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# Seeking Development in the Neoliberal World: China's State-owned Enterprises Reforms in the Context of International Economic Law

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*This research examines China's development in terms of the nation's SOE reforms surrounding the two major milestones in China's integration with neoliberalism, the accession to the World Trade Organization and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). It considers the interlinking of the legal aspect of China's SOEs reform with its economic development, and reinforces the economic argument that China has embraced both neoliberalism and state-capitalism in order to achieve its industrial development. This paper highlights the persistent logic of China's SOEs reform which aims to approach international legal standards while keeping sight of the objectives of economic development. China's semi-embrace of neoliberalism and its insistence on state capitalism, on the one hand, provide an alternative developmental model for other developing countries, while on the other hand, facing an increasingly deteriorating relationship with the US which cannot tolerate any rising power that challenges its hegemony, especially a power with a different ideology.*

## Keywords

Developmental State, Neoliberal Economic Order, State-owned Enterprises, Commercial Operation, Corporatization

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## I. Introduction

In recent years, a strand of economic scholarship reveals that China has the dual faces of neoliberalism and state capitalism<sup>1</sup> in its integration with the global economy. For example, Graaff argues that while China pragmatically adapts to the neoliberal globalization, it simultaneously adheres to “its distinctive state-directed capitalism and the (Party) direction.”<sup>2</sup> Weber and Qi point out that China’s system reflects a strong state “deeply entwined with a fundamentally marketized economy,” and that state-market relations are under the control of the state more in essential industries than in nonessential industries.<sup>3</sup> Hsueh posits that China has exercised a bifurcated strategy which enhances “both the role of markets and the state’s authority over industry as China integrates into the international economy.”<sup>4</sup> In the similar vein, but with a narrower focus, Tan finds that China’s trading behavior after its WTO accession is a result of both embracement and resistance of market forces.<sup>5</sup>

State capitalism and development often intersect and overlap,<sup>6</sup> because state capitalism mainly serves the purpose of development. As one of the principal mechanisms of state capitalism, state-owned enterprises (SOEs)<sup>7</sup> also assume the public policy function of promoting economic development.<sup>8</sup> SOEs in China are important implementers of the government’s developmental goals and are increasingly feeling the constraints of international economic law as China seeks integration with the global economy.

This article aims to scrutinize China’s SOE reforms in the light of its international obligations for the dual purposes of integrating into the neoliberal network and maintaining its developmental state trait. After tracing the long-term recurring pattern

<sup>1</sup> For details on China’s state capitalism, see STATE CAPITALISM, INSTITUTIONAL ADAPTATION, AND THE CHINESE MIRACLE 20 (Barry Naughton & Kellee Tsai eds., 2015).

<sup>2</sup> Nana Graaff, *China Inc. Goes Global. Transnational and National Networks of China’s Globalizing Business Elite*, 27(2) REV. INT’L POL. ECON. 208 (2022).

<sup>3</sup> Isabella Weber & Hao Qi, *The State-Constituted Market Economy: A Conceptual Framework for China’s State-Market Relations* (Working Paper No. 2022-01), at 4, <https://www.econstor.eu/bitstream/10419/266991/1/1785223305.pdf>.

<sup>4</sup> ROSELYN HSUEH, CHINA’S REGULATORY STATE: A NEW STRATEGY FOR GLOBALIZATION 5 (2011).

<sup>5</sup> Yeling Tan, *Disaggregating “China, Inc.”: The Hierarchical Politics of WTO Entry*, 53(13) COMP. POL. STUD. 2118-52 (2020).

<sup>6</sup> LALITA SOM, STATE CAPITALISM: WHY SOES MATTER AND THE CHALLENGES THEY FACE 27 (2022).

<sup>7</sup> Benjamin Liebman & Curtis Milhaupt, *Introduction: The Institutional Implications of China’s Economic Development, in REGULATING THE VISIBLE HAND? THE INSTITUTIONAL IMPLICATIONS OF CHINESE STATE CAPITALISM* xiii–xxvi (Benjamin Liebman & Curtis Milhaupt eds., 2016).

<sup>8</sup> OECD, STATE-OWNED ENTERPRISES IN THE DEVELOPMENT PROCESS 152 (2015).

embedded in China's SOE reform measures under the pressure of international rules, this research reconfirms the existing economic scholarship regarding China's dual faces of neoliberalism and state capitalism in the context of international economic law. This article jumps outside the box of conventional legal study and presents a contextual reading of legal measures through a social-legal lens. It also contributes to the study of development by providing supportive evidence from the discipline of law, and offering a better understanding of the interaction between state capitalism and neoliberalism in China, which requires a multi-disciplinary approach.

This paper is composed of four parts including a short Introduction and Conclusion. Part two will discuss SOEs as a development instrument for China. Part three will analyze the two major waves of reform related to China's accession to the WTO and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). It will highlight China's SOE reform measures that both embrace neoliberal rules while maintaining China's intention of SOEs-driven development. Part four concludes.

## II. SOEs as a Development Instrument for China

### A. China as a Developmental State

China is often said to have followed earlier development experiences of East Asian countries which were dubbed "developmental states."<sup>9</sup> In the 1980s and 1990s, economists found that East Asian countries achieved economic growth because they adopted the developmental state model characterized by heavy state intervention in the economy.<sup>10</sup> China's economic development gradually caught up with that of other East Asian countries, following its decision to "open up" in 1978. It did so by selectively adapting the policies of other East Asian countries, taking into account both internal and external social factors. For example, internally, given its vast national

<sup>9</sup> Seung-Wook Baek, *Does China Follow "The East Asian Development Model"?*, 35(4) J. CONTEMP. ASIA 485-98 (2005); Mark Beeson, *Developmental States in East Asia: A Comparison of the Japanese and Chinese experiences*, 33(2) ASIAN PERSPEC. 5-39 (2009); John Knight, *China as a Developmental State*, 37(10) WORLD ECON. 1335-47 (2014); Wei Chen & Shu Keng, *The Chinese Developmental State in Transition: In Light of the East Asian Experiences*, 2(2) J. CHINESE GOVERNANCE 209-22 (2017).

<sup>10</sup> CHALMERS JOHNSON, *MITI AND THE JAPANESE MIRACLE: THE GROWTH OF INDUSTRIAL POLICY, 1925-1975*, 318 (1982); ALICE AMSDEN, *ASIA'S NEXT GIANT: SOUTH KOREA AND LATE INDUSTRIALIZATION* 320 (1989); ROBERT WADE, *GOVERNING THE MARKET: ECONOMIC THEORY AND THE ROLE OF GOVERNMENT IN EAST ASIAN INDUSTRIALIZATION* 370 (1990); PETER EVANS, *EMBEDDED AUTONOMY: STATES AND INDUSTRIAL TRANSFORMATION* 218 (1995).

scale which comprises numerous subnational governments, China faces distinct local issues, more so than other East Asian developmental states. Heberer calls China a “Developmental State 3.0” which exhibits strong state capacity at both the central and local level.<sup>11</sup> Externally, given that China’s economic takeoff occurred later than other East Asian countries, and overlapped with the emergence of neoliberalism, China “creatively adapted and re-purposed regulatory logics from the Washington Consensus and East Asian policies to consolidate its own version of Leninist state-led development.”<sup>12</sup>

Among the distinctive features of the Chinese developmental state, the most salient one is the strong public sector with thriving SOEs. China’s reliance on SOEs for the state-led industrialization is substantially different from the experience of conventional East Asian developmental states which rely on public-private partnerships.<sup>13</sup> While traditional developmental states achieved success by reinforcing state-business relations, China has demonstrated that state-state relations, represented by SOEs, can also facilitate development policies.<sup>14</sup> The United States Trade Representative (USTR) stated: “China pursues a wide array of continually evolving interventionist policies and practices ...”<sup>15</sup>

Tan states, “in comparison to the government-business relationship in the East Asian case, the Chinese government had much more direct control over the state enterprises. Chinese state was able to push forward industrialization more forcefully than the East Asian governments that did not have an organizational grip over the private companies.”<sup>16</sup> Horesh & Lim see China as a variant of the East Asian developmental state given “the CPC’s direct economic involvement in the large state-owned sector and its spatially uneven and socially unequal development pattern.”<sup>17</sup>

Similarly, Gabusi argues that China is a peculiar form of developmental state “with private property being introduced while maintaining a strong component of State-Owned Enterprises (SOEs) in strategic industries.”<sup>18</sup> As China is an East Asian

11 Thomas Heberer, *The Chinese ‘Developmental State 3.0’ and the Resilience of Authoritarianism*, 1(4) J. CHINESE GOVERNANCE 611-32 (2016).

