

The Identity Coordination between Public Body and Government Procuring Entity from the Perspective of State-owned Enterprises

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Abstract: Government procuring entities in the Government Procurement Agreement and the public bodies in the Agreement on Subsidies and Countervailing Measures are two different system entities, but on the issue of state-owned enterprises (SOEs), they may have some degree of overlapping identity that blurs the differences between SOE market player and government policy tool. An analysis of the governmental nature and market nature of SOEs shows that the core characteristic of the governmental nature of SOEs is the organic combination of government control, governmental purpose and governmental function. As to the subject, public body and government procuring entity respectively reflect the governmental nature of SOEs while exhibiting similarities. As to the behavior itself, subsidy and government procurement are interconnectable, where gaps and exemptions exist in international regulations. The scope of the procuring entity list is based on the SOE classification system, and the subsidy behavior by the public body of SOE is converted to government procurement behavior, which tends to resolve the overlapping identity of SOEs within the Government Procurement Agreement and the Agreement on Subsidies and Countervailing Measures.

Keywords: State-owned Enterprise(SOE), Public Body, Subsidy, Government Procuring Entity, Identity Coordination

I. INTRODUCTION

Recently, unilateralism and trade protectionism have risen, and international trade liberalization and facilitation, as well as the normal production and operation of Chinese state-owned enterprises (SOEs), have been increasingly challenged. Meanwhile, as China accelerates its global integration, in the

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context of the joining and application of different economic and trade agreements and international treaties, potential overlaps between identity competition and cooperation exist regarding identity restrictions on SOEs. Among these, the public body identity for SOEs under the Agreement on Subsidies and Countervailing Measures (SCM Agreement) and the procuring entity under the Government Procurement Agreement (GPA), combined with the identity that SOEs naturally take a governmental function, cause SOEs to face an embarrassing situation amidst their normal production and operation.

Since 2007, China has submitted its scope and coverage Appendix to the WTO seven times to join the GPA and has actively and continuously negotiated with its participants. However, long-term disputes have existed regarding how to further improve the scope and coverage Appendix, especially the extent to which SOEs should be included in it.¹ On one hand, although the scope and coverage Appendix that China submitted includes a wide scope of entities, especially since continuously increasing numbers of SOEs are involved in Annex III, Western countries, particularly the US, still doubt China. On the other hand, the SOEs included in the scope and coverage Appendix will be labeled as exercising governmental functions, and it is likely that they will be easily recognized or proved as public bodies under the SCM Agreement.

In terms of the issue of public bodies, Chinese SOEs have long been criticized for their identity as public bodies under the SCM Agreement. Since the beginning of the *US – Anti-dumping and Countervailing Duties (China)* (DS379) that China submitted to the WTO Dispute Settlement Body (DSB) in 2008, the debate over the characterization of the relationship between public body and SOE is becoming increasingly controversial. Although in early 2022, the WTO ruled in favor of China in the *US – Anti-dumping and Countervailing Duties (China)* (DS437) and authorized China to take trade retaliation against the US, this does not mean that the issue of SOEs as public bodies has been resolved. Western countries, primarily the US, will continue to seek new ways to redefine the concept of a public body. Recently, the Court of Justice of the European Union (CJEU) issued its judgment in a case concerning the

¹ Xiaoyong He, Legal Advices on China's Accession to the Government Procurement Agreement as Soon as Possible, *UIBE Law Review*, No. 6, 2019, p. 17.

European Union (EU) imposing countervailing measures on imports of glass fiber originating in Egypt,² which determined that Chinese SOEs acting as public bodies provided financial support to two companies within the China-Egypt Suez Economic and Trade Cooperation Zone (SETC) and confirmed the implementation of subsidies. This ruling once again elevates the identity issue of SOEs as public bodies to a new level, that is, financial contributions for subsidies do not necessarily directly come from the originating country or exporting country.

When separately considering the status of SOE identities such as government procurement and public body, it seems that the GPA, the WTO plurilateral agreement, and the SCM Agreement, the Multilateral Agreement, regulate them. The two seem compatible with each other, but this is not the case. Overall, Western countries such as the US as well as European countries have passed domestic legislation or signed regional or bilateral treaties, which confuses the nature of Chinese SOEs as a public or private entity and also imposes sanctions against the overseas operations and development of Chinese SOEs on the grounds of market distortion and national security.³ On one hand, they encourage China to open up all SOEs to enter the government procurement market; on the other hand, they attempt to redefine a public body based on government cybernetics to identify all Chinese SOEs as public bodies, a topic whose intention and context are worth pondering.

Nowadays, SOEs are facing unprecedented challenges. It is not easy for them to enter the government procurement market, and a slight move may affect the whole situation. An issue here worth focusing on is the consideration of a public body. However, the Reform and Opening-up and Going Global strategies are still important ways to achieve high-quality SOE development. This paper aims to identify the doubts and challenges that SOEs face when assuming the identities of a public body and a procuring entity, based on an analysis of their governmental and market natures. At the same time, this paper explores the

² Court of Justice of the European Union, Press Release No. 38/23, Luxembourg, March 1, 2021.

³ Yewei Shi, Identification Standards for “Public Body” at SCM Agreement: Taking Case DS379 for Example, *Journal of Comparative Law*, No. 6, 2016, p. 143.

intrinsic correlation and essential interoperability between the behaviors of subsidies and government procurement. Combined with multilateral, regional, and bilateral treaties, this paper analyzes the subsidies that SOEs undertake under relevant economic and trade agreements, along with the obligations and regulations regarding their procurement behaviors and identity. The goal is to coordinate and unify the procuring entity and public body identities of SOEs, and to alleviate the identity and behavior conflict and competition issues that they face in terms of government procurement and subsidies.

II. THE HISTORICAL EVOLUTION OF THE DEVELOPMENT OF STATE-OWNED ENTERPRISES

Throughout the development of SOEs, they have undergone the historical process of birth, reinforcement, impact and progressive regulation. SOEs emerged as early as the Western Renaissance and Enlightenment, the most typical of which was the French royal manufacturing industries founded by Henry IV. At that time, SOEs should be called more precisely as royal enterprises, and compared with small handicraft industries, their existence in the market was sporadic and occasional. As the First Industrial Revolution promoted the progress of productivity, changes in politics, economics, and ideology as well as the trend of mercantilism led to changes in the relationship between the public and private sectors, that is, the government and market. During that era, continental Europe and the United States realized that government can and should play a major role in catching up with and leading the world's most developed industrialized countries. During the feudal period, governments developed the economy and became affluent by investing in private enterprises and establishing state-run enterprises. This occurred in two forms: continental European governments' direct involvement in production and *ad hoc* agencies' market regulation established by the US government. During the industrial era, to promote large-scale projects and develop emerging industries, the state often needed to establish enterprises to act in pioneering and demonstration roles, which was the context of how SOEs were first created.

After World War I, SOEs decided to enable the economy to recover as quickly as possible, especially by pursuing industrial development. After the Great Depression began, with the implementation of the New Deal and the increased popularity of Keynesianism, states used SOEs to build infrastructure, expand demand, and maintain social and economic development.⁴ After World War II, Europe continued to face the severe challenge of economic recovery. Driven by Keynesianism and left-wing ideological trends, it relied again on nationalizing enterprises to attain economic recovery. Within the thirty years after World War II, this became the pillar of its national economies and a method of government macro-control. When management by the invisible hand and private profits is ineffective, nationalization is not only justified but also necessary.⁵ SOEs have enhanced their role as institutions that help economies progress from development to reinforcement.

In the 1970s, the neoliberalist economic system represented by the ideals of Margaret Thatcher was first implemented, which affected SOEs by regulating them in the international arena. Although the establishment of SOEs can promote industrialization in underdeveloped areas, prevent sectoral monopoly of private enterprises, solve employment issues, and respond to financial crises, objective conditions such as the stagflation that appeared in Europe around 1974, the growth of private capital, the introduction of market competition into monopolized industries, and the formation of a unified European market led to increased demand for the expansion of privatization and regulation of SOEs. On one hand, this stemmed from when the states had already privatized and were concerned about unfair treatment from the states that were still nationalized, such as EU regulations limiting the anti-market tendencies of state ownership, the abolishing of special treatment for SOEs, and inspections of the behaviors of SOEs to prevent hidden state subsidies.⁶ On the other hand, this originated

4 Hongbo Luo and Dianxin Rong, *Western European Public Enterprises*, University of International Business and Economics Press, 2000, p. 95.

5 A. Nove, Efficiency Criteria for Nationalized Industries: A Study of the Misapplication of Micro-economic Theory, *Acta Oeconomica*, Vol. 20, No. 1/2, 1978, pp. 83–105.

6 Pier Angelo Maria Toninelli, *The Rise and Fall of State-owned Enterprise in the Western World*, Translated by Jijun Tang, Economic Science Press, 2020, p. 20.

when international organizations prohibited state subsidies to SOEs, such as the 1973 Tokyo Round negotiation on the General Agreement on Tariffs and Trade, intended to resolve the problems related to trade dependence among states and domestic government intervention in their economies. After long-term negotiations and extensive consultations, the Subsidies Code further regulated both subsidies and countervailing duties. This also became the blueprint for the SCM Agreement.

The development of SOEs is essentially the interaction between the government and market. The government effectively manages social and economic development through SOEs, which reflects their government functions. Well-functioning SOEs repeatedly saved European countries from economic downturns, which is based on the fact that these enterprises compete for profits in a market economy as market players and commercial subjects. In other words, in addition to having governmental functions, SOEs must also engage in commercial activities (economic activities), or else they are the same as government agencies and cannot be considered as enterprises. Government ownership and control are two elements that define SOEs, and control is based on ownership relationships.⁷ However, the market operations of enterprises are not immune from the constraints of market rules, which include not only economic rules but also external constraints from domestic laws and international treaties. This is the most prominent problem that SOEs face. Therefore, correctly understanding and interpreting the regulations of SOEs by examining international treaties and exploring the differences in market rules such as regulatory rules will help distinguish the overlaps and ambiguities between the governmental and commercial natures of SOEs.

