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STRENGTHENING THE GLOBAL TRADE AND INVESTMENT SYSTEM FOR SUSTAINABLE DEVELOPMENT

Governments as Competitors in the Global Marketplace: Options for Ensuring a Level Playing Field

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7 Chemin de Balexert, 1219 Geneva, Switzerland
Tel: +41 22 917 8492 – E-mail: ictsd@ictsd.ch – Website: www.ictsd.org
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Tel: +41 22 869 1212 – E-mail: contact@weforum.org – Website: www.weforum.org
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ABSTRACT

Over the past two decades, there has been a marked increase in outward investment by state-owned enterprises (SOEs), making "mixed markets" — in which state-related enterprises and private enterprises find themselves competing with each other — common. This development has given rise to concerns with respect to the potential for protectionist policy responses at the domestic level as well as the functioning of the global marketplace.

Against this background, this paper considers what governments can do to address these concerns. It considers the importance of the issue and the policy tools that currently exist to help governments maintain a level playing field between SOEs and the private sector. The paper takes a multidisciplinary approach, looking at the issue from the competition, investment, and trade policy perspectives. It concludes by outlining options and prospects for developing some form of commonly accepted disciplines that would address gaps in the current policy toolbox available to governments for maintaining well-functioning markets open to both privately- and state-owned enterprises.

CONTENTS

LIST OF ABBREVIATIONS AND ACRONYMS

AFTA	US–Australia Free-Trade Agreement
BITs	Bilateral investment treaties
CN	Competitive neutrality
EU	European Union
FTA	Free-trade agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross domestic product
GNI	Gross national income
ICSID	International Centre for Settlement of Investment Disputes
IIA	International investment agreement
M&A	Mergers and acquisitions
MFN	Most-favoured nation
NAFTA	North American Free Trade Agreement
OECD	Organisation for Economic Co-operation and Development
POE	Privately owned enterprise
PTA	Preferential trade agreement
SAFTA	Singapore-Australia Free-Trade Agreement
SCM	Subsidies and countervailing measures
SOE	State-owned enterprise
STE	State-trading enterprise
TPP	Trans-Pacific Partnership
TTIP	Transatlantic Trade and Investment Partnership
US	United States
WTO	World Trade Organization

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INTRODUCTION

Countries have followed many different economic models of state intervention (or lack thereof) to pursue their development objectives. Proponents of state involvement argue it should be up to governments and the publics they represent to decide which model is best for them. However, in an ever more open and globalised economy, the effects of national policies can have beggar-thy-neighbour, or even globally detrimental, effects, suggesting a case for commonly accepted disciplines.

Government's Influence, control, or ownership of enterprises is supported by interventionist arguments, which consider that governments as competitors in markets can (in some circumstances) be an efficient way of achieving economic and social goals. In fact, mixed markets — in which state-related enterprises and private enterprises find themselves competing with each other — are becoming more common. However, it is not without criticism. In effect, domestic policy choices about the relationship between the state and enterprises are increasingly giving rise to extraterritorial effects. This has raised concerns, both with respect to the implications for the functioning of the global marketplace as well as the potential for protectionist policy responses.

Recently this debate has concentrated on state ownership. One practical reason for this is that over the past two decades the global marketplace has observed a rise in outward investment by state-owned enterprises (SOEs), and this trend has been measurable.[1] But, it is clear that ownership is not a necessary condition for governments to influence markets. In this context, a broader debate is whether the focus should extend to a wider range of state-influenced, controlled, or owned enterprises — which can be generally termed "state enterprises" — and their potentially competition-distorting behaviours.

This paper considers what governments can do to address the concerns to which state enterprises as competitors in global markets can give rise. It considers the importance of the issue and the policy tools that currently exist to help governments maintain a level playing field between SOEs and the private sector. The paper takes a multidisciplinary approach, looking at the issue from the competition, investment, and trade policy perspectives. The paper concludes by outlining options and prospects for developing some form of commonly accepted disciplines that would address gaps in the current policy toolbox available to governments for maintaining well-functioning markets open to both privately- and state-owned enterprises.

GOVERNMENTS AS COMPETITORS IN GLOBAL MARKETS: HOW BIG IS THE ISSUE?

The role of SOEs[2] in the world economy is significant and apparently growing. In 2010-2011 approximately 10 percent of the 2000 world's largest firms on the Forbes' Global list were majority state-owned (OECD, 2013a). The value of their sales (domestic and international) corresponded to approximately 19 percent of the value of global cross-border trade in goods and services and approached an equivalent[3] of the value of 6 percent of world gross national income (GNI), exceeding the gross national products (GDPs) of countries like Germany, France, or the United Kingdom (UK). Within two years (in the business years 2012-13), the share of SOEs among the 2000 largest firms is shown to have increased to as much as 14 percent (OECD, 2014a). Moreover, the weight of SOEs has an even higher incidence (19 percent in 2011) among the world's very largest firms, and their importance had grown strongly over the last decade. Among the Fortune 500 firms, the share of SOE revenues increased from 6 percent in 2000 to 20 percent in 2011, and the share of SOE employment among the largest firms increased from 19 percent to 30 percent respectively during the same period (OECD, 2013b).

Several industries are characterised by high levels of state ownership. These include, for example, mining of coal and lignite and mining support activities, civil engineering, land transport, and transport via pipelines, extraction of crude petroleum and gas, and telecommunication and financial services. Beyond natural resources and services, manufacturing of metals is another area where state ownership is quite prominent (Figure 1). Products of many of these sectors are intensely internationally traded and their ownership is increasingly transnational. Many of these sectors are also known as playing important upstream and downstream roles in international supply chains, suggesting a considerable

1 Another reason is that state-ownership also implies certain interests, rights, and obligations characteristic of the state remaining an owner, which may also have implications for the provision of advantages or exertion of influence in the marketplace.

2 The remainder of this paper applies a relatively broad definition of SOEs, which includes not only enterprises that are majority state-owned, but also enterprises that are perceived as being effectively controlled by the state. For further details see OECD (2015e).

3 This comparison is only indicative as "sales" is not a value-added concept, in contrast to the GNI or GDP.

potential for the effects of state enterprise policies to spillover to other parts of the economy and indeed have broader ramifications for global resource allocation.

An important channel for the rapid internationalisation of SOEs has been cross-border mergers and acquisitions (M&A). Figure 2 shows two distinct periods of SOE involvement in M&A. Between 1996 and 2007, M&A by SOEs and privately owned enterprises (POEs) more or less followed the same trend. After 2007, SOE M&A activity broke from the prevailing trend, with overall M&A, cross-border M&A, and FDI all shrinking significantly, while cross-border M&A by SOEs grew rapidly. M&A by SOEs came down after 2009 but has continued to grow much faster than overall M&A or FDI. Domestic M&As by SOEs have also seen a surge during the same period, which might reveal a more general trend of increased state intervention in the marketplace in the aftermath of the 2008-2009 crisis.