12 Niv Horesh & Kean Fan Lim, *China: An East Asian Alternative to Neoliberalism?*, 30(4) PAC. REV. 425-42 (2016).

13 ANDRZEJ BOLESTA, CHINA AND POST-SOCIALIST DEVELOPMENT 252 (2014).

14 Jewellord Singh & Geoffrey Chen, *State-owned Enterprises and The Political Economy of State-state Relations in The Developing World*, 39(6) THIRD WORLD Q. 1077-97 (2017).

15 USTR, 2022 Report to Congress on China’s WTO Compliance, at 9, <https://ustr.gov/sites/default/files/files/reports/2022/2022USTRReportCongressChinaWTOCompliance.pdf>.

16 LI TAN, INSTITUTIONS AND CHINESE ECONOMIC DEVELOPMENT: A COMPARATIVE HISTORICAL APPROACH 152 (2021).

17 Horesh & Lim, *supra* note 12, at 438.

18 Giuseppe Gabusi, *The Reports of My Death Have Been Greatly Exaggerated: China and the Developmental State 25 years after Governing the Market*, 30(2) PAC. REV. 232-50 (2016).

developmental state,<sup>19</sup> it retains interventionist tradition and has its own fully-fledged SOEs.

## B. SOEs' Contribution to China's Developmental State

In regard to China's development, the promotion of SOEs was the only option at the economic takeoff stage "given the lack of capital, unwillingness of foreign firms to invest, and the relative backwardness of domestic capitalists."<sup>20</sup> "The existence of state-owned enterprises offers an adaptive, efficacious strategy" in developing countries.<sup>21</sup> In the era of globalization, SOEs are also crucial to the generation of long-term growth due to their functions such as "countering monopoly pricing, evenly distributing economic surpluses, and subsidizing and promoting cheaper inputs in industrialization."<sup>22</sup> Particularly in China, the "higher share of state-owned enterprises is favorable to long-run growth and tends to offset the adverse effect of economic downturns on the regional level."<sup>23</sup>

SOEs used to play an overwhelmingly dominant role in China's planned economy era and gradually lost their impact during the reform era. SOEs' contribution to China's gross domestic product decreased dramatically from around 77.6% in 1978 to around 30% in 2004,<sup>24</sup> and have more or less stayed at this level ever since. While private economy, which accounts for more than two thirds of China's GDP, has been the engine that propelled China's economic growth in the past decades,<sup>25</sup> this does not diminish the role of SOEs in the economy. Although no longer the major contributor to China's GDP and employment, SOEs have been essential to China's economic development, especially in the context of China's integration with the

<sup>19</sup> Beeson, *supra* note 9. As was opined by scholars cited in *supra* note 10, East Asian developmental states are mainly characterized by heavy state intervention in the economy. Beeson notes more concretely that the key quality of developmental state is that "it planned the development process rather than relied on market forces to determine the optimal allocation of resources."

<sup>20</sup> Singh & Chen, *supra* note 14, at 1082.

<sup>21</sup> Yunhua Liu, *A Comparison of China's State-Owned Enterprises and Their Counterparts in the United States: Performance and Regulatory Policy*, 69(1) PUB. ADM. REV. S46-S52 (2009).

<sup>22</sup> Ha-Joon Chang, *State-Owned Enterprise Reform* (UN DESA Policy Notes, 2007), at 12-3, <https://state-owned-enterprises.worldbank.org/sites/soe/files/reports/State-Owned%20Enterprise%20Reform.pdf>.

<sup>23</sup> Hao Qi & David Kotz, *The Impact of State-Owned Enterprises on China's Economic Growth*, 52(1) REV. RADICAL POL. ECON. 96-114 (2020).

<sup>24</sup> OECD, *State Owned Enterprises in China: Reviewing the Evidence* (OECD Working Group on Privatisation and Corporate Governance of State-Owned Assets Occasional Paper, 2008), at 6, [https://one.oecd.org/document/DAF/CA/PRIV/RD\(2008\)14/en/pdf](https://one.oecd.org/document/DAF/CA/PRIV/RD(2008)14/en/pdf).

<sup>25</sup> Rainer Zitelmann, *State Capitalism? No, The Private Sector Was and Is the Main Driver of China's Economic Growth*, Foundation for Economic Education (Oct. 17, 2019), <https://fee.org/articles/state-capitalism-no-the-private-sector-remains-the-driver-of-china-s-economic-growth>.

global economy for the following reasons.<sup>26</sup>

First, SOEs are China's most powerful enterprises to compete with its foreign counterparts. Through the concentration of state ownership, China was able to "take full advantage of economic scale and technological spillover effects" and create national champions that could compete with Western giants.<sup>27</sup> As of 2023, China has 142 seats on the Fortune Global 500 list, ranking first for five consecutive years. Of these 142 large corporations, 97 are SOEs among which 57 are national SOEs and 40 are subnational.<sup>28</sup>

Second, SOEs' cheap input into downstream industries increases the productivity of China's overall industrial sector and strengthens the competitive advantage of Chinese enterprises. Although China's SOEs retreat from many industries since the 1990s as China liberalized its market to join the WTO, these enterprises have monopolized essential industries related to national security, utilities such as electricity, telecommunication services, and key raw materials. The SOEs' monopoly in these industries enables them to provide low-priced resources such as energy, water, among others, to domestic downstream industries,<sup>29</sup> which gives the latter a competitive advantage in both domestic and international markets.

Third, SOEs have been key implementers of China's development goals. As Bolesta states: "[t]he Chinese government's overall state policy is to entrust the development of targeted industries and realize this goal through SOEs given that SOEs are easier to control and influence."<sup>30</sup> Throughout China's reform era, SOEs have been required to pioneer the development of strategic emerging industries and new technologies. During the early stages of China's development, SOEs implemented "China's industrial policy to foster innovation by way of forming SOE joint ventures involving significant foreign investment which transfers advanced technology to China."<sup>31</sup> As China's economic status grows and seeks expansion in the global market, SOEs have become the main driver of China's "going out" strategy,<sup>32</sup> and the main implementer

<sup>26</sup> Barry Naughton, *The Current Wave of State Enterprise Reform in China: A Preliminary Appraisal*, 12(2) *ASIAN ECON. POL'Y REV.* 282-98 (2017).

<sup>27</sup> Hong Yu, *The Ascendancy of State-owned Enterprises in China: Development, Controversy and Problems*, 23(85) *J. CONTEMP. CHINA* 164 (2014).

<sup>28</sup> Qingshan Liu, *97 State-owned Enterprises Listed on the 2023 Fortune Global 500 list* [97家国企入选2023年度《财富》世界500强名单], *CHINA ENTERPRISE NEWS* [中国企业报] (Aug. 7, 2023), [https://h5.ifeng.com/c/vivo/v002VZgazTJWFObMEs-\\_cAvnLOd918YbsaBzi4W8WrTjID24\\_\\_?isNews=1](https://h5.ifeng.com/c/vivo/v002VZgazTJWFObMEs-_cAvnLOd918YbsaBzi4W8WrTjID24__?isNews=1).

