

Review and Response to the Non-Commercial Assistance Provisions in the CPTPP

Shuming Li

School of Law, Anhui University of Finance and Economics, Bengbu, 233030, China

Abstract

The non-commercial assistance provisions under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership introduce adjustments to existing international subsidy rules, establishing the first international trade framework specifically regulating state-owned enterprise subsidies. Compared to the Agreement on Subsidies and Countervailing Measures, these provisions eliminate the identification procedures for "public bodies" and redefine the criteria for determining "specificity" of subsidies. This legal evolution may constrain the Chinese government's ability to provide subsidies through SOEs, hinder the development of SOEs in service trade and cross-border investment sectors, and weaken China's influence in negotiating new international trade rules. To address challenges posed by these provisions, China should implement competitive neutrality policies by preventing cross-subsidization and legislating equal subsidy access rights for enterprises of all ownership types, while enhancing transparency regarding SOE subsidy disclosures.

Keywords

CPTPP; Non-commercial Assistance; SCM Agreement; Competitive Neutrality.

1. Introduction

The Non-Commercial Assistance Provisions, as the cornerstone of Chapter 17 (State-Owned Enterprises) in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), specifically regulate subsidy practices involving state-owned enterprises (SOEs). On March 31, 2023, the United Kingdom was officially approved to accede to the CPTPP, marking its status as the first European member of the agreement. In contrast, China's accession application, submitted on September 16, 2021, remains unapproved, reigniting scholarly debates over the challenges of CPTPP membership. Existing scholarship widely attributes China's stalled accession to the stringent regulatory requirements imposed by the CPTPP's SOE chapter.[1] However, most analyses of these provisions remain macro-level, with limited dedicated research on the Non-Commercial Assistance Provisions. For instance, some domestic scholars have outlined the conceptual framework, characteristics, and forms of these provisions, while international researchers have focused on their remedial mechanisms, arguing that parties providing non-commercial assistance must take measures to mitigate adverse impacts on other signatories. This paper systematically examines the historical development of the Non-Commercial Assistance Provisions, conducts a comparative analysis with the Agreement on Subsidies and Countervailing Measures (SCM Agreement), evaluates their specific implications for China, and proposes targeted response strategies to address the regulatory constraints they impose on SOEs.

2. Legislative Origins and Conceptual Definition of the CPTPP Non-Commercial Assistance Provisions

2.1. Legislative Origins of the CPTPP Non-Commercial Assistance Provisions

The evolution of international rules governing subsidies traces its origins to U.S. domestic law. Around 1890, the influx of sugar subsidized by foreign governments into the U.S. market severely disrupted domestic sugar production. Influenced by Alexander Hamilton's protectionist theories, the United States imposed countervailing duties on subsidized sugar imports under the McKinley Tariff Act of 1890, which was formally codified in the Tariff Act of 1897. [2] This marked the institutionalization of countervailing duties, expanding their application from sugar to all subsidized imported goods. In 1947, during negotiations for the Havana Charter for an International Trade Organization, participating nations incorporated anti-subsidy provisions into the General Agreement on Tariffs and Trade 1947 (GATT 1947), transforming countervailing measures from a U.S. domestic policy into an international legal framework.

The 1979 Tokyo Round Subsidies Code, negotiated during the Tokyo Round (1973–1979), became the first standalone international agreement addressing subsidies and countervailing measures. However, its failure to standardize the definition of "subsidy" allowed significant discretion in the application of countervailing measures, leading to widespread abuse. To resolve this, the Uruguay Round (1986–1994) culminated in the Agreement on Subsidies and Countervailing Measures (SCM Agreement), adopted as part of the World Trade Organization (WTO) legal framework. The SCM Agreement established a comprehensive system to regulate subsidies and countervailing measures, balancing competing interests between subsidization and trade remedies.