III. SEPARATE REGULATIONS ON STATE-OWNED ENTERPRISES UNDER THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES AND THE GOVERNMENT PROCUREMENT AGREEMENT

The SCM Agreement regulates SOEs in practice mainly by identifying them

⁷ Liyu Han, Reform of Chinese State-owned Enterprise from the Perspective of International Law, *China Legal Science*, No. 6, 2019, p. 174.

as subsidy providers, that is, as public bodies, thereby acknowledging them as having this status due to their functions. At the same time, China is actively negotiating with contracting parties to the GPA. The extent to which SOEs should be included in the list of other procuring entities in Annexes 1 to 3 of this agreement is a focal point of controversy among the negotiating parties. This shows that joining the GPA means that SOEs will be subject to dual regulations under both agreements. Therefore, the overlapping identity issue of SOEs should be clarified before China formally joins the GPA, to avoid new challenges resulting from the superposition of multiple identities of SOEs.

A. Regulations on State-owned Enterprises as Subsidy Providers

1. The Nature of Public Body as Determined by WTO Agreements and Judicial Practice

The concept of public body derives from Article 1.1(a) of the SCM Agreement, which does not define it in this article. The Appellate Body (AB) in DS379 provided a detailed explanation of the concept and this article. The AB clarified the relationship between private and public by providing a contextual explanation, that is, both concepts emphasize right and control, and the difference lies in the subjects who exercise power or control.⁸ It is considered that the power of public bodies in situations of directives and the responsibilities in situations of delegation are features they share with government in a narrow sense. It is finally argued that a public body is an entity that has been granted certain government power, or that exercises a certain level of government power”. Eventually, in DS379, the AB overturned the interpretation of public bodies determined by the Panel,⁹ that is, “a public body is an entity controlled by a government, and government ownership is highly related to government control, a majority government shareholding can clearly and conclusively prove government control”,¹⁰ agreed with China’s proposition that the interpretation

8 United States – Definitive Anti-dumping and Countervailing Duties on Certain Products from China, Report of the Appellate Body, WT/DS379/AB/R, March 11, 2011, para. 291.

9 Ibid., para. 322.

10 United States – Definitive Anti-dumping and Countervailing Duties on Certain Products from China, Report of the Panel, WT/DS379.R, October 22, 2010, para. 8.94.

of public body should be defined as something that “possesses, exercises or is vested with governmental authority”.¹¹

What is more critical in this case is that the AB created the concept of “meaningful control”. The AB ruled that “evidence that a government exercises meaningful control over an entity and its conduct may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions”.¹² The AB immediately denied that the government is a major shareholder of an entity and there is no definite relationship with its meaningful control over the entity’s behavior, and it cannot even prove that the government has given the entity government power. Unfortunately, the AB did not fully explain meaningful control, which gave the US an opportunity to expand its interpretation of this concept and move infinitely closer to the core of “Government Cybernetics”.

One of the necessities of clarifying the concept of public body is to analyze the nature of SOEs’ identity, and then clarify the specific provisions regulating them. If the behavior of SOEs meets the identification criteria of public body, their behavior is typically viewed as government behavior within a certain scope. Thus, the regulation of SOEs within this scope should refer to provisions for the government or contracting parties. On the contrary, they should be viewed as market players, and their behavior should be subject to the same regulations or treatment as private enterprises.

2. The Evolution and Development of the Concept of Public Body

Starting with DS379, the concept of public body, especially the understanding of meaningful control, has gradually changed under the impetus of the US. On one hand, in 2012, the US Department of Commerce (USDOC) issued a document named Public Bodies Memorandum, which describes the USDOC’s understanding of meaningful control, and expresses how it interprets

¹¹ *Supra* n. 8, para. 317.

¹² *Ibid.*, para. 318.

government control over entities. The USDOC believes that interference and control in the operations and activities of economic sectors are the basis for governmental functions or behaviors. Whether an entity may possess, exercise, or is vested with government power can be explored by considering aspects such as legal documents, the entity's behavior and whether the government has meaningful control over the entity.¹³ Generally speaking, the government's control over entities includes three aspects. First, many industries are subject to industrial policies (such as five-year plans, industrial guidance manuals, etc.), and in turn, SOEs or State-invested Enterprises (SIEs) in these industries have also received a large number of benefits and protection from the government. Second, SOEs are tools that the government uses to achieve competitive purposes, and the government leads the state-owned sectors by controlling SOEs or SIEs. Third, the State-owned Assets Supervision and Administration Commission of the State Council (SASAC) appoints, removes, and supervises the personnel of SOEs or SIEs.¹⁴ In addition to the above three aspects, meaningful control includes two additional inspection indicators: "management strategies, competition in important industries and corporation investment decisions" and "using the profits of SOEs in one industry to support SOEs in another industry".¹⁵ Meanwhile, the extent of state ownership that the AB mentioned in DS379 as a factor that is unable to separately identify if an entity is a public body has been included as an important factor for the USDOC. Therefore, the USDOC has specified three categories of enterprises that are public bodies. First, any enterprise in which the government has full or controlling ownership; second, enterprises in which the government owns a significant majority of equity and are subject to government industrial planning; third, even if there is no equity investment relationship between the government

13 Section 129 determination of the countervailing duty investigation of circular welded carbon quality steel pipe; light-walled rectangular pipe and tube; laminated woven sacks; and off-the-road tires from the People's Republic of China: analysis of public bodies in the People's Republic of China in accordance with the WTO Appellate Body's finding in WTO DS379, pp. 11-12.

14 *Ibid.*, pp. 14-33.

15 *Ibid.*, p. 14.

and these enterprises, they are public bodies if there is meaningful control.¹⁶

On the other hand, since December 2017, the trade ministers of the US, EU, and Japan have issued eight joint statements. The issues of industrial subsidies and SOEs have become essential for each of these statements, and Western countries hope to formulate new standards and rules¹⁷ as well as to redefine the concept of public body. When reading these statements from the perspective of subsidies to SOEs and public bodies, refinement, standardization, and expansion are the changing trends. The core of these statements is that non-market-oriented policies and practices have led to severe overcapacity, and the issue of subsidies to SOEs and the qualitative issue of public bodies are the main aspects of this problem. The issues of SOEs and public bodies in the first six joint statements have undergone the process of building a consensus (first statement), drafting rules (second statement), deepening discussions (third statement), revising and improving (fourth statement, such as adding transparency clauses), promoting externally (fifth statement), and striving for a consensus (sixth statement),¹⁸ which shows that the aim to change the current WTO rules is gradually emerging. The trade ministers of the US, Japan and EU issued the seventh joint statement in early 2020. In addition to reiterating their concerns that SOEs in some countries were distorting the international market as well as their efforts to launch more stringent industrial subsidy negotiations, the difference from the previous six statements is that the three parties bluntly pointed out in terms of public bodies that SOEs provide many subsidies, and also discussed the importance of ensuring that the subsidized entities are viewed as public bodies. They argued that the AB's interpretation of public bodies in several of its reports undermined the effectiveness of the WTO's subsidy rules. Determining that an entity is a public body does not require finding that it "possesses, exercises, or is vested with governmental authority".

¹⁶ *Ibid.*, pp. 37–38.

¹⁷ Ming Liu, Analysis on the Joint Statement of Trade Ministers from the United States, European Union and Japan Since 2017, *Governance*, Vol. 21, 2019, p. 16.

¹⁸ Refer to the Office of the United States Trade Representative Executive Office of the President, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/may/joint-statement-trilateral-meeting> (Last Visited on August 13, 2024).

The joint statement also mentioned that these three ministers agreed to use this as a basis to continue trying to define public body. However, in July 2022, the US and 17 partner economies issued the Joint Statement on Cooperation on Global Supply Chains. Compared with the previous 7 joint statements, this one has diluted contents regarding subsidies and SOEs, which shows that most of the world have expressed reservations about this proposal.

B. Regulations on State-owned Enterprises as Government Procuring Entities

China has still not joined the GPA. Since the first submission of the scope and coverage Appendix in 2007, after more than a decade of negotiations, China still cannot reach an agreement with the existing signatories in terms of threshold prices, covered entities, and covered goods and services. The extent to which Chinese SOEs will be included in the government procuring entity list is still the focus of these negotiations.

Article 2 of the GPA delineates the scope of the entire agreement. From the perspective of procurement objectives, the GPA first regulates the purpose of procurement. Article 2 Paragraph 2 requires that procurement means procurement for governmental purposes, which determines whether a certain behavior falls within the scope of government procurement by defining the purpose of procurement. Unfortunately, this article does not further explain these purposes.

In terms of procuring entities, the GPA requires that all of them are specified in Appendix I. In addition to more specific central government entities and sub-central government entities, the GPA requires, from the perspective of procurement purposes, enterprises that procure for governmental purposes are included in the list of Appendix I and Annex 3 as other entities. As for the procuring entities defined by the Chinese government procurement system, in addition to all types of state agencies which can accurately match the central government entities and sub-central government entities listed in the GPA, there are great hidden dangers in the way that the perspective of procurement purposes by public institutions, organizations and projects related to public

interests and public safety, and projects using state-owned capital investment or state funding focuses on the sources of funding. On one hand, this method cannot closely correspond to the method used for other entities in this Agreement. On the other hand, the premise of using state-owned funds may be deemed as “controlled or influenced by the government”,¹⁹ and thus be forcibly included within the scope of other entities.