<sup>29</sup> SOM, *supra* note 6, at 133.

<sup>30</sup> BOLESTA, *supra* note 13, at 212.

<sup>31</sup> SOM, *supra* note 6, at 35.

<sup>32</sup> Chih-shian Liou, *The Politics of China's "Going Out" Strategy: Overseas Expansion of Central State-Owned Enterprises* 7 (unpublished PhD dissertation, The University of Texas at Austin, 2010), <https://core.ac.uk/download/5185918.pdf>.

of China's Belt and Road Initiative.

In general, "China's SOEs have been crucial to the success of its economic reform and transformation process which started more than three decades ago,"<sup>33</sup> and the Chinese leadership "aspired to create next-generation SOEs with the market share, technology and capital to go head-to-head with foreign multinationals at home and abroad."<sup>34</sup>

### III. China's SOE Reforms in the Context of International Economic Law

#### A. China's SOE Reforms in the Course of the WTO Accession (1990s-2000s)

##### 1. The WTO Rules for China's SOEs

When the WTO was established, SOEs did not appear to be a sensitive issue requiring regulations and provisions. The most relevant provision for SOEs under the WTO framework is GATT Article 17, which loosely provides that state-trading enterprises should follow the requirements of non-discrimination and commercial considerations in trade. However, SOEs became a core issue at the time of China's WTO accession negotiation given Western countries' concern about China's planned-economy legacy and state control of the economy. As was commented by Blumental, "reform of bloated inefficient state-owned enterprises (SOEs) ... is at the crux of the issues concerning China's accession to the WTO. The problem of SOEs ... underlies negotiations on market access and elimination of non-tariff barriers."<sup>35</sup>

In its WTO accession package, China made the liberal commitment that Chinese SOEs should operate as commercial entities without government intervention.<sup>36</sup> Also, China dispelled trading partners' concerns about SOE subsidies by undertaking to mitigate trading partners' obligation in countervailing investigation.<sup>37</sup> This means

<sup>33</sup> SOM, *supra* note 6, at 113.

<sup>34</sup> Wendy Leutert & Sarah Eaton, *Deepening Not Departure: Xi Jinping's Governance of China's State-owned Economy*, 248(S1) CHINA Q. 200-21 (2021).

<sup>35</sup> David Blumental, "Reform" or "Opening"? *Reform of China's State-Owned Enterprises and WTO Accession – The Dilemma of Applying GATT to Marketing Economies*, 16(2) PAC. BASIN L. J. 198-262 (1997).

<sup>36</sup> WTO, Report of the Working Party on the Accession of China, WTO Doc. WT/ACC/CHN/49 (Oct. 1, 2001), at ¶¶ 46 & 172, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/ACC/CHN49.pdf&Open=True>.

<sup>37</sup> This commitment treats all subsidies to China's SOEs as specific and does not require China's trading partners to conduct the normal specificity test in SCM agreement. *See* WTO, Protocol on the Accession of the People's Republic of China, WTO Doc. WT/L/432 (Nov. 23, 2001), at ¶ 10.2, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q/>

that China's trading partners do not need to conduct the specificity test as was required in Article 2 of SCM agreement when determining SOEs-related subsidies. In addition, China committed to notify<sup>38</sup> and reduce SOEs subsidies.<sup>39</sup>

Hence, after its WTO accession, China was required to not only follow the general WTO rules regarding SOEs in GATT Article 17, but also meet the obligations specified in its WTO accession package. These obligations required China to eliminate subsidies to SOEs; make SOEs operate on commercial basis without government intervention; and enable China's trading partners to countervail SOE subsidies more easily. "In a sense, China's WTO accession is all about opening its inefficient state sector to foreign competition, thereby accelerating the SOE reform. The comprehensive market access commitments China has made are bound to exert tremendous pressure on its SOEs."<sup>40</sup> In practice, China did engage in groundbreaking SOE reforms in order to meet these commitments. However, China's SOE reforms were not totally oriented to the Western-style market economy as was expected by China's major trading partners such as the US and the EU.

## 2. China's SOE Reforms related to the WTO Accession

China joined the WTO in 2001 and made significant reforms to its domestic legal and economic systems in compliance with the WTO rules, including the reform of SOEs. For example, China started to experiment with trade liberalization in certain special economic sectors and implemented reform measures such as unilateral tariff reduction and the expansion of trading rights as early as the 1980s to prepare for its WTO accession negotiations.<sup>41</sup> Soon after the WTO accession, China engaged in the largest legislative revamp in history to comply with the WTO rules by amending or repealing laws and regulations at both the central and local levels.<sup>42</sup> In the years following its membership of the WTO, China continued to implement sporadic reforms to align its system with the WTO.

China's SOE reforms have continued for years both before and after China's WTO accession. Notably, the SOEs reform is not only driven by China's commitment in

WT/L/432.pdf&Open=True.

<sup>38</sup> *Id.* at annex 5A [Notification Pursuant to Article XXV of the Agreement on Subsidies and Countervailing Measures].

<sup>39</sup> *Id.* at ¶ 10.3, annex 5B [Subsidies to be Phased out].

<sup>40</sup> Julia Ya Qin, *WTO Regulation of Subsidies to State-Owned Enterprises (SOEs) – A Critical Appraisal of the China Accession Protocol*, 7(4) J. INT'L ECON. L. 863-919 (2004).

<sup>41</sup> Chenxi Wang, *Special Economic Zones: The Subnational-National-International Nexus in China's Integration with The International Economic Order*, 56(6) J. WORLD TRADE 1013-34 (2022).

<sup>42</sup> State Council Information Office of China, *China and the World Trade Organization (White Paper, June 2018)*, at 5, [https://english.www.gov.cn/archive/white\\_paper/2018/06/28/content\\_281476201898696.htm](https://english.www.gov.cn/archive/white_paper/2018/06/28/content_281476201898696.htm).



the WTO, but also influenced by the broader neoliberal international background. As neoliberalism gained currency from the 1980s, SOEs' role in the economy was negatively evaluated. For example, the World Bank comments that "state-owned enterprises remain an important obstacle to better economic performance" and a "significant impediment to economic growth."<sup>43</sup> Therefore, from the 1980s onwards, the privatization of SOEs became an optimal choice for governments in both the Western developed world<sup>44</sup> and former Eastern European socialist countries.<sup>45</sup> In the 1990s, China moved into an unprecedented stage of SOE ownership reform which was boosted by the enactment of the Company Law in 1994. At this time, China privatized many small-scale enterprises and non-essential industries in response to the global tide of privatization of SOEs in the 1990s.

The most outstanding effect of SOE reforms related to China's WTO accession was the sharp decrease in the number of SOEs and SOEs' withdrawal from many non-strategic industries. China's SOE reform efforts began in the 1990s with privatization and its accomplishments should be ascribed to the WTO accession. In regard to China's WTO accession, Li and Xu note that "privatization of SOEs as a major reform approach was implemented on a national scale" and "the privatization process in China has led to a significant development of the private enterprises as well as a reduction in the number of SOEs."<sup>46</sup> Tian and Xia also comment that "the major incentive for the Chinese government to join the WTO [is] to overcome domestic obstacles and to promote economic reforms on its SOEs."<sup>47</sup> However, China did not privatize SOEs in all sectors given that the WTO does not require private ownership in all economic sectors.<sup>48</sup>

In addition to privatization, China started the corporatization of SOEs in the 1990s. However, the corporatization of SOEs did not gain momentum until the 2020s when a new wave of international economic laws exerted more pressure on China. As will be discussed in the following section, prompted by the pressing needs to join CPTPP, China accomplished the nationwide corporatization of SOEs in 2021.