Figure 3 presents the top 10 acquiring countries for SOE-led international M&A. In 1996, six European countries were the main sources of SOE-led international M&A. By 2013, only one of these (Norway) remained on the list. The only other country to appear among the top 10 in both years was

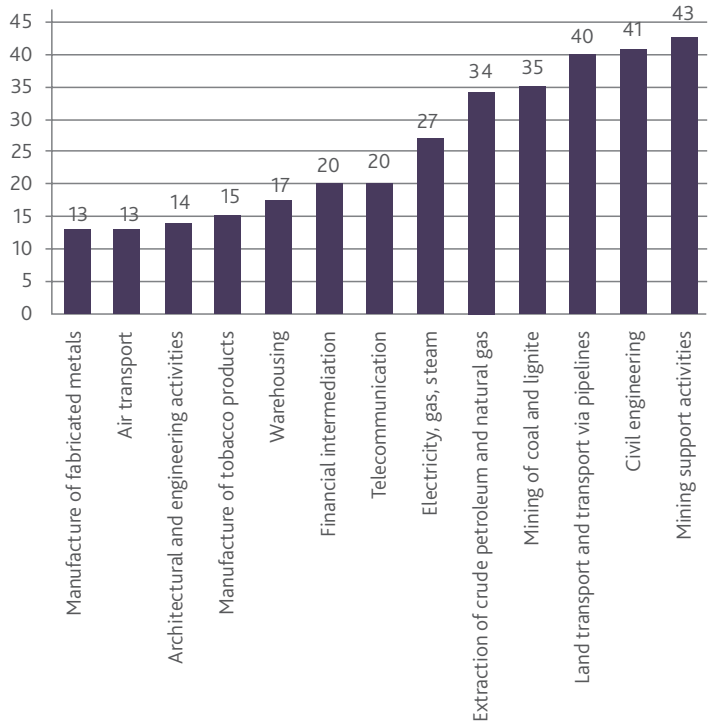


FIGURE 1:

Importance of SOEs among sectors' top 10 firms in percent

Note: Figures represent equally-weighted averages of SOE shares of sales, assets and market values among the sector's top ten companies, where SOEs are defined as majority state-owned entities on the Forbes Global 2000 list. Only sectors with shares above 10% are shown.

Source: OECD (2013a).

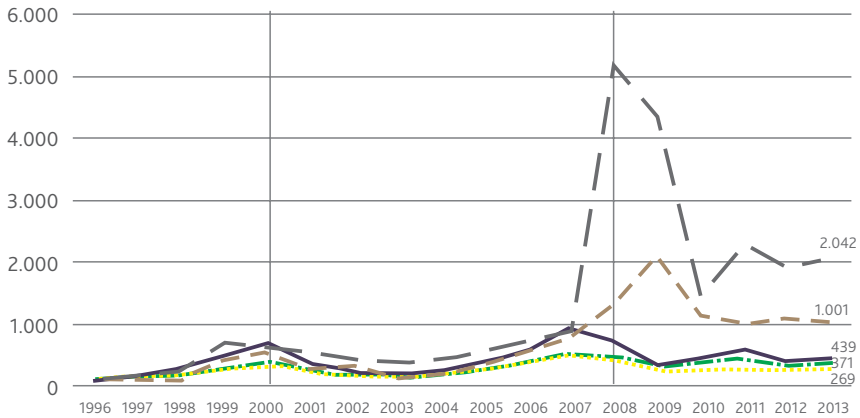


FIGURE 2:

Evolution in the value of total and international M&A by SOEs

LEGEND:

- Evolution in Value of M&A Deals, current prices
- Evolution in Value of Cross-Border M&A Deals, current prices
- Evolution in Value of M&A Deals by SOEs, current prices
- Evolution in Value of Cross-Border M&As Deals by SOEs, current prices
- Evolution in Foreign Direct Investment Inflows, current prices

Source: OECD FDI statistics database, Dealogic M&A Analytics Database, and authors' calculations.

Malaysia. The surge in acquisitions by Chinese SOEs is clearly the most notable development, but the figure also reflects the important role that sovereign wealth funds have come to play as sources of international M&A activity, since much of the investment from countries, like Canada, Singapore, and Norway, reflects investment by these government-controlled entities.

Figure 4 shows the SOE share of total cross-border M&As in five of the sectors presented in Figure 1 as having high levels of state ownership. The figure indicates that the trends in some sectors have been toward a slight increase in the share of international transactions by SOEs. Moreover, this may be a low-end estimate, since the figure includes only investment in extant enterprises, while a lot of attention recently has been given to greenfield investment in resource-based industries.[4] It further bears mentioning that, in most sectors, domestic transactions of SOEs continue to outstrip international mergers and acquisitions by a wide margin (OECD, 2013b and OECD, 2015a). Thus, SOEs are making themselves increasingly felt among international investors, but international investment by SOEs is still a small category in cross-border M&A transactions worldwide.

4 This data also excludes re-nationalisations which have been important, for example, in Latin America.

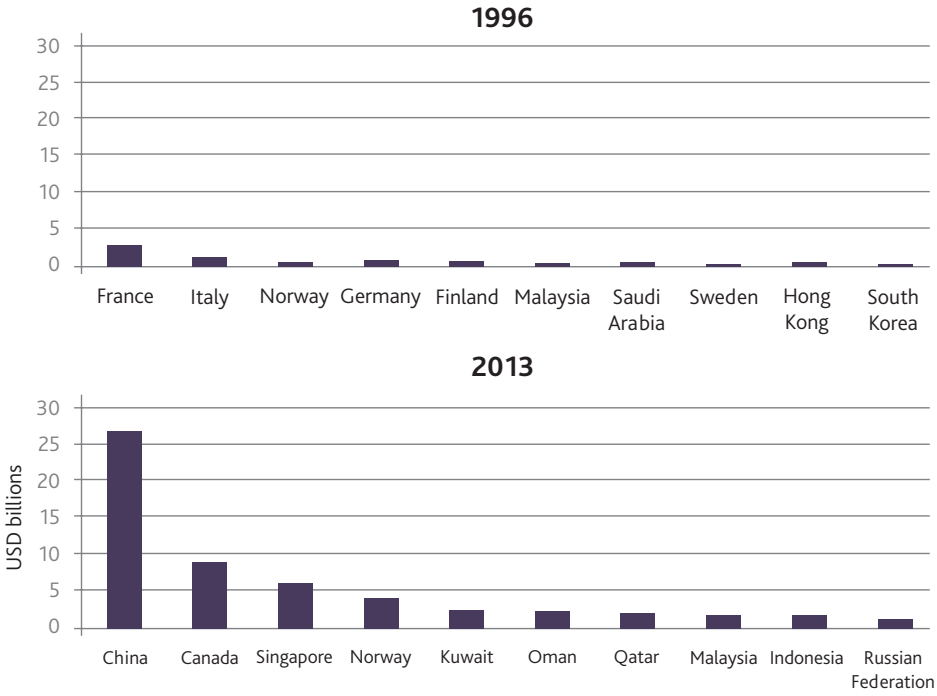


FIGURE 3:

Top 10 acquiring countries, SOE-led international M&A, 1996-2013

Source: Dealogic M&A Analytics Database, and authors' calculations.

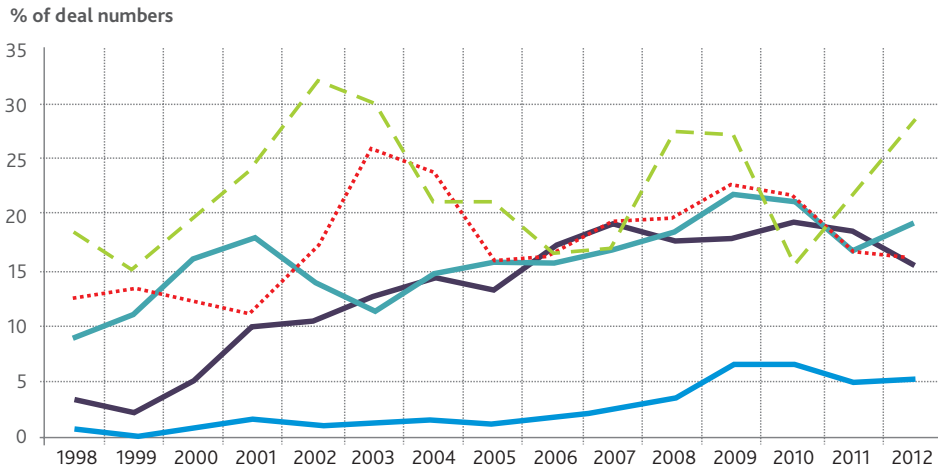


FIGURE 4:

Share of cross-border M&As with a state-owned acquirer

LEGEND:

- Mining
- Oil and gas
- Airlines
- Power generation
- Telecommunication

Source: OECD, 2014a.

