAI concluded between China and the EU also includes such a request for information mechanism. See Article 3bis(4)(a) CAI.

Which issues may transparency obligations be able to address?

93. While understanding the extent to which an entity is owned or invested in by the government can be a complex task, apprehending whether an entity is otherwise controlled or influenced by the government may prove even more difficult. The former exercise requires collecting information on *inter alia* the identity of the owners of the shares or votes, the rights attached to them, as well as the ownership structure of the firms owning the entity in question (e.g. its parent company or holding subsidiary). In this respect, **Information 1 to 4** may address the critical lack of information related to the assets owned by the government in an entity established within its territory. Requests for **information 3 and 4** could allow a Party to uncover situations where the government owns an enterprise through various intermediary entities, be they governmental agencies, sub-central authorities, SEs, designated monopolies, or investment holdings.

94. Appreciating the degree of government control or influence over companies may necessitate additional evidence, which may not be publicly available, particularly as it concerns the organisational and management structure of the entity. This may include the identity of the individuals serving as officials or members of the board of directors, their relationship with the government, as well as various institutional or procedural factors suggesting that the governmental body regulating SEs lacks independence and impartiality. In that regard, the various PTAs granting to one Party the right to request to another Party **Information 5, 6, and 7** may contribute to filling in this evidence gap, thus shedding light on the more indirect link between the government and the entity concerned.

95. While notifications of **Information 1 and 2**, as well as requests for **Information 3 to 7** focus on non-transparent ownership structures, requests for **Information 8 to 11** offer a Party the possibility to detect potential market-distorting advantages specifically received by SEs. Requests for **Information 8 and 10** allow governments to solicit access to the financial information of an entity established in the territory of another Party, thereby potentially suggesting that such information is crucial to measure the level of government support an entity benefits from and its financial health. Such a right may aim to remedy the difficulties attached to accessing the financial information of SEs, particularly where firms are otherwise not subject to an obligation to publish annual reports (e.g. because they are not listed or have not issued bond prospectuses).

96. Requests for **Information 9 and Information 11** represent a more direct avenue to identify government support or regulatory advantages received by an SE. The former can address the lack of government transparency and hence the paucity of public information related to the provision of government support to SEs. It is notable that the request for information covers not only the programmes through which a Party provides NCA, but also its policies. The last category may notably include unwritten governmental directives for which public information may be inexistent, instructing an SE or a private enterprise to provide support by, for instance, offering electricity and natural gas at below-market prices to specific industrial users or below-market financing. Moreover, in providing the right to a Party to require information concerning potential exemptions or immunities from laws and regulations, the PTAs concerned could permit the identification of regulatory privileges enjoyed by SEs, such as *inter alia* exemptions from bankruptcy laws, public procurement laws, or competition laws, which are not otherwise justified on public policy or public interest grounds. Although this request for information could overcome potential barriers, notably linguistic,

financial, and human, related to the discovery of regulatory measures,[101] it may not cover implicit discriminatory practices and policies, which are harder to detect and document.[102]

97. In summary, the transparency obligations contained in certain PTAs having a specific discipline on SEs may contribute to clarifying the degree of government ownership, control, or influence within firms, as well as the financial, material, or regulatory advantages SEs may receive. On a few occasions, these obligations are strengthened by a duty to designate for each Party a contact point on SEs and designated monopolies to facilitate communications between the Parties on any matter related to the obligations on both SEs and governments with respect to their SEs.[103]

Potential limitations to existing transparency obligations

98. While advanced transparency provisions in certain PTAs go a long way to addressing current information gaps, there may remain limitations related to the reach and enforcement of these provisions.

99. A first potential limitation relates to the definition of SEs contained in the PTAs concerned. The reach of certain obligations, namely the obligation to publish a list of SEs (**Information 1 and 2**) and the obligation to give information on any non-commercial assistance (**Information 9**), depends on the definition of SEs within the PTA. Indeed, a definition that would exclude SEs that are not principally engaged in commercial activities or SEs that are *de facto* -controlled or -influenced by the government,[104] would narrow the scope of these two transparency provisions, thereby weakening their reach and effectiveness. Nonetheless, the degree of precision of certain SE definitions (Table 2), could help to avoid some of the issues posed by the Appellate Body's interpretation of the concept of 'public body'. Indeed, disagreements as to whether an entity is a 'public body' under Article 1.1(a)(1) of the SCM Agreement (OECD, 2023[39]) may have direct implications for which support measures WTO Members notify to the SCM Committee. By contrast, although the exact coverage of the definitions of SEs contained in the PTAs remains a debated issue in the academic literature, there might overall be less disagreement as to whether an entity is an SE and thus whether (i) the Party where this entity is located needs to notify its existence to the