China's performance regarding the notification and reduction of SOEs subsidies,

<sup>43</sup> WORLD BANK, *BUREAUCRATS IN BUSINESS: THE ECONOMICS AND POLITICS OF GOVERNMENT OWNERSHIP* 175 & 257 (1995).

<sup>44</sup> THE RISE AND FALL OF STATE-OWNED ENTERPRISE IN THE WESTERN WORLD ix (Pier Toninelli ed., 2000).

<sup>45</sup> SOM, *supra* note 6, at 23.

<sup>46</sup> Shanshan Li & Ningxiang Xu, *The Influences of WTO Accession on China's State-Owned Enterprises*, 3(2) OPEN J. BUS. & MGMT. 192-8 (2015).

<sup>47</sup> Ye Tian & Min Xia, *WTO, Credible Commitments, and China's Reform of State-owned Enterprises*, 5(2) ECON. & POL. STUD. 158-78 (2017).

<sup>48</sup> Robert Howse, *Making the WTO (Not So) Great Again: The Case Against Responding to the Trump Trade Agenda Through Reform of WTO Rules on Subsidies and State Enterprises*, 23(2) J. INT. ECON. L. 371-89 (2020).

as was required by the WTO, seemed to fall short of Western expectations. In 2022, the US complained that “China has not yet submitted to the WTO a complete notification of subsidies maintained by the central government ...”<sup>49</sup> With insufficient transparency, it is difficult to determine the extent to which China has subsidized its SOEs and private industries.<sup>50</sup> However, trade frictions between China and its major trading partners, such as the multiple countervailing investigations of Chinese exportation by Western countries, as well as subsidy cases against China at the WTO, suggest that subsidies provided to or from SOEs constitute a significant concern for China’s trading partners. In general, subsidies relating to SOEs, although problematic under the WTO framework, have not been resolutely eliminated by the Chinese government given that “subsidies provided to or by SOEs are key to China’s success in and continuous pursuit of a wide range of ambitious industrial policies and economic development goals.”<sup>51</sup>

While China’s SOE reforms after the 1990s responded to international pressure from the neoliberal world, it also adheres to developmental goals by maintaining the state monopoly over essential industries, conglomerating SOEs, and pursuing the implementation of industrial policies through SOEs. In 1999, China issued the decision of SOEs reform.<sup>52</sup> The decision reaffirmed that state ownership is the “principal component” of the economy and required continued SOEs control in such industries related to national security, natural monopoly, public goods and services, and high-tech.<sup>53</sup> Through persistent mergers and monopoly of strategic industries, China’s SOEs continues to play an essential role in China’s economy. Also, SOEs are still considerably influenced by the state and are the foremost implementers of China’s industrial policies. Tan and Davis argued, while the WTO accession pushed SOEs to engage in more liberalizing trade behavior, the WTO’s liberalization impact is limited to some extent when SOEs undertook the tasks of implementing industrial policy.<sup>54</sup>

China’s SOEs reform surrounding its WTO accession, which seeks to integrate

<sup>49</sup> US Trade Representative, *supra* note 15, at 27.

<sup>50</sup> Robert Wolfe, *Sunshine over Shanghai: Can the WTO Illuminate the Murky World of Chinese SOEs?*, 16(4) WORLD TRADE REV. 713-32 (2017).

<sup>51</sup> HENRY GAO & WEIHUAN ZHOU, BETWEEN MARKET ECONOMY AND STATE CAPITALISM 102 (2023).

<sup>52</sup> *Decision of the Central Committee of the Communist Party of China on Major Issues Concerning the Reform and Development of State-Owned Enterprises* [中共中央关于国有企业改革和发展若干重大问题的决定], CHINA NEWS (Sept. 22, 1999), <https://www.chinanews.com.cn/2002-05-16/26/186033.html>.

<sup>53</sup> *Id.*

<sup>54</sup> Yeling Tan & Christina Davis, *The Limits of Liberalization: WTO Entry and Chinese State-Owned Firms*, 67(3) INT’L STUD. Q. 30 (2023).

into the neoliberal world while serving its own developmental purpose, has been disappointing according to western commentators. For example, Howse notes that contrary to the Western predictions at the time of its WTO accession that China would not only implement WTO rules but also adopt the Western democratic value of economic freedom, China did not abandon the model of a state-driven economy.<sup>55</sup> Levy also argued that although China was imposed more strict and stringent obligations in its WTO accession commitments, these commitments have not been “effective at resolving concerns about Chinese SOEs.” He points out that this demonstrates “the limitations in using the WTO as a vehicle to promote economic reform.”<sup>56</sup> Therefore, the Western bloc keeps exploring new rules to discipline China's SOEs, while China continues to compromise between international economic rules and its domestic developmental needs.

## B. China's SOE Reforms related to the CPTPP Accession (2010-2024)

### 1. CPTPP rules for SOEs

As China's economy becomes increasingly integrated with the global economy, its SOEs are also expanding their international footprint and causing widespread concern to other countries regarding SOEs' implications for “national security, fair competition, reciprocity, transparency, corruption, and even the function of the free market at home.”<sup>57</sup> It is feared that Chinese SOEs may place their foreign competitors at a disadvantage in the global value chain.<sup>58</sup>

The issue of SOEs as global competitors is multi-faceted and could be regulated in regard to investment, trade, competition, and corporate governance. Regulations on SOEs in regard to competition, corporate governance, and screening of foreign investment mainly fall into the scope of domestic law. As for international investment law, it does not see SOEs as a specific problem. SOEs might well initiate a dispute

<sup>55</sup> Robert Howse, *Official Business: International Trade Law and the Resurgence (or Resilience) of the State as an Economic Actor*, 43(4) U. PA. J. INT'L L. 821-37 (2022).

<sup>56</sup> Philip Levy, *The Treatment of Chinese SOEs in China's WTO Protocol of Accession*, 16(4) WORLD TRADE REV. 635-53 (2017).

<sup>57</sup> OECD, STATE-OWNED ENTERPRISES AS GLOBAL COMPETITORS: A CHALLENGE OR AN OPPORTUNITY? 27 (2016), [https://www.oecd.org/en/publications/2016/12/state-owned-enterprises-as-global-competitors\\_g1g6c657.html](https://www.oecd.org/en/publications/2016/12/state-owned-enterprises-as-global-competitors_g1g6c657.html).

<sup>58</sup> Ming Du, *When China's National Champions Go Global: Nothing to Fear but Fear Itself?*, 48(6) J. WORLD TRADE 1127-66 (2014); Dessie Ambaw & Shandre Thangavelu, *Industrial Subsidies and Impact On Exports of Trading Partners: Case of China*, 26(3) REV. DEV. ECON. 1310-37 (2022); Kevin Lefebvre, Nadia Rocha & Michele Ruta, *Containing Chinese State-Owned Enterprises? The Role of Deep Trade Agreements* (World Bank Policy Research Working Paper 9637, Apr. 2021), at 3, <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/326941619094864250/containing-chinese-state-owned-enterprises-the-role-of-deep-trade-agreements>.

with private enterprises in host countries,<sup>59</sup> as shown by case law involving Chinese SOEs.<sup>60</sup> They used to win more in damages and compensation than private enterprises in international investment disputes.<sup>61</sup> Therefore, at the international level, as trade law becomes the main regulatory tool to restrict SOEs, it contains comprehensive rules to curb the government's support of SOEs.<sup>62</sup>

While China's trading partners were worried about subsidies given to SOEs at the time of China's WTO accession, subsidies provided from Chinese SOEs became more pressing concern for them in the following years. In a couple of countervailing investigations, the US found that China's SOEs provided materials such as steel and electricity to downstream industries at relatively low prices.<sup>63</sup> The US deemed that these SOEs constituted a "public body" which offered benefits to other enterprises; accordingly, countervailing duties were imposed on China.<sup>64</sup> In these countervailing investigations, the WTO tribunal did not agree with the US's approach which considers an entity to be a "public body" according to Article 3.1 of SCM based merely on the fact that the entity is owned or controlled by the government.<sup>65</sup>

Without the WTO's support, however, the US continued to treat Chinese SOEs as a "public body" in its domestic countervailing measures, and urged a revision of the relevant international rules. The US designed and drafted the SOEs chapter for TPP and urged it on other members after involving in the TPP negotiations.<sup>66</sup> In 2017, the US quit the TPP negotiations and brokered United States-Mexico-Canada Agreement (USMCA) which includes a chapter on SOEs similar to that in the TPP. TPP was later renamed CPTPP and signed by thirteen countries in the Asia-Pacific area. It retained the TPP's chapter on SOEs and became a representative example of new SOEs rules

<sup>59</sup> Mark Feldman, *State-Owned Enterprises as Claimants in International Investment Arbitration*, 31(1) ICSID REV. 24–35 (2016).