At the sector level, an increase in state-driven international investment in some of the public utilities sectors has occurred — notably in power generation and telecommunication. Interestingly, most of this investment originated within the OECD area. European SOEs, in particular, taking advantage of European Union (EU)-mandated market liberalisation, have been active investors in other member countries of the EU Single Market. In these sectors, over the past 15 years there has been no particular upsurge in overseas M&As by SOEs located in emerging market countries (OECD, 2014a).

One sector in which growing SOE involvement emanating from companies located in emerging economies is the mining industry. Here, SOEs have grown to represent 5-6 percent of total international M&As from an almost zero share prior to the 21st century — a development driven by companies domiciled in China and other emerging economies (OECD, 2014a). This still represents an internationally low share of transactions, with the bulk attributed to private mining companies domiciled in a handful of advanced economies. However, if current trends continue in the future, state-controlled mining companies operating from emerging economies are set to become an important international factor.

Most of the economies with a particularly high share of SOEs among their largest enterprises are important players in international trade in goods and services. Moreover, those segments of the raw materials, manufacturing, and services sectors that have the strongest SOE presence account for significant shares of world trade (OECD, 2013a).

WHAT ARE THE MAIN CONCERNS WHEN SOES COMPETE IN GLOBAL MARKETS?

A primary concern is that trade and investment by SOEs may be driven by "political" or public policy goals rather than, or in addition to, commercial considerations, and this can have detrimental or distortionary commercial effects on trading partners and competitors. This goes to the heart of the debate, because if governments make a conscious decision to own an enterprise, it is not illogical to assume that this enterprise is under some circumstances required to act in a different way from private companies (although, in some cases, governments may decide to support private enterprises in pursuit of similar objectives). Usually, the motivation is the delivery of public service obligations, such as, for example, universal coverage and general affordability in the utilities sector. A number of emerging economies also assign an active role to SOEs in their development strategies and in industrial policy. SOEs may also be acting on behalf of their government owners to secure control over scarce resources in the broader national interest. SOEs may be buying into foreign technologies and know-how with the purpose of diffusing them widely in the domestic economy. As with other forms of state intervention (e.g. subsidies), the problem is that what may be a public good and justified under one country's sovereign right to regulate, may have harmful commercial effects on its trading partners and competitors — especially considering SOEs operate in sectors with important upstream and downstream roles in international supply chains. For this reason, commonly accepted disciplines may be needed.

Harmful spillover effects relate to the fact that SOEs, which are often active in economic markets, continue to pursue commercial as well as public policy objectives without a clear division between the two. Compensation and special status can also raise concerns. In return for accepting various non-commercial tasks, SOEs are generally granted certain compensations by their government owners. This can consist of regulatory exemptions (e.g., being allowed to maintain monopolies), access to cheap finance, tax concessions, etc. (See Table 1 below).

While minimising state enterprise-related distortions in the domestic context is challenging enough for governments, it can present additional complications in an international context. As SOEs expand into the competitive economies of other countries, these various forms of intervention and compensation can give rise to problems. Certain advantages granted to SOEs by governments (or provided to private firms via SOEs) can create distortionary or anti-competitive effects in the global marketplace. Such effects may be by accident or by design. Poorly designed compensation schemes are not uncommon. For example, SOEs are granted advantages that are proportional with their business volume rather than their public policy objectives — which gives them both an incentive and an edge in foreign expansion. Some development strategies, include compensating SOEs for market failure such as economies of scale, almost by definition implies assisting them against foreign competitors. Even a highly reactive effort to stave off the default of an ailing SOE may be perceived negatively by other market observers, from whose perspective state intervention has prevented the otherwise likely disappearance of a competitor and deterred overall competition based on merit.

TABLE 1:

Sample of preferential treatment with distortionary cross-border effects

Types	Description
Preferential financing from SOEs, state banks or other (state-backed) financial institutions	Preferential financing can entail: (i) favourable requirements with respect to rate-of-return on capital of SOEs; (ii) favourable requirements with respect to dividends of SOEs; (iii) direct financial state support (not linked to public service obligations); (iv) recapitalisation of SOEs at lower than market rates; (v) provision of credit below the market interest rate; and, (vi) provision of state-backed guarantees. This concern can extend to preferential lending by state-owned financial institutions to private companies (e.g. for the expansion/maintenance of their production capacities).
Privileged access to information	If SOEs are privy to privileged information from governments, including classified intelligence, confidential cabinet decisions, etc. then this could be perceived as an unfair advantage and can have an impact on market confidence. SOEs may also be perceived to have access to data and information which are not available to their private competitors or only available to a limited extent (i.e. planned regulation, procurements, technical specifications, sanitary rules, environmental policies, laws, taxation initiatives)
Outright subsidies/Tax concessions	Some SOEs receive direct subsidies from their government or benefit from other public forms of financial assistance to sustain their commercial operations. For example, tax concessions can often be found in the form of schemes aimed at compensating SOEs for their public services obligations at home (e.g. delivery of postal service or transport services in remote areas which would not be commercially viable); however, if schemes are proportional to the business volume rather than public service obligations themselves this can be seen as a form of preferential treatment and tantamount to selective government subsidies.
In-kind subsidies	Another form of subsidisation is in kind benefits, for instance where state-owned operators in the network industries receive benefits such as land usage and rights of way at a price significantly below what private competitors would have had to pay in like circumstance. These exemptions artificially lower the SOEs' costs and enhance their ability to price more efficiently than competitors. Other examples include preferential access to inputs such as labour and infrastructure.
Grants and other direct payments.	Grants or other direct payments can include: (i) policies that support R&D; environmental and green programmes; (ii) general economic development policies (e.g. industrial policy); (iii) sector or product-specific economic development policies; and, (iv) support for the provision of public services; all of which if not provided equally to competitors on the same market could create a non-neutral situation.[5]
Privileged position in the domestic market.	In many cases, governments entrust SOEs with exclusive or monopoly rights over some of the activities that they are mandated to pursue. This can be seen, for example, in postal services, utilities and other universal services that the state decided to pursue through state-controlled entities. Where SOEs continue to benefit from a legal or natural monopoly this may be of little practical consequence for the competitive landscape, but a number of SOEs in the network industries operate as vertically integrated structures with incipient monopolies in parts of their value chains. This can have a direct effect on relative competitiveness, and it may also allow them to influence the entry conditions of would-be competitors across a number of commercial activities. Moreover, concerns may arise as to preferences towards SOEs in domestic public procurement.
Explicit or implicit guarantees	State guarantees for SOEs, can be of concern if they reduce the cost of borrowing and enhance their competitiveness vis-à-vis their privately-owned rivals. In practice, it can be difficult for the state to convince markets that a given enterprise is not subject to such guarantees.
Exemptions	SOEs in some sectors and/or some corporate forms may enjoy outright exemptions from bankruptcy rules. This is of concern because equity capital is locked, and SOEs can generate losses for a long period of time without fear of going bankrupt. Exemptions from anti-trust enforcement can also create opportunities for SOEs to engage in anti-competitive behaviour. For example, it may allow SOEs to engage in predatory behaviour.
Preferential regulatory treatment	SOEs which are not subject to the same regulatory regimes as private firms can lower their operating costs. This can entail: (i) simplified procedures to obtain licences or permits; (ii) granting of special rights to extract resources; (iii) exemptions for application of general laws and regulations; (iv) exemptions from regulatory compliance (e.g. environmental or technical specifications); (v) exemptions or non-compliance with information disclosure requirements; (vi) unjustified denial of approvals to potential competitors; (vii) exemptions from building permits or zoning regulations; and, (viii) obtaining of grandfather clauses.
Preferential treatment in public procurement	Preferential access to information about upcoming public procurement contracts and tenders (i.e. technical or other specifications essential for awarding the contract); or outright favouritism of SOEs in awarding contracts can give an upper hand to a SOE vis-a-vis a potential competitor.
Price support	Price support is with regard to policy measures that can create a gap between domestic market prices and reference prices of a specific commodity, which can be market distorting.
Support in the form of commercial diplomacy	Reliance on the government's backing and diplomatic relations to pursue business opportunities, otherwise not commercially possible without such support or not available to competitors, can give SOEs an upper hand vis-a-vis competitors.