C. The Identity Dilemma of Public Bodies Faced by SOEs in the Government Procuring Entity List

1. SOEs Are Blamed for Identity Conflicts

The inclusion of SOEs in the GPA means that their behaviors will involve public interests and their purposes include governmental purposes. This concept is related to the issue of the public body of SOEs under the countervailing framework. When China incorporates SOEs into the GPA, the nature of SOEs under the SCM Agreement must be considered and coordinated with. Western countries intend to include the broadest Chinese SOEs into Appendix I and Annex 3 of the GPA, which means that in the broadest sense, all Chinese SOEs, as the main body of government procurement, exercise this power, which typically reflects the public functions of the government. The more challenging question is that GPA Annex 3 is a clear list and the entities on it cannot be easily exchanged. Once an SOE is included in Annex 3, its procurement behavior can be equivalent to the exercise of governmental and public functions.

Compared to public bodies under the SCM Agreement, if the SOE under the GPA is separate from the SOE under the SCM Agreement, three situations will arise. These are: an SOE both assumes public functions under the GPA and serves as a public body under the SCM Agreement; an SOE neither assumes public functions under the GPA nor serves as a public body under the SCM Agreement; an SOE assumes public functions under the GPA or serves as a

¹⁹ Hanyang Lyu, *The Definition of Procuring Entity in the Government Procurement Agreement When State-owned Enterprises Join the WTO*, *China Government Procurement*, No. 4, 2020, pp. 71–72.

public body under the SCM Agreement. The first and second situations will not have much impact on SOEs, while the last situation will attack SOEs from front to rear. If an SOE performs public functions in the GPA but is not recognized as a public body under the framework of the SCM Agreement, some countries may rely on GPA Annex 3 as a basis for identifying the entity as a public body in the DSB. If an SOE is recognized as a public body under the SCM Agreement framework but does not assume public functions in the GPA, the existing GPA signatories may require that SOEs acting as public bodies under the SCM Agreement be included in the GPA on the grounds that the government procuring entity list does not meet their expectations.

It is worth noting that China clearly stated in the Report of the Working Party on the Accession of China that “China’s public entities engaged exclusively in commercial activities would not be conducting government procurement”.²⁰ It also stated that “all government entities at the central and sub-national level, as well as any of its public entities other than those engaged in exclusively commercial activities, would conduct their procurement in a transparent manner”.²¹ Although this commitment does not specifically refer to SOEs, the juxtaposition of commercial activities and public entities makes people think of this large and complex group. Additionally, from the perspective of Western countries, commercial activities and public entities are more like a pair of antonyms. Commercial activities are decisions that enterprises make based on commercial considerations, even if the special nature of the investor is considered. For example, the ultimate purpose for a state or government is to make profits, and it will not be classified as a procuring entity in the scope and coverage Appendix. In contrast, the establishment of a public entity is intended to satisfy governmental purposes or public interests and should be included in government procuring entity. This is also why SOEs that are in between these two face an embarrassing situation when they are included in the GPA.

20 Report of the Working Party on the Accession of China, WT/AC/CHN/49, October 1, 2001, para. 337.

21 *Ibid.*, para. 339.

2. Internal and External Factors Require State-owned Enterprises to Accelerate the Pace of Inclusion in the Government Procurement Agreement

Although criticisms have arisen due to the identity and nature of SOEs when joining the GPA, it is still necessary to further promote their inclusion in this Agreement. On one hand, joining the GPA can help SOEs to find a new development direction in the international market, forcing them to improve themselves and become compatible with this agreement. After joining the GPA, as candidate suppliers for the purchasing government, SOEs will compete with global enterprises with various forms of ownership to achieve SOEs products' comparative advantages in quality and price. In market competition, by fully competing with diverse enterprises, SOEs can marketize their resources allocation and outlast their competitors. This can force SOEs to continuously improve themselves, enhance their endogenous power, and attain vigorous development.

On the other hand, China needs to fulfill the commitments it made when joining the WTO as well as promote and implement its participation in the negotiations of other regional, multilateral, and bilateral free trade agreements (FTAs). In 2001, when joining the WTO, China expressed its intention to become a party to the GPA, promised that it should become an observer to this agreement upon accession to the WTO, and should initiate negotiations for membership in the GPA by tabling an Appendix 1 offer within two years of accession.²² At the Asia-Pacific Economic Working Conference in December 1995, as a member of Asia-Pacific Economic Cooperation (APEC), China submitted a unilateral action plan and committed to member states that it would reciprocally open up the government procurement market with all APEC members no later than 2020.²³ Since 2013, China has signed bilateral FTAs with Iceland, Switzerland, the Republic of Korea, Australia and other countries. Among these trade agreements, China has promised that after it joins the GPA, it will start negotiations on government procurement with these four countries

²² *Ibid.*, para. 340.

²³ Minxing Zhang, China: Gradually Opening up the Government Procurement Market, *Shanghai & Hongkong Economy*, No. 5, 1998, pp. 51–52.

as soon as possible to reach bilateral commitments on government procurement based on reciprocity.²⁴ In addition, the documents or memorandums between China and Germany,²⁵ China and France,²⁶ China and Central and Eastern European Countries,²⁷ and China and the UK²⁸ reflect China's willingness and commitment to actively join the GPA.

Moreover, since 2019, the Office of the United States Trade Representative (USTR) has begun to research China's compliance with WTO regulations and released the Annual Report to Congress on China's WTO Compliance (Compliance Report) for four consecutive years. In the latest version of the 2021 Compliance Report released by the USTR, although the US believed that

24 For specific terms, see Free Trade Agreement between the Government of the People's Republic of China and the Government of Australia, signed on June 17, 2015, Chapter XVI, Article 8; Free Trade Agreement between the Government of the People's Republic of China and the Government of the Republic of Korea, signed on June 1, 2015, Article 17.17; Free Trade Agreement between the People's Republic of China and the Swiss Confederation, signed on July 6, 2013, Article 13.4; Free Trade Agreement between the Government of the People's Republic of China and the Government of Iceland, signed on April 15, 2013, Article 99.

25 The Joint Statement of the Fifth Round of China-Germany intergovernmental consultations, signed on July 9, 2018, provides in Article 25: "China and Germany attach particular importance to the significance of non-discriminatory participation of foreign enterprises in China's public tenders in promoting bilateral economic relations. In order to implement China's announcement on accelerating its accession to the WTO Government Procurement Agreement, the Chinese government is further improving its bid in an all-round way and will submit it to the World Trade Organization as soon as possible. At the same time, it will continue to actively negotiate with participating parties including the EU and strive to reach negotiation results as soon as possible".

26 The Joint Statement on the Sixth China-France High-level Economic and Financial Dialogue, signed on December 7, 2018, states in Article 1, paragraph 4: "France welcomes China's commitment to further improve its bids in accordance with President Xi Jinping's instructions at the Boao Forum for Asia to accelerate its accession to the WTO Government Procurement Agreement (GPA). Both sides agree that equal treatment of foreign and domestic companies in public procurement is an important component of fair competition, allowing foreign companies to participate in public tenders on a non-discriminatory basis".

27 The Dubrovnik Framework for Cooperation between China and Central and Eastern European Countries, signed on April 12, 2019, states in Article 4, paragraph 5: "The Parties recognize the importance of ensuring that government procurement procedures are open, transparent and non-discriminatory. For the Parties, procurement procedures and the conclusion of contracts shall comply with the relevant rules and international obligations of the Parties. The Parties support China's accession to the World Trade Organization's Agreement on Government Procurement".

28 The Policy Outcome of the 9th China-UK Economic and Financial Dialogue, signed on December 17, 2017, states in Article 2, Section 13, Item 2: "Both sides recognize that joining the Government Procurement Agreement (GPA) will bring mutual benefits to members. China welcomes the UK's intention to remain a member of the GPA after Brexit, and the UK welcomes China's intention to join the GPA at an appropriate time".

the latest seventh scope and coverage Appendix submitted in October 2019 (the sixth revised draft) had the threshold price, covered entities, covered services and trade, it had not yet meet the US expectations, and was far from being gaining acceptance from the US and other parties to the GPA.²⁹ The US still reiterated China's commitment to join the GPA and open its huge government procurement market to the US as part of its obligation to join the WTO.

In January 2023, the European Commission (EC) announced that the Foreign Subsidies Regulation (FSR) will officially come into effect. In March of the same year, the CJEU made a ruling that Chinese SOEs, as public bodies, provided financial assistance to two enterprises in the China-Egypt Suez Economic and Trade Cooperation Zone, and determined the implementation of subsidy behavior. The EU's legislative arrangements and judicial practices have increased the legal and factual risks that these SOEs may face when investing overseas.

The FSR was originally a proposal initiated by Germany, France, and Poland that aimed to solve the problem of distortion in the EU's internal market and trade caused by foreign (specifically from non-EU states) subsidies. On one hand, this manages subsidy behavior, and on the other hand, it closely links subsidy behavior with government procurement. In terms of the definition and regulation of subsidies, the FSR interprets foreign government subsidies as situations that meet three conditions: financial assistance provided by a third country, benefits received by enterprises engaged in economic activities in the EU internal market, and legal and factual limitations to individual enterprises or industries.³⁰ As for subsidy providers, it provides that both public and private entities may provide direct or indirect financial contributions. Regarding the definition of public entities, it involves meanings resembling the public body defined by the Panel of DS379 and the AB: in terms of behavior, the behavior of public entities should be determined on a case-by-case basis; in terms of

²⁹ United States Trade Representative, 2021 Report to Congress on China's WTO Compliance, March, 2022, p. 43.