101 It is worth mentioning that the WTO Accession Protocol of China imposed an obligation on the Chinese central government to establish or designate an enquiry point to provide information on laws, regulations, and other measures pertaining to or affecting trade in goods, services, or TRIPS upon request of any WTO Member, enterprise, or individual (Accession Protocol of China, Section 2(C).3). The creation of such an enquiry point was meant to address the concerns of the WTO Members with regard to "the difficulty in finding and obtaining copies of regulations and other measures undertaken by various ministries as well as those taken by provincial and other local authorities." See Report of the Working Party on the Accession of China, WT/ACC/CHN/49, 1 October 2001 and (Gao and Zhou, 2022[46]). Note that the United States recently made use of this enquiry point to ask for documents relating to semiconductor and fishery subsidies yet to no avail. See on this point, (USTR, 2023[61]).

102 A recent OECD study looking at distortions in the rolling-stock value chain noted the possible presence of such implicit policies and practices under public procurement laws, which may have the effect of undermining market access (OECD, 2023[10]).

103 See, for instance, Article 16.12 of Australia-Peru FTA.

104 See subsection above on the 'issue of defining state enterprises'.

other Party and whether (ii) the Party concerned should consider the support measures provided to this entity as non-commercial assistance.

100. Another potential limitation lies in the fact that a few PTAs exempt sub-central SEs from their transparency obligations. Under the CPTPP, for instance, the obligation imposed on the Parties to the Agreement to publish a list of their SEs[105] does not apply with respect to SEs owned or controlled by a sub-central level of government.[106] Moreover, Viet Nam, Malaysia, and Mexico are entirely exempted from the transparency obligations for their sub-central SEs.[107] No Party would therefore be able to submit a request for information to these countries on any matters referred to in Article 17.10(3).[108] When applied to a country having a large share of sub-central SEs, this exemption could obscure the true level of state ownership of firms and, by the same token, hinder efforts to identify differential treatment between private and state enterprises.

101. The third and last potential limitation concerns the absence of an enforcement mechanism attached to these transparency obligations. The SCM Agreement similarly lacks an enforcement mechanism, which may have contributed to the low level of compliance of WTO Members with their subsidy notification obligations.[109] In that regard, some proposals have focused on rendering the obligation of subsidy notification and, more broadly, the WTO transparency rules enforceable (OECD, 2023[39]). Absent any enforcement mechanism under the PTAs in question, the same challenge that WTO Members currently face could well emerge in a plurilateral or bilateral context (Gao and Zhou, 2022[46]).

Conclusion

102. While state ownership may not in and of itself be problematic, poorly governed SEs and a wider regulatory environment granting them a more favourable treatment can raise important competition and trade concerns. The recent work undertaken in the Trade Committee and other related projects in the OECD highlight that understanding the role of SEs is of paramount importance for current trade debates about industrial subsidies. The OECD has notably found that SEs in the manufacturing sector could not only be large recipients of a wide range of government support but also providers of government support, thereby acting as intermediaries between the government and industrial recipients.

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105 Article 17.10(1) of the CPTPP.

106 Article 17.9(2) and Annex 17-D of the CPTPP. See also, for instance, Annex 16-D of Peru-Australia FTA.

107 Article 17.9(2) and Annex 17-D of the CPTPP.

108 i.e. **Information 3, 4, 6, 8, 9**, and **11** detailed in Table 3.

109 A WTO Member may bring a complaint before the WTO dispute settlement body under Article 25 SCM, arguing that another Member has failed to notify its subsidies, inconsistent with its obligations under the SCM Agreement. Oftentimes, WTO Members have formulated such a complaint in the context of multilateral trade disputes challenging a domestic measure under the SCM Agreement. See notably, *US-Renewable Energy*, WT/DS510/1. No legal remedy is, however, attached to an adjudicatory finding that a government has failed to notify a subsidy in accordance with Article 25 SCM.