<sup>60</sup> Anran Zhang, *The Standing of Chinese State-Owned Enterprises in Investor-State Arbitration: The First Two Cases*, 17(4) CHINESE J. INT'L L. 1147–53 (2018); Ming Du, *Chinese State-owned Enterprises and International Investment Law*, 53(4) GEO. J. INT'L L. 627–734 (2022).

<sup>61</sup> Julia Calvert et al., *Does Ownership Matter? Claimant Characteristics and Case Outcomes in Investor-state Arbitration*, 27(5) NEW POL. ECON. 788 (2022).

<sup>62</sup> SOM, *supra* note 6, at 32.

<sup>63</sup> Panel Report, *United States - Countervailing Duty Measures on Certain Products from China*, WTO Doc. WT/DS437/R (July 14, 2014), at ¶ 3.1, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/437R.pdf&Open=True>.

<sup>64</sup> *Id.* at ¶ 7.1.1.

<sup>65</sup> Appellate Body Report, *United States - Countervailing Duty Measures on Certain Products from China*, WTO Doc. WT/DS437/AB/R (Dec. 18, 2014), at ¶ 4.92, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/437ABR.pdf&Open=True>.

<sup>66</sup> Julien Fleury & Jean-Michel Marcoux, *The US Shaping of State-Owned Enterprise Disciplines in the Trans-Pacific Partnership*, 19(2) J. INT'L ECON. L. 445–65 (2016).

in the context of international economic law.

In Article 17.1, the CPTPP defines SOEs as enterprises that principally engage in commercial activities in which the government directly holds more than 50 percent of the share capital or voting rights, or the power to appoint a majority of members of the board of directors or any other equivalent management body. This definition confirms the US's approach in previous countervailing measures. It ultimately decides whether SOEs provide subsidies to other enterprises based on the fact that SOEs are controlled by the government rather than mandated with state authority. The definition of SOEs in the CPTPP enables China's trading partners to identify subsidies from SOEs more easily and makes the trade environment more restrictive for Chinese enterprises. However, its confined scope which focuses on SOEs that engage in commercial activities, also provides guidance for China's later reform. In the second wave of SOE reforms from the 2010s to 2020s, China classified its SOEs as either commercial or non-commercial to narrow down the scope of SOEs that are subject to the CPTPP rules.

CPTPP also adopted subsidy rules to SOEs. It named a subsidy "non-commercial assistance," a term used interchangeably with 'subsidy' in the following discussion. This was actually a revival of the China's WTO accession commitment (Section 10.2 of China's WTO Accession Protocol) which was designed to reduce the burden on governments tackling subsidies granted to Chinese SOEs.<sup>67</sup> Drawing on the US's experience in countervailing measures which treat low-priced input from Chinese SOEs as subsidies, Article 22.6 of the CPTPP expands the restrictions to include not only subsidies to SOEs, but also subsidies provided by SOEs.

The CPTPP reiterates the commercial consideration in SOEs' operation as required by China's WTO accession commitments. Article 17.4 of the CPTPP provides that the operation of SOEs should be based on commercial consideration without government intervention. While China's WTO accession commitments generally require that SOEs should make purchases and sales solely based on commercial considerations, the CPTPP clarified the obligation by stating that the term 'purchase' covers both trade in goods and trade in services.<sup>68</sup> The CPTPP also reinforced the transparency requirement of SOEs. Article 17.10 demands proactive disclosure of SOE information upon request. This is consistent with the transparency requirement in the Annex of China's WTO accession commitments that China should disclose any subsidies made to certain SOEs. However, CPTPP goes further by providing more detailed and

<sup>67</sup> Weihuan Zhou, *Rethinking the (CP)TPP as a Model for Regulation of Chinese State-Owned Enterprises*, 24(3) J. INT'L ECON. L. 572–90 (2021).

<sup>68</sup> CPTPP art. 17.4.

workable disclosure procedures.

In sum, new rules pertaining to SOEs in Regional Trade Agreements (RTAs), represented by the CPTPP, “draw heavily from their predecessors but modify them as necessary” and “reflect the experiences and conceptual assumptions of the past.”<sup>69</sup> They incorporate the GATT rules regulating state-trading enterprises, SCM rules on subsidies, China’s WTO accession commitments, as well as the US’s experience in addressing subsidies relating to Chinese SOEs. The CPTPP provides a complex set of more stringent, clarified, and detailed rules on the commercial operation of SOEs, subsidies provided to and given by SOEs, and disclosure of SOE information. China has steered its SOEs reform towards this direction as it seeks to join the CPTPP.

## 2. China’s SOE Reforms related to the CPTPP

In September 2021, China formally submitted its application to join the CPTPP, which represents the high level of existing RTAs and rewrites the rules for 21st-century trade.<sup>70</sup> China had already started domestic reform to prepare for its further integration with the neoliberal economic order. In November 2013, China issued the “Decision of the Central Committee of the Communist Party of China on Several Major Issues concerning Comprehensively Deepening Reform” (hereinafter 2013 CCCPC reform decision),<sup>71</sup> marking the beginning of another round of comprehensive and significant reform after China’s WTO accession. The international background of the 2013 CCCPC reform decision is the phenomenal achievement in the investment negotiation between China and the US in 2013.

Given the complex relationship between investment and trade in services, trade agreements and investment treaties tend to overlap.<sup>72</sup> The US has been actively pushing for a negative-list approach in RTAs and Bilateral Investment Treaties (BITs) to seek more market openness and further liberalization of trade and investment. In 2012, the US made major progress when it signed the US -Korea Free Trade Agreement and published its model of BITs, both of which adopted a negative-list approach.

Since trade agreements contain a broader range of issues and are more difficult to

<sup>69</sup> Minwoo Kim, *Regulating the Visible Hands: Development of Rules on State-owned Enterprises in Trade Agreements*, 58(1) HARV. INT’L L. J. 225-72 (2017).

<sup>70</sup> Stephanie Honey, How the CPTPP can Rewrite the Rules of 21st Century Trade, Hinrich Foundation (Feb. 13, 2024), <https://www.hinrichfoundation.com/research/article/ftas/cptpp-rewrite-rules-of-21st-century-trade>.

<sup>71</sup> Decision of the Central Committee of the Communist Party of China on Matters on Comprehensively Deepening Reform [中共中央关于全面深化改革若干重大问题的决定] (Nov. 12, 2013), [https://www.gov.cn/zhengce/2013-11/15/content\\_5407874.htm](https://www.gov.cn/zhengce/2013-11/15/content_5407874.htm).