³⁰ European Commission, Proposal for a Regulation of the European Parliament and of the Council on Foreign Subsidies Distorting the Internal Market, p. 23.

entity, it must consider the characteristics of the entity as well as the legal and economic environment of the country where the entity is located, as well as the economic role of the government; in terms of nature, it must be “attributable to a third country”, which is like the AB’s criteria for defining “governmental functions”.³¹

In relation to government procurement, the FSR discusses three models to regulate the subsidy behaviors of non-EU entities to the EU internal market, one of which is to link the concept of subsidy with that of public procurement. The EC clarified in the White Paper on Levelling the Playing Field as Regards Foreign Subsidies, the predecessor of the FSR, that public procurement is economically significant in the EU internal market. At the same time, since public procurement involves the use of taxpayer funds, the issue of subsidies in public procurement is particularly worthwhile.³² This model associated with government procurement, known as Model Three, aims to regulate the behavior of bidders who utilize foreign government subsidies to gain additional financial advantages. Under this model, bidders must declare the financial subsidies they receive from non-EU countries to the procurement authority. The declaration information will be forwarded to the authorities in the member state or the EU for evaluation, including whether there is any foreign government subsidy and whether these subsidies harm the fairness of the procurement process. If these authorities determine that there are foreign government subsidies that cause distortion, bidders who receive subsidies will be excluded from the procurement process.³³ The effect caused by exclusion can last up to three years. This not only applies to the current procurement process, but also to subsequent procurement processes, provided that certain conditions are met. The FSR also provides that the grounds for exclusion are defined in accordance with the EU’s international obligations under the GPA and bilateral agreements concerning access to the EU procurement market. Analyzing Model Three of the FSR from the perspective of government procurement shows that the relationship

31 Jianguo Hu and Yujin Chen, EU Draft Regulation on Foreign Subsidies and Its WTO Compliance, *China Journal of European Studies*, Vol. 39, No. 5, 2021, p. 93.

32 *Supra* n. 30, p. 19.

33 European Commission, White Paper on Levelling the Playing Field as Regards Foreign Subsidies, para. 4.3.2.

between government procurement and subsidy behavior is increasingly close. On one hand, this is between the procurement process, that is, the suppliers participating in procurement are subsidized by the country where they operate, and thus have additional competitive advantages during the government procurement process of the purchasing state. On the other hand, it extends to the substantive issue of government procurement, that is, whether the enterprise as a supplier will become a public body under the SCM Agreement, and if the normal sales behavior of an SOE will be recognized as a subsidy behavior that provides benefits to downstream enterprises. Thus, it is automatically deemed to have obtained subsidy benefits while participating in government procurement.

In March 2023, the CJEU ruled against the applicant's request to revoke the countervailing duties imposed on fiberglass fabrics and products imported into the EU. When defining the source of financial support, the CJEU supported the EC's interpretation of the rules, based on Article 3(1)(a) of the EU Anti-subsidy Regulation.³⁴ This does not exclude the possibility that financial support made by third-country governments is attributed to the government of the country of origin or export.³⁵ As to the term "within the territory of a Member" in Article 1 of the SCM Agreement, the CJEU and the EC stated that this does not mean that financial support must come directly from the government of the country of origin or export,³⁶ because there are good reasons to believe that a financial support could come from a governmental or public body within the territory of a WTO member.³⁷ Ultimately, the CJEU determined that subsidies granted by China could be attributed to Egypt as the country of origin or export of products subject to anti-subsidy measures, and that anti-subsidy duties could be imposed on enterprises that were established in the SETC but received subsidies from China. It also suggested that the Egyptian government could

³⁴ Regulation (EU)2016/1037 of the European Parliament and of the Council of June 8, 2016.

³⁵ Judgment of the General Court, (First Chamber, Extended Composition), Subsidies – Imports of certain woven or stitched glass fibre fabrics originating in China and Egypt – Implementing Regulation (EU) 2020/776 – Definitive countervailing duty – Calculation of the subsidy amount – Attributability of the subsidy – Rights of the defence – Manifest error of assessment – Import duty drawback scheme – Tax treatment of foreign exchange losses – Calculation of the undercutting margin, March 1, 2023, para. 48.

³⁶ *Ibid.*, para. 50.

³⁷ *Supra* n. 2.

stop its close financial cooperation with the Chinese government or propose measures to limit the impact of the subsidies.

Although the EU is not a common law system, the judgment of the CJEU provides a judicial precedent for the future handling of similar situations within the EU and provides new ideas for other countries such as the US and Japan to explain the source of financial support. The CJEU and the EC first identified SOEs as public bodies and then interpreted their overseas investments as government financial assistance. Here, the subsidy provider and recipient are not in the same territory, so their creative proposal is that financial support does not necessarily come directly from the country of origin or export. This case has created hidden dangers for Chinese SOEs' overseas direct investment. If SOEs can be identified as public bodies and their investment activities as fiscal subsidies, the products of most Sino-foreign joint ventures of foreign legal persons will face anti-subsidy investigations, and they may be required to stop cooperating with the Chinese government regarding financial subsidies.

IV. THE RESPECTIVE EMBODIMENTS OF THE COMMERCIAL AND GOVERNMENTAL NATURES OF SOES

Enterprises are the main body of the market economy, which includes SOEs. The regulation of SOEs by international law and the challenges that Chinese SOEs face fully demonstrate that SOEs differ from enterprises who have other ownership structures. This is reflected in many aspects, such as establishment of laws, business scopes, investors, along with organizational and management methods. Their essential differences are that the government, as both a vertical market regulator and a horizontal market participant, or a market rule maker, directly or indirectly participates in the business activities of enterprises as part of the market economy. This highlights SOEs where the government is the investor and who have both governmental and market characteristics. This superposition is manifested as the contraction and unity of two hands, that is, its governmental nature and market nature act simultaneously on SOEs.

The existence of SOEs indicates the unity of these two identities. However, when SOEs are examined and analyzed from different perspectives, this superposition collapses into government or market, thus creating conflicting identities. However, for Chinese SOEs, commerciality is their general state, and governmentality is their special state.

A. The General Commercial Nature and Special Governmental Nature of SOEs

The commercial nature and governmental nature of SOEs reflect the dialectical relationships between the market and the government, and between private law and public law from a higher perspective. Benjamin C. Zipursky proposed in his philosophy of private law that from a traditional economics perspective, “private law is just a special case of public law”.³⁸ This means that the boundary between public law and private law is not clear-cut. Public law defines the scope within which private law can operate. Within the scope of behavior defined by public law, it should respect and minimize intrusions into private law. However, public law may potentially intervene in and influence private law by considering reasons such as national security and public interest.

1. SOEs Have Both General Commercial Characteristics and Special Governmental Characteristics

SOEs undeniably have both commercial and governmental characteristics, and it is difficult to clearly distinguish between them. In September 2016, the SASAC and the Ministry of Finance (MOF) jointly issued the Implementation Plan for Classifying the Functions of Central Government Enterprises and Evaluating Their Performance, which divided Chinese SOEs into three supervisory categories, namely: commercial, strategic, and public welfare. This classification has demonstrated in practice that SOEs need to pursue profits and benefits by pursuing public interests. The former is the state-owned motive, and the latter is the essence of enterprises. Each one has different levels of

³⁸ Jules Coleman and Scott Shapiro, *Oxford Jurisprudence and Legal Philosophy Manual*, Vol. 2, SDX Joint Publishing Company, 2017, p. 696.

importance. In theory, government ownership and control are two elements defining SOEs, and control is determined by ownership relations.³⁹ However, the market operation of enterprises is always constrained by market rules. The latter constraints include not only economic laws, but also external constraints such as domestic laws and international treaties. This is the most prominent practical problem that SOEs face.

2. SOEs Are Generally Characterized by Commerciality

After China joined the WTO, most laws concerning SOEs recognize their commercial characteristics in general or most cases. In terms of SOEs operation, their operation must be based on “commercial considerations” to separate government and enterprises as well as government and capital, and make SOEs into independent market entities.⁴⁰ Government supervision must involve treating all types of market players equally,⁴¹ and the emphasis is on achieving fairness of factor allocation between SOEs and other ownership enterprises.⁴² As for the nature of SOEs, profit-seeking is their essential characteristic and fundamental purpose. China’s Measures for the Performance Assessment of Central Enterprise Leaders (2019) clarified that for commercial enterprises whose main businesses are in fully competitive industries and fields, their focus of assessment is to enhance the state-owned economy, amplify the functions of state-owned capital, as well as maintain and increase the value of state-owned capital, with the focus on assessing the economic benefits, capital return levels, and market competitiveness of SOEs. Finally, in 2021, China announced that the main tasks of divesting social functions of SOEs and solving historical problems were basically completed.⁴³ The production,

³⁹ *Supra* n. 7.

⁴⁰ See the Outline of the Planning for the Construction of the Chengdu-Chongqing Twin Cities Economic Circle issued by the CPC Central Committee and the State Council.

⁴¹ See the Outline of the Yellow River Basin Ecological Protection and High-quality Development Plan issued by the CPC Central Committee and the State Council.

⁴² See the Several Opinions on Strengthening Financial Services for Private Enterprises issued by the General Office of the CPC Central Committee and the General Office of the State Council.

⁴³ Resolution of the Fourth Session of the 13th National People’s Congress on the Implementation of the 2020 Plan for National Economic and Social Development and on the 2021 Plan for National Economic and Social Development.

operation, supervision, and management of SOEs generally resemble those of enterprises with other ownerships, while reflecting more on their commercial characteristics.

3. SOEs Have Special Governmental Characteristics

On one hand, if involving special and important matters, such as national security, public interests, and social livelihood, SOEs tend to exhibit more of their governmental identity. From a political perspective, the purpose of SOEs as entities that seek to meet the public interest is reflected in the fact that only the state can operate some strategically significant industries and those involving national security. From an economic perspective, this purpose is mainly reflected in their tendency to occupy the public utility sector by creating a monopoly. In this sector, monopolistic enterprises can block potential entrants from the market, thereby preventing private enterprises from marketing to seek their own profits,⁴⁴ which would undermine prices along with social and economic fairness. From a social perspective, the purpose of SOEs as entities that seek to meet the public interest is mainly reflected in their ability to fully guarantee employment as well as not lay off redundant staff during economic crises but promote the development of underdeveloped regions.⁴⁵ Article 8.2(b) of SCM Agreement provides that “assistance to disadvantaged regions” falls within the scope of non-actionable subsidies, which indirectly shows that the government’s financial support for these regions has little impact on market distortions and reflects the government’s pursuit of the public interest.