5 To the extent that they can be considered distortive or only applicable to certain specific enterprises or groups of enterprises. See also OECD *Policy Guidance for Investment in Clean Energy Infrastructure* http://www.oecd.org/daf/inv/investment-policy/CleanEnergyInfrastructure.pdf

In a business survey conducted by the OECD (OECD, 2015b), a majority of firms indicated that foreign-owned competitors benefited from government-granted preferential treatment, which they did not benefit from.[6] This illustrates the greater difficulty of minimising state intervention-related distortions in an international context. The economic effects of such intervention were reported to extend well beyond the markets they were intended to influence. This highlights the high degree of commercial integration and the fragility of the separation between "domestic" and "cross-border" effects.

Ownership status of firms was also perceived to matter to some respondents, as the reported severity of the impact of preferential treatment by governments was higher for SOEs than for other types of firms. The use of SOEs by governments to indirectly grant advantages to respondents' competitors through lower prices or better accessibility of inputs was also reported frequently. This suggests that the issue of determining more clearly which enterprises can be considered as receiving subsidies — for example, in the context of the World Trade Organization (WTO) — may be an important one to focus on in the future.

An OECD policy survey conducted in 2015[7] (OECD, 2015c) corroborates the business view that financial and regulatory forms of support are considered to be the most serious in terms of distorting competition. This suggests that rules on subsidies granted to state enterprises as well as the potential extension of regulatory advantages might be a priority for further deliberations in the international trade and investment context. Preferential access to finance and other forms of financial advantage are difficult to measure. However, important differences in the ways SOEs and POEs structure their cross-border M&A deals suggest that these two groups are quite different when it comes to the way they finance cross-border expansion.

Table 2 provides a comparative snapshot. A first important difference concerns deal size. SOE deals are on average more than twice as large (in value) as deals by POEs. This is the case for both domestic and international deals. Another important difference between POEs and SOEs concerns the size of the stakes (in percentage) that enterprises take in their targets. Table 2 also presents deal characteristics in terms of whether acquirers go for outright purchase (100 percent); majority interest (more than 50 percent); or minority interest (less than 50 percent). The favourite approach of POEs is to undertake outright purchases (32 percent of deals). In contrast, this is the least-favoured option of SOEs (10 percent), while the majority of SOE deals are for a minority interest (53 percent of deals, versus 31 percent of deals for POEs). More generally, POEs acquire larger stakes than SOEs in both international and domestic M&A and irrespective of whether or not deals are in the financial sector. The analysis also shows that SOEs are paying much more to acquire smaller stakes in their targets on average. Further analysis would be required to determine whether this implies that they are attributing higher valuations to their targets, whether these differences are associated with preferential access to financing for SOEs, or whether they are attributable to structural factors, e.g., a systematic preference on the part of SOEs to go after larger targets (OECD, 2015a).

Central or federal levels of government are reported to be granting advantages with strong negative impacts on competition. However, sub-federal governments are often engaging in discriminatory behaviour as well.[8] This, in turn, suggests that enterprises influenced by both central and local governments should be a subject for discussions on any future commonly accepted disciplines.

Actions of SOEs have also been the subject of a number of WTO and other international disputes. WTO rules concentrate generally on discriminatory actions of governments, and as such they do discipline actions by certain enterprises that can be proven to exercise governmental functions. Two early cases, for example, concerned the question of special

6 OECD Business Survey on State Influence on Competition in International Markets conducted in 2014 (OECD, 2015b)

7 OECD *Policy Survey on State-Owned Enterprises in the Global Market Place* conducted in 2015 (OECD, 2015c).

8 OECD Business Survey on State Influence on Competition in International Markets conducted in 2014 (OECD, 2015b)

TABLE 2:

Summary of key features of POE and SOE M&A deals

Source: Dealogic M&A Analytics Database, and authors' calculations.

	SOEs			POEs		
	Domestic	International	Total	Domestic	International	Total
Average deal size (USD mil)	496.9	577.9	520.8	231.1	245.5	234.9
Deal characteristics (% of deals)						
Partial interest	52.8	54.9	53.4	32.2	28.5	31.2
Majority interest	14.3	10.7	13.3	8.9	11.3	9.5
Qutright purchase	9.7	11.1	10.1	31.2	33.2	31.7
Other	23.2	23.3	23.2	27.7	27.0	27.6

privileges granted to, and state influence on, the level or direction of trade of state-trading enterprises (STEs) as defined by Article XVII of the General Agreement on Tariffs and Trade (GATT).[9] More recent cases considered claims of a preferential regulatory treatment of a state entity under the General Agreement on Trade in Services (GATS) Articles XVI and Article XVII[10] and whether state enterprises are disciplined by the WTO's Subsidies and Countervailing Measures (SCM) Agreement as "public bodies" and thus potential granters of subsidies.[11] SOEs have also been the subject of some investment-related disputes considered by the International Centre for Settlement of Investment Disputes (ICSID)[12] and in the context of the application of "national benefit" and "national security" tests under national investment laws.[13]

In sum, the expansion of SOEs into international markets through trade and investment has given rise to a broad range of concerns. The anticipated growth and trade and investment expansion of some of the emerging market economies with important state sectors, adoption by some countries of deliberate policies aimed at supporting competitiveness and business operations of state enterprises in foreign markets and, more generally, the deepening of international commercial links and the geographical fragmentation of production, where products are increasingly produced from inputs coming from many countries, suggest that concerns related to SOEs are likely to be become even more prominent in the future.

OPTIONS FOR ENSURING A GLOBAL LEVEL PLAYING FIELD

Emerging evidence on increased concerns related to the rising presence and impact of SOEs in international markets calls for a reflection on two questions: 1) how to minimise any potential distortionary or anti-competitive effects created by state intervention in the global marketplace; and 2) how to restrain undue protectionism, to keep markets open to trade an investment, regardless of firm nationality or ownership. Further reflection is also necessary to consider whether a soft approach (i.e. promotion and international coordination of domestic reforms and implementation of good practices and guidelines); a more hard approach (binding international rules); or some combination of approaches is warranted. The sections below consider what policies and instruments are at the disposal of policymakers at the domestic and international levels.

DOMESTIC POLICIES AND INSTRUMENTS

The public policy purposes state enterprises often pursue may not easily lend themselves to more stringent regulation at the international level. Domestic reforms and international coordination of these reforms might, thus, have better potential for covering a wider range of issues and delivering desired outcomes. The policy areas that are relevant in this respect include competition laws and policies, rules related to corporate governance of SOEs, and the various rules and procedures for dealing with inward Investment, especially screening requirements.

Competition law and policy

SOEs often enjoy privileges and advantages that private market players do not. Such privileges are generally associated with public policy or service obligations entrusted to SOEs. SOEs can also carry out commercial activities and be active in markets where private players do or could compete. Some SOEs may simultaneously carry out activities in areas where they face competition and where they do not. SOEs may use their privileges to influence market strategies and distort or restrict effective competition. For example, an SOE may leverage its legal monopoly position into markets where it competes with private participants, e.g., through cross-subsidisation. It is, therefore, important to ensure that, to the greatest extent possible consistent with their non-commercial responsibilities, SOEs are subject to similar competition disciplines as private competitors. Competition concerns that arise in relation to the conduct of SOEs may vary depending on the form in which the state exercises its control over them and whether they occupy monopoly positions or actively compete in a market with private entities. SOEs may also be put at a competitive disadvantage, owing to their public service obligations, which are often costly. This creates market distortions, too. An SOE may, in fact, use profits from its market activities to subsidise these obligations, which, albeit not profitable, are of value to society.

There is a general consensus that competition law should apply to all actors in the market, be they public or private,

9 See *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef (DS161) and Canada — Measures Relating to Exports of Wheat and Treatment of Imported Grain (DS276)* and their discussion in OECD (2015b).

10 Ibid. See *China – Certain Measures Affecting Electronic Payment Services* (DS413).

11 Ibid. See *US – Anti Dumping and Countervailing Duties (China)* (DS379) and United States — *Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India* (DS436).