103. Against the background of the growing role of industrial SEs in global supply chains and capital markets, both the OECD and some countries have emphasised that there needs to be a better understanding of the extent and forms of direct and indirect government intervention favouring such enterprises to the detriment of trade and competition. Indeed, it is fundamental to identify and diagnose the issues at stake at a time where like-minded countries are discussing whether and how to improve multilateral subsidy disciplines, with a view to better capturing certain forms of government support, including support specifically granted to and by SEs.

104. However, identifying instances of government support granted to SEs or provided by SEs may prove particularly complex due to various transparency issues concerning the ownership structure of firms and subsidisation. In relying on previous work, this report points to these specific issues and the consequences for trade and competition attached to such issues. First, opaque ownership structure of firms may obscure the extent of industrial assets in the hands of the governments while complex ownership chain through investments by government funds and other intermediaries can only exacerbate the issue. In addition, large industrial firms with lower thresholds of ownership may receive high levels of government support. It is particularly the case of firms with 25%-50% state ownership, which might not be captured by the domestic definition of SEs. Absent an extensive understanding of the extent of state ownership, control, or influence, it might prove particularly difficult to assess the scale of government support to SEs. This is compounded by other transparency issues, which concerns the identification of government support to or by SEs. Certain forms of government support or regulatory privileges remain indeed difficult to detect, notably when stemming from unwritten governmental policies or general governmental policies that do not *de jure* target a specific industry or enterprise. Moreover, the provision of government support through SEs as intermediaries can make it harder for trading partners to identify measures or policies of concern, as well as creating further ambiguity around the nature of government entities and the global scale of industrial subsidies.

105. At this juncture, no WTO agreement or provision is specifically tailored to address the potential trade distortions caused by subsidies to and by SEs and their conduct. Although the SCM Agreement disciplines domestic subsidies, it might not capture certain forms of support granted to and through SEs. Furthermore, WTO Members' lack of transparency with respect to their subsidies may contribute to hindering efforts to identify such support. Countries are increasingly seeking to remedy some of these gaps in the context of their preferential trade agreements (PTAs) by inserting specific disciplines regulating both the relationship between governments and SEs, as well as the behaviour of SEs. In that regard, PTAs with such disciplines in place could serve as a laboratory for the various approaches to regulating SEs and could lead to the emergence of a form of convergence of views for developing new trade rules on SEs. This report, therefore, examines the extent to which approaches followed in current PTAs can be useful in tackling the issues identified above, with a view to informing future plurilateral or multilateral discussions on these matters. Any such discussions could also benefit from ongoing efforts in the OECD through, for example the revision of the *Guidelines of Corporate Governance on State-Owned Enterprises* to promote the principles of transparency, efficiency, as well as good governance and operations of SEs.

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Annex A. Large M&As of industrial SOEs in China since 2015

Table A A.1. Large industrial SOEs have emerged in China since 2015 following a wave of M&As

Year	Sector	Acquired Company or Merging Entities	Acquiring Company or Newly Created Entity
2015	Rolling stock	CNR Corporation	China Railway Rolling Stock Corporation (CRRC)
		CSR Corporation	
2015	Metals	China Metallurgical Group Corporation	China Minmetals Corporation
2016	Steel	Baoshan Iron and Steel Group (Baosteel)	Baowu Steel Group (Baowu)
		Wuhan Iron and Steel Corporation	
2016	Cement	China National Building Materials Group Corporation	China National Building Material
		China National Materials Group Corporation (Sinoma)	
2017	Heavy Machinery and Textile	China High-Tech Group	China National Machinery Industry (Sinomach)
2017	Steel	Qingdao Special Steel Co., Ltd.	Citic Limited through its indirect wholly-owned subsidiary, Jiangyin Xingcheng Special Steel Works Co., Ltd
2017	Steel	Jingjiang Special Steel	Citic Pacific Special Steel
2018	Shipbuilding	China State Shipbuilding Corporation (CSSC)	China Shipbuilding Group
		China Shipbuilding Industry Group Corporation Ltd (CSIC)	
2018	Aluminium	Yunnan Metallurgical Group controlling Yunnan Aluminium Co Ltd	China Copper Co, a joint venture between Chinalco and the Yunnan provincial government
2019	Steel	Maanshan Iron & Steel Group	Baowu Group
2019	Aluminium	Yunnan Aluminium	Chalco, Aluminum Corp of China Ltd
2020	Steel	Taiyuan Iron & Steel Group (TISCO)	Baowu Group
2020	Steel	Sinosteel Group	Baowu Group
2020	Steel	Chongqing Changshou Iron and Steel Co. Ltd	Baowu Group
2021	Steel	Kunming Iron & Steel Holding Co. Ltd.	Baowu Steel Group Corp. Ltd.
2021	Steel	Anyang Steel	Shagang
2021	Steel	Benxi Steel	Ansteel
2021	IT equipment	China Putian Information Industry Group (Potevio)	China Electronics Technology Group (CETG)
2021	Rare earths	Aluminum Corporation of China (CHALCO) (rare earths units)	China Rare Earth Group Co. Ltd
		China Minmetals Corporation (rare earths units)	
		Ganzhou Rare Earth Group Co., Ltd (rare earth units)	
Pending	Steel	Xinyu Iron and Steel (Xingang Group)	Baowu Group
Pending	Steel	Shandong Iron and Steel Group (Shangang Group)	Baowu Group
Pending	Oil and Chemicals	ChemChina	No name yet
		Sinochem	
Pending	Aluminium	Yunnan Aluminium	Chalco, Aluminum Corp of China Ltd
Pending	Steel	Nanjing Iron and Steel United	CITIC Pacific Special Steel