On the other hand, when the government entrusts and authorizes to handle important matters, SOEs display additional aspects of their governmental identity. From the perspective of WTO judicial practice, the AB in DS379 ruled that SOEs are vested with the authority to perform governmental functions, which is considered as the core of public bodies.⁴⁶ From the perspective of

⁴⁴ Dieter Bös, *Public Enterprise Economics: Theory and Application*, North-Holland, 1989, The Netherlands: Amsterdam, pp. 225–227.

⁴⁵ *Supra* n. 6, p. 5.

⁴⁶ *Supra* n. 8, para. 290.

state practice, “public corporations” as one of the types of SOEs in Japan, are defined as enterprises established under special laws, in which the central or local government is only obligated to invest and entrusts others to manage them.⁴⁷ In the text of regional treaties, Article 17(3) of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) provides that when SOEs implement government instructions or are entrusted with governmental functions, they shall act in accordance with the obligations of the contracting parties under the agreement. SOEs only resemble the government when it authorizes them, which further confirms that they have a commercial identity in more general situations.

B. Analysis of the Governmental and Commercial Natures of SOEs in International Practice

Examining the relevant provisions of SOEs involved in international practice and conducting vertical comparisons will clarify the criteria of defining SOEs as assuming governmental functions. This will also more clearly define the meaning of SOEs as public bodies and the extension of government procuring entities.

In Western economics, governmental functions mainly include three categories, namely macroeconomic regulation, offer of public goods and services, and market supervision. These functions are internationally recognized as government responsibilities. The macro-control function refers to the government’s regulation of social and economic operations by implementing fiscal and monetary policies to prevent economic overheating or recessions. The market supervision function is that the government implements the laws made by the legislature or, after obtaining authorization from the legislature, issues laws, regulations and policies to ensure the successful operation of the market, ensure repeated competition, and protect the legal performance of rights. The governmental and public functions that SOEs demonstrate mostly represent the governmental function of providing public goods and services.

⁴⁷ Jie Cao and Junran Hou, On the Reform of Japan’s State-owned Enterprises, *Journal of Hebei University of Economics and Business*, Vol. 30, No. 5, 2009, pp. 87–90.

The government's function of providing public goods and services is mainly reflected in resources allocation, including taxes, government transfer payments (including transfer payments of funds and goods), direct supply such as government purchases, as well as indirect supply such as formulating industrial policies and guidance goals. Therefore, some international practices have extended their judgment of the governmental and commercial natures of SOEs to analyze the actualization of governmental functions. On the other hand, some international practices can partly identify the governmental nature of SOEs by analyzing control over entities, including ownership control, to differentiate and analyze this nature.

1. General Agreement on Tariffs and Trade

One way to differentiate and analyze the implementation of governmental functions is to define the purpose of purchase and sales of products. Article XVII of the General Agreement on Tariffs and Trade (GATT 1994) describes and regulates the trading activities of state trading enterprises. This treaty requires that the actions of state-owned trading enterprises are guided by commercial considerations and commercial practices. Commercial considerations specifically includes factors such as price, quality, volume of resources, difficulty in sales, transportation, and other purchase and sales conditions. Meanwhile, sufficient competition should be provided for purchase and sales involving foreign SOEs in accordance with commercial practice. GATT 1994 is committed to transforming state-owned trading enterprises into those that the government is only obligated towards as an investor. The second paragraph of Article XVII excludes the purchase and sales of products for governmental or public purposes, which provides a definition for further analysis of the purpose of SOEs' behaviors. Therefore, in practice, when SOEs conduct commercial activities, they purchase and sell goods and services. If the governmental authorizes SOEs to perform governmental and public functions, they also purchase and sell goods and services. If we only examine the purchase and sales behaviors of SOEs, how can we determine whether they are

conducting normal business activities or performing governmental functions? The author believes that this can be examined from two aspects. First, in terms of the purpose of this behavior, they can examine whether it seeks to fulfill governmental or public purposes. The EU summarizes whether the actions of SOEs are for governmental or public purposes as “whether the business purpose is to meet regional economic interests or promote social goals, or even to complete relevant policy plans formulated by the government, etc.”. Second, the purposes of purchase and sales of products can be examined. If this purpose is commercial, then the SOEs only reflect their commercial nature within the framework of purchase and sales behaviors. If this purpose, that is, its use, is for governmental or public purposes, then the SOEs only reflect the meaning of public body within the framework of purchase and sales behaviors. Thus, SOEs can escape the scrutiny of a state or government as an investor or holding entity. Instead, only their purpose in purchasing and selling each batch of products as reflected by their use is examined.

2. Comprehensive and Progressive Agreement for Trans-Pacific Partnership

At the end of 2018, the Japan-led CPTPP was officially signed and came into effect. The CPTPP largely inherited the provisions of the original Trans-Pacific Partnership (TPP) Agreement based on avoiding multi-party disputes.

In terms of trade, the CPTPP defines and regulates the nature of SOEs according to three aspects: SOE behavior, source of power, and government control. In addition, the nature of SOEs can be inferred by determining immunity from litigation jurisdiction.

From the perspective of Article 17 of CPTPP, the SOEs chapter in the CPTPP also regulates SOEs by category. One type is SOEs engaging in commercial activities, while the other is SOEs exercising governmental functions. First, for SOEs engaged in commercial activities, in terms of special content, the agreement directly clarifies that SOEs are mainly engaged in commercial activities. Second, in terms of state participation, the CPTPP defines SOEs as those that directly own over 50% of the share capital or control

the exercise of over 50% of the voting rights through ownership interests, or that hold the power to appoint a majority of members of the board of directors or any other equivalent management body. The CPTPP has evidently created a new definition of SOEs with a broader scope and clearer boundaries. This is intended to generalize and narrow the commercial nature of SOEs while magnifying the facts that SOEs are controlled by government ownership.⁴⁸ Third, in terms of enterprise behavior, commercial activities and commercial considerations become the focus. Commercial activities refer to profit-oriented activities that enterprises conduct to produce goods or provide services and sell them to consumers in markets at quantities and prices determined by these enterprises, while the content of commercial considerations matches that of GATT 1994. Last, in terms of enterprise control, government cybernetics is used to examine whether the government is the actual controller of the enterprise by considering the two aspects of enterprise personnel and equity. For SOEs engaged in public services and exercising governmental functions, the classification issued by the SASAC and MOF is reinforced by the concept of public service mandate in the CPTPP, Article 17.2, paragraph 8 of the CPTPP, as well as the Delegated Authority in Article 17.3 of the CPTPP. Public service mandate means a government mandate pursuant to which a SOE makes a service directly or indirectly available to the public within its territory. This service includes the distribution of goods and the supply of general infrastructure services. The CPTPP does not prevent SOEs from providing goods or services exclusively for the purposes of implementing governmental functions.

From the perspective of jurisdiction over litigation involving SOEs, the CPTPP requires that a Party shall provide its courts with jurisdiction over civil claims against an enterprise owned by a foreign government based on a commercial activity conducted within its territory. The CPTPP is standard and a mere review of the territorial principle. However, the USTR's interpretation is

48 Fen Jiang and Wei Zhou, A Review on CPTTP Rules of State-owned Enterprises and the Chinese Response, *Journal of Zhejiang University (Humanities and Social Science)*, No. 6, 2021, p. 194.

that the essential meaning is to prevent SOEs from exercising state immunity on the grounds that their property belongs to the state. China has always advocated the theory of absolute immunity in terms of state immunity, that is, unless a state expressly waives immunity, the acts and property of a state are immune from the jurisdiction and execution of the courts of other states.⁴⁹ In 2021, in *FG Hemisphere Associates LLC v. Democratic Republic of Congo*,⁵⁰ the Standing Committee of the National People's Congress reiterated this position by making a legislative interpretation of the Basic Law of the Hong Kong Special Administrative Region. However, Article 17.5 of the CPTPP reflects the theory of restrictive immunity, that is, only sovereign acts have immunity, while non-sovereign acts cannot be exempted.⁵¹ Thus, when reviewing the text of Article 17.5 of the CPTPP, the emphasis on engaging in commercial activities, on one hand, reflects the theory of restrictive immunity. On a deeper level, it also reflects the distinction between the sovereign and non-sovereign actions of SOEs from the perspective of state immunity, which coincides with their governmental public functions and commercial activities.

Therefore, even under the CPTPP framework, SOEs taking on the role of a public body still need to consider from the perspectives of behavior, source of power, and government control, which reflects the governmental function in terms of behavior. This behavior includes both commercial goods distribution and governmental corporation supervision. In terms of form, the government must authorize or promise it. The formal elements of SOEs assuming governmental functions are the premises and source of power for their content elements. In terms of government control, we return to the meaning of ownership control and include as many SOEs or government agencies as possible into the management scope,⁵² which echoes the idea of Western

49 Zhiying Duan, State Immunity in International Investment Law – Also on China's Position on State Immunity, *Legal Vision*, No. 14, 2015, pp. 72–73.

50 Yujun Guo and Yuanyuan Liu, Commentary on *FG Hemisphere Associates LLC v. Democratic Republic of Congo*, *Presentday Law Science*, No. 10, 2012, pp. 3–10.

51 *Supra* n. 49.

52 Hong Song, Analysis of CPTPP State-owned Enterprises and Designated Monopoly Provisions and Their Impact, *Intertrade*, No. 1, 2022, p. 27.

countries to reconstruct the meaning of public bodies.

V. THE BEHAVIORAL AND PHYSICAL LINKS BETWEEN SUBSIDIES AND GOVERNMENT PROCUREMENT

Solving the conflict between the identities of public body and government procurement that SOEs face relies, on one hand, on sorting out and distinguishing between the governmental and commercial natures of SOEs. On the other hand, it relies on returning to the specific international rules on subsidies and government procurement, as well as judicial precedents and state practices to examine the connection and difference between the identities of public body and government procurement. It also aims to further explore the similarities between subsidy and government procurement behaviors.