12 Ibid and OECD, 2013a. See the case of Mr. Maffezini versus SODIGA.

13 These refer to Rio Tinto—Chinalco and Canadian oil sands cases. See Kowalski and Perepechay (2015).

and that is also the reality in most Organisation for Economic Co-operation and Development (OECD) countries. SOEs that are corporatised and, therefore, organisationally distinct from the state are generally subject to the same set of competition rules on cartels, abuse of dominance, and mergers as their private counterparts. Most competition laws define their subjective scope as covering the conduct of any "person" or "undertaking," which has been generally interpreted as encompassing any entity engaged in a commercial, economic, or business activity regardless of its ownership, nationality, legal form, or financing. Competition policy is, therefore, a powerful tool to level the playing field by addressing competition concerns stemming from SOE conduct, provided such conduct amounts to an abuse of dominance, cartel participation, or is subject to merger control. This holds true for domestic and foreign SOEs: competition concerns are examined at the market level, which can be local, national, or cross-border, depending on the demand and supply patterns for the goods or services at stake.

However, there may be circumstances where SOEs are exempt from competition rules. This may be the case when they act as the long arm of the government to provide general public services, such as postal services, railways, heath care, etc. Exemptions of this nature often are, and should be, limited and accompanied by appropriate regulation to minimise or neutralise the risk of market distortions.

When confronted with a possible distortion of competition between SOEs and POEs, the first question for competition authorities is whether the distortion is likely to amount to an infringement that can be addressed under competition law (i.e., an abuse or a cartel subject to prohibition and sanctions or a merger subject to control). If so, it must identify the competition tools to address it and the challenges arising from applying competition laws against state-induced violations (Figure 5, circle 3). If not, the question arises as to whether other laws or legal mechanisms can be used to restore competition and competitive neutrality (CN) (circle 2) (OECD, 2015d). CN can be defined as a principle according to which all enterprises, public or private, domestic or foreign, face the same set of rules, and where government's contact, ownership, or involvement in the marketplace, in fact or in law, does not confer an undue competitive advantage on any actual or potential market participant (OECD, 2015d), as discussed further below.

Competition law enforcement (circle 3):

Even though competition law generally applies to both private and public economic entities, competition authorities may face distinct challenges when enforcing it against SOEs. These may be of institutional as well as substantive character.

While the vast majority of competition authorities are impartial in their investigations, it is theoretically conceivable that, in some instances, they could be exposed to the risk of undue government influence. Competition authorities may further lack sufficient statutory power over the SOE, in particular, with respect to industries that are subject to oversight by sector regulatory agencies. Also, while competition law applies equally to domestic and foreign competitors, competition authorities may face practical hurdles in enforcing it effectively against foreign players, notably SOEs linked to foreign governments (OECD, 2015d).

Concerning substantive challenges, competition law enforcers may have to deal with the fact that obtaining relevant information from SOEs could be very difficult, owing to lack of transparency concerning costs and insufficient standard accounting procedures, especially when the SOE carries out various activities. Even where the relevant information can be collected, the application of the traditional competition law tests, such as recoupment in predatory pricing, may be limited, as some SOEs have goals

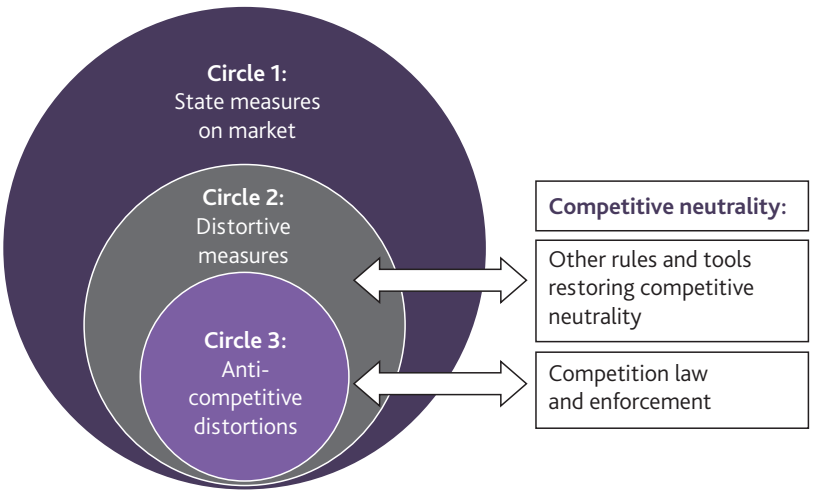


FIGURE 5:

The boundaries of competition law and enforcement

other than profit maximisation, such as maximising revenue and the size of the workforce (OECD, 2011a). It can also be difficult to determine whether an SOE is cross-subsidising, pricing at below competitive levels, or engaging in other anti-competitive conduct. In case of collusion (cartel) or a merger between SOEs owned by the same government, competition authorities are to determine whether they qualify as a single entity (in which case, merger control or cartel prohibition rules do not apply) or rather as separate entities. Some jurisdictions, such as the EU, provide useful criteria to determine when they ought to be treated distinctly, and therefore fall under competition law enforcement. (OECD, 2015a)

Competitive neutrality policies (circle 2):

Competition law alone may not be sufficient in ensuring a level playing field for SOEs and POEs, which is why policies aimed at achieving CN play an essential role (OECD, 2015d, 2015a, 2012, and 2010). There is broad consensus that competition can generate significant benefits by enhancing consumer welfare through the provision of better products and services at a lower cost. These benefits are equally available in purely private markets as well as where private and public enterprises compete. However, SOEs may often benefit from advantages conferred upon them by existing legislative and administrative frameworks, which may have an effect on the quality and cost of the goods and services they provide. These effects include, but are not limited to, lower costs of capital, lesser tax burdens, and lower risks of takeover and bankruptcy. As a consequence, competition between public and private enterprises may be distorted.

Corporate governance tools

There is a broadly held view[14] that SOEs can be operated according to similarly high standards of governance, transparency, and efficiency as stock-market listed companies. When high-standard corporate governance principles are properly implemented by owners of SOEs, the only residual concern for foreign authorities relates to the non-commercial or strategic commercial objectives governments may impose on their SOEs. Particularly in the case of non-commercial objectives, since the expectation is that these will be properly accounted for and disclosed, regulatory action can, when deemed necessary, be easily undertaken.

An increasing number of countries have come to share a commitment to similar principles with respect to best practice corporate governance of SOEs. Mostly, they have been motivated by domestic reform agendas aimed at reducing inefficiencies in the SOE sector and securing a healthy domestic competitive environment. In particular a growing number of emerging economies — as they approach what has been termed "mid-income levels" of development — have implemented reforms consistent with OECD standards, in some cases citing the Guidelines as a point of departure (OECD, 2015f, 2013c). For example, recently the Chinese leadership announced wide-ranging reform plans to expose its SOEs to greater competition and improve their management.[15]

These challenges can also be addressed through a widespread commitment to a CN framework for companies engaged in international commerce. Such a framework would ensure that no company, purely as a result of its ownership, is at a competitive advantage or disadvantage in the marketplace. (OECD, 2012)

The OECD recently developed a "best practice report" identifying priority areas for policymakers that are committed to CN (OECD, 2012). The main conclusion is that governments wishing to obtain and enforce CN need to focus attention on the following seven priority areas:

- Streamline government businesses either in terms of corporate form or the organisation of value chains. An important question when addressing CN is the degree of corporatisation of government business activities and the extent to which commercial and non-commercial activities are structurally separated. Separation makes it easier for commercial activities to operate in a market-consistent way. Incorporating public entities having a commercial activity and operating in competitive, open markets as separate legal entities enhances transparency.

- Ensure transparency and disclosure related to cost allocation. Identifying the costs of any given function of commercial government activity is essential if CN is to be credibly enforced. For incorporated SOEs, the major issue is accounting for costs associated with fulfilling public service obligations (if applicable). For unincorporated entities, problems arise where they provide services in the public interest as well as commercial activities from a joint institutional platform.