As globalization advanced, state-owned enterprises (SOEs) emerged as major players in international markets, particularly with the rise of emerging economies like China. The growing economic clout of SOEs disrupted established global trade norms, fueling tensions between developed and developing nations.[5] SOE-related issues became a focal point for Western countries, led by the United States, which argued that preferential government support to SOEs caused "global trade distortions." Under the rationale of advancing the competitive neutrality principle, the U.S. spearheaded efforts to craft new international trade rules targeting SOE subsidies.[3]

Notably, WTO rules adopt a ownership-neutral stance, offering limited mechanisms to regulate SOEs. This regulatory gap prompted the U.S. to negotiate SOE-specific subsidy clauses outside the WTO framework, particularly through bilateral and regional trade agreements. In 2016, the U.S.-led Trans-Pacific Partnership (TPP), signed by 12 nations including Japan and Australia, introduced a dedicated SOE chapter featuring Non-Commercial Assistance Provisions to comprehensively restrict subsidies to SOEs. These provisions disrupted the SCM Agreement's balance between subsidies and countervailing measures. Following U.S. withdrawal under the Trump administration, the remaining members rebranded the agreement as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) in 2018, retaining the TPP's original SOE rules.

The CPTPP's Non-Commercial Assistance Provisions operationalize the competitive neutrality principle, prohibiting signatory governments or SOEs from providing subsidies to SOEs. This framework aims to "eliminate inherent advantages derived from state ownership at their root, reflecting a systemic effort to commercialize SOEs."

2.2. Conceptual Definition of the CPTPP Non-Commercial Assistance

With the formal entry into force of the CPTPP, its Non-Commercial Assistance Provisions under the State-Owned Enterprises (SOE) Chapter have emerged as a new paradigm in international

subsidy regulation. The CPTPP defines "non-commercial assistance" as support provided to SOEs by virtue of government ownership or control over such enterprises. Article 17.1 of the CPTPP specifies that "assistance" encompasses direct transfers of funds or liabilities, as well as the provision of goods or services to SOEs.[4]

The Non-Commercial Assistance Provisions impose the following obligations on signatory parties:(1) Prohibition of Adverse Effects: No party shall directly or indirectly provide non-commercial assistance to its SOEs in a manner causing adverse effects to the interests of another party. (2) Prevention of SOE-Conferred Disadvantages: Each party shall ensure that its SOEs do not, through the provision of non-commercial assistance, cause adverse effects to other parties. (3) Investment-Related Restrictions: No party may provide non-commercial assistance to its SOEs investing in another party's territory if such assistance injures the domestic industry of the host party.

Article 17.6.1 further clarifies key terms:(1) Occur when subsidized SOE goods or services cause absolute or relative shifts in market share within a given market. (2) Encompasses material injury, threat of material injury, or material retardation to the establishment of a domestic industry in another party.[5]

These definitions substantively mirror the "adverse effects" and "injury determination" criteria under Articles 5 and 15 of the SCM Agreement, effectively transplanting core anti-subsidy rules from the WTO framework into the CPTPP. While the CPTPP replaces the term "subsidy" with "non-commercial assistance," the conceptual scope remains functionally equivalent for member states. The two regimes operate in a complementary manner, with the CPTPP expanding regulatory precision while maintaining doctrinal continuity with multilateral trade law.

3. A Comparative Analysis of the Evolution of the CPTPP Non-Commercial Assistance Provisions and the SCM Agreement

A comparative analysis of the CPTPP Non-Commercial Assistance Provisions vis-à-vis the SCM Agreement reveals that the former streamlines subsidy identification procedures, lowers evidentiary thresholds for determining subsidies, and promotes multilateral dispute resolution mechanisms.

3.1. Exclusion of the "Public Body" Identification Procedure

Article 1.1 of the SCM Agreement defines subsidies as financial contributions provided by governments or public bodies. To determine whether state-owned enterprises (SOEs) provide subsidies to other SOEs, it is necessary first to identify whether such SOEs constitute "public bodies" under the definition. However, there remains divergence among parties regarding the identification criteria. In the US - Anti-Dumping and Countervailing Duties (China) (DS379) case, the United States and China disputed whether SOEs and state-owned banks qualify as "public bodies" under the SCM Agreement. The US advocated the "government control theory," maintaining that any SOE subject to government control should be deemed a public body. China upheld the "governmental authority theory," arguing that SOEs, as market entities in China's economy, should not be automatically classified as public bodies unless exercising governmental functions. The WTO Appellate Body ultimately adopted China's position, interpreting public bodies as "entities vested with governmental authority or exercising governmental functions." [6]This ruling failed to satisfy US demands. Recognizing the complex evidentiary requirements for identifying public bodies, the US promoted non-commercial assistance provisions in TPP negotiations that directly designate both governments and SOEs as potential providers of non-commercial assistance. Article 17.6.2 of CPTPP further redefines SOEs through an "effective control" standard, encompassing enterprises engaged in

commercial activities that meet any of the following criteria: (1) government ownership exceeding 50% of shares; (2) government control over more than 50% of voting rights; or (3) government authority to appoint majority board members. These provisions effectively circumvent the evidentiary challenges of identifying public bodies under the SCM Agreement while preventing covert government assistance through SOE manipulation.