A. The Intrinsic Relationship between Subsidies and Government Procurement

When considering the original intentions of the SCM and GPA, it is important to note that the identity of a public body or government procuring entity regulates government agencies and entities that are extended based on the nature of government agencies. This can be categorized into the entity assuming governmental functions, the government's meaningful control over the entity, and the entity's behavior that achieves governmental purposes. These three elements, as they identify the concepts of public body and government procuring entity, are endorsed by WTO treaties and WTO judicial practice, and these three elements are mutually explanatory and interdependent.

1. The Entity Assumes Governmental Functions

SOEs assume governmental functions, which is a characteristic of SOEs reflecting their governmental nature, and a common characteristic of SOEs assuming the identities of public bodies and government procuring entities.

In terms of the identity of public bodies, in DS379, the AB ruled that on

one hand, exercising governmental functions or being authorized to exercise them is the core commonality between government and public bodies.⁵³ On the other hand, it decided that power in case of instructions and responsibility in case of delegation are common features of narrow government and public bodies.⁵⁴ A public body is an entity that is granted government powers or an entity that exercises real government powers. Based on this viewpoint, China won this case by applying the government function theory.

As for government procuring entities, direct provision itself such as government procurement is a concrete manifestation of governmental functions. This feature can also be found by examining the state practices of GPA signatory states in incorporating procuring entities. In the GPA, the US included some policy-based enterprises, such as policy-based financial institutions, house policy-based financial institutions, insurance companies and other financing companies, as well as monopoly enterprises, such as electricity and ports, and other entities into procuring entities.⁵⁵ In the CPTPP, financial institutions such as the Federal Home Mortgage Corporation, the Export-Import Bank of the US, and the Federal Deposit Insurance Corporation, as well as public utilities and public service companies such as the Alaska Gas Transmission System and the Holocaust Memorial Commission are included in the list.⁵⁶ The EU regulations on government procurement are mainly set out in the Public Sector Procurement Directive (Directive).⁵⁷ The Directive has detailed articles for the entities listed in Annex III as other entities. On the premise that entities are subject to public law, they also need to meet the following three requirements: first, the purpose of their establishment is to meet the needs of public interest

⁵³ *Supra* n. 8, para. 290.

⁵⁴ *Ibid.*, para. 294.

⁵⁵ Wenjia Guo and Hanyang Lyu, Introduction and Enlightenment of the Bidding Situation of US State-owned Enterprises after Joining the WTO Government Procurement Agreement, *China Government Procurement*, No. 11, 2018, pp. 75–80.

⁵⁶ The List of Three Types of Government Procuring Entities Committed by Some TPP Negotiating Countries Including the United States, http://www.caitec.org.cn/n5/sy_gzdt_xshd/json/3805.html (Last Visited on August 13, 2024).

⁵⁷ Yanjie Chang and Aihua Jiang, The Application of European Single Procurement Document and Its Enlightenment to China, *Tendering & Purchasing Management*, No. 8, 2019, pp. 61–63.

and they do not have an industrial or commercial nature; second, the entity should be a legal person; third, the entity should receive a substantial portion of its funding from bodies governed by public law, including but not limited to state, regional, or local authorities.⁵⁸ In the scope and coverage Appendix submitted by the EU, illustrative guidance is provided for other procuring entities in Annex III by citing EU internal directives and communiqués. According to Annex III submitted by the EU, the entities involved mainly include public service departments such as water supply, power supply, airports and aviation facilities, harbors, and municipal public transportation. Japan included a total of 114 entities involving road and railway transportation, municipal transportation, environment, agriculture, elderly care, finance, energy, airports, communications, and other public institutions and facilities, as well as universities, medical institutions, research institutions, museums and other public bodies into the government procuring entity list. The Republic of Korea included entities related to banking and financial institutions, coinage, electricity, energy, highways, railways, and municipal transportation. Singapore included public bodies such as civil aviation, universities, research institutes, as well as public service agencies such as transportation, ports, and cultural relics under this category.⁵⁹

2. The Entity Is Subject to Meaningful Government Control

The government's meaningful control over an entity was originally intended by the AB in DS379 to overturn the concept of a public body as determined by the Panel in DS379, that is, public bodies include government-controlled entities and are not limited to governments and other entities vested with and exercising governmental authority.⁶⁰ The AB replaced the government control theory advocated by the US and the Panel with meaningful control. In contrast, the latter was more focused on the meaning of equity control or ownership control.

58 Hongbao Jiao, Comparison and Enlightenment between EU's Public Sector Procurement Directive and China's Government Procurement Law, *China Government Procurement*, No. 11, 2020, pp. 34–39.

59 <https://egpa.wto.org/en/Annex/Details?Agreement=GPA113&Party=Singapore&AnnexNo=3&ContentCulture=en> (Last Visited on August 12, 2024).

60 *Supra* n. 10, para. 8.63.

This can also be found in the documents released by the USDOC and DS437.

Regarding meaningful control, the USDOC simply uses it as a classification method at the same level as government equity control in the Public Bodies Memorandum. The meaningful control created by the AB is a framework concept. In other words, when assessing individual cases, if the government exercises meaningful control over an enterprise, this enterprise is a public body. As the AB stated, the extent of government ownership of an enterprise is only one of the reference factors of meaningful control, which contains others. However, the USDOC lists meaningful control and government equity control side by side and identifies them as factors for identifying public bodies for enterprises without government ownership, which contradicts the views and original intentions of the AB. Therefore, China applied to set up a panel to redefine a public body.

In the enforcement phase of this case, the AB ruled that investigations of public bodies should follow these principles: first, it must be done on a case-by-case basis; second, the core characteristics and functions of the relevant economic entity must be appropriately considered; third, the relationship between the entity and the government should be considered; and fourth, the prevailing legal and economic environment in the country where the entity under investigation is located should be considered.⁶¹ In addition, the evidence found during the investigation should prove this: first, an entity is exercising governmental functions, especially continuous and systematic practices; second, the entity under investigation should fall within the scope and content of governmental policy; third, the ability to demonstrate that the government exercises meaningful control over the entity and its conduct. The fundamental criterion guiding these considerations and evidence is to “avoid focusing on or inappropriately regulating any single characteristic”.⁶² Therefore, the AB believes that the focus of the identification of a public body is on the entity that engages in the behavior, its core characteristics, and its relationship with the

61 *United States – Countervailing Duty Measures on Certain Products from China*, Recourse to Article 21.5 of the DSU by China, Report of the Appellate Body, WT/DS437/AB/RW, July 16, 2019, para. 5.96.

62 *Ibid.*, para. 5.96.

government, rather than the logical relationship between the entity's behavior and the granting of benefits.⁶³

Based on other appeals in this case, the AB, at the execution stage of this case, basically upheld the conclusions of the expert panel. The AB further interpreted the meaning of public body and continued to analyze this based on its proposal in DS379. On one hand, it focused on the nature, characteristics, and functions of the entity itself and its behavior; on the other hand, it emphasized "continuous and systematic practices".⁶⁴ As to meaningful control, the AB did not elaborate further during the enforcement phase of this case, but determined that the Public Bodies Memorandum issued by the USDOC fell within the scope of Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)⁶⁵ because its contents could be challenged as a rule or norm of general or prospective application, and since the Memorandum did not substantively restrict the USDOC from acting under the SCM Agreement.⁶⁶ It denied that this was inconsistent with the SCM Agreement.⁶⁷ There was also a certain degree of recognition of the Public Bodies Memorandum and its content on meaningful control. On the other hand, whether the USDOC continues to apply the identification standards of public body and meaningful control set out in the Public Bodies Memorandum, or China's claims that the AB did not recognize and affirm the Public Bodies Memorandum and its identification of the content of meaningful control during the execution stage of this case, both show that broad government control over entities is a core feature of the identity of a public body.

The concept of meaningful control also exists in government procurement. Article 19 of the GPA provides that "with respect to a proposal to remove an entity from Annex 1, the grounds upon which the exercise of its rights shall be based are the effective elimination of government control or influence

⁶³ *Ibid.*, para. 5.100.

⁶⁴ *Ibid.*, para. 5.95.

⁶⁵ *Ibid.*, para. 5.120.

⁶⁶ *Ibid.*, para. 7.133.

⁶⁷ *Ibid.*, para. 5.126.

over a procuring entity covered by this Agreement and the evidence of such elimination”. This means that to a certain extent, the fact that “the government has influence or control over the enterprise” can be recognized as a criterion (or one of them) for inclusion in other entities of Annex III to Appendix I. However, neither the Agreement itself nor the WTO Committee on Government Procurement (GPA) has provided a standard for what constitutes influence or control. In October 2010, the US, Canada, and Japan jointly submitted a discussion paper to the GPA, intending to clarify the meaning of government control and influence based on eight aspects, including legal and regulatory provisions, governmental functions, government ownership of shares, voting rights and appointment rights, government participation in commercial operations and management, responsibility for revenue and expenditure to the national treasury, acceptance of government subsidies, and enjoyment of special policies.⁶⁸ However, the GPA ultimately did not review it.