- Devise methods to calculate a market-consistent rate of return on business activities. Achieving a commercial rate of return is an important aspect in ensuring that government business activities are operating like comparable businesses. If SOEs operating in a commercial and competitive environment do not have to earn returns at market consistent rates, an inefficient producer may appear cheaper to customers than an efficient one.

- Ensure transparent and adequate compensation for public policy obligations. CN concerns often arise when public policy priorities are imposed on public entities that also operate in the market place. It is important to ensure

14 As expressed for example through the newly revised standard on SOE governance, the OECD Guidelines on Corporate Governance of State-Owned Enterprises (OECD, 2015e). See box 1.

15 See statement made by Chinese Communist Party, Third Plenary Session of the 18th Central Committee

that concerned entities are adequately compensated for any non-commercial requirements on the basis of the additional cost that these requirements impose.

- Ensure that government businesses operate in the same or similar tax and regulatory environments. To ensure CN, government businesses should operate, to the largest extent feasible, in the same or similar tax and regulatory environment as private enterprises. Where government businesses are incorporated according to ordinary company law, tax and regulatory treatment is usually similar or equal to private businesses.

- Debt neutrality remains an important area to tackle if the playing field is to be levelled. The need to avoid concessionary financing of SOEs is commonly accepted since most policymakers recognise the importance of subjecting state-owned businesses to financial market disciplines. However, many government businesses continue to benefit from preferential access to finance in the market due to their explicit or perceived government-backing.

- Promote competitive and non-discriminatory public procurement. The basic criteria for public procurement practices to support CN are: (1) they should be competitive and non-discriminatory; and (2) all public entities allowed to participate in the bidding contest should operate subject to the above standards of CN.

Ongoing negotiations of international trade and investment treaties have grappled with the role of SOEs, and one of the topics for discussion has reportedly been whether it would be more efficient to concentrate on subsidised SOEs operating abroad rather than aim for broader neutrality commitments. At issue is first and foremost the difficulty in assessing and regulating intangible advantages that an internationally active SOE may enjoy, such as, for example, regulatory forbearance and a privileged position in the domestic economy. In this context, again, transparency of the state sector has been one of the central points of discussion. At the same time, it must be recognised that CN is difficult to enforce in the international marketplace unless the participating countries engage in a concurrent commitment to enforcing it at home (OECD, 2015a).

Hence, CN is a useful guidepost for self-regulation, assessment of current practices and international trade and investment discussions.

National investment policies

In most cases, SOEs are treated in the same manner as foreign private investors under domestic regulatory frameworks. However, some countries have domestic rules and regulations that specifically apply to foreign SOEs. Among the 46 adherent countries to the OECD Declaration on International Investment and Multinational Enterprises, 7 countries — Australia, Iceland, Israel, Mexico, Spain, Costa

BOX 1:
The revised 2015 Guidelines on Corporate Governance of State-Owned Enterprises: Strengthened language and further clarity

The revised 2015 Guidelines on Corporate Governance of State-Owned Enterprises: Strengthened language and further clarity

The Guidelines have been expanded and strengthened since they were adopted in 2005 by member governments of the OECD to provide further clarity in three main areas which bear on SOEs in the market place, which include:

1) A new introductory section on "Applicability and definitions" – provides insight on defining an SOE for the purpose of the Guidelines. The section also deals with corporate forms, commercial orientation, defining economic activities and the degree of government control.

2) A new chapter on defining and communicating the rationales for state ownership has been added – with stronger language on the need for governments to identify and disclose the public policy rationales that justify the maintenance of enterprises under state ownership. It builds on existent text on developing an ownership policy. It also calls for governments to define the rationales for owning individual SOEs and subject these to recurrent review; and, his is relevant in the context of competitive neutrality because it helps identify SOEs that deviate from common commercial practices, and whose operating conditions may need to be reviewed to ensure neutrality.

3) A revamped chapter entitled "SOEs in the marketplace" dealing exclusively with competition between SOEs and private enterprises; and how to ensure a level playing field between the two to avoid market distortions when SOEs engage in economic activities. The chapter builds on existent provisions in the previous version of the Guidelines, but includes more explicit text concerning the conditions of both private and public debt and equity financing, rate-of-return requirements, and public procurement procedures.

Rica, and Turkey — have reported specific restrictions on investments by foreign SOEs in their policies related to foreign SOEs. Some countries have lodged reservations to the OECD Code of Liberalisation of Capital Movements, others have notified exceptions to the national treatment commitment laid down by the Declaration or notified the OECD of "for transparency" of measures that are not formally discriminatory but may nevertheless be onerous for SOE entrants. (OECD, 2015g)

Among these measures, some apply to all investments by foreign SOEs across the sectors (e.g., Australia, Iceland, and Spain), while others are sector specific, applicable to investments by foreign SOEs in certain sectors (e.g., Costa Rica, Israel, Mexico, and Turkey). Among countries having foreign investment review mechanisms, four countries — Australia, Canada,[16] the Russian Federation, and the United States (US) — have rules specifically addressing inward investments by foreign SOEs. In most instances, these rules do not appear to seek to deter investments by foreign SOEs as such or to treat them less favourably. (OECD, 2015h)

However, in these cases it could become more likely that SOEs are subject to a review or they may be more thoroughly reviewed in certain countries. The fact that such rules have been the subject of clarifications in some countries in the recent period signals heightened attention to investment by foreign SOEs on the part of recipient countries.

INTERNATIONAL POLICIES AND INSTRUMENTS

Some of the relevant binding international rules that discipline discriminatory government behaviour related to SOEs can already be found in WTO law as well as certain regional and preferential trade agreements (PTAs) and bilateral investment treaties.

Overall, WTO rules concentrate generally not on actions of enterprises, but on discriminatory actions of governments. They do however also discipline actions by certain enterprises that can be proven to exercise governmental functions. Thus, in principle WTO rules cover a broad range of relevant anti-competitive practices related to state enterprises. Still, uncertainty exists as to what can be understood by governmental functions in different competitive contexts and different countries.

First, there are the WTO rules that discipline some of the trade-distorting government policies that may be directed at state enterprises. For example, the current rules of the SCM Agreement prohibit or discipline various forms of trade-distorting financial preferences irrespective of whether they are granted to state or private firms. Another example is GATT Article III on national treatment, which bans discrimination favouring domestic producers, including state enterprises.

In addition, in principle, all WTO obligations (e.g. most-favoured nation, national treatment, bans on import and export restrictions) can be applied to state enterprises if the complainant in a dispute is able to demonstrate that such enterprises are acting under governmental instructions. For example, whether state enterprises are disciplined by the SCM rules as granters of subsidies depends on whether they can be considered a "public body." WTO case law has recently established that ownership is a relevant criterion in the determination of whether an entity is a "public body," but it is not a determining factor. Determination of "public body" statute has to reflect on what are considered government functions in the legal order of the country in question, but it may also consider what features are normally exhibited by public bodies. This approach does not single out any particular type of entities that can be considered as vehicles of subsidies, which lends it useful flexibility. On the other hand, it can be seen as creating uncertainty.[17]

In addition, a number of specific WTO provisions, such as Article XVII of the GATT, discipline some practices in which certain types of enterprises can be used by governments as vehicles to influence international trade. The narrow definition of STEs by this Article means, however, that it is of limited use when it comes to curbing anti-competitive actions of state enterprises seen more typically in global markets today (i.e., those that are influenced by the state but have not been granted exclusive or special rights or privileges).[18]

The GATS does not refer to state enterprises, STEs, or SOEs explicitly, but contains two related concepts. Article I:3(b) of the GATS carves out from the scope of the Agreement "services provided in the exercise of governmental authority." These services are defined as services "supplied neither on a commercial basis nor in competition with one or more service suppliers." The GATS also contains disciplines concerning monopolies that apply to both public and private monopolies. Under GATS Article XVIII, members must ensure that monopoly suppliers act in a manner consistent with members' specific commitments, as well as with the most-favoured nation (MFN) obligation. An important gap in the area of services, however, is the absence of specific WTO disciplines — equivalent to the SCMA in the area of goods — on subsidies in the services sector. This is a significant omission considering the important presence of state enterprises in the services sector as well as the vertical links observed between goods and services sectors.