<sup>72</sup> Gabriel Gari, *Recent Preferential Trade Agreements’ Disciplines for Tackling Regulatory Divergence in Services: How Far beyond GATS?*, 19(1) WORLD TRADE REV. 29 (2018).

negotiate, China tried to negotiate BIT first with the US, which is less challenging and more likely to bear fruit. In July 2013, China and the US held the Fifth Round of China-US Strategic and Economic Dialogue, in which China made the groundbreaking commitment to negotiate on the basis of pre-establishment national treatment with a negative-list approach as was requested by the US.<sup>73</sup>

This unprecedented liberalization commitment which led to far more market openness, prompted significant reforms in China marked by two essential decisions in 2013. The first decision is the establishment of Shanghai free trade zone to experiment with radical market liberalization measures in September 2013. This kicks off a new round of nationwide experimentalism in China which aims to try out wider market openness and test international economic rules ever since the epochal experimentalism in the 1980s started from Shenzhen.<sup>74</sup> The second decision was made in November 2013.<sup>75</sup> This reform decision encouraged China to streamline its domestic economic governance and improve market access for foreign investment. The two decisions represent both bottom-up and top-down reform efforts in China under the external pressure of international economic rules. Together, these two decisions indicate that China is seriously steering its reform toward a more open and market-oriented direction on a nationwide scale.

A prominent issue in the new round of market reform that indicates China's resolution to further integrate with the neoliberal economic order is the SOEs reform. The 2013 CCCPC reform decision outlined a number of SOE reforms such as the improvement of the modern enterprise system, the categorization of SOEs' functions, and the promotion of mixed ownership. In alignment with the spirit of the 2013 CCCPC reform decision, in 2015, the CCCPC and the State Council jointly issued the "Guiding Opinions of the Communist Party of China Central Committee and the State Council on Deepening the Reform of State-Owned Enterprises" (hereinafter 2015 Guiding Opinions).<sup>76</sup> The 2015 Guiding Opinions steered the SOEs reform into the implementation stage which involved the application of many detailed rules. This new round of SOE reforms was spurred by China's determination to catch up with the latest international rules, and reflected China's responses to new SOEs rules shaped by regional trade agreements like the CPTPP.

<sup>73</sup> *China, US to Start Negative List BIT Negotiations*, CHINA DAILY (July 10, 2014), [http://www.chinadaily.com.cn/business/2014-07/10/content\\_17700488.htm](http://www.chinadaily.com.cn/business/2014-07/10/content_17700488.htm).

<sup>74</sup> Wang, *supra* note 41, at 1013.

<sup>75</sup> *Supra* note 71.

<sup>76</sup> Chinese General Office of the State Council, *Guiding Opinions of the Communist Party of China Central Committee and the State Council on Deepening the Reform of State-Owned Enterprises* [中共中央 国务院关于深化国有企业改革的指导意见] (Aug. 24, 2015), [https://www.gov.cn/gongbao/content/2015/content\\_2937313.htm](https://www.gov.cn/gongbao/content/2015/content_2937313.htm).

The first feature of the new round of SOE reforms that reflected the CPTPP was the classification of SOEs, which helped decrease the number of Chinese SOEs that could be regulated by restrictive rules in the CPTPP. In 2015, China published the guidelines for the classification of SOEs,<sup>77</sup> which grouped SOEs into commercial and public welfare according to their function. Commercial SOEs were further classified into Competitive Commercial SOEs and Special Commercial SOEs. Competitive Commercial SOEs operate in industries where there is adequate competition and allow a majority of private shareholding. Special Commercial SOEs run their business in industries concerned with national security and national economic lifelines and undertake special projects.<sup>78</sup> The CPTPP rules cover only those SOEs engaged mainly in commercial activities, China's category of competitive commercial SOEs which will cover many existing SOEs, will obviously fall into the scope of CPTPP. However, the category of Public Welfare SOEs and the subcategory of Special Commercial SOEs may not fit the CPTPP's definition of SOEs, and these two categories will help China reduce the number of SOEs that were subject to the CPTPP's restrictive rules for SOEs' commercial operations, subsidies and transparency.<sup>79</sup>

In addition to classifying the SOEs, China reformed the policy for mixed ownership of SOEs. In September 2015, the State Council published the opinion of developing mixed ownership of SOEs.<sup>80</sup> To implement this opinion, from 2016, China gradually approved 207 pilot programs for mixed ownership reform of SOEs across the nation. Although China had proposed the mixed ownership reform of SOEs as early as 1999,<sup>81</sup> in effect, the reform had not begun until 2016. The mixed ownership of SOEs appears to serve, in tandem with the classification of SOEs, China's purpose of restricting the number of SOEs that could be regulated by the CPTPP rules. The CPTPP defines SOEs as those in which the government directly holds more than 50 percent of the share capital or voting rights. By inviting the investment of private capital in SOEs and minimizing state ownership, China on the one hand, pushes forward the privatization of SOEs, on the other hand, transforms some SOEs into enterprises that were not subject to the CPTPP rules. Similar to the above-mentioned

<sup>77</sup> State-owned Assets Supervision and Administration Commission, Guiding Opinions on the Functional Definition and Classification of State-Owned Enterprises [关于国有企业功能界定与分类的指导意见] (Dec. 7, 2015), [https://www.gov.cn/gongbao/content/2016/content\\_5061700.htm](https://www.gov.cn/gongbao/content/2016/content_5061700.htm).

<sup>78</sup> *Id.*

<sup>79</sup> Junqi Zhang & Shufan Tian, *CPTPP's Disciplines on State-owned Enterprises and Deepening the Reform of State-Owned Enterprises* [CPTPP 国有企业规则与深化国有企业改革], 33(4) WEST F. [西部论坛] 61-76 (2023).

<sup>80</sup> Chinese General Office of the State Council, Opinions of the State Council on Development of An Economy of Mixed-Ownership of State-Run Enterprises [国务院关于国有企业发展混合所有制经济的意见] (Sept. 24, 2015), [https://www.gov.cn/zhengce/zhengceku/2015-09/24/content\\_110177.htm](https://www.gov.cn/zhengce/zhengceku/2015-09/24/content_110177.htm).

<sup>81</sup> *Supra* note 52.



reform of SOEs classification, the mixed ownership reform reflects China's strategy to carve a certain amount of SOEs out of the CPTPP's scope.

The second feature of the new round of SOE reforms is aligned with the CPTPP requirement that SOEs operate on the basis of commercial consideration. The 2015 Guiding Opinions required SOEs to "adopt a market-based remuneration distribution mechanism, introduce a market-oriented selection and employment mechanism..."<sup>82</sup> To implement the spirit of market-oriented reform of SOEs set out in the 2015 Guideline Opinions, China emphasized the corporatization of SOEs. In 2017, the State Council issued two documents which required that central SOEs be restructured to be limited liability companies or joint stock limited companies.<sup>83</sup> The reform of the corporatization of SOEs began as early as the 1990s and slowed down in the following years. In the wave of new reforms, China accelerated the pace of reform under external pressure, announcing that more than 99% of central and local SOEs had accomplished the corporatization reform by the end of 2021.<sup>84</sup>

Apart from speeding up the corporatization of SOEs, China also mitigated the state's involvement in the management of SOEs and established intermediary capital companies between SOEs and its investor and regulator, SASAC. In 2017, SASAC announced that it would shift its role to the management of SOEs' capitals and committed to reducing its intervention in SOE management by leaving or decentralizing or mandating 43 regulatory areas.<sup>85</sup> In 2018, the State Council began to implement its pilot program to establish state capital operation companies (SCOCs) and state capital investment companies (SCICs).<sup>86</sup> SCOCs and SCICs replaced SASAC to become the state shareholder in SOEs, while SASAC became the shareholder of the former. The intention was to establish a firewall between SASAC and the SOEs so

<sup>82</sup> *Supra* note 76.