3. The Entity Is to Achieve Government Goals

Article 2 of the GPA provides more specific provisions on the nature of the procurement scope. Its second paragraph states that “for the purposes of this Agreement, covered procurement means procurement for governmental purposes”. Therefore, governmental purposes will be the fundamental nature of procurement activities conducted by all procuring entities. In addition to directly judging whether a behavior falls within the scope of government procurement by considering the perspective of the procurement object, governmental purpose can also indirectly determine the rationality of its

⁶⁸ *Supra* n. 19. In October 2010, the US, Canada and Japan jointly submitted a discussion paper to the WTO Committee on Government Procurement, proposing to define whether an entity is under government control and influence from the following aspects: first, whether there are any laws or regulations that provide for the government to exercise control or influence over the entity; second, whether the entity performs governmental functions; third, whether government ownership of voting rights and shares in an entity constitutes control or influence over that entity; fourth, whether the government appoints or has the power to appoint the entity's executive officers; fifth, whether the government is involved in the entity's business decision-making or management and control; sixth, whether the entity is responsible to the government or the treasury for expenditure and profit; seventh, whether the entity accepts subsidies or support from the government; eighth, whether the entity enjoys special policies granted by the government, franchise rights and monopoly status, etc.

inclusion in the procuring entity by considering the perspective of the procuring entity. In other words, governmental purpose is not a sufficient condition for an entity to gain inclusion in the government procuring entity list, but is a necessary condition. From a practical perspective, this means that the criterion for determining whether the actions of a purchasing entity are based on commercial considerations or governmental purposes is not the enterprise itself, such as the source of funds or control, but shall be according to the purpose of the product. If the purposes of purchasing goods, that is, the uses of the goods are for governmental purposes or public purchases, the purchasing entity only reflects the meaning of governmental purpose within the framework of this purchasing behavior. If the use of purchased goods is for commercial purposes, the purchasing entity only reflects its commercial nature within the framework of this behavior. This viewpoint can also be confirmed by the exemption of SOEs from government procurement under the national treatment clause of the GATT.

Article III:4 of GATT 1994 provides for the principle of national treatment, while Article III:8 of GATT 1994 excludes “procurement by government agencies for government purposes”. Therefore, whether the procurement of SOEs is subject to the provisions of Article III:4 of GATT 1994 or the exemption of Article III:8 of GATT 1994 will determine the purpose of the behavior of SOEs as purchasing entities under this framework.

Article III of GATT 1994 does not clearly define the entities it covers, but we generally limit the non-discrimination obligations to contracting parties, i.e., government agencies, which are the entities that undertake the obligations in Article III of GATT 1994. However, the situation becomes complicated when SOEs with both governmental and commercial characteristics are involved. One viewpoint is that if the government substantially controls the entity involved in procurement, then this entity will be bound by Article III of GATT 1994. The criteria for judgment mainly includes: first, there is a risk that the government’s control over an entity will allow the government to use it to set up trade barriers; second, the close ties between the government and the entity enable

international treaties to intervene directly in the entity, and the government is responsible for the entity's activities.⁶⁹ After these two requirements are met, the procuring entity can be identified as a government-controlled entity. Therefore, procurement activities conducted by the entity can be compared to those of a government agency, and related terms will be applied according to its purpose.

Therefore, we can conclude that procurement by government agencies for commercial purposes is governed by Article III:4 of the GATT. In other words, it must comply with the principle of national treatment. Since these entities are not regulated by Article III of GATT, procurement by non-governmental agencies for any purpose is still able to involve taking discriminatory actions without invoking the exemption clause of Article III:8. SOEs that are identified as state-controlled are generally subject to the GATT national treatment clause, which means that commercial procurement should follow the principle of non-discrimination, while government procurement is excepted from Article III:8. However, if these entities become purchasing entities in the GPA, they also must be subject to the non-discrimination principle of Article III:1 of GATT 1994.

B. The Similarity of Behaviors and Impacts of Subsidy and Government Procurement Behaviors

1. The Relationship between Subsidy and Government Procurement Behaviors

Subsidies and government procurement are essentially two kinds of behaviors of government fiscal expenditure, and they can be connected with each other. The SCM Agreement clearly states in Articles 1.1(a)(1)(i) and (iii) that government practices involving direct transfers of funds and government provision of goods, maintenance services, or purchases of goods other than general infrastructure are considered subsidies. In practice, the clearest example of government subsidies to domestic industries is direct payments to companies

69 Sue Arrowsmith, *Government Procurement in the WTO*, Translated by Guofu Cao, Economic Science Press, 2016, p. 53.

to produce certain products, which creates trade distortions.

At the same time, government procurement measures can constitute subsidies that are prohibited or actionable under the SCM Agreement. For example, if the government provides excessive funds to enterprises in the form of payments for goods, it is a subsidy referred to as procurement. The EU emphasized in the Proposal for a Regulation of the EP and of the Council on Foreign Subsidies Distorting the Internal Market that “private and SOEs may receive subsidies from third countries and then use them to finance economic activities in any economic sector in the internal market, such as participating in public procurement procedures”.⁷⁰ What is reassuring is that Article 14 of the SCM Agreement provides that “the provision of goods or services or the purchase of goods by a government shall not be deemed to be the grant of a benefit”. The proviso acknowledges that unless the remuneration does not match the product or service, and the determining factors of this match include price, quality, availability, marketability, transportation, and other purchase and sales conditions prevailing in the purchasing country. Unfortunately, the application of proviso clauses is highly discretionary. This is also the EU’s recognition in the Proposal for a Regulation of the EP and of the Council on Foreign Subsidies Distorting the Internal Market that “foreign subsidies cover a large part of the estimated value of contracts awarded in public procurement procedures and may cause distortions”.⁷¹ If the entire procurement process is fully open and conducted in a fully competitive market, reasonable remuneration is easy to determine. However, the reality is that there is almost no fully free market that can provide guidance on determining appropriate remuneration,⁷² especially in procurement in monopoly areas such as national security. This allows the government to provide disguised subsidies by purchasing domestic products, especially those of strategic SOEs.

Even bigger loopholes may exist within trade in services. Article 2 of the

⁷⁰ *Supra* n. 30, p. 1.

⁷¹ *Ibid.*, p. 4.

⁷² *Supra* n. 69, p. 79.

GPA includes services within the scope of government procurement. However, the SCM Agreement does not provide for subsidies for trade in services. On the contrary, in the discussion of government procurement in the SCM Agreement, government purchase of goods is deliberately emphasized, while government purchase of services is intentionally ignored. The General Agreement on Trade in Services (GATS) does not mention subsidies that may arise from government purchases of services. Therefore, in international treaty regulations and domestic practices, it is possible that the government's provision of subsidies can be concealed and converted as government procurement of goods or services.

2. Both Subsidy and Government Procurement Can Have a Negative Impact on Free Trade

The negative impact of subsidies on free trade is self-evident. The adverse effects listed in the SCM Agreement include damage to domestic industries of other members, loss or impairment of expected tariff reduction benefits of other members, and serious infringement of the interests of another member. An examination of the expansion of adverse effects in WTO rules and other international agreements shows that the attention paid to the adverse effects of subsidies is expanding from point to plane, from quantity to quality, from products to markets, and from individual cases to order.⁷³

The negative impact of government procurement on free trade is mainly reflected in the fact that it is essentially a trade barrier. There is extensive evidence that government procurement practices severely restrict foreign products from entering the domestic market. Some of these reasons closely resemble the original intention of subsidies. First, from the perspective of industrial competition, it can protect the state's underdeveloped industries and enhance its competitive advantages. Second, from the supplier's perspective, expanding procurement to remote and underdeveloped areas can improve the economic development of these areas in a targeted manner and enable them

⁷³ Liyu Han, Investment Subsidy: Fantasy or Reality, *Journal of Political Science and Law*, No. 2, 2022, p. 20.

to attain coordinated regional development. Expanding procurement from innovative scientific research enterprises can enable them to further explore and innovate, which is the content of non-actionable subsidies in the SCM Agreement. Third, from a political perspective, procurement is an important tool for trade protectionism. The Benchmarking Public Procurement 2016 released by the World Bank showed that government procurement of goods and services generally accounted for about one-third of government public expenditure. For developed countries and high-income economies, government procurement accounts for about one-fifth of a country's GDP. In developing countries, it accounts for about half of that in developed countries.⁷⁴ It is difficult for many countries to give up their power to use procurement to support national industries.

There are specific differences between public bodies and government procuring entities. For example, the latter applies to the procurement of goods, services and projects between governments, while the scope of the former is the transaction of goods and services between private entities. The agreements related to public bodies clearly indicate that the scope of application excludes government procurement. For example, the types of fiscal expenditures included in the former are more diverse than in the latter. Moreover, the collection or non-collection of taxes is included in the category of subsidy behavior, while the latter's fiscal expenditure types only include the purchase of goods or services and a combination of these two. However, subsidy and government procurement behaviors are interconnected and inherently correlated.

VI. THE IDENTITY COORDINATION OF SOES BETWEEN THE PUBLIC BODY AND GOVERNMENT PROCURING ENTITY

Public bodies, SOEs, and government procuring entities are closely connected. On one hand, SOEs represent both the identities of public bodies and procuring

⁷⁴ Benchmarking Public Procurement 2016, World Bank Group, 2016.

entities. Without SOEs, public bodies and procuring entities would resemble trees without roots and water without a source. Therefore, promoting the effective classification of SOEs can help them to more effectively implement the meaning and extension of public bodies, thereby reducing the chance that they will be subject to trade sanctions. This can also more quickly improve the government procurement system and accelerate China's pace towards joining the GPA. On the other hand, public bodies and procuring entities are the two major overlapping identities of SOEs. The subsidy and procurement systems underneath these overlapping identities have more profound impacts on trade, in terms of both domestic and international regulations. Therefore, when coordinating the identities of SOEs as public bodies and procuring entities, we should not only base our efforts on China's situation and start with SOE reform, but also stick to the principle of fair competition. It is also necessary to consider the regulation of the identification and behaviors of these entities by joining international treaties. At the same time, we should reference the connection between subsidies and procurement activities to reduce the risks and challenges arising from the competing identities of public bodies and procuring entities for SOEs.

A. Distinguishing and Understanding the Connotations of Governmental and Commercial Aspects of SOEs Is the Basis for Identity Coordination

The basis for coordinating the identities of China's SOEs as public bodies and government procuring entities is to clarify and distinguish between the governmental and commercial natures of SOEs, and then further explore the governmental nature of these entities. This analysis of international rules, judicial practices, and domestic practices indicates that governmental functions, governmental purposes, and government control are the three major factors in measuring the governmentality of SOEs, namely: SOEs are government-controlled and vested with governmental functions to achieve government goals.