16 Canada is a specific case: whereas its national security review does not explicitly distinguish between foreign private investment and SOE investment, concerns related to non-commercial activity by SOEs are dealt with under the general Investment Canada Act "net benefit" review.

17 *See* OECD (2015b) for a more detailed discussion of the "public body" concept.

18 Ibid.

Preferential trade agreements and international investment agreements

Some additional rules related to state enterprises have been added in selected existing PTAs, including most notably the recently concluded Trans-Pacific Partnership (TPP) (see below), and some new ones are being currently negotiated in the Transatlantic Trade and Investment Partnership (TTIP) negotiations. In general, they build on and try to fill the gaps in the existing WTO rules by providing clearer definitions of state enterprises; more precise interpretations of certain related concepts; and by including additional obligations, for example, on transparency and consultation.

For example, in the North American Free Trade Agreement (NAFTA), US-Korea or Colombia-US free-trade agreements (FTAs), SOEs are obliged by the same non-discriminatory obligations as governments. The US-Singapore FTA has additional transparency provisions, prohibiting direct government influence on SOEs, collusion, and other anticompetitive activities and foresees a progressive reduction in the number of Singapore's SOEs. The Singapore-Australia FTA also has extensive references to CN. Some PTAs contain provisions on services or the so-called "trade +" provisions on intellectual property rights, technical barriers to trade, or investment and competition, which may also be extended to state enterprises. (OECD, 2015a)

In October 2015, 12 countries — including countries with important state sectors, such as Malaysia, Singapore, or Viet Nam — concluded negotiations on additional disciplines on SOEs in the TPP. While, at the time of writing this think piece, the final shape of new provisions has been known only for a short time and deserves a separate detailed analysis, it is clear that TPP Chapter 17 on "State-Owned Enterprises and Designated Monopolies" introduces a new level of ambition of international commitments with respect to SOEs. The key distinguishing features include: the clear focus on majority ownership and control through ownership interests; coverage of activities of SOEs that affect trade, in both goods and services;[19] and investment between TPP parties, including in third markets; specific definitions of advantages granted to SOEs in the form of non-commercial assistance and definitions of related adverse effects and injury; requirement of both non-discrimination and commercial considerations when engaging in commercial activities; more extensive transparency provisions; and inclusion of provisions on dispute settlement.

Disciplines on state enterprises are also being discussed in another potential mega trade deal — the TTIP between the US and the EU — which will involve several economies with important state sectors from both Western and Eastern Europe. When it comes to defining state enterprises, the EU's public initial proposal for legal text makes, among others, references to state ownership, voting rights that may be held by the state, as well as the ability of states to appoint members of administrative, supervisory, and managerial boards. It also includes some of the terms used in the WTO, including "enterprises granted special and exclusive rights and privileges" as well as "commercial considerations" of state enterprises. The initial proposal also made express reference to the OECD Guidelines on Corporate Governance of State-Owned Enterprises as a source of good practices for governance and transparency of SOEs.[20]

With respect to international investment agreements (IIAs), the majority do not distinguish between investors on the basis of ownership. Of 1,813 agreements surveyed by the OECD, 1,524 do not explicitly mention SOEs in the definition of investor or investment. Figure 6 presents the number of IIAs concluded annually between 1960 and 2013 (left-hand axis). It also shows the share of IIAs that explicitly refer to one or more categories of SOEs in the investor definition (right-hand axis). The frequency of treaties that explicitly include SOEs among the protected investors is clearly rising. Until the early 1980s, very few treaties mentioned SOEs in the investor definition. The number of treaties referring to SOEs gradually increased along with the increase of number of IIAs starting in the early 1990s. In the past few years, IIAs have come to address SOEs regularly. All five of the surveyed IIAs concluded in 2013 explicitly cover international investments by SOEs. At the same time, a general trend toward more sophisticated and detailed treaties has been observed; thus, the trend toward more frequent treaty references to SOEs would be part of a broader development in investment treaty practice. In addition, since most of the existing treaties were drafted before SOEs became prominent in the global marketplace, the relative infrequency of explicit references to SOEs may reflect the fact that not much attention would have been paid to them as investors at the time of drafting.

The fact that the majority of the IIAs do not mention SOEs in the definition of investor could give rise to some uncertainty with respect to the coverage of these agreements to SOEs, although it may be reasonably assumed that they are nonetheless covered by the treaties unless explicitly excluded. However, the issue has not yet been tested frequently in treaty-based arbitration cases. In addition, the recent trend that more countries have started to include an explicit coverage of such types of investors in IIAs and the general increase in the specificities of these investors may in the future exacerbate the need for clarification. Explicit exclusion of SOEs from IIA coverage is rare.

Some IIAs include provisions that attempt to ensure fair competition between SOEs and POEs, or specifically mention the principles of CN. This is mainly the case in IIAs negotiated by the US, Australia, New Zealand and Singapore. These provisions can usually be found in the competition or state enterprise chapters of modern PTAs, but also in relatively old

19 With the important exception of financial services.

20 See: http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153030.pdf

bilateral investment treaties (BITs) concluded by the US. For example, Article II.7 of US–Senegal BIT (1983) provides:

> The Parties recognize that, consistent with paragraphs 1 and 2 of this Article, conditions of competitive equality should be maintained where investments owned or controlled by a Party or its agencies or instrumentalities are in competition, within the territory of such Party, with privately owned or controlled investments of nationals or companies of the other Party.

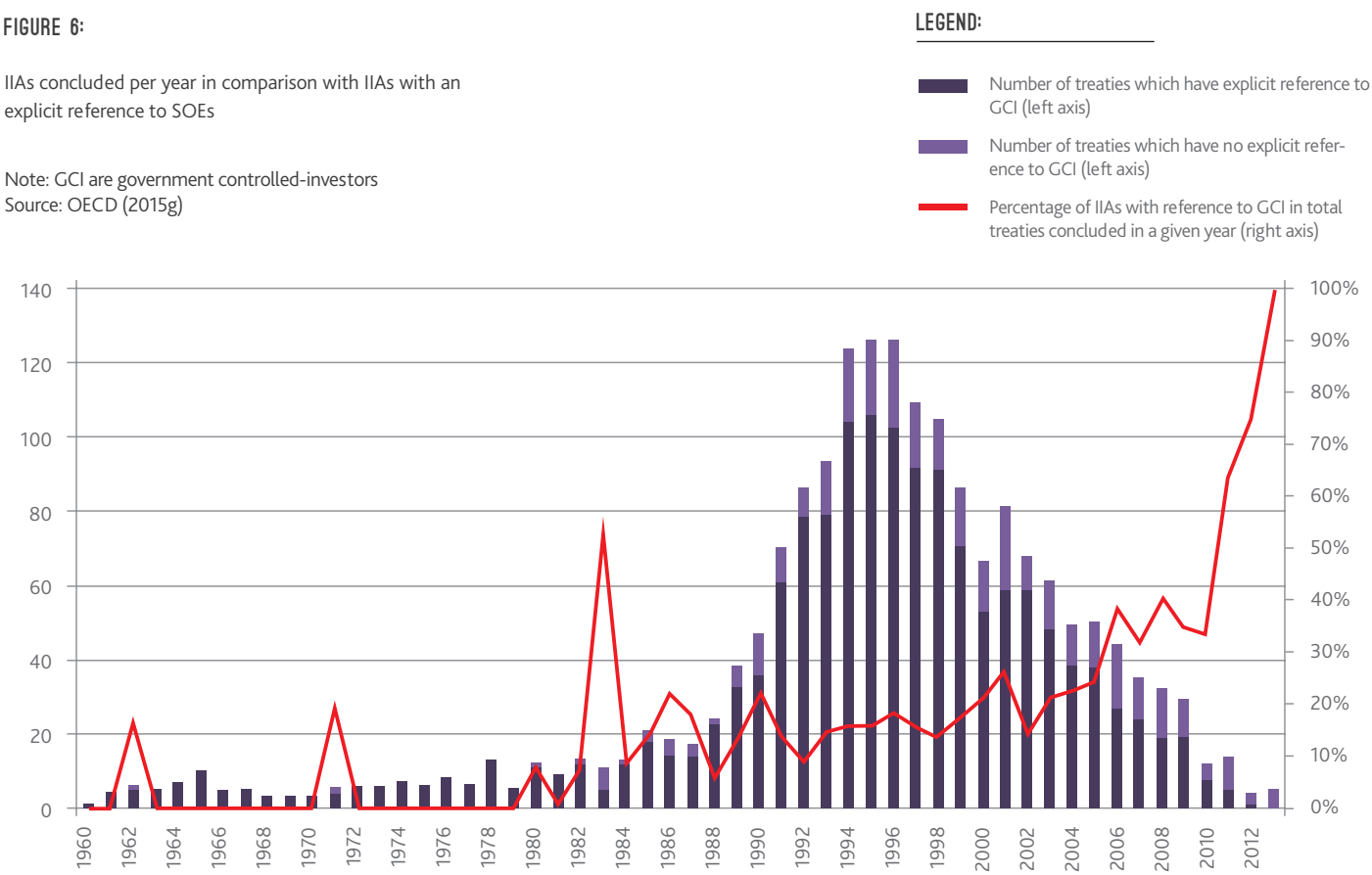
More recently, the Singapore-Australia FTA (SAFTA) (2003) has a provision stating that "[t]he Parties shall take reasonable measures to ensure that governments at all levels do not provide any competitive advantage to any government-owned businesses in their business activities simply because they are government owned." Similar provisions are found in Article 15.4 of the Singapore–Korea FTA (2005) and Article 14.5 of the Australia–Chile FTA (2008). The US–Australia FTA (AFTA) (2004) (Article 14.4 on State Enterprises and Related Matters) provides that "the Parties recognize that state enterprises should not operate in a manner that creates obstacles to trade and investment" and then describes different commitments that each party made. Australia specifically committed to CN by promising that "Australia shall take reasonable measures, including through its policy of CN, to ensure that its governments at all levels do not provide any competitive advantage to any government businesses simply because they are government-owned".