3.2. Restructuring the "Specificity" Determination Standard

Drawing from economic distortion theory, subsidies generally available are considered to have negligible trade-distorting effects, whereas "specific" subsidies warrant regulation. Accordingly, the SCM Agreement establishes actionable subsidies as those demonstrating specificity and causing adverse effects, with Article 2.1 prescribing dual standards for de jure and de facto specificity. Under this framework, only specific subsidies face countervailing measures. [7] In contrast, CPTPP's non-commercial assistance provisions simplify specificity determination through an "effective control" test derived from its definition of non-commercial assistance. This standard automatically deems subsidies specific when providers (governments or SOEs) exercise effective control or ownership over recipient SOEs. The provisions emphasize examining control relationships between subsidy providers and recipients.

3.3. Prohibition of Unilateral Countervailing Measures

The SCM Agreement permits both multilateral and unilateral countervailing measures, allowing members to address subsidy disputes through either WTO dispute settlement mechanisms or domestic countervailing duties. However, with the current paralysis of the WTO Appellate Body, the diminished role of dispute settlement institutions has encouraged increasing unilateral measures that risk exacerbating international trade disorder and friction. In contrast, CPTPP's non-commercial assistance provisions fundamentally alter dispute resolution approaches by eliminating unilateral measures. Article 17.12.2 prioritizes multilateral and bilateral solutions, requiring parties to first pursue consultations and subsequently request panel reviews if consultations fail. This institutional design helps mitigate the rising trend of unilateralism in global trade governance.[8]

4. China's Response to CPTPP Non-Commercial Assistance Provisions

4.1. Challenges for China's Application of CPTPP Non-Commercial Assistance Provisions

While the CPTPP non-commercial assistance provisions demonstrate procedural improvements over the SCM Agreement in areas such as dispute resolution, these new international trade rules targeting SOE subsidies establish an unprecedented presumption of harmfulness toward state-owned enterprises in global markets. Given China's reality where state-owned sectors dominate critical national economic sectors, it is imperative to anticipate challenges posed by these provisions to SOEs and formulate prudent countermeasures.

4.1.1. Restricting Government Subsidy Provision Through SOEs

In China, the unique relationship between the government and SOEs enables the government to guide SOE operations to fulfill policy objectives, positioning SOEs as instruments for achieving governmental goals. The government may provide subsidies directly to target SOEs or indirectly through intermediary SOEs. The former approach, involving direct governmental provision, remains subject to SCM Agreement constraints. The latter method, utilizing SOEs as subsidy conduits, historically evaded strict SCM regulation due to contentious "public body" identification requirements. As analyzed in the evolution of non-commercial assistance provisions, the removal of "public body" determination procedures substantially expands the scope of potential subsidy providers by explicitly designating SOEs as direct subsidy sources.

This development will inevitably constrain the Chinese government's ability to channel support to target SOEs through intermediary state-owned entities.[9]

Take state-owned commercial banks as an example. As societal regulators and reform facilitators, the Chinese government prioritizes state banks' capacity to address systemic challenges. Credit allocation by state-owned banks consistently aligns with national industrial policies. For instance, the Industrial and Commercial Bank of China (ICBC) noted in its 2023 interim report that new loans predominantly flowed to strategic priority sectors under the manufacturing power strategy, including new-generation information technology industries, new energy vehicles, and high-end equipment manufacturing—all key areas of current industrial policy. Under CPTPP non-commercial assistance rules, while state bank support to private enterprises in these sectors remains unrestricted, low-interest loans to SOEs would automatically qualify as "non-commercial assistance" once such loans cause "adverse effects" or "injury" to other signatories, thereby triggering countervailing measures. This regulatory framework not only jeopardizes China's development in strategic sectors but also obstructs the government-led growth model where SOEs advance target industries through mutual assistance.