First, government control can consider many aspects, including

whether the procurement funds come from the government and the degree of government ownership of the entity. Second, identifying governmental functions can involve referring to the views of the AB, namely whether the entity is commissioned or vested with the government, whether the purpose of establishing the entity is to pursue social interests or achieve governmental purposes, and whether the entity is established in accordance with the provisions of laws and regulations. Third, identifying the governmental purpose can start by focusing on the purpose for purchasing products. If this purpose is to pursue public interests, it can clarify the governmental purpose of the entity. For government procuring entities, since the list of procuring entities cannot be easily changed, it is difficult to independently identify whether an enterprise has governmental characteristics before each procurement has occurred. Therefore, it is important to examine the consistent performance of SOEs. At the same time, these three elements should be organically combined with each other, and should not be interpreted from a single perspective or separately when analyzing the governmental nature of SOEs.

The meaning of public body is that of “possessing, exercising or being vested with government power”.⁷⁵ Article 2 of the GPA on the substance of government procurement argues that: “covered procurement is procurement for governmental purposes”. When SOEs take on the identities of public bodies and government procuring entities, they embody governmental nature. For this reason, if SOEs are included in other procuring entities in Annex III to the GPA, governmental nature becomes the universality of SOEs on the list. This is transmitted to the individual case identification of public bodies mentioned in the SCM Agreement, resulting in risks and challenges to the normal commercial purchase and sales activities of SOEs.

B. The Scope of Including SOEs in the Government Procuring Entity List Is Limited Based on Their Classification System

In December 2015, the SASAC, the MOF, and the National Development and

⁷⁵ Here is the generally accepted definition of public body in the Appellate Body Report in DS379.

Reform Commission (NDRC) issued the Guiding Opinions on the Definition and Classification of the Functions of State-owned Enterprises⁷⁶ (Guiding Opinions), which defined SOEs as commercial and public welfare enterprises, and classified their reform, development, and supervision. In September 2016, the SASAC and the MOF jointly issued the Implementation Plan for Improving the Function Classification and Performance Evaluation of Central Enterprises (Implementation Plan), which divided China's central enterprises into three categories for supervision, namely: commercial, strategic, and public interest. Both documents supplement and improve the Guiding Opinions of the CPC Central Committee and the State Council on Deepening the Reform of State-owned Enterprises issued in 2015. Therefore, when including China's SOEs in the Government Procuring Entity List, while considering the issue of public body, we should also return to the GPA based on the general direction of China's SOE classification reform and include SOEs in a limited manner based on scope and coverage Appendix of other countries.

For purely public welfare SOEs, firstly, the requirements of the Guiding Opinions explained that these have the main goals of ensuring people's livelihood, serving society, and providing public goods and services. This goal is consistent with procurement for governmental purposes discussed in the GPA and the meaning of governmental purposes. Secondly, some public welfare SOEs are established for the purpose of performing governmental or public functions. In other words, this kind of SOEs was originally based on governmental entrustment or legal authorization. In addition, every action they take is essentially the same as governmental action, so they should be included in the Government Procuring Entity List. Finally, most public welfare SOEs are public institutions, social groups, or social service organizations that the government established using state-owned assets as well as involved in

⁷⁶ In accordance with the requirements of the Guiding Opinions of the CPC Central Committee and the State Council on Deepening the Reform of State-owned Enterprises, the three ministries and commissions accurately defined the functions of SOEs and promoted their reform in a targeted manner, which is important for improving the corporate governance structure, optimizing the layout of state-owned capital, and strengthening the supervision of state-owned assets.

education, science and technology, culture, health and other fields. The funding sources, personnel appointments and removals, and business management of these enterprises are largely government-controlled.

Commercial and strategic SOEs should be cautiously included in the Government Procuring Entity List. From the perspectives of government shareholding ratio, business scope, and the degree of public and commercial nature, exploring the inclusion of a limited number of these commercial SOEs in the Government Procuring Entity List of the GPA tends to weaken the requirements of Western countries on the number of Chinese SOEs on this list.

When incorporating China's SOEs into the GPA, both China and Western countries have their own inherent considerations. From the perspective of Western countries, maximally incorporating China's SOEs into the GPA can consolidate industries with inherent comparative advantages and expand territory for enterprises in signatory states with insufficiently broad coverage. Contemporary international trade is based on comparative advantages, and countries trade products within their most advantageous industries. However, as China's scientific research capabilities have gradually improved, some products have impacted products inherent in Western countries as comparative advantages. China's science and technology cannot sufficiently reduce the costs of products to where they have comparative advantages in international trade. Western countries intend to curb this trend by including the purchases of most of China's SOEs in the GPA, and plan to distribute products representing the comparative advantages of existing signatory countries throughout the markets of purchasing countries. On one hand, this hinders the purchasing country's research and development (R&D) investment in products with comparative advantages in Western countries and consolidates its products with comparative advantages in the purchasing country's market. On the other hand, due to the huge potential of China's government procurement market, after most SOEs are included in the GPA, the non-discrimination clause will provide an unprecedentedly large sales market for product suppliers in Western countries. As for China, the conditional opening of SOEs into the GPA can

be understood from the perspective of negotiation and protection of domestic emerging industries. China's government procurement is currently linked to international relations. In other words, the closeness of the international relations between two countries tends to affect their trade cooperation. If China maximizes its ability to open up SOEs, includes them in the scope of the GPA, and is bound by the non-discrimination principle, including the most-favored-nation treatment principle and the national treatment principle, the choices and cooperation in government procurement will not change due to trends in international relations. Similarly, the number of trade orders will not influence negotiations and bargaining in certain fields. On the other hand, as products with comparative advantages made in Western countries have a significant impact on the general trade market and government procurement market of purchasing countries, the R&D of domestic products may be curbed or impacted. Therefore, generally restricting SOEs from being included in the Government Procuring Entity List and narrowing the openness of government procurement market can effectively protect domestic industries and provide opportunities for continued development in related industries, especially those where Western countries have comparative advantages.

C. The Subsidy Behavior of SOEs with Public Body Status Is Transformed into Government Procurement Behavior in Practice

There is a close connection between public bodies and government procuring entities. First, the problems they face internationally are both related to the entity of SOEs. Regarding the issue of SOEs and public bodies under the SCM Agreement, Western countries believe that SOEs are government-controlled and regard their commercial behavior of selling products to downstream entities as governmental behavior of exercising subsidies, while the dilemma that government procuring entities face under the GPA framework is that Western countries hope to include the maximum amount of China's SOEs in the list of government procuring entities of the GPA. Second, the two have highly similar characteristics. The most notable characteristic of the behavior of entities

identified as public bodies is to exercise governmental functions and attain governmental purposes, and the significance of the existence of government procuring entities list in the GPA is procurement for the purpose of attaining governmental purposes. Third, both are important concepts in important agreements under the WTO framework. The SCM Agreement, as a package of trade agreements that must be signed upon joining the WTO, is one of its most important agreements. As one of the four plurilateral agreements in the WTO package of trade agreements, the GPA occupies a very important position in WTO rules and has become a model for other multilateral, regional, or bilateral government procurement agreements.

At the same time, there are similarities between subsidy and government procurement behaviors. In essence, both are fiscal expenditure behaviors, but the former is a more extensive form of fiscal expenditure. At the regulatory level, whether in goods or services trade, there is no way to effectively avoid the practice of subsidizing enterprises through government procurement.

Therefore, SOEs and traditional government agencies included in the GPA as purchasing entities can receive subsidies when necessary. For industries in urgent need of development and enterprises in regions with unbalanced socio-economic levels, as well as some industries with high-tech enterprises, the risk challenges resulting from the sensitive behavior of subsidies to both subsidy providers and recipients can be transformed through government procurement. On one hand, it can further expand the number of SOEs included in the GPA, and on the other hand, it reduces the controversy over SOEs being simultaneously identified as public bodies and subject to subsidies.

D. Continuing to Deepen the Reform of SOEs under the Guidance of the Principle of Fair Competition

Guided by the principle of fair competition, continuing to deepen the reform of Chinese SOEs remains the most fundamental way to address their risks and challenges. First, a strict distinction should be made between governmental and commercial aspects, and the public body functions and commercial entity

functions of SOEs should be distinguished in terms of funding, functions, institutional rules, vertical management, and supervision. Second, it is important to promote SOEs to integrate more independently into market competition and clarify through legislation that commercial considerations are the core of commercial SOEs. The government may treat commercial SOEs, private enterprises, and foreign enterprises equally in terms of subsidies, supervision, and taxation. Third, in continuing to deepen the mixed-ownership reform of SOEs, to carefully implement this reform that involves national security, people's livelihood, and public interests, for non-key industries and fields, we must open up to a certain degree of participation of private capital. For the majority of SOEs, we can relax the participation of private capital and expand the intensity of this reform. Fourth, to clarify the investment relationship between the governmental and commercial SOEs, it is essential to enforce the checks and balances between investors (shareholders' meetings) and the board of directors within enterprises to achieve independent operation of SOEs.

VII. CONCLUSION

The reform of SOEs affects the entire economy. When faced with economic and trade criticisms that Western countries direct against China on the issues of SOEs, public body, and government procurement, we should coordinate these with China's situation, domestic laws, and existing international treaties. If we simply deal with the situation as it comes, without any macro-coordination and coordination of reforms, it may create greater risks to the SOEs in the future. In addition, in January 2020, the China-US Phase One Economic and Trade Agreement ended the Sino-US trade frictions that lasted for nearly two years. However, China and the United States have not yet reached an agreement on several issues, including public body, industrial subsidies, SOEs, overcapacity, market distortions, and government procurement, which have become unavoidable issues during the negotiations on the second phase of this agreement. Therefore, it is necessary to coordinate the status of SOEs

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in different international treaties, while further promoting their reform and taking practical actions to alleviate overcapacity and market distortion. It will enable us to make theoretical and practical preparations more thoroughly for negotiating and implementing the second phase.