Source: Authors' elaboration.

Annex B. References to State-owned Enterprises in the Accession Protocols of China and Viet Nam

106. In December 2001, China acceded to the WTO on terms, which, unlike any other WTO accession concluded thus far, included special rules expanding, altering, or deviating from the existing provisions of the WTO Agreement (Qin, 2004[52]). These rules, which are set out in the text of the Protocol,[110] as well as in the Report of the Working Party on the Accession of China,[111] contain specific references to SOEs. Similarly, when acceding to the WTO in January 2007, Viet Nam made specific commitments with respect to SOEs.[112]

107. Annex 5B to the Protocol of Accession of China provides that budgetary funding from the central government in the form of grants or tax concessions to certain loss-making SOEs had to be phased out by 2000.

108. Furthermore, Paragraph 10.2 of the section of subsidies specifies that subsidies provided to SOEs will be deemed specific within the meaning of Article 2 of the SCM Agreement if *inter alia* SOEs are the predominant recipients of such subsidies or SOEs receive disproportionately large amounts of such subsidies. The provision aims to address instances where a general government support programme would fall outside the scope of the WTO subsidy discipline although the recipients are predominantly SOEs or a disproportionate large amount of the support is bestowed to SOEs.

109. In addition, both China and Viet Nam confirmed that all SOEs and state-invested firms would make purchases and sales in accordance with commercial considerations and would not be subject to the direct or indirect influence of their government in their commercial decisions.[113] The representatives of China and Viet Nam also confirmed that the procurement by SOEs and state-invested enterprises of goods and services would not be considered as government procurement and thus any laws, regulations, or measures relating to the procurement of goods and services by these enterprises should be subject to the WTO national treatment obligation.[114]

110. In another paragraph incorporated in the Protocol dealing with SOEs, the representative of China pointed out that the objective of the China's central government was that SOEs, including banks, "should be run on a commercial basis and be responsible for their own profits and losses."[115] The Working Party Report does not, however, set out a timetable for the introduction of such reforms.

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110 Accession of the People's Republic of China, WT/L/432, 23 November 2001.

111 Report of the Working Party on the Accession of China, WT/MIN(01)/3, 10 November 2001.

112 Accession of the Socialist Republic of Viet Nam, WT/L/662, 15 November 2006 and Report of the Working Party on the Accession of Viet Nam, WT/ACC/VNM/48, 27 October 2006.

113 Working Party Report on the Accession of China, para 46 incorporated through para 342 into China's Accession Protocol and Working Party Report on the Accession of Viet Nam, para 78 incorporated through para 527 into Viet Nam's Accession Protocol.

114 Working Party Report on the Accession of China, para 47 incorporated through para 342 into China's Accession Protocol and Working Party Report on the Accession of Viet Nam, para 79 incorporated though para 527 into Viet Nam's Accession Protocol.

115 Working Party Report on the Accession of China, para 172 incorporated through para 342 into China's Accession Protocol.