<sup>83</sup> Chinese General Office of the State Council, Guiding Opinions of the General Office of the State Council on Further Improving the Corporate Governance Structure of State-owned Enterprises [国务院办公厅关于进一步完善国有企业法人治理结构的指导意见] (May 3, 2017), [https://www.gov.cn/zhengce/zhengceku/2017-05/03/content\\_5190599.htm](https://www.gov.cn/zhengce/zhengceku/2017-05/03/content_5190599.htm); Chinese General Office of the State Council, Notice of the General Office of the State Council on Printing and Distributing the Implementing Plan for Corporate-style Restructuring of Central Enterprises [国务院办公厅关于印发中央企业公司制改制工作实施方案的通知] (July 26, 2017), [https://www.gov.cn/zhengce/zhengceku/2017-07/26/content\\_5213271.htm](https://www.gov.cn/zhengce/zhengceku/2017-07/26/content_5213271.htm).

<sup>84</sup> See *A Historic Breakthrough! The Reform of State-owned Enterprise Corporate System Has Been Basically Completed* [历史性突破! 国有企业公司制改革基本完成], SOHU [搜狐] (Jan. 17, 2022), [https://www.sohu.com/a/517257745\\_267106](https://www.sohu.com/a/517257745_267106).

<sup>85</sup> Chinese General Office of the State Council, Notice of the General Office of the State Council on Forwarding the Plan of the State-owned Assets Supervision and Administration Commission of the State Council to Promote Functional Transformation with Capital Management as the Main Approach [国务院办公厅关于转发国务院国资委以管资本为主推进职能转变方案的通知] (June 5, 2017), [https://www.gov.cn/zhengce/content/2017-05/10/content\\_5192390.htm](https://www.gov.cn/zhengce/content/2017-05/10/content_5192390.htm).

<sup>86</sup> Chinese General Office of the State Council, Implementation Opinions of the State Council on Advancing the Pilot Program of the Reform of State Capital Investment and Operation Companies [国务院关于推进国有资本投资、运营公司改革试点的实施意见] (June 30, 2017), [https://www.gov.cn/zhengce/content/2018-07/30/content\\_5310497.htm](https://www.gov.cn/zhengce/content/2018-07/30/content_5310497.htm).

as to stop the “tendency for SASAC to become increasingly involved in the business operation of SOEs.”<sup>87</sup> The total corporatization of SOEs and the diminishing role of SASAC as SOEs’ regulator and investor directed China’s SOE reforms further towards commercial operation.

The third feature of the new round of SOE reforms was the enhanced transparency required by SOEs in alignment with the CPTPP transparency rules. For example, in November 2022, SASAC established the Regulatory Enterprise Property Rights Information Query Platform which provides property information about SOEs.<sup>88</sup> In 2023, SASAC published a notice requiring central SOEs to develop an ESG (Environmental, Social, Governance) reporting system.<sup>89</sup>

While the new round of SOE reforms showed a more market-oriented trend that aligned with the CPTPP rules, it also indicated that the state had tightened its grip on SOEs. As President Xi stated, “[SOEs] are an important material and political foundation of socialism with Chinese characteristics, and an important pillar and strength for our party to govern and rejuvenate the country.”<sup>90</sup> Considering that China has a long tradition of “twin governance structures” in which the management team dominate legal governance and the CPC control the political governance in SOEs, this is to reinforce the existing regime rather than a brand-new reform measure.<sup>91</sup>

However, the intensification of the CPC’s role in SOEs cast doubt on Chinese SOEs’ autonomy of operating on the basis of commercial consideration. In spite of the previous market-oriented reforms such as the classification of SOEs, mixed ownership, and the diminished SASAC, China might still be able to influence SOEs’ operation through the CPC’s involvement, especially when developmental goals need to be implemented. As Yu comments, “reform of the SOEs is a central component of the government’s agenda for sustaining domestic economic growth and tightening the political control of the Chinese Communist Party over all aspects of the nation.”<sup>92</sup>

<sup>87</sup> Jiangyu Wang & Tan Cheng-Han, *Mixed Ownership Reform and Corporate Governance in China’s State-Owned Enterprises*, 53(3) *VAND. J. TRANSNAT’L L.* 1055-107 (2020).

<sup>88</sup> Chinese Intellectual Property Office, The State-owned Assets Supervision and Administration Commission (SASAC) has launched a platform for inquiring about the property rights of supervised enterprises [国资委上线监管企业产权信息查询平台] (Nov. 17, 2022), <http://www.sasac.gov.cn/n2588020/n2588072/n2591020/n2591022/c26506339/content.html>.

<sup>89</sup> State Owned Assets Data Centre, Notice on Forwarding the Research on the Compilation of ESG Special Reports for Listed Companies Controlled by Central Enterprises [国务院国资委办公厅印发《关于转发<央企控股上市公司ESG专项报告编制研究>的通知》] (July 25, 2023), <http://www.guozhi.org/special/gzwpagapi.php?id=11110>.

<sup>90</sup> Xi Jinping, *Uphold the Party’s Unwavering Leadership over State-Owned Enterprises* [坚持党对国有企业的领导不动摇], *CPC NEWS* [中国共产党新闻网] (Oct. 12, 2016), <http://cpc.people.com.cn/n1/2016/1012/c64094-28770427.html>.

<sup>91</sup> Jiangyu Wang, *The Political Logic of Corporate Governance in China’s State-owned Enterprises*, 47(3) *CORNELL INT’L L. J.* 631-69 (2014).

<sup>92</sup> Hong Yu, *Reform of State-owned Enterprises in China: The Chinese Communist Party Strikes Back*, 43(2) *ASIAN STUD. REV.* 332-53 (2019).

According to Margaret et al., China's regime is a "Party-State Capitalism" that will arouse not only economic competition, but also security issues at the international level.<sup>93</sup> That said, while China's unabated Party-state control of SOEs and the concurrent marketization and liberalization help it to reach its developmental goal, it also incurs international backlash from Western countries.

China's SOEs reforms surrounding its accession to the WTO and the CPTPP share the commonality of the co-existing liberalization and state-control. As international economic rules evolved and turned out to be more restrictive to state-capitalism, China also carried out its SOEs reform in the way that aligns more with these liberalizing rules. The SOEs reforms surrounding the CPTPP accomplished the corporatization of SOEs that was not finished in the last round of SOEs reform surrounding the WTO accession. Also, compared to the SOEs reform surrounding the WTO accession which was characterized by the SOEs' retreat from non-essential industries, the SOEs reform surrounding the CPTPP witnessed SOEs' further retreat from essential industries. For example, under the classification reform, many SOEs were classified into competitive commercial entities which should operate on a commercial basis like private enterprises; under the mixed ownership reform, private capitals flowed into SOEs. However, both the SOEs reform surrounding the WTO accession and the CPTPP accession retained state-control to ensure SOEs' role in implementing China's industrial policies. For a long time, China has been purposefully integrated with neoliberalism, and in the meantime maintained its developmental purposes with state's intervention in the economy.

## IV. Summary and Conclusion

SOEs are of great concern in China because of their economic contribution to development and their political value that underpins the stability of the Chinese government's regime.<sup>94</sup> The dual political and economic demands imposed on SOEs require them to strengthen both the Party's leadership and the modern enterprise system.<sup>95</sup> The Chinese Communist Party has retained its control of SOEs although

<sup>93</sup> Margaret Pearson et al., *China's Party-State Capitalism and International Backlash: From Interdependence to Insecurity*, 47(2) INT'L SEC. 135-76 (2022).

<sup>94</sup> Andrei Shleifer, *State versus Private Ownership*, 12(4) J. ECON. PERSPECTIVE 133-50 (1998).