4.1.2. Impeding SOE Development in Trade Services and Cross-Border Investment

Traditionally, the SCM Agreement's subsidy rules apply exclusively to goods trade, lacking explicit provisions for service trade and investment subsidies. This does not imply the absence of such subsidies but rather confines them within domestic jurisdictions. In contrast, CPTPP's non-commercial assistance provisions explicitly extend regulatory coverage to international goods trade, services trade, and investment activities.

Regarding service trade subsidies, the inherent complexity of technical issues – including subsidy definition in services trade and disciplinary enforcement mechanisms – has prevented multilateral consensus on service trade subsidy rules. Although GATS Article XV references subsidies, it imposes no binding obligations, leaving related disputes outside WTO dispute settlement mechanisms. The CPTPP provisions unilaterally expand subsidy disciplines to service trade without addressing these complexities, potentially creating new trade barriers in international service markets through indiscriminate cross-border subsidy regulation.[10]

In cross-border investment, CPTPP Article 17.6.3 prohibits governments and SOEs from using home-state subsidies to harm host-country industries through overseas subsidiaries, while banning government investments inconsistent with "ordinary investment practices of private investors." However, the agreement provides no substantive interpretation of this critical concept, creating latent disputes over overseas investments. Consequently, CPTPP's non-commercial assistance rules significantly surpass SCM Agreement constraints, imposing comprehensive disciplines on SOE subsidies across all commercial activities – whether domestic production/sales, cross-border goods/service provision, or commercial presence operations in other signatories.

4.1.3. Diminishing China's Negotiating Leverage in New International Trade Rulemaking

Regionally, the incorporation of non-commercial assistance provisions in CPTPP and USMCA demonstrates that SOE subsidy restrictions have become essential components of U.S.-style free trade agreements. At the multilateral level, the WTO Appellate Body's complete paralysis – caused by U.S. obstruction of judge appointments through consensus abuse – coincides with deglobalization trends and rising unilateralism, urgently necessitating international trade rule reform. In such rule restructuring, dominant powers typically steer negotiation agendas. As the current hegemon in trade governance, the United States will undoubtedly prioritize its SOE provisions from FTAs as key WTO reform agenda items.

Despite becoming the world's second-largest economy, China remains reactive rather than proactive in WTO negotiations – a common predicament for late-developing economies. This power asymmetry originates from Western-developed nations' historical dominance in establishing international trade rules. When emerging economies' development challenges rule-makers' interests, the latter frequently recalibrate rules to preserve dominance. In WTO reform proposals, China merely advocates non-discrimination against SOEs and opposes special discriminatory rules. However, given the inevitable centrality of SOE regulations in rule reforms and Western powers' institutional advantages, China's non-discrimination advocacy faces marginalization, further eroding its influence in shaping new international economic governance norms.

4.2. China's Strategic Responses to CPTPP Non-Commercial Assistance Provisions

Former WTO Director-General Pascal Lamy observed during China's 20th WTO accession anniversary: "China should collaborate with trading partners to reform WTO rules on state subsidies and SOEs. Without compromising members' freedom to choose economic systems, all should explicitly endorse competitive neutrality principles and submit to stronger WTO disciplines." The core objective of competitive neutrality lies in maintaining fair international competition by preventing SOEs' "public advantage" from distorting global markets, emphasizing maximal avoidance of competition restrictions in national economic governance. At the international legal level, competitive neutrality is transitioning from soft-law consensus to binding hard-law obligations. Given the CPTPP non-commercial assistance provisions' roots in competitive neutrality principles, China should strategically adopt these policies to enhance SOE competitiveness, address efficiency deficiencies, and accelerate SOE reforms.