Overall, the types of SOE-related provisions seen in PTAs and IIAs naturally reflect specificities and sensitivities of the signatory countries and can differ from one agreement to another. While they provide some indications of directions in which multilateral rules could evolve in the future, the potential for their harmonisation at the multilateral level remains unclear. Still, given the economic significance of countries involved in the TPP and TTIP negotiations, the provisions that have been, or will be, agreed may have important implications not only for the concerned parties, but also for third countries and for future bilateral, regional, and multilateral trade and investment agreements.

FIGURE 6:

IIAs concluded per year in comparison with IIAs with an explicit reference to SOEs

Note: GCI are government controlled-investors
Source: OECD (2015g)



LOOKING AHEAD: ANTICIPATING FUTURE POLICY CONSIDERATIONS

As this paper has documented, the existing policy toolbox is well equipped to deal with many concerns related to governments as competitors in global markets. At the domestic level, some countries and jurisdictions, in particular those that have progressed on the path of liberalisation the furthest, have used a wide selection of these tools that put in place relatively comprehensive frameworks to address competitive distortions caused by state intervention (including subsidies), as for example the European Union Rules on State Aid and Australia's CN policy (OECD, 2012, 2010). In a cross-border context, an overarching commitment to CN might eliminate almost all concerns about internationally operating SOEs. However, it would need to rely on a strong element of self-regulation by enterprise owners, as well as transparency, monitoring, and peer review mechanisms, as the ability to enforce domestic CN frameworks extraterritorially might be limited.

Given this uneven policy "coverage," the argument can be made that some sort of multilateral agreement — or amendments to already existing agreements — might be called for. One of the main concerns is that, in the absence of such an agreement, governments could increasingly resort to their bluntest policy instrument — denial of market access to SOEs or other state-invested enterprises. It would, therefore, seem desirable to reach some form of mutual international agreement.

What might such an agreement look like? In terms of the type of agreement, the options could range from voluntary guidelines or principles, to legally binding rules. Since the main objective in this instance is to establish a shared understanding of how to support a level playing field for POEs and SOEs in global markets, all of these options could be expected to play a useful role. Indeed, to the extent that most cases of egregious anti-competitive conduct could arguably be dealt with using existing instruments; additional voluntary guidelines could usefully serve to support a shared understanding and underpin the participants' commitment to maintaining a level playing field, while keeping markets open.

Apart from the question as to the form that an eventual agreement could take, clearly a case can be made for exploring options. The current framework is arguably too *ad hoc* and uneven to cover what has become an increasingly important feature in global trade and investment. An important distinction that can be made in this context is the nature of concerns and the nature, depth, and coverage of disciplines in the areas of international investment and international trade. On the one hand, SOEs as foreign investors are subject to the same regulatory framework and transparency rules in the host country as any other investor. CN can, therefore, be more easily ensured in the post-establishment phase where such rules may apply.[21] The situation is different in the case where POEs compete with SOEs in SOEs' home markets or in international markets at arms-length. CN is less likely in these scenarios. These differing concerns are perhaps also reflected in the differences in the international regulation of trade and investment activities of SOEs. In the area of investment, pre-establishment policies with respect to SOEs are not bound by international obligations, and in principle SOEs can be held up to higher standards (e.g., stricter screening). In international trade agreements, countries tend to commit not to discriminate against SOEs under the condition that the former play by market rules in their commercial activities. These differences, and the reality of global value chains, which increasingly bring trade and investment activities together and blur the lines between the different policy domains, suggest a need for a more careful comparison of trade and investment rules in this area.

Fortunately, the key ingredient required for the negotiation of an international agreement is in place: the main actors involved share a clear mutual interest. On one side, as countries with important SOEs become more international, they will want to ensure that concerns about their trade and investments do not lead to markets closing. On the other side, countries that are committed to open trade and investment regimes want to feel confident that this openness will not give rise to unfairness and distortions.

At the same time, views on how to obtain an international level playing field in practice differ. Should future policy responses target specific types of enterprises or should they be more universal? Since SOEs and POEs alike can in principle be favoured by the state, some argue for ownership-neutral rules and advocate disciplining the use of various types of state intervention that can influence the competitive position of market players rather than focusing on ownership per se. SOEs are also not a homogeneous category; entities owned by countries with strong SOE governance rules should likely be treated differently from those owned by countries where such rules are lax. Others argue that ownership implies certain interests, rights, and obligations, and may effectively mean that the government combines the roles of a regulator, regulation enforcer, and business owner. From the latter perspective, there is a case for a state ownership-specific approach to regulation. It is not yet clear which should be the dominant approach in future international trade agreements. This suggests that further consideration of the definition or taxonomy of entities that should be the focus of guidance of

21 Still, the issue of subsidisation may be less well covered in some countries that do not have rules on state aid.

disciplines and advantages extended to them by governments as well as the collection of more disaggregated data on these issues are obvious areas for further exploration

The OECD, through its work on "State-Owned Enterprises in the Global Market Place" is looking at these issues from a multidisciplinary approach (bringing together competition, investment, corporate governance, and trade policy perspectives) (OECD, 2015a). It is clear that all communities agree on the paramount importance of keeping the global economy open to trade and investment — but all also agree that specific concerns, such as CN and the transparency of SOEs, remain to be addressed. The recently revised OECD Guidelines on Corporate Governance of SOEs are a cornerstone to efficiency and fair competition.

The ongoing work in this area can help to enhance the inter-governmental and multi-stakeholder dialogue, especially in light of commitments to a level playing field increasingly embedded in bilateral and regional trade and investment treaties. With its existing disciplines, the OECD can be a good place to start to create a knowledge-sharing platform on these issues, involving emerging economies and cooperating with other international organisations.

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