<sup>95</sup> Xiankun Jin et al., *Political Governance in China's State-owned Enterprises*, 15(2) CHINA J. ACCOUNTING RES. 1-29 (2022).

it persists with market-oriented reforms of SOEs under the pressure of neoliberal economic rules. Even during periods of dramatic ownership change of SOEs marked by their privatization in the 1990s, the Chinese Communist Party insisted that state ownership be the leading force which must be consolidated and developed.<sup>96</sup>

As a developmental state, China continues to pursue development by integrating into the neoliberalism global economy with a public economy-dominated regime. Market reform and opening have been persistent since the late 1970s and has guided China throughout its long process of embracing the neoliberal economic order. From the WTO to the CPTPP, China has continued the restructuring of its economic and legal regime to accommodate international economic law, among which the rules pertaining to SOEs have led China to make painstaking reforms despite the tension between China's public ownership regime and the neoliberal economic order. Throughout the reform era started from 1978, all the decisions made by China in regard to SOE reforms have confirmed that public economy is the core of China's economic system and China should unwaveringly adhere to the goal of public economy, and the state sector should retain dominance and play the leading role. While the neoliberal rules do not specifically prohibit the free choice of an economic regime, the acquiesced assumption is Western-style market economy dominated by the private sector. China's purpose is to seek development in the neoliberal world, especially through trade and investment. Therefore, China is motivated to narrow the wide gap between its domestic regime and international rules.

This article has discussed two major waves of China's SOE reforms in the context of international economic law. Both rounds of SOE reforms were triggered by China's intention to accommodate neoliberal economic rules in order to further integrate with the global economy. In the first wave of SOE reforms, China undertook radical reforms at the time of the WTO accession negotiations. During this period, China engaged mainly in the extensive privatization and partial corporatization of SOEs. Even though the privatization and corporatization failed to transform China into a Western-style market economy characterized by the domination of private enterprises with a modern enterprise system, these reforms were achieved at a heavy social cost with "around 30 million SOE employees, nearly half of the SOE workforce, lost their jobs."<sup>97</sup> Moreover, the SOEs' share of China's industrial output was slashed

<sup>96</sup> Naughton, *supra* note 26, at 282.

<sup>97</sup> Chunlin Zhang, *The World Bank in China's State-Owned Enterprise Reform Since the 1980s* (World Bank Working Paper No. 134778, 2019), at 3, <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/828251550586271970/the-world-bank-in-chinas-state-owned-enterprise-reform-since-the-1980s>.

from more than 70% to less than 30%.<sup>98</sup>

Although China reduced the total numbers of SOEs and withdrew SOEs from many industrial sectors to cater to the neoliberalism, it reinforced the SOEs' power in essential industrial sectors by way of conglomerations and providing preferential treatment in the way of subsidies. The empowered SOEs monopolized a few essential industries which were able to feed downstream private industries with low-cost output such as electricity. This strategy of embracing the international economic rules while simultaneously using SOEs as a developmental tool proved to be successful and led to China's rapid economic success in the following years.

In the second wave of SOE reforms that began in the 2010s, China strived hard to stay in line with the stringent SOE rules in the CPTPP which revised existing SOEs rules and incorporated the US's experience in dealing with China's SOEs issue. The classification of SOEs and mixed ownership reform, on the one hand, pushes forward the liberalization and privatization of Chinese SOEs in the spirit of CPTPP, while, on the other hand, it reduces the number of SOEs subject to CPTPP's restrictive rules in the interest of China. The effective corporatization of SOEs and the diminished role of SASAC in SOE management enabled commercial Chinese SOEs to better comply with the regulations stipulated for them by the CPTPP. In addition, China made substantial progress in improving the transparency of Chinese SOEs, particularly in regard to the information disclosure required by the CPTPP. While the aforementioned measures steered Chinese SOEs in a more market-oriented direction as was expected by CPTPP, the CPC simultaneously tightened its grip on SOEs and appeared to run against the market power. Yu states that, "this wave of state-directed SOE reforms ... reflects the Chinese leaders' determination to retain the state sector's dominance over domestic industries and increasingly to use the SOEs as a powerful instrument for achieving the various political and social goals of the Party-state."<sup>99</sup> Similar to the SOE reforms in the 1990s, those in the 2010s again reflected China's resolution to integrate with the neoliberal economic order without giving up its developmental goal which relied on the SOEs' implementation of Party-state plans.

Between the two waves of radical SOEs reform in the 1990s and the 2010s, which were prompted by the external pressure placed on China when aspiring to join the WTO and the CPTPP, China seemed to be in the grip of reform inertia. Levy regrets that the higher standards demanded by SOEs in China's WTO accession commitment were able to prompt the liberal domestic economic reform, but China was unable to maintain the reform momentum throughout the period following

<sup>98</sup> OECD, *supra* note 24.

<sup>99</sup> Yu, *supra* note 92, at 340.

accession.<sup>100</sup> However, in hindsight, it might have been the insufficient liberal reform of SOEs, criticized by Westerners, that facilitated China's rapid economic growth in a number of ways. For example, due to inexhaustive privatization, the state retained its presence in essential industries and created enormous SOEs that could compete with multinational enterprises in the international market. The opaqueness of China's governance probably helped to channel subsidies to SOEs and, in turn, enabled SOEs to provide low-priced input to downstream industries to strengthen their competitive advantage. In essence, it appears that both the integration with the global economy (neoliberal economic rules), and the insistence on the SOEs' substantial role in the economy, have facilitated China's realization of its developmental goal. Therefore, China's SOE reforms always have a dual nature as they reflect both neoliberalism and the non-liberal Party-state control.

As a former planned economy, China has achieved significant economic success in its attempts to integrate with the global economy. In this process, China has been transformed by the neoliberal network, but has simultaneously maintained its developmental trait characterized by SOEs that are vital to the economy. This article examines the sporadic SOE reform measures implemented by China in order to comply with the economic rules and regulations imposed on it by the WTO and CPTPP. It finds that while China has been approaching international legal standards for SOEs such as the commercial operation and transparency, it retains developmental purposes such as unextinguished subsidies to and from SOEs and the unabated Party grip on SOEs to facilitate implementation of industrial policies.

This article uses a broad brush to sketch a big picture of China's SOEs reform by moderately diving into the technical level of SOEs reform measures, it reveals a persistent legal logic whereby China strives to maintain SOEs as a driver of development in a constrained international legal environment. This legal logic resonates with existing economic scholarship regarding China's dual faces of neoliberalism and state capitalism and provides a realistic angle to review the correlation between China's latest SOE reforms and its accession to the CPTPP. While the surgical changes that China made via SOE reforms for the purpose of the CPTPP accession might have increased China's level of compliance with international legal obligations, they are unlikely to change China's logic of pragmatically seeking development in the neoliberal world and transforming China to a westernized market economy.

As China made it clear to the WTO, the international community should respect a country's developmental models. China opposes "special and discriminatory

<sup>100</sup> Levy, *supra* note 56, at 652.

disciplines against state-owned-enterprises.”<sup>101</sup>In 2003, after China's WTO accession, Guo commented that China's SOE reforms have been directed to “some kind of Party-state controlled market socialism dominated by corporatized public ownership rather than a free market economy of capitalism.”<sup>102</sup> This opinion seems still relevant today, years after China initiated another round of significant SOE reforms in pursuit of accession to the CPTPP.

China's development model which embraces neoliberalism without compromising state capitalism, witnesses its own industrialization and modernization. It would also provide a model for other developing countries striving to achieve economic success. In the end, China's economic rise with its alternative model and different ideology will continue to pose a significant challenge to the US hegemony and drives it further apart from the global value chain dominated by the US.

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<sup>101</sup> MOFCOM, China's Position Paper on WTO Reform (Dec. 20, 2018), <http://www.mofcom.gov.cn/article/jiguanzx/201812/20181202817611.shtml>.

<sup>102</sup> Sujian Guo, *The Ownership Reform in China: What Direction and How Far?*, 12(36) J. CONTEMP. CHINA 553-73 (2003).