4.2.1. Preventing Cross-Subsidization

Cross-subsidization occurs when government subsidies to SOEs undertaking social obligations exceed their social service costs, thereby permeating commercial operations. Such practices distort market competition by allowing inefficient SOEs to offset losses through cross-subsidies, sustaining operations despite declining performance, while potentially crowding out competitive private enterprises. To prevent cross-subsidization, rigorous cost accounting should be implemented for SOEs' non-commercial activities, ensuring subsidies strictly match social obligation costs.[11]

4.2.2. Legislative Guarantee of Equal Subsidy Access Across Ownership Types

China's SOEs dominate strategic sectors (energy resources, aerospace, power grids) while undertaking public service obligations, inevitably skewing subsidy distribution in their favor. Even in sectors with substantial private participation like construction, SOEs receive disproportionately larger subsidies. Despite recent market access expansions for private enterprises, operational barriers persist in administrative approvals and filing procedures, let alone equitable subsidy distribution. The 2022 Central Economic Work Conference mandated: "Institutionalize and legalize equal treatment requirements for SOEs and private enterprises." To implement this directive, legislation should establish transparent subsidy criteria – including eligibility conditions, application procedures, and timelines – ensuring equal access across ownership types while gradually expanding private enterprise participation in SOE-dominated sectors.

4.2.3. Enhancing Transparency in SOE Subsidy Disclosures

CPTPP Article 17.10.4 establishes transparency requirements for non-commercial assistance, obliging parties to disclose subsidy details (form, provider, recipient, amounts) upon request. China's current transparency practices remain inadequate, with only four central-level subsidy notifications (2006, 2011, 2013, 2015) since WTO accession. The 2015 notification exclusively

quantified direct fiscal transfers while leaving other subsidy categories undisclosed, indicating non-compliance with SCM Agreement obligations. CPTPP's enhanced transparency rules further intensify disclosure requirements. To address this challenge, China should establish regularized subsidy disclosure platforms detailing government subsidy allocations, forms, and amounts, subject to domestic and international oversight.

5. Conclusion

The CPTPP non-commercial assistance provisions have pioneered comprehensive regulation of state-owned enterprise subsidies, with their streamlined identification procedures, lowered evidentiary thresholds, and restructured specificity criteria inherently presuming SOEs' harmful market distortions in international trade - a paradigm imbued with discriminatory undertones. As China actively pursues CPTPP accession, these stringent provisions pose formidable challenges for SOE development in a state-dominated economy.

In response, China must undertake policy recalibration beyond accelerating SOE reforms. This necessitates adopting a competitive neutrality framework to establish equitable market conditions through measures curbing cross-subsidization and implementing subsidy transparency mechanisms. Such systemic adaptations will empower Chinese SOEs to strategically navigate evolving international trade norms while maintaining developmental momentum.

References

- [1] Information on: <https://baijiahao.baidu.com/s?id=1771553284281992930>.
- [2] Borlini, Leonardo: "When the Leviathan goes to the market: A critical evaluation of the rules governing state-owned enterprises in trade agreements." *Leiden Journal of International Law*, Vol. 33(2020) No. 3, p. 1-22.
- [3] Bhala R: "Exposing the Forgotten TPP Chapter 17 as a Model for Future International Trade Disciplines on SOEs." *Social Science Electronic Publishing*, Vol. 14(2017) No. 1, p. 2-49.
- [4] Prusa T J, Vermulst E: "United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China: Passing the Buck on Pass-Through." *World Trade Review*, Vol. 12(2013) No. 2, p. 197-234.
- [5] Lee, J. . (2019). "Trade agreements new frontier- regulation of state-owned enterprises and outstanding systemic challenges." *SSRN Electronic Journal*.
- [6] Fleury, Julien Sylvestre: "The US Shaping of State-Owned Enterprise Disciplines in the Trans-Pacific Partnership." *Journal of International Economic Law*, Vol. 19(2016) No. 2, p. 53-68.
- [7] Rolland S E: "Emerging Powers and the World Trading System: The Past and Future of International Economic Law." *American Journal of International Law*, Vol. 13(2022) No. 2, p. 116-139.
- [8] Information on: <https://baijiahao.baidu.com/s?id=1719303907459150634>.
- [9] Li, Chunding, and J. Whalley: "China and the TPP: A Numerical Simulation Assessment of the Effects Involved." *NBER Working Papers*, Vol. 37(2012) No. 2, p. 169-192.
- [10] Gao, Henry Shuchao: "The Trans-Pacific Strategic Economic Partnership Agreement: A Critical Analysis." *Legal Issues of Economic Integration*, Vol. 25(2010) No. 3, p. 221-240.
- [11] Young, Margaret A: "Energy transitions and trade law: lessons from the reform of fisheries subsidies." *International Environmental Agreements*, Vol. 17 (2017) No. 1, p. 1